COMPUTER-RELATED AGREEMENTS: A PRACTICAL GUIDE by C. Ian Kyer and Mark J. Fecenko (Toronto: Butterworths, 1993)

The objective of Kyer & Fecenko in producing a book on computer-related agreements is to "assist lawyers and their clients through the process of understanding, negotiating and drafting computer-related agreements."[1] In so doing, the authors provide a brief and very general overview of the computer industry and the main components of a computer system. The one point that they stress, and that should be reiterated, is that the industry is in a massive state of flux. With the computational power of computers doubling every eighteen months, it is a difficult and time consuming task to keep on top of all industry developments. Thus, the focus of the rest of the book is on standard agreements that are used for the purchase or custom-design of hardware and software regardless of the parties involved or the state of the industry.

Computer-Related Agreements has several strengths, making it a very useful book for the practitioner with a commercial law or telecommunications law practice or the network administrator in charge of systems acquisitions and installation. As businesses rely increasingly on the use of computers to organize their operations and conduct business, lawyers must become well-informed of potential issues and problems which may arise throughout the process of contracting for a computer system or parts thereof. Many issues can arise regarding the acquisition, installation, and servicing of a computer system, software or information technology services.

Kyer & Fecenko's book outlines several contractual methods of resolving these issues while attempting to explain the viewpoints of both the purchaser and the vendor or developer. They also provide strategies to ensure maximum bargaining strength for the client.

The structure of the book is, in many respects, standard for books on the topic. The book provides a discussion of the process of contract negotiations for computers and related services. The book then provides a brief primer on intellectual property issues arising in the computer context for which the authors rely heavily on Barry Sookman's book *Computer Law: Acquiring and Protecting Information Technology.*[2] The remainder of the book provides discussions about specific types of agreements, their purpose, and how they address the concerns of the vendor or developer and the purchaser. Topics include: computer systems acquisitions, software licensing, maintenance and support agreements, agreements addressing software development, the protection of source code, non-disclosure and confidentiality, and software distribution.

One of the greatest strengths of the book is the many examples it provides in the form of model agreements and sample contractual clauses. Kyer & Fecenko provide a good discussion of the place of and rationale for each sample clause in the context of

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1 C.I. Kyer & M.J. Fecenko, *Computer-Related Agreements: A Practical Guide* (Toronto: Carswell, 1993) at ix.

2 B.B. Sookman, *Computer Law: Acquiring and Protecting Information Technology* (Toronto: Carswell, 1989).

an agreement. The authors also provide the same context for each agreement they discuss throughout the book. After exploring each type of agreement and reviewing the necessary clauses for each, comprehensive sample agreements are included at the end of each chapter. This effectively illustrates the conventional form of each document discussed.

Another strength of *Computer-Related Agreements* is the attempt by the authors to anticipate associated concerns arising during the negotiation or drafting process. For example, readers are referred to a discussion of methods of intellectual property protection (chapter three) when dealing with software distribution arrangements (chapter ten). By cross-referencing issues and strategy through footnotes referring the reader to applicable case law, other treatises, and other agreements and sections of the book, Kyer & Fecenko assist the reader in relating agreements, issues, and strategies.

However, there are some shortcomings to the book. Its greatest liability lies not in what is covered so much as what is missing. For example, in the chapters on software licensing and software development arrangements, chapters five and seven respectively, the discussion of representations and warranties refers the reader to the discussion of the topic relative to systems acquisition in chapter four. That discussion is placed within the context of warranties and representations under the *Sale of Goods Act*.[3] In a footnote, the authors state that "[n]o Canadian court has, however, specifically addressed the issue of whether software provided under a licence as part of a system is supplied as a good."[4] Does, then, the *Sale of Goods Act*, of Ontario or any other jurisdiction, apply to software licences or not? Do the implied conditions of merchantable quality and fitness for purpose apply? These are points of current debate and yet neither are explored nor mentioned to the reader other than in this obscure manner. Given the central place of software-related agreements in the book, this was a major oversight.

Also, the book is of little use in new and emerging areas of the industry which either were not anticipated by the authors or which were merely overlooked. To name two of the most important omissions, the book does not address electronic data interchange (EDI) or contracting for on-line electronic services. Their exclusion may have been intentional, as the authors may have seen these topics as part of telecommunications law; however, their importance to the functionality and evolving purpose of computer systems make at least some discussion necessary. To take each of these issues in turn, the most significant oversight is regarding EDI.

EDI is defined as the direct computer-to-computer exchange of standard business forms, such as price quotations, schedules, orders, acknowledgments, delivery documentation, receipt notes, invoices, remittance advice, payments (electronic funds

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3 R.S.O. 1990, c. S-1.

4 Kyer & Fecenko, *supra* note 1 at 89n.

transfers), reconciliations, bills of lading, and manifests.[5] It is, in essence, paperless-trading, paperless-selling, and paperless-purchasing.

The implementation of EDI requires the creation of industry-wide standard documentation and communication protocols to facilitate inter- and intra-company communication. This has also required international, industry-wide communication networks for the exchange of funds and documentation.[6] There arises a number of legal questions in the implementation of EDI which are often covered in EDI agreements. These agreements are of two types, applying to either a long-term, stable trading relationship, or to an industry-wide context such as banking. The former are usually of greater specificity than the latter. The agreements based on long-term trading relationships are usually found in North America between large manufacturers and their smaller suppliers, while the industry-wide agreements are more common in Europe. The agreements usually state the intention of the parties to trade electronically, that contract terms and signatures are on file, that the EDI agreement does not supersede any normal term of trade, and that, in the event of disputes, both parties shall apply the law of a governing jurisdiction.[7]

Electronic data interchange or electronic commerce, as it is otherwise referred to, is an increasingly important medium of business, accounting for 5 percent of all commercial transactions in the United States today, and that figure is expected to grow exponentially.[8]

Readers wanting to learn more about EDI and the law are referred to Ian Walden, ed., *EDI and the Law*[9] for the British perspective and to Benjamin Wright, *EDI and American Law: A Practical Guide*[10] for the American Perspective. There is currently no definitive Canadian treatise on this topic. It is therefore all the more unfortunate that Kyer & Fecenko did not address it.

The second omission of the book results more from industry change than oversight. The considerations necessary for the contracting of electronic services, such as electronic mail (E-mail) and commercial Internet access, are becoming very important to businesses competing in global markets. The corporate sector is the fastest growing user group of the Internet and associated network providers. Access to the vast quantities of electronic information requires negotiations with telecommunications

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5 S. Malhotra, *Canadian Participation in the Development of EDI Standards* (Ottawa: Department of Communications, 1990) at 3: "EDI currently accommodates 140 standard business transactions."

6 The airlines and banks throughout the world are connected on their own networks, SITA and SWIFT, respectively. S. Malhotra, *Port Information Systems: Around the World* (Ottawa: Department of Communications, 1990) at 1. The banking systems in the United States moves about $1.2 trillion (1988 dollars) daily. Approximately 90 percent of that volume moves electronically, yet only 1 percent of the transactions occur electronically. H.A. Davis, *Electronic Data Interchange and Corporate Trade Payments* (Morristown, N.J.: Financial Executives Research Foundation, 1988) at 18.

7 P. Kimberley, *Electronic Data Interchange* (Toronto: McGill-Hill, Inc., 1991) at 208.

8 J. Katsaros, "Electronic Commerce" (July/August 1994) Internet World 41 at 41.

9 (London: Blenheim Online Publications, 1989).

10 (Alexandria, WA: EDI Association, 1989).

providers, value-added network (VAN) vendors, hardware/software suppliers and consultants. The common problems for many commercial Internet users involve connection costs, support services and training, information confidentiality, and government regulation. The creative attorney will be able to address some of these emerging issues by adapting some of the agreements discussed by Kyer & Fecenko, specifically, the maintenance and support agreement, non-disclosure and confidentiality agreements, systems acquisition and licensing arrangements.

In sum, *Computer-Related Agreements: A Practical Guide* has a place in the computer law literature. It is a good source of model contractual provisions and a checklist on a number of computer-related issues placed within a Canadian context. However, its utility is hampered by two things: one, its limited discussion or warning about areas of legal uncertainty, and two, its omission of several emerging computer-related issues and a framework for dealing with them.

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