

ASPEN CASEBOOK SERIES

GOMULKIEWICZ

SOFTWARE LAW  
AND ITS APPLICATION



Wolters Kluwer  
Law & Business

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# SOFTWARE LAW AND ITS APPLICATION

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*For Andrea, Abby, and Katie — my in-house counsel*

*And for Dad — who bought me my 128K Macintosh*

*R.W.G.*

## · PREFACE ·

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### HOW THIS BOOK WORKS

This book aims to put you into the roles that you will play as lawyers in the software industry. Each chapter begins with an overview to provide context. Then, each section of the chapter covers a common issue or scenario (for example, open source software). In doing so, the chapter provides cases, statutes, licenses, NDAs, and other materials so that you can work directly with the relevant texts. Cases have been edited as lightly as possible to give you a case reading experience closely approximating law practice. Following these materials will be three sets of discussion questions. One set of general questions will focus on doctrine and policy, and the other two sets will challenge you to think like a litigation and business lawyer, respectively. Moving beyond the discussion questions, the chapter provides exercises that will provide opportunities for you to “practice law” in the classroom setting.

You do not need a technical background to study or practice software law. Some of the best software lawyers majored in history, literature, economics, or political science (not computer science). You must, however, be eager and willing to learn about software and the software industry—that passion makes the difference. This book will introduce you to software technology and the business models that software firms use but you can learn even more by simply reading the technology news, browsing the consumer electronics section in stores, paying closer attention to the software you use regularly, and talking to software developers and entrepreneurs who you know or meet about what they do.

*Robert W. Gomulkiewicz*  
*December 2014*

## · ACKNOWLEDGMENTS ·

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I have taught a course on software law and its application for two decades but I have always team-taught the course so that students could learn from the best lawyers in the field. I am grateful to those lawyers — especially to Kate Sako, my original partner in teaching the course, Kevin Harrang who has taught a lively unit on multimedia software nearly every year, and Andy Culbert who has been teaching the unit on patents with great skill and insight for over a decade. Jennifer Snider provided excellent administrative support through the years on the course reader that provided the core material for this casebook. Slaven Svetinovic, Dawn Bell, and Ruth Beardsley provided invaluable secretarial support in preparing the book manuscript. Finally, thanks are due to the smart and speedy research librarians at the Gallagher Law Library.

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· CHAPTER ·

1

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INTRODUCTION TO LEGAL PROTECTION  
FOR SOFTWARE

I. INTRODUCTION

Four decades ago Congress appointed a commission to study whether copyright law should protect software, and in 1980 Congress amended the Copyright Act to implement the commission's recommendation that it should. At about the same time the U.S. Supreme Court opened the door for patent protection for software in the *Diamond v. Diehr* case.<sup>1</sup> Since 40 years seems like an eternity in the software industry, you might expect that our legal system has resolved all the major questions about legal protection for software. But it hasn't. In many ways the controversies today are sharper than ever before. Do the laws that we have in place now provide the right degree of protection for software? Do the laws give software developers enough protection so that they can receive a return sufficient to motivate them to produce more great software? Do the laws leave enough in the public domain so that software developers can build on prior software works?

Today, there are two radically different answers to these questions: Some would say that there is not enough protection for software — not nearly enough. These people point to billions of dollars in software piracy and the prevailing attitude that copying software is not morally wrong. Others would say, however, that there is enough protection — far too much. These people point to intellectual property laws, technical

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1. 450 U.S. 175 (1981).



protections, and licenses that stand in the way of legitimate and productive uses of software.

This book places you in the middle of this important debate. To put the debate in perspective, the book begins with a brief history<sup>2</sup> of the software industry, followed by a parallel brief history of legal protection for software, with an overview of the forms of software and software development in between.

## II. A BRIEF HISTORY OF THE SOFTWARE INDUSTRY

Today, software seems as common as an automobile or an electric light. It is hard to believe that 60 years ago software was nearly invisible to us. In the early 1950s, *Fortune* magazine published an article titled “Office Robots,” which was one of the first pieces in the popular press to discuss computers.<sup>3</sup> The article focused on computer hardware, however, not software.<sup>4</sup> At that time the term “software” did not even exist. The “software” nomenclature came into general usage around 1960<sup>5</sup> and the media finally began to recognize the emergence of a discrete software industry in the early 1980s. By 1984 a *Business Week* headline proclaimed software “The New Driving Force” of the U.S. economy.<sup>6</sup>

### *A. Software Industry Progress*

How did the software industry grow from obscurity to prominence in such a short time? Software development began as merely one aspect of creating an overall computer system. Developing software was no more remarkable than developing the system’s processor, keyboard, storage, switches, or wires. Even though software did not seem remarkable, it was distinct and software programming services began to emerge by the mid-1950s as a separately valuable aspect of computer systems development when the U.S. government began to hire programmers for its SAGE air defense project and private firms followed suit albeit on a smaller scale.<sup>7</sup> The Computer Sciences Corporation emerged in this era, for example, and continues to sell its programming services to this day.

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2. Two excellent books provide a fuller history of the software industry: MARTIN CAMPBELL-KELLY, *FROM AIRLINE RESERVATIONS TO SONIC THE HEDGEHOG: A HISTORY OF THE SOFTWARE INDUSTRY* (2004) (hereafter *A HISTORY OF THE SOFTWARE INDUSTRY*); and MICHAEL A. CUSUMANO, *THE BUSINESS OF SOFTWARE* (2004). Useful information on the economics of the information economy in which software plays a starring role can be found in CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* (1999).

3. *Office Robots*, FORTUNE, Jan. 1952, at 87.

4. See also TRACY KIDDER, *THE SOUL OF A NEW MACHINE* (1981) (Pulitzer Prize winning book).

5. See FREDRICK P. BROOKS, JR., *THE MYTHICAL MAN MONTH: ESSAYS ON SOFTWARE ENGINEERING* 4 (1975) (this book is considered one of the classic works on software development).

6. *Software: The New Driving Force*, BUS. WK., Feb. 27, 1984, at 54.

7. CAMPBELL-KELLY, *A HISTORY OF THE SOFTWARE INDUSTRY*, at 5.