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The Law of Computer Technology

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BOOK REVIEWS

THE LAW OF COMPUTER TECHNOLOGY

Author: Raymond T. Nimmer

Publisher: Warren Publishing, Everett, Washington, 1985.

ISBN #: 088712-355-4

Reviewer: Howard C. Anawalt*

Nimmer's book is a reference resource for the computer law practitioner. The author has undertaken the difficult task of constructing a book on "computer law," which is an umbrella covering many subjects rather than a specific field of law. He attempts to cover many topics in one volume: chapters 1 through 5 discuss intellectual property (copyrights, patents, trade secrets, and licensing); chapters 6 and 7 cover contract and tort problems related to computers; chapter 8 relates to international trade aspects; chapter 9 is on computer crime; chapter 10 focuses on electronic transactions (primarily electronic fund transfers); chapter 11 deals with electronic communications (such as Lexis and Westlaw); and chapter 12 examines computer privacy. While I am critical of certain aspects of the book, I emphasize that it is generally well-written and is a sound survey of an extensive topic.

The beginning of the book sets forth a glossary of computer and programming terms — "algorithm," "assembly language," "ROM," and sixteen others. While this feature is very helpful, it could be improved by the inclusion of a more complete listing of common terms in the field such as "EPROM," "primitives," "logic," "chip," "interface," "OEM," and "documentation." While not all of these additional terms are used in the text, their definitions would aid the puzzled practitioner who faces the new language. For example, the term "documentation" has a use and meaning of its own in the lexicon of software users and producers.

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* Howard C. Anawalt is a professor at Santa Clara University Law School. He teaches torts, constitutional law, and computer law. He originated the latter course in 1978 as part of the communications law course. Since then it has become a tightly organized practical course on computer legal problems. His book, *Ideas in The Workplace — Planning for Protection*, is scheduled for publication this summer.

It refers to all the instructions and information necessary to use a given program. It is a critical item for the software developer because a program that lacks proper and easily understood documentation is likely to be a failure in a market that rightly demands simpler, "user-friendly" programming.

LICENSING

Chapter 5, "Technology Licensing," deals with licensing.¹ The chapter is a helpful introduction to the subject, but there are several aspects which could be improved. For instance, the beginning of the chapter merges two concepts that need to be kept distinct — licenses and contracts. The author defines a license as "an agreement in the form of permission to practice the technology in a manner that would otherwise be reserved exclusively by the original proprietor." (p. 5-4). Although it is true that most licenses are embodied in contracts, the author fails to note that it is not necessary that a license be founded on a contract. That is, a license may be granted without consideration as where the licensor grants limited use in order to build relations with a prospective consumer.

The introduction to the chapter also seems to underestimate the importance of the bargaining process in transactions where the license is embodied in an agreement. The author emphasizes that licenses are principally concerned with "restrictions imposed on the recipient of the technology." (p.5-3). Although this is generally true, it is important to be aware that the license contract is also the appropriate instrument for reciprocal restrictions such as the exclusive license.

The licensing chapter focuses extensively on the antitrust potential in licensing situations. Unfortunately, it does so to the near exclusion of other important licensing considerations. One of the problem areas only briefly discussed is the tying arrangement — a license that conditions permission to use a product upon the agreement to purchase some other separate good or service. The author states, "A major issue in licensing law involves the extent to which the proprietor may leverage intellectual property rights to control other aspects of the transaction or other products."² Certain tying

1. Chapter 4 on research and development also contains related discussion.

2. Page 5-13. Tying arrangements are agreements which require the purchaser or licensee to purchase or subscribe to some other service or product in order to obtain the desired item. The author states correctly that "a major issue in licensing law involves the extent to which the proprietor may leverage intellectual property rights to control other aspects of a transaction or other products." (p. 5-13). The term "leverage" is vague even though it is often used in financial circles. More simply stated, the issue is: to what extent may the

arrangements are prohibited under antitrust law, namely those in which the stronger party dictates economic results in the market for the "tied" product. In many instances, the author's treatment of antitrust issues could use more clarification regarding the risks of liability and common arguments and counter-arguments.³ On the other hand, the author's discussion of grantbacks is very clear. He concludes the chapter with sound advice: "A narrowly drawn [grantback] provision is more likely to be acceptable than one drawn broadly to encompass all or most of a licensee's innovative activity, including that unrelated to the subject of the license." (p. 5-32)

Unfortunately, the book does not systematically cover the problems of designing and drafting licenses. It contains no guidelines for forecasting the client's needs and it fails to emphasize that the contractual license is a two-way proposition offering a wide range of choices for each party. The basic stages of proper license preparation are forecasting (diagnosis of client needs), planning, and drafting. Practitioners would welcome a thorough discussion of these stages.

CONTRACT AND TORT

The author moves into his strength in chapter 6 on computer contracts. The writing is clear, and the chapter competently handles the practical and conceptual problems in contracts.

The first part of the chapter is entitled "Defining the Bargain". Contract law draws a fundamental distinction between goods and services. The author points out that both goods and services contracts involve a great outlay of "human labor or creativity." Thus, it is difficult to assess whether a contract calling for delivery of software is for a good (the program) or a service (the effort to produce it). "The principal question is what constitutes the essence of the agreement and, essentially what performance satisfies the contract." That approach draws attention to the hard facts of the matter at hand — where is the work to be done, under whose direction, and what variation from standard components is contemplated?

holder of an intellectual property right use that right to demand some other contractual or economic advantage?

3. For example, the author's discussion of the relation between antitrust policy and intellectual property policy needs clarification. The author states that the premise of economic power "is debatable for patents, since the scope (copyright) and durability (trade secret) of the exclusive rights are less extensive than in patent." The sentence introduces a lot. It makes powerful points about copyright and trade secret, but it is cryptic and needs expansion.

The author then moves to the heart of contractual problems — the delineation of responsibilities. For example, a contract which calls only for delivery of a completed program would normally demand less attendant service on the part of the provider than a custom tailored solution for a particular computing need. The author asks, "Is the presumed expectation that the contract provide a solution, or merely resources to subsequently develop that solution?" (p. 6-9). The definition of these expectations lies in the hands of the contracting parties and their attorneys. They can define them in advance through careful contractual choice or leave the matters to evolve without clear contract specification. The author favors clear advance definition of obligations including timetables, acceptance standards and separation of software hardware responsibilities.

Some of the authority reviewed in the book addresses situations in which the seller has provided hardware and software that has fallen short of the buyer's expectations. The author notes that the cases "at least indirectly enforce an interdependence between software and hardware contracts if the circumstances clearly indicate that this relationship was intended by the parties." (p.6-17).

Parol evidence issues often arise in high-technology contract litigation. The author points out that these commonly arise with respect to "published technical specifications that are not directly included in the contract." (p. 6-21). A critical issue is whether there is a clause in the contract stating that the terms of the written contract are exclusive. Although these clauses are touched upon in the book (paragraph 6.07), the author's discussion is not comprehensive, and it is an area that the practitioner will have to research further.

The chapter also includes a discussion of warranties. Computers embody new technology that often raises inflated expectations. Complicated problems can arise when performance falls short of these expectations. For instance, design difficulty and cost overruns often become critical issues in computer contracts. In such cases the issue becomes the extent to which the vendor remains responsible for performance shortcomings, which it frequently argues are beyond its control. The author offers a systematic approach to resolution of these problems. He explains established doctrines such as UCC allocation of risk, indicates how they apply to the new technology and then cites relevant cases. The author points out, for example, that UCC 2-615 applies to technological impossibility as it does to other kinds of impossibility. The author states that while that section "is potentially flexible, the

courts considering impracticality defenses often apply a strict interpretation, even when the inability to perform is caused by factors clearly outside the seller's control." (p. 6-79).

Chapter 7 discusses three different contexts of the application of tort law: fraud, harm to third parties, and liability for reliance on computer-generated information. Issues of fraud become especially critical because the buyer will often rely on statements made by someone who has superior knowledge of the technology. The author distinguishes tort claims from claims based on contract and gives an account of current industry patterns as they appear in the cases. These chapters are helpful to the practitioner in surveying the alternative theories that are available in presenting and defending given claims.

In sum, while the book shares the strengths and weaknesses that are likely to be found in most general reference works. It provides a very useful overview. In some places the discussion is very good, while at other points it leaves the reader wanting. In general, it is a helpful book that alerts the reader to relevant issues, provides excellent references, and gives sound direction for further research.