LAW and the COMPUTER

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To Bill Harvey, Dean when I started; Tom Read, Dean when I finished; and to all of the administration, faculty, staff, and students of the Indiana University School of Law at Indianapolis, I gratefully dedicate this book.

PREFACE

Computer science, in the few decades since the first stored-program computer was built, has evolved at a rate that has outstripped society's ability to deal with the novel issues this technology has raised. In no area is this fact more evident than in the law which is just now beginning to recognize that its classical concepts and rules literally cannot "do justice" with regard to much actual and potential computer-related litigation. There can be little doubt that vendors, buyers, operators and other computer professionals have proceeded until now without more than at most a nod toward major legal issues, if not, indeed, a total ignorance of such issues.

This book is intended to acquaint those who work with computers, but who have no training in law, with basic legal concepts and some of the principal issues of law relating to computing. Because the law, even computer law, is so vast in its scope, only selected materials can be included in a single text. And because this area of law is developing so rapidly, much of what this text contains may already be out-of-date. Nevertheless, the fundamental legal concepts and the necessity for the computer professional to be aware of those legal issues which significantly affect his work remain. Just as Business Law has long been a core course in the business administration curriculum, so too computer law must certainly become a central part of the education of anyone who holds a position of responsibility in computing.

Much of material in Chapters IV and V appeared in the RUTGERS JOURNAL OF COMPUTERS, TECHNOLOGY AND THE LAW and the INDIANA LAW REVIEW. I thank Robert Macek, my editor, who was of considerable assistance as I wrote this book, and I thank as well the unnamed reviewers for their thoughtful comments.

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A BRIEF INTRODUCTION TO THE NATURE OF LAW

WHERE DOES LAW COME FROM?

It is probably fair to say that most citizens' ideas about the law are negative. The law orders us *not* to drive 40 miles per hour in a 30 mile per hour zone. If we choose to disregard this negative command, then we risk suffering penalties. The law commands us not to steal or murder under pain of suffering serious punishment. The law tells most businesses that they must file numerous reports and forms with the federal government, certainly something that businesses do not view in a very positive way. We may say to ourselves, "The law ought to be simple and readily understood so that all persons can understand and follow it," yet the law's complexity seems to increase at an ever-greater rate so that even lawyers have difficulty comprehending it. Yet the popular view of a perhaps unpopular legal system encompasses but a small part of that system. Before beginning a discussion of computer-related law, it is necessary to have some idea of what "law" in general is and where it comes from.

Despite the belief of many that law should be, and can be, made much simpler than it is, law as it exists today is highly complex. The concept of "law" as used here will not include a variety of legal processes and functions. A municipal ordinance which forbids driving at a speed greater than 25 miles per hour in a certain zone is part of the law; and the officer who arrests a speeder in that zone is performing a legal function, but that function is part of a broader notion of law than will be employed in this text. Likewise, the process of a trial is different from the positions that the attorneys representing each party in the trial will try to convince the judge is really the law governing the

case being tried; and each of these remains distinct from any questions of fact, that is, questions about what really took place, which a judge or jury may have to determine. The law this text deals with is really the rules of law, the rules that try to determine who has a right to what property, who has the power to do what things, what is wrong, and what is right in the eyes of the legal system.

Rules of law

Sources of law

The rules of law come from three basic sources: the federal and state constitutions and statutes, case or common law, and rules and regulations of administrative agencies. The broad outlines and fundamental principles of government and law within the United States are spelled out in the Constitution. Each state has its own constitution, but these may not contradict the Constitution of the United States. The Congress and state legislatures pass statutory laws. None of these statutes should contradict the federal Constitution and no state statute should contradict the constitution of the state that adopts it. In many areas, states are not free to pass statutes because the federal government has declared that area to be under its sole control because of powers given it by the Constitution. No state, for example, is free to declare war on another state or country.

Statutes and general rules of law are not always clear; it is not always obvious what they mean or when they apply. Nor is it always clear whether or how some rule of law applies in some specific situation. There may even be a question whether a given statute or rule of law was adopted in an improper manner or contradicts an even higher rule of law, and, hence, is invalid. Who then is to make this decision how to interpret a certain law, or even whether a given statute is void? This is the role of the courts. Very simplistically, the legislative branch of government passes laws in the form of statutes, and the courts interpret those laws, thus sometimes making new law in the process.

A state larceny statute may declare, for example, that the subject matter of larceny—that is, an object that is capable of being stolen, in the eyes of the law—is "something of value." The phrase "something of value" could be interpreted as requiring that some specific value be proved for some object in order to be able to convict someone accused of stealing it; or it could mean that it suffices for the prosecution to prove that the item in question just has some value, however small or uncertain, in order to establish the item could be an object of theft. It would be up to courts, unless there is some express and clear intent on the part of the legislature concerning the matter, to determine whether some specific actual value must be proved, or a mere proof of some real, though wholly unknown, worth was required.

Case law

When deciding an issue of law, that is, giving an interpretation of the law, a judge or group of judges usually produces an opinion, which is a written statement setting forth the reasons behind the decision reached. These opinions are an important source of information

about the law, because they inform us what the courts believe the law to be. Because courts are likely to be guided in the future by what they have said in the past, these opinions offer a guide as to how the courts issuing them will act when presented with various questions of law. The body of interpretations of the law handed down by the courts forms the case, or common, law.

No one should believe that courts are unfettered in what they can do or in the conclusions they can reach about the law. A lower court can be overruled or reversed by a higher court. No court, high or low, can act outside its proper jurisdiction. There are many laws that bind the courts, but this is not the proper text to discuss this matter. Nevertheless, it is important to understand that the courts themselves are a source of law. They also remain those bodies to which citizens must resort to redress real or imagined grievances that cannot be settled outside the courtroom, and to which they turn to seek many clarifications of the law.

Administrative agencies

In addition to the legislatures and courts, there is a third source of law, an area of government that shares aspects of all three branches of government—executive, legislative, and judicial—and that source is the administrative agencies. An administrative agency is established by legislative action under broad guidelines to provide rules and regulation in some important area of society, such as interstate commerce. Administrative agencies can be involved in both adjudication and fact-finding as well as rule-making, and the rules that an agency makes generally have the force of law. Administrative rules and findings are often subject to review in the courts. This is, however, a highly technical and complicated subject and, again, not one which is appropriate to explore at length in this text. But because administrative law undoubtedly affects computer professionals now, and will affect them even more in the future, we must deal with this area to some extent in later sections.

OF COURTS AND LAWYERS

The role of a good attorney is not simply to defend his or her client in court when that is necessary, but to keep the client out of court in the first place. Someone resorts to a court after a conflict has arisen which cannot be resolved in any other way than formal litigation. The good lawyer should try to keep the client from such conflicts. But because in this country anyone can file suit on any one of numerous grounds it is too much to expect that an active business man or woman will never be in court. The next best thing to never being brought to court is to have one's adversary's case dismissed by the court as being insubstantial as a matter of law. The good lawyer

should try to make his or her client's position as genuinely unassailable as possible, thus effectively blocking anyone wishing to bring the client to court before the matters in question get to trial. That too, of course, is not always possible.

A law student learns a great deal of law in three years of law school, but the purpose of law school is not primarily to teach the law. There is so much law in so many different areas that no one, not even the most capable and famous of all attorneys, ever really knows more than a small fraction of it at any one time. What law school teaches the future attorney is to review a particular situation, identify the special legal issues and problems that the situation presents, and then to do the research necessary to address the issues and propose solutions to the problems.

Rarely one solution

Rarely does a legal problem have only one solution. Our legal system is adversarial in nature. Cases do not come before courts until there is some conflict, and there is more than one party in any conflict. Each party in a case believes in the rightness of its cause. The lawyer for each party will of course attempt to argue as persuasively as possible for the court to adopt his or her client's view of the facts and the law.

In rendering a legal opinion for a client, then, a lawyer must anticipate what opposing positions might be, because these are the positions that will be argued if the matter is ever litigated. It may seem that an attorney always hedges his or her bets, never coming down solidly on one position or another. A lawyer can support any legally defensible position, but must keep in mind that there may be, and usually are, other lawyers willing and able to defend an opposing viewpoint. For better or worse, that is the system of justice, of arriving at the "truth" in the courtroom, that we have in this country.

The lawyer, in short, analyzes his or her client's situation, and suggests and if necessary defends the position which he or she feels is both lawful and most beneficial to the client. The lawyer is trained to spot issues of law and to find the required answers.

THE PURPOSE AND SCOPE OF THIS TEXT

This is not intended as a text that will enable computer professionals to be their own attorneys. It is not intended as a do-it-yourself legal kit, but to

1. Acquaint the reader with some basic legal concepts and terminology, as these relate to computing;
2. Enable the reader to recognize more easily and more quickly potential legal problems in his or her work, and thus know when the help of an attorney might be required;

3. Aid the reader in communicating more effectively with an attorney. This includes both explaining the potentially or actually troublesome situation as well as understanding more clearly the attorney's response.

Few clear-cut answers

The reader should expect few clear-cut answers to any legal questions in this text. There are many good reasons for this. First, each computer user's situation is individual and unique. Any attempt to generalize to fit all situations is foolish and dangerous. Sometimes minor differences in a fact pattern can make a major change in how the law views a certain situation. Second, much of the law relating to computing is state law, and state law differs from state to state. What may pertain to trade secrets in California, for example, may not be valid in Virginia. Local attorneys know best what the local law is. Third, and perhaps most important, computer law is a very new and rapidly evolving area of the law. There is simply no settled body of computer law anywhere. No doubt major decisions will be reached and laws passed, even as this text is being published, which will make some of it obsolete before you even read it. Yet the basic legal issues will still be relevant. You should be able to identify these so that you then can go to an attorney to find out what the latest state of the law actually is.

Understanding now what this text is and what it is not, let us get on with the business of exploring some of the important legal concepts and questions as they pertain to computing.

SOME GENERAL SOURCES ON COMPUTER-RELATED LAW

The *Rutgers Journal of Computers, Technology and the Law* (until recently the *Rutgers Journal of Computers and the Law)* is a law review that is largely dedicated to computer-related law. It also regularly publishes book reviews and bibliographies in this area. Its editorial and business offices are located at the Rutgers Law School, 15 Washington Street, Newark, NJ 07102. The *Computer Law Service* and *Computer Law Service Reporter* are a loose-leaf and reporter series published by Callaghan and Co., 3201 Old Glenview Road, Wilmette, IL 60091; the editor is Robert Bigelow. An early survey text is *Your Computer and the Law* by Robert Bigelow and Susan Nycum, published in 1975 by Prentice-Hall. Survey articles appear from time to time in various journals; see, for example: R. Raysman, "DP and the Law," in the "In Depth" section of *Computerworld,* March 10, 1980; and John Lautsch, "Computers and the University Attorney: An Overview of Computer Law on Campus," *Journal of College and University Law,* Vol. 5, No. 4 (1979) (this entire issue is devoted to Mr. Lautsch's article).

The Computer Law Association (address: c/o Michael Yourshaw, 1776 K Street, NW, Washington, D.C. 20006) publishes proceedings of conferences on various topics of computer-related law.

Roy Freed (address: c/o Powers & Hall, 30 Federal St., Boston, MA 02110) is a prolific computer lawyer who has privately published a compilation of articles, opinions, and miscellany on a wide variety of topics. The Fifth Edition of *Computers and the Law: A Reference Work* came out in 1976.

Jurimetrics, the journal of the Section on Science and Technology of the American Bar Association (address: ABA, 1155 E. 60th Street, Chicago, IL 60637) often contains excellent material related to computer law. The Spring 1980 issue is completely devoted to "Digest and Analysis of State Legislation Relating to Computing Technology" by John Lautsch.

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CONTRACTS

WHAT IS A CONTRACT?

In essence, a contract is a promise that the law is willing to enforce. As is true of most legal concepts, however, there is no simple definition of contract, nor any certain test to see whether any given agreement rises to the level of a contract. Yet the contract has for a long time been one of the notions at the very core of business law.

Essentials of a contract

There are at least two parties to any contract: the party that promises to do, or refrain from doing, something, known as the promisor, and the party to whom the promise is made, known as the promisee. A contract implies a meeting of the minds of the parties, an agreement concerning the terms of the contract. It also implies that something of value, known technically as consideration, passes between the parties. The courts will generally not enforce a purely gratuitous promise. Thus, if you say to a friend, "I am going to give you $50 tonight," and there is nothing to be given in return, such as a power saw or stamp collection, then the friend is unlikely to be successful in a suit for the $50 if you do not pay. One common form of consideration is a return promise; for example, "I will write a program to enable your computer to keep your accounts if you will promise to pay me $5000 when the job is completed." A promise to do certain work is exchanged for a promise to pay when the work is completed.

Formation of a contract

The formation of a contract generally begins with an offer made by one of the parties; for example, "I will paint the fence around your house for $50." The contract is created if both parties understand the terms of the offer and the second party accepts the offer; "All right, I will pay you $50 if you paint the fence around my house." A problem arises, and there may be no contract formed, if the parties understand

quite different things by the offer. For example, if the party accepting the offer is speaking about the fence that surrounds his 500-acre country estate, but the other party offers to paint a fence for $50 believing the fence in question is the picket fence enclosing the offeree's small town cottage, then there has been no agreement, and hence no contract, because the two parties have not been able to agree on the fence to be painted.

All this may seem somewhat elementary. After all, to have a genuine promise, you need someone to whom the promise is made. If one person is to give something to another, then it is not unreasonable to expect that other person to give something in return if he or she wishes to enforce the original promise in a court of law. And if two people cannot agree on what they are to exchange, then it hardly seems right to make them go ahead with the exchange anyway. If all contracts involved painting fences, life and the law would be much simpler indeed.

But, of course, problems do arise that do not have easy solutions. The contractor may begin building a house only to find that an underground river runs through the basement, and insists the job cannot be completed at the agreed-upon price because of the unforeseen complication. A saleswoman claims that the paint will not peel for at least five years, but the written contract expressly states that no promise is made concerning how long the paint will go without peeling. The seller tells the buyer to pick up his piano at the factory in Walla Walla although the buyer in New York assumed it would be delivered to his home: no mention is made of the place of delivery in the contract. These are but a minute fraction of the dilemmas that anyone doing business can face each day in the area of contracts.

It is axiomatic that each party to a contract wants the better deal for him- or herself. Each party will therefore attempt to have the contract drawn with as many clauses and terms favorable to him- or herself as possible, and, conversely, with as few clauses and terms favorable to the other party as possible. The next best thing to scoring a point yourself is avoiding letting your opponent score against you. The typical computer or computer services vendor contract is usually roundly laced with terms highly protective of the vendor.

THE TYPICAL VENDOR CONTRACT

There are three principal tools a vendor will use as protective shields should anything go wrong with his or her product. These are disclaimer of warranties, limitations on remedies, and integration clauses. We consider each of these in order.

Disclaimer of warranties

Warranty

A warranty is essentially a guarantee that some product or service will live up to certain expectations. A computer vendor may warrant less than a certain percentage of downtime. If the downtime exceeds the warranted amount, the vendor may be in breach of warranty and be liable for damages caused by the excessive downtime.

Express warranties

Warranties can be either express or implied. An express warranty is one which the warrantor spells out expressly. "This car will go 50,000 miles without any repairs," is an example of an express warranty. Express warranties can be created in several ways. Below is quoted Section 2-313 of the Uniform Commercial Code; the code is a vitally important piece of legislation adopted in some form in every state except Louisiana.

1. Express warranties by the seller are created as follows:
   a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.
   b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
   c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
2. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Note that this section of the Uniform Commercial Code (UCC) speaks of a warranty created by a *seller*. Article 2 of the UCC, of which the section quoted above is a part, deals only with "transactions in goods." Services are not considered to be goods according to the UCC. Because much computer equipment is leased rather than sold, and because many computer-related contracts or purchases deal with services (such as maintenance), it is far from clear that this section of express warranties can be applied in any but very special circumstances, specifically, where something that is recognizable as goods, such as hardware, is actually sold. Despite this seeming drawback in the express wording of the section, many courts are willing to apply the principles of the section, and of Article 2 generally, by analogy to leases and provision of services; but not all courts are willing to do this.

Note too that the seller does not have to make formal reference to the word "warranty" in order to be held bound by an express warranty. The salesperson, who is usually considered to be an agent of, and able to speak for, the seller can make express warranty simply by asserting that the product is capable of doing thus and so. If a salesman says that a particular system has sufficient memory to solve a particular class of problems, that may constitute an express warranty binding the seller if the ability to solve problems of that class is one of the principal reasons the buyer chose that particular machine. If the salesman points to a picture of an IBM 370/158 and says, "My Ipswitch 001 does everything that machine does," he has made an express warranty if the reason, or one of the basic reasons, why the buyer chooses that machine is that she wants the capabilities of an IBM 370/158. If the Ipswitch 001 can't live up to the warranty, then the seller may be liable for damages in breach of warranty.

One of the most important forms of express warranties is the Warranty of Fitness for a Particular Purpose. Basically, this warranty arises when the seller knows that the buyer is relying upon the product to do a particular task and upon the expertise of the seller in selecting a product that can do the job. If a businessman comes to a computer vendor and describes the requirements of his particular business, and relies on the vendor to suggest an appropriate machine to fill those needs, then by suggesting a particular computer system, the vendor may make an express warranty of fitness for a particular purpose; in this case, the purpose is to satisfy the computing needs of the business-purchaser.

Implied warranties

Express warranties are thus rather strong promises, at least in the eyes of the law, that a seller makes stating that a product will perform in a certain way; these warranties must be stated explicitly in some form in order to be enforceable, or even to exist at all. The law, however, also provides some implied warranties. An implied warranty is one which automatically attaches to the goods sold unless the seller successfully disclaims it.

One of the most important protections any buyer has is the implied Warranty of Merchantability. Again, we quote at length from a section of the Uniform Commercial Code:

> §2-314. Implied Warranty: Merchantability; Usage of Trade
> 1. Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
> 2. Goods to be merchantable must be at least such as
> a) pass without objection in the trade under the contract description; and . . .
> b) are fit for the ordinary purposes for which such goods are used; and