Ward Classen’s new edition of the ABA’s *A Practical Guide to Software Licensing for Licensees and Licensors* does an excellent job of capturing and explaining the practical concerns facing counsel supporting organizations that create, license, and use software. Its thorough analysis of the myriad aspects of software licensing gives all the essential background for practitioners who need to understand why software license agreements take the form they do. It also addresses new (and sometimes re-labeled) developments, such as open source, cloud computing, and privacy and data security issues, that are at the top of mind for deals in the second decade of the twenty-first century. This book and its associated forms should be in every practitioner’s library.

The book is organized in a straightforward and easy to access manner. For example, a chapter on the negotiation process lays out the typical RFI/RFP (Request for Information/Request for Proposal) process, providing good advice to both provider and customer. Issues are presented from the perspective of both the licensor and licensee, and all differences are reasonably explained. Frequent citation to relevant U.S. case law, statutes, and commentary helps the reader to follow up as necessary.

The 100-page chapter on grant of license is essential reading for any practitioner representing a company that is considering developing or licensing software. For example, the discussion of limitation of liability captures all the nuances of this critical component of the licensing transaction, reviewing in detail issues of consequential, direct, deemed direct, indirect, special and punitive damages, the relationship between limitation of liability and indemnity, the various exceptions to the limitation clause, and potential compromise positions.

But the grant of license chapter is not everything. In a chapter titled “Other Important Issues,” the book covers issues such as ownership and work-for-hire, statements of work, functional and technical specifications, change control, audit and compliance assurance, service level agreements, business continuity, antitrust, guarantees and performance bonds, and the differences between “best efforts,” “reasonable efforts,” and the choices in between.

This new edition addresses many new developments. The discussion of cloud computing is well presented, with an emphasis on the “software as a service” (SaaS) services model. Open source software licenses are explained, but the specifics of available open software licenses are not covered in detail. Chapter 10 covers privacy and data security issues, but almost entirely from a U.S. perspective. Understandably, very complicated international cross-border transactions require more international perspective than this book can provide.

Chapters 16 and 17, titled “When Problems Arise” and “Bankruptcy,” are important reading to undertake before drafting and negotiating the contract, since the cases illustrate the importance of good contract drafting for these agreements. Many software development and licensing transactions run aground for any number of reasons. Experienced counsel for providers will almost always be well-versed in the issues of maintaining attorney-client privilege, the use of alternative dispute resolution, how to document disputes, and various settlement techniques, covered by the book. Counsel for customers need to become knowledgeable on all these topics, and this book gives an excellent introduction on how to prepare a customer claim, if and when it comes to that.

An important element of this work is the Model Forms, most of which are available in print, and all of which are included in the accompanying CD-ROM. Over 100 forms of agreements, policies, and checklists give a broad array of starting points for the drafting of practically everything one would have to draft to support software development projects and multiple
software licensing structures. Form 23.B.1 is a 150-page annotated form for a generic software license and services agreement. The annotations are excellent, and well summarize the likely trajectory of the potential negotiation of the clause.

A well-constructed clause library posits clauses that are provider-friendly, customer-friendly, or neutral, as well as commentary that, as in the annotated form, tracks the likely negotiation path in the event a one-sided clause is used and the other side is knowledgeable about the risks. As such, the commentary provides valuable direction for practitioners who have not had a great deal of experience negotiating these agreements. Even for those who are very experienced, the commentary is a good source of training for associates and junior attorneys supporting them.

A caveat is necessary that applies to all forms books. Do not use the forms without understanding the elements of the deal your client intends to negotiate. Rather, pick and choose among the forms, clauses, and checklists to construct the agreement that is right for you. A Practical Guide to Software Licensing for Licensees and Licensors has good explanations of the key issues which need to be addressed, so do not simply copy a form. Read the commentary and annotations and structure the agreement accordingly.

Over all, the most important attribute of A Practical Guide to Software Licensing for Licensees and Licensors is, as its title proclaims, its practicality. In his forward, Ward Classen writes that he sought to summarize his “practical licensing experiences over 25 years.” He has created a work that clearly and concisely presents almost all of the issues facing a software licensing attorney, and how they will be addressed and negotiated by the knowledgeable provider and customer. It is a well written and well organized tool for everyday use.

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