

Legal perspectives on system development

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

<http://cyberlawcentre.org/2006/talks/cse.htm>

2006 David Vaile
Executive Director
Cyberspace Law and Policy Centre
Faculty of Law, University of NSW
<http://www.cyberlawcentre.org/>

Outline

- ◆ Strange bedfellows
- ◆ Legal system
- ◆ Liability
- ◆ Software development – immature?
- ◆ Examples:
 - Consumer protection
 - Product liability
 - Professional liability
 - Anti-trust
 - Copyright
 - Software patents
 - Privacy
 - Spam

My background

- ◆ Tech support manager: JAM Software
 - OS, expert system, utils - UCD
- ◆ Privacy Commissioner's Office: policy
 - Big government projects
- ◆ Public interest law: PIAC, RLC, Legal Aid
 - Test cases, Consumer, Crime
- ◆ Virtual community SysAdmin: MSP
- ◆ Web exec. producer: Access Online
- ◆ Australian Privacy Foundation

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
- ◆ Forseeability of harm
- ◆ Proximity

Consumer protection hypothetical

See hypothetical [example](#)

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 [example](#)

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

Patents and software

- ◆ 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

Current patent battles

- ◆ Resistance to patentability of software
- ◆ EU Commission recommends, Parl. Rejects
- ◆ CSIRO v. US computer industry – wireless
- ◆ Linux?
- ◆ Why are software patents a danger?
 - Locking up pure ideas? Mathematics? Stallman
 - Not just open source
 - Impossible to ascertain if infringing
 - Patent Offices too lax and inexperienced? \$\$ motive
 - Very expensive
 - Only works if you have a huge portfolio

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
Cyberspace Law and Policy Centre
Faculty of Law, University of NSW
<http://www.cyberlawcentre.org/>