Review of "A Practical Guide to Software Licensing for Licensees and Licensors, 4th Edition" ABA Press, by H. Ward Classen

A non-fiction book should state its main point on the first page, and that is precisely what the new edition of H. Ward Classen's "A Practical Guide to Software Licensing for Licensees and Licensors" does: "Regardless of who creates the initial draft, a party should seek to control or at least share responsibilities for the agreement." A lawyer who fails to follow this advice places his or her client at a substantial competitive disadvantage because, as Mr. Classen, explains, only by "controlling the drafting process," can a party best represent its interests. Once as lawyer fulfills his or her ethical responsibilities to protect the client's interests by controlling or sharing control of the drafting process, the lawyer must competently advance the client's interests by knowing what and how to draft a software license. The rest of Mr. Classen's book gives practical and detailed subject matter advice to allow the lawyer to do just that. No lawyer should go into software license contract drafting without this book within arm's reach. Observing the first command of control of the drafting process without observing the second of being conversant with the hows of advancing the client's interest is to risk being in the position of the Dustin Hoffman character at the end of The Graduate: having achieved the short-term goal of seizing the affections of the girl but having no idea of what to do next.

In describing the issues that a drafting lawyer faces in negotiating a software license, Mr. Classen is thorough, methodical, and complete. The text of the book is approximately 400 pages, the remainder consisting of a model software license form, and it is dense, but no more so than required. The thoroughness of the book's treatment of software license terms is balanced by its organization: clear and directed to the needs of the legal practitioner. Clarity is not only the hallmark of the book; it is also one of its principal themes. Especially in as complex a matter as software licenses, clarity is essential. Lack of clarity leads to disputes, disputes lead to ruptured relations between licensor and licensee, and that leads to litigation. Mr. Classen states his theme of clarity less than ten pages into his test: "The importance of accuracy, clarity, and completeness in the [functional] specification cannot be overemphasized. The specifications are the vendor's contractual obligations to the customer."

Mr. Classen is correct. The failure to be crystal clear in defining the obligations under the software contract can be fatal and will be costly. Mr. Classen returns to this theme repeatedly in his book. He gives prescient advice on this very issue of clarity of functional specifications when he returns in detail to the matter in discussing statements of work, or "SOW," which is usually attached to a master agreement and provides the detail of what is agreed to between the parties for any specific project. It is, as Mr. Classen states: "the most important part of any contract, as it defines what the vendor will deliver." Indeed, it is as important, if not more so, that the master agreement. For that reason, it is critical that the lawyers review and be integral to the drafting of the function al specifications. To leave the negotiations to the technical staff, without legal input, is, the book states, "is a serious mistake because the lawyers can enhance the specificity of the applicable document and determine whether legal terms have been included in the specifications or the scope of work, which benefits both parties."

In that last phrase, Mr. Classen captures a truth that informs the entire book: ambiguity in software agreements does not aid either party. Lawyers negotiating agreements are under a constant tension about whether to highlight a potential area of dispute by identifying an issue through language in the contract. The *raison d'être* of this book and its enduring value is the message that lawyers who are fully informed and who represent both sides of the negotiations will produce a better document for all the parties to the agreement. Business people understandably want to avoid contentious issues. That is why oral understandings replace written change orders even in the face of contract language which establishes a change order procedure requiring, as Mr. Classen correctly commands, that all modifications in the agreement be in writing. Just as avoiding clarity during the performance of an executed software contract is foolish, so too is elision of difficult issues during the negotiation of the agreement itself. Get competent lawyers in the room, each with access to Mr. Classen's book, each with access to the technical staff and a ready command of his or her client's interests, and you will have a contract at the end that will minimize surprise, will control disappointment, and that greatly increase the likelihood of continuing and profitable work, profitable for both sides.

Ultimately, the test of a book that purports to be "practical" is whether it lives up to that claim in the real world. I have litigated contracts and software contracts. Mr. Classen is spot on in identifying issues, in assigning importance to them, and in proposing solutions. For example, a recurrent problem in litigating "contracts" is whether a letter of intent or memorandum of agreement is a contract. The general rule is that if the parties sign a document that has all terms material to the performance of a contract, it is a contract unless the parties state otherwise. These issues are a nightmare for the parties. For this reason, Mr. Classen correctly, and early on in his book, advises that if the parties are going to sign such a document, that it include a detailed disclaimer of the document having any meaning whatsoever. He is right. He is also right in detailing the commonsense and legally accurate rule that breach of contract does not constitute fraud: "A duty under tort law arises from circumstances extraneous to and not constituting elements of the contract, even though it may be related to and dependent on the contract." I cannot calculate that amount of time I have spent telling clients, angry that the other side has breached a contract, that they cannot sue for fraud, cannot get punitive damages, cannot claim that the failure to perform itself is so egregious that the other side must have known that it was incapable of living up its obligations. If only more clients were to read Mr. Classen's book, they would save money in having to have such basic principles explained to them, again and again.

Mr. Classen negotiates software contracts. He would be a formidable opponent in the drafting room. The best way to deal with him is to have him on your side through his book. We cannot all be a Ward Classen; in fact, only he is. But we can have him as our senior advisor. There is a reason, in fact, many reasons, why his book is in its 4th edition. I suggest that you obtain a copy for your library if you negotiate a software contract, litigate a software contract dispute, or represent a client in a dispute with a former lawyer who did either and who chose not to follow this basic advice.

A Practical Guide to Software Licensing for Licensees and Licensors: Model Forms and Annotations Included in Print and on CD-Rom (Fourth Edition) by H. Ward

Classen (Chicago: American Bar Association, 4th ed. 2011) $129.95, pp. 987, ISBN: 978-1-61632-813-9.

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