Chapter 1

Introduction

This book examines some of the fundamental issues that both licensors and licensees may confront in the negotiation of a software license and, where appropriate, relevant ancillary issues such as software development, cloud computing, professional services, and maintenance and support. It focuses primarily on non-mass-market production licenses, as most "retail" or mass-market "off-the-shelf" software is governed by non-negotiable "shrink-wrap," "browse-wrap," and "click-wrap" licenses. Nonetheless, the principles of software licensing are the same for shrink-wrap, browse-wrap, click-wrap, and custom-developed software. For a brief overview of a few of the significant issues involved in software licensing, see Nimmer & Dodd, Modern Licensing Law (Thomson Reuters 2015); Davidson, Avoiding Pitfalls and Allocating Risk in Major Software Development and Acquisition Contracts, 14 COMPUTER LAW 12 (May 1997); and Boudreau, An Introduction to Software Licensing, 20 ACCA DOCKET 54 (No. 9 2002), as well as those resources listed in Appendix 3.

This book does not discuss software transactions with the government, as the laws relating to government contracting are beyond the scope of this treatise. For an overview of intellectual property rights related to government contracting, see Bergman & Aina, Intellectual Property Rights in Government Contracting, 156 INTELL. PROP. COUNS. 1 (Dec. 2009).

The structure and context of every software license differs depending on the needs of the parties. While this book discusses some of the most important issues and includes numerous forms, D.C. Toedt III, Esq., in conjunction with the Computer Programs Committee of the Information Division of the Section of Intellectual-Property Law of the American Bar Association, created a model license that—although voluminous—is quite thorough and educational. Toedt’s license was created to be a resource but is not a commercially viable form due to its complexity and length. It is included as Form B.15. For a detailed discussion of this license, see Toedt, The Model Software License Provisions: Precursor to a Gap-Filling Uniform License Statute, 18 RUTGERS COMPUTER & TECH. L.J. 521 (1992).

Finally, the nature of software licensing is trending toward vendor-hosted delivery models, commonly referred to as cloud computing and thus, Chapter 9 discusses several of the most common alternative delivery methods and the principle issues associated with each, as well as licenses arising from the marketing and distribution of software through third parties.