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SOFTWARE AND INTERNET LAW

Fourth Edition

Wolters Kluwer
Law & Business

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Software and Internet Law

Fourth Edition

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Wolters Kluwer
Law & Business

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Published by Wolters Kluwer Law & Business in New York.

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Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

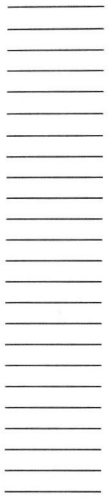
ISBN 978-0-7355-8915-5

Library of Congress Cataloging-in-Publication Data

Software and internet law / Mark A. Lemley . . . [et al.]. — 4th ed.
p. cm.
Includes index.
ISBN 978-0-7355-8915-5
1. Software protection—Law and legislation—United States.
2. Internet—Law and legislation—United States. I. Lemley, Mark A., 1966-

KF3024.C6S617 2011
343.7309'944—dc22

2011005171



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For Rose, as ever.

—M.A.L.

For Claire, Dylan, and Noah

—P.S.M.

For Jo, Robbie, and James

—R.P.M.

For Bob, who has made so many things possible.

—P.S.

For Jac, Cora, and Freal

—B.W.C.

Preface

Lawyers serve the software industry and Internet firms in many significant roles. They often draft or review license agreements for acquiring software or other information products. They may monitor ongoing licensing arrangements. They sometimes draft or negotiate agreements for the custom development of software to be performed by other firms. They may conduct intellectual property audits to enable their clients to understand better how to protect their firm's overall intellectual capital. Lawyers also help design electronic ordering systems or review websites to ensure that no illegal content is posted there. They may provide assessments about legal or policy developments likely to affect their clients. Finally, when necessary, they litigate claims or otherwise work to settle disputes between their clients and other firms. To play these multiple roles successfully, lawyers need a considerable understanding of the law, how it has been applied in the past, and how it is evolving.

Although one might achieve this understanding by taking a standard curriculum in intellectual property, antitrust, contract, and tort law, perhaps with some constitutional or criminal law mixed in, there are several reasons why studying software and Internet law in one course may offer a better framework for providing sound advice to information technology clients. The most obvious reason to study software and Internet law as a special course is that the practice of law in this field will often require the integrative thinking needed to answer, for instance, the kind of questions a software entrepreneur, having developed an innovative user interface, might ask her lawyer: "Should I patent it? Can I copyright it? How else might I protect the look and feel?" Such questions may be easier to answer when the lawyer has studied intellectual property law as it has specifically been applied to software.

There are, however, at least three other reasons to study software and Internet law. A course on these subjects not only is useful because it covers cases that involve the application of different kinds of laws to computers, software, or the Internet; more important, a course of this sort raises fundamental questions about the adequacy of existing laws to adapt to the challenges posed by computer software and the Internet. Computer software was the first digital subject matter to raise such challenges and several chapters in this fourth edition (Chapter 2 on copyright, Chapter 3 on patent) address them. However, as will become apparent in Chapters 7-9, those challenges are not confined to software. Why did software pose challenges for the law? The answer lies in the very nature of software: software is a utilitarian text. Copyright law has a long history of protecting literary and artistic works, but not

utilitarian works. Patent and trade secret laws, on the other hand, have a long history of protecting useful physical devices but not writings or innovations embodied in textual form. Given the traditional bounds of copyright and patent law, the hybrid nature of computer programs has made it difficult to integrate them into the existing intellectual property law regimes.

A second reason to study software and Internet law is that economic considerations, especially those deriving from network effects, complicate the application of existing laws to the information industry. When the value of a product is critically dependent on its compatibility with other products, the absolute character of traditional intellectual property rights can block access to networks, thereby creating particularly serious impediments to competition as well as new challenges for antitrust law. In addition, firms need to plan their development and marketing strategies with network effects in mind; this may mean planning to give away some software or other digital products or services in order to establish market share, build brand, and take advantage of network effects. *See* Carl Shapiro and Hal Varian, Information Rules (1998).

A third reason to study software and Internet law is that the needs of these emerging industries are bringing about legal developments that once might have seemed unlikely or unthinkable. In the 1970s or 1980s it might have seemed absurd to think that firms could use licensing agreements to distribute mass-marketed information products. Developers of computer software started using "shrinkwrap" licenses for this purpose (i.e., putting inside a box of packaged software a document that states, among other things, that the purchaser of the software is a licensee; that the purchaser's rights to use the software are restricted in certain ways; and that the purchaser's opening of the package or installing the software constitutes agreement to the terms of the "license"). Yet the ubiquity of such licenses in the software marketplace has paved the way for an increased use of licensing as a means to control distribution of commercially valuable information in other venues and has led to proposals for laws to validate mass-market licensing agreements. Additional new legal regimes have been devised to respond to other perceived threatened market failures to information technology industries, one for the design of semiconductor chips and another to protect the contents of databases. New laws of this sort are best understood in the information industry context out of which they arose.

The goal of this book is to provide students with a comprehensive treatment of the law of computer software and the Internet, with a particular focus on intellectual property, licensing, antitrust, tort, and constitutional law. By their nature, software, and especially Internet law, will change rapidly. Indeed, even the second edition of this book differed radically from the first, particularly in the Internet chapters. We greatly expanded our treatment of jurisdiction, Internet intellectual property disputes, and computer crime. We also added a new chapter on unauthorized access to Internet servers. Our goal in this current edition is not to freeze the development of the law at one particular point in time, but to provide a base of fundamental principles and issues on which subsequent developments will build. Those subsequent developments will be reflected in future supplements to this book and, perhaps more important, in our website, *http://www.law.berkeley.edu/institutes/bclt/pubs/swbook/*. We encourage those who use the book to refer to the website for up-to-date developments before planning their course of study.

Finally, as always, a book of this magnitude would not be possible without the assistance of many people. We would like to thank Ryan Garcia, Peter Huang, John Sasson, Jason Schultz, Leah Theriault, and Larry Trask, for their work on the first edition; Colleen Chien, Laura Quilter, Chris Ridder, and Helaine Schweitzer for their work on the second edition; Tom Fletcher, Michael Geist, Orrin Kerr, Paul Schwartz, Chris Swain, Sara Terheggen, and

Alison Watkins for help with the third edition; and Dan Burk, Stacey Dogan, Paul Heald, and several anonymous reviewers for their comments on earlier versions.

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February 2011

Acknowledgments

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Michael Meurer, Price Discrimination, Personal Use and Piracy, 45 Buff. L. Rev. 845 (1997).

Note: We have selectively omitted citations and footnotes from cases without the use of ellipses or other indications. All footnotes are numbered consecutively within each chapter, except that footnotes in cases and other excerpts correspond to the actual footnote numbers in the published reports.

Many of the problems in this text are taken from actual cases. However, in many instances we have altered the facts of the case. In most cases we have also altered the names of the parties involved. In a few cases, however, particularly in the trademark and antitrust chapters, we felt that it was important to the problem to use the name of a product or company with which the reader would be familiar. Readers should understand that the problems are hypothetical in nature and that we do not intend them to represent the actual facts of any case or situation.

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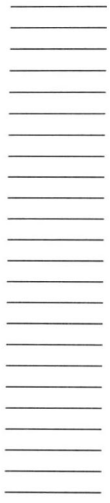

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