Abstract

The U. S. legal structure for protecting intellectual property is comprised of patent, copyright and trade secret concepts. Whether it be in self-contained desk top models, mainframes or national networks, that structure is finding awkward application in protecting the value of information in computer systems.

The Computer Law Division of the Science and Technology Section of the American Bar Association has developed a project to analyze and provide for and protect the economic value of information in computer systems.

The goal of the project is to provide a comprehensive and authoritative analysis of all aspects of U. S. legal protections for the value of information in computer systems. Such an analysis has not been attempted before, and if successful, could have a major impact upon the understanding of the bar and bench, as well as legislators, of the problems our present legal system presents for our infant information economy.

Background of the Study

It presently appears that the rights and liabilities of parties in electronic commerce are not defined or fixed, or even as well understood, as they are in other areas of commerce (such as for negotiable instruments). We thus have attorneys who assume that legal schemes like the Copyright Act apply to information in all fixations in computer systems, and judges who do not.

The situation indicates that a tension exists between the growing realities of our new information economy and our classical legal structure. In response to these new realities, the legal structure, of course, is likely to change. After all, in the 50 years that followed the Civil War, the American legal system changed substantially under the impact of industrialization. Most important legal modes of the pre-Civil War agrarian society of the United States were altered by the beginning of World War I to accommodate the relationships created by the country's new industrialized economy.

The impact of the integrated circuit upon American life promises to be even more dramatic. It has been predicted that computerization will change the basis of our present economy at least as fundamentally as did industrialization; that it will fundamentally alter the relationship between the citizen and the government, and between the citizen and the business enterprise. In fact, it may well be that future historians will conclude that the regulatory history of the United States in the half century after the invention of the integrated circuit was written largely in terms of the reaction of the legal order to our new information economy. This project is an attempt to gain a concrete and professional understanding of how a major aspect of our law may or may not change under the impact of computerization.

The foregoing theoretical and historical ideas aside, the Division project is primarily focused on a practical end: comment, critique and propose concrete and possible changes, where changes are determined desirable, with respect to that portion of the legal order that provides for and protects the economic value of information in computer systems. If we are to become an "information economy," it seems obvious that developing clearly understood notions of what constitutes protectable value in information in systems, and what does not, is a task to be accomplished.

When completed, a Draft Statement will make recommendations for changes, where such changes are determined to be needed, and will recommend no changes, where the present legal structure is determined to be adequate. One principal goal of the project is to state clearly for practicing attorneys the nature, shape, scope and horizons of the legal terrains as it presently exists and affects the value of information stored and processed by computerized systems. A principal purpose of the Draft Statement is to recommend changes in this legal structure, where such appear to be needed.
Committee Mandates

The Division's project has been divided into fourteen committees, each committee addressing the legal issues of the rights and value of computerized information affecting a specialized legal area.

1. Computer Crime Committee: Analyze the adequacy and scope of criminal law sanctions used to protect the value in, and against the consequences of loss of information in computer systems. The committee will be addressing not only the criminal statutes dealing with the "theft" of information, but also will be recommending changes where information is not "taken" but is "utilized."

2. Computer Contract Committee: This committee has been assigned the task of (a) analyzing useful litigation techniques for the protection of the value of information in computer systems; and (b) reviewing forms which might be used to review claims affecting the value of information in computer systems. The principal focus of the committee will be to address discovery issues of litigation and the usefulness of activities to resolve disputes.

3. Data Communications Committee: Analyze issues surrounding "ownership" and other rights in information transmitted, stored, forwarded, or manipulated in data networks. In addition, the committee will focus on the rights and responsibilities of protecting information by network providers, network service providers and network users.

4. Electronic Funds Transfer Committee: Critique of State and federal regulatory schemes that protect the value in, and against the consequences of loss of information in EFT systems. The committee will focus on the conflict of individual privacy interests with the information needs of financial institutions called on to provide ever-increasing benefits and convenience in their financial services.

5. International Data Flow Committee: Critique of present legal means of protecting the value in, and against the consequences of loss of information in computer systems when it crosses U.S. international borders including the review of customs problems in valuation when software crosses borders and the proposal of the World Intellectual Property Organization to permit foreign countries to prevent inventors from exercising their inventions if the product is not made from scratch in the foreign country.

6. National Market Systems Committee: Critique of present legal means used to protect the quality of markets in computerized market-makers. The use of computerized systems that permit trading without financial intermediaries (brokers, dealers, specialists) creates a need for new comprehensive legal protections for the nature, quality, value and consequences of loss of the information in the computerized trading system. The committee will address what new legislation is needed for these protections.

7. Original Equipment Markets Committee: Critique of State and federal means to protect the value of information in chips (firmware).

8. Computerized Point of Sales Committee: Critique of State and federal means of protecting the value in, and against the consequences of loss of information used in POS systems.

9. Professionalism of Computer Specialists Committee: Critique of cryptography as a means of protecting the value of information in computer systems. The committee will comment on the NSA view that professional discussion in print of certain cryptographic schemes violates the national security laws. It will also comment on professional malpractice aspects of breach of fiduciary duty by computer specialists using proprietary information in systems for self-enrichment and the difficulties of proof in implementing present remedies to protect the value of information in systems.

10. Proprietary Rights in Software Committee: Critique of patent and new approaches to protecting software.

11. Software Licensing Practices Committee: Critique of copyright and trade secret approach to protecting the value in, and against the consequences of loss of information in computer systems.

12. Taxation of Computer Systems and Products Committee: Critique of State and federal taxing schemes which are based upon or affect the value of information in computer systems.

13. Tort Liability for Use of Computer Systems and Services Committee: Critique of trade secret approach to protecting the value in, and against the consequences of loss of information in computer systems, liability exposure for errors in computer systems and critique of the applicability of product liability principles and proposed product liability legislation to computer systems.

14. Use of Computer Produced Data Committee: Critique of legal means used to assure the evidentiary value or reliability of computerized information used in court or for business records.

The Division's project is by no means as comprehensive as some would hope for. However, as the project goes on new issues will be reviewed simply because technological revolutions tend to be highly disruptive of established legal order. New technology will imperil old private legal rights while evoking new public risks and concerns. The Division's project is a first step in addressing these new risks and concerns.