

Legal perspectives on system development

Liability, Litigation risk, 'Professional' standards, and Ethics

My background

- Jam Software: tech support manager
 - OS, expert system, utils - UCD
- Privacy Commissioner's Office: policy
 - Big IBM-style government projects
- PIAC, RLC, Legal Aid: public interest law
 - Test cases, Consumer, Crime
- MSP: Virtual community sys admin
- Access Online: web exec. producer

Software, Law and Ethics

Strange bedfellows
How the law is made, and works
Differing Principles and standards
Risks in software development

Examples:

- Consumer protection
- Product liability
- Professional liability
- Anti-trust: abuse of monopoly
- Intellectual property: copyright, patents
- Privacy
- Spam

Features of the legal system

Main divide: Criminal <-> the rest

Criminal

- Launched by state, trial, conviction or acquittal

Civil

- Sued by other party, damages, restitution

Sources

- **Statutes** ('Laws') set rules, **Cases** interpret them
- **Jurisdiction**: which laws and courts
- **Appeals** to higher court
- **Precedent** is critical in cases

Obligations: from Statutes and Contracts

Everything is arguable (if you lose, \$\$ costs)

What shapes the law?

Ongoing struggle between interests
Commercial reality
Technical reality
Public standards
International affects (indirect)

Different standards

- Liability
- Is it against the law?
- Litigation risk
- Will you be caught, sued or prosecuted?
- 'Professional' standards
- Will your peers reject you?
- Ethics
- Will your children & friends reject you?

Development risk factors

20% coding and engineering – ignore?
80% analysis, communication, revision
User-Centred Design & Risk Management
Neglected but critical
Early vs. late error discovery
'User sovereignty'

Hypothetical

- Most software projects fail
- \$, time, scope, quality (for User)
- Many break various standards, but...
- ↳ You could do it accidentally...
 - ↳ Or be asked/tempted to deliberately
 - ↳ Your own position
 - ↳ Your employers
 - ↳ The 'victim's position'

What matters?

Breaking the law?	Liability
Getting caught?	Enforcement
Losing your job?	Professional
Losing your reputation?	Ethics
Or just building crap?	Self respect

Consumer Protection

- Based on consumer/vendor relation
- Assumes imbalance
- Statutory Warranties – fit purpose
- Contractual waiver?
- Misleading and deceptive conduct
- Unfair Contracts
- Can be Strict Liability – State Bank

Tort/ Negligence

- Product liability
- Duty of Care, special relationship
- Act or omission
- Causation
- Foreseeability of harm
- Proximity

Consumer protection hypothetical

See hypothetical [essay](#)

Professional Liability

Nature of Profession?
Membership of Professional body
Registration required to work?
Self-regulation
Insurance
Peer attitudes
Reputation

Anti-trust: Abuse of Monopoly

Competition policy
Monopoly
Example: *MS v DoJ re Netscape*
Political involvement
Practical significance

Anti-trust hypothetical

See hypothetical [here](#)

Intellectual Property

Purpose:
Copyright Act: form, not substance
• No registration
• Digital Agenda
Patents Act: the idea, not the form
Circuit Designs
Free Trade Agreement

Copyright

Copyright Act:

- Exclusive right to control exploitation

No registration

Actual text, code or implementation

Licences with conditions and fees

Technological Protection

- 'Digital Rights Management' tools
- DMCA and contracting away user rights

Copyright and Public Domain

Differences in Australia, US...

Fierce battle: maximalist v PD?

'Public Domain'

Open Source software: GPL, copyleft

Open Content

- Creative Commons – US, global?
- Free for Education - Australian

Business models

Patent

Right to deny access

Requires registration

Expensive to fight

Patentable material?

E-business patents

- Amazon 1-Click web shopping cart

Gene sequence patents

- Bioinformatics – human genome race

Privacy

Right to be left alone

Defeat of Australia Card, Privacy Act

Limited Rights of data subjects

Restricts what technology can do

Requires security

Affects everyone

Privacy Hypothetical

See hypothetical [example](#)

Spam

Spam Acts: Australia, USA, California
Unsolicited commercial electronic message
Single message
Address harvesting
Penalties
Surveillance
Workplace privacy bill NSW

Spam hypothetical

See hypothetical [example](#)

Questions?

Conclusion

David Vaile
Executive Director
Baker & McKenzie Cyberspace Law and
Policy Centre
Faculty of Law, University of NSW
<http://www.bakercyberlawcentre.org/>