BRINGING SOFTWARE LICENSING TO DATE: AN IN-DEPTH INSTRUCTIONAL ABOUT SOFTWARE LICENSING IN THE MODERN WORLD

MICHAEL L. RUSTAD, SOFTWARE LICENSING (Matthew Bender, Rev. Ed., 2014).
Software Licensing
By Michael Rustad
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"Business lawyers as well as intellectual property lawyers need to know the anatomy of a software license, just like a medical student must master the anatomy of the human body." [1]

With the software industry being the third largest industry in America, it is important that all business lawyers, whether transactional lawyers or litigators, be familiar with software law. In Michael L. Rustad's *Software Licensing*, he helps to fill in an undeveloped area of law by utilizing the American Law Institute's Principles of the Law of Software Contracts, UCITA, U.C.C. Article 2, and international commercial law as well as interviews with leading software lawyers. Rustad provides practical examples, and well-detailed explanations of legal, business, and policy issues pertaining to software licenses. He strategically creates the hypothetical company, Suffolk Software Company ("SSC") to highlight and illustrate key concepts and legal issues faced during licensing activities. This gives the reader a more practical sense of the subject rather than just the academic view. *Software Licensing* is suitable for attorneys, business executives, software engineers, law students, or anyone who is looking to obtain a deep knowledge of software licensing.

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[1] MICHAEL L. RUSTAD, SOFTWARE LICENSING (Matthew Bender, Rev. Ed., 2014).

School in Boston, Massachusetts. He teaches High Technology Law, Cyberspace Law,

Information Law, Uniform Commercial Code, and Torts. Rustad has published many books and

articles, including (1*) E-Business Legal Handbook* (Aspen Law & Business, 2003); (2)

Understanding Sales, Leases and Licenses in a Global Perspective (Carolina Academic Press,

2008); (3) *Everyday Consumer Law* (Paradigm Publishers, 2008); and (4) *Internet Law in a*

Nutshell (Westlaw, 2009).

      The book is broken up into twelve chapters. Each chapter touches on different facets of

software licensing, but all use real-life examples such as the hypothetical company, SSC, to help

the reader visualize each topic with a hands-on and practical approach. The first chapter focuses

on how the twenty-first century American "lives in a culture and an economy dependent upon

the licensing of software, data and other information transfers."[2] The chapter continues on to a

brief history of the software industry, then surveys the most important types of software and

introduces the reader to the concept of what the software licensing agreement is. In particular,

Rustad focuses on the various kinds of software license agreements that licensors can utilize to

structure their agreement to meet their desirable outcomes.

      The second chapter brings life to the hypothetical company, SSC, and is used through out

the rest of the book to illustrate various licensing activities. In this chapter, Rustad focuses

primarily on the five "Ws," who, what, when, where, and why of every software license

agreement. U.S. courts utilize the five "Ws" when interpreting a software license agreement to

give effect to the mutual intention of the contracting parties when the contract was formed.[3] The

main purpose for the five "Ws" is to help attorneys consider risk factors, protect intellectual

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[2] RUSTAD *supra* note 1 at 10
[3] *See* RUSTAD, *supra* note 1 at 68

property rights, and avoid from infringing the rights of others.[4] Rustad effectively shows the five

"Ws" used in an example where SSC gives XYZ a right to use their software for a year subject to

the terms and conditions of the agreement. They answer;

> (1) *Who* will be able to use the software, derivative products, related documentation, and technical manuals? (2) *What* software is included in the license agreement? Does it include access to source code, improvements, enhancements, and new versions? (3) *Where* can a licensee use software under what conditions? (4) *When* does the license agreement begin and when is it terminated, if ever? (5) *Why* is evidenced by the recitals that summarize the reasons for entering into software license agreement. (RUSTAD, SOFTWARE LICENSING, at 69).

Lastly, the second chapter explains punch lists or "to do" lists for practicing lawyers. The punch

lists enable lawyers to double check that they have handled the most important risk factors in a

software contract. To further the concept of the punch lists, the third chapter explains how they

help with warranties, indemnification, and disclaimers.

The fourth chapter then utilizes SSC to show issues that arise with breaches and the

remedies for the breach. The following four chapters (5,6,7 and 8) focus on specialized software

agreements. They use SSC to illustrate the different kinds of software agreements. Topics

focused on in these chapters include standard-form software licensing agreements, open

software, and cloud computing service level agreements.

In the ninth chapter, Rustad introduces the Uniform Computer Information Transactions

Act ("UCITA") as the first comprehensive software licensing statute. Although UCITA is not

widely adopted, it is important because it functions to adapt many U.C.C. Article 2 provisions to

licensing and essentially creates a template for many software license agreements.[5] The rest of

the chapter dives in-depth on the various topics of UCITA such as how to construct and interpret

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[4] *See* RUSTAD, *supra* note 1 at 69
[5] *See* RUSTAD, *supra* note 1 at 839-40.

a UCITA license, UCITA warranties, and UCITA breeches and remedies. The tenth chapter

then further dives into UCITA and examines the history of software contracting law. The main

focus of the chapter is on the Principles of Software Contracts, which was approved by the

American Law Institute in May of 2009.

Another topic Rustad points out to the reader is U.C.C. Article 9, focusing on how

software is classified as collateral and how to create purchase money security interests

("PMSIs") in software. This is extremely important as bankruptcies are on the rise because it is

critical to properly secure software as collateral under U.C.C. Article 9. The chapter heavily

outlines and discusses software and how U.C.C. Article 9 handles it. The last chapter, 12,

explains how it is vital for U.S. companies to localize their license agreements to launch

successful business enterprises. The chapter looks at software licensing on a global scale and

analyzes cross-border software licensing issues.

Software Licensing does exactly what it is set to do, it engages the reader whether

experienced or not in the software industry and guides them through the history and how

software licenses have become extremely important and prominent in an ever-changing world of

technological advances. Rustad lays out how the U.C.C. and UCITA blend together and how

software licenses utilize the provisions in each of them. As someone who is inexperienced in the

software field, the book does a great job of providing a substantial amount of knowledge without

being overwhelming because Rustad uses real life examples and broke many of the books topics

down to terms that are understandable. *Software Licensing* is also a great reference for those

experienced in the software field. Rustad provides lawyers with an extensive analysis of the

concepts and methods of software licensing with an emphasis on the contract and intellectual-

property interface of the process. He examines key issues and negotiating points that licensors

and licensees face in licensing software. He also provides insight into the larger business implications of software licensing.

The only downfall when reading the book was that there were various grammar and editing errors. This sometimes made it hard to understand some concepts the first time reading it. Also there are some abbreviations that are used before providing the full entity, which lead the reader to have to search for what it stood for on later pages. Lastly, at a price point of $199.57, it is an expensive book for those who may not need to go that far in-depth if looking for a question regarding software licensing. The editing and price; however, do not make *Software Licensing* any less of a valuable tool for those who need practical and substantial knowledge in the area of software licensing, which is becoming more and more necessary in the world of technology we are in today.