

# TABLE OF CONTENTS

## CHAPTER 1

### Introduction to the Internet

§ 1.01	Overview . . . . .	1-3
§ 1.02	History of the Internet . . . . .	1-4
	[1] Internet2 . . . . .	1-8
	[2] Next Generation Internet (NGI) . . . . .	1-9
	[3] Net Neutrality . . . . .	1-9
	[a] Internet Traffic Regulation . . . . .	1-9
	[b] Broadband Privacy Rules . . . . .	1-14.1
§ 1.03	The World Wide Web . . . . .	1-14.3
	[1] Continuing Development of the Web: W3C . . . . .	1-14.3
§ 1.04	Accessing the Internet . . . . .	1-14.5
	[1] ISPs, IAPs and OSPs . . . . .	1-14.5
	[2] Connecting to the Internet . . . . .	1-15
	[a] Bandwidth . . . . .	1-15
	[b] Modem Access . . . . .	1-16
	[c] Gateways and Dedicated Lines . . . . .	1-16
	[d] ISDN . . . . .	1-16
	[e] T1 and T3 . . . . .	1-17
	[f] Cable Modems . . . . .	1-17
	[g] ADSL . . . . .	1-18
	[h] Wireless Access . . . . .	1-19
	[i] Satellite Access . . . . .	1-19
	[ii] Fixed Wireless . . . . .	1-19
	[iii] Cellular Wireless . . . . .	1-19
	[iv] Wireless LANs . . . . .	1-20
§ 1.05	Communications on the Internet . . . . .	1-20.1
	[1] Electronic Mail . . . . .	1-20.1
	[2] Usenet and Newsgroups . . . . .	1-20.1
	[3] Listservs . . . . .	1-20.2
	[4] Internet Relay Chat . . . . .	1-20.3
	[5] Instant Messaging . . . . .	1-20.3
	[6] Weblogs/Blogs . . . . .	1-20.4

## INTERNET FORMS

	[7]	Real Time Streaming Protocol . . . . .	1-20.5
	[8]	OpenMP . . . . .	1-20.5
	[9]	Voice-over IP (VoIP) or Internet Telephony. . . . .	1-20.6
	[10]	Social Networks . . . . .	1-20.7
§ 1.06		Internet Applications. . . . .	1-20.8
	[1]	Telnet . . . . .	1-20.8
	[2]	File Transfer Protocol . . . . .	1-20.8
	[3]	Gopher . . . . .	1-20.8
	[4]	Wide Area Information Servers (WAIS). . . . .	1-20.8
	[5]	IP Multicasting. . . . .	1-20.9
	[6]	Grid Computing . . . . .	1-20.9
	[7]	ENUM . . . . .	1-20.9
	[8]	Edge and Fog Computing . . . . .	1-20.10
§ 1.07		Searching the Web . . . . .	1-20.11
	[1]	Spiders and Robots . . . . .	1-20.12
	[2]	Indexes, Catalogues and Search Engine Software. . . . .	1-20.12
	[3]	Keyword Searching and Power Searching . . . . .	1-20.13
	[4]	Meta Tags. . . . .	1-20.13
	[5]	Search Managers . . . . .	1-20.13
§ 1.07A		Markup Languages . . . . .	1-20.14
	[1]	SGML. . . . .	1-20.14
	[2]	HTML. . . . .	1-20.14
	[3]	Dynamic HTML. . . . .	1-20.15
	[4]	XML. . . . .	1-20.15
§ 1.08		Web Tools and Terminology . . . . .	1-21
	[1]	Java. . . . .	1-21
	[2]	Virtual Reality Modeling Language (VRML) . . . . .	1-21
	[3]	Plug-in Technologies . . . . .	1-22
	[4]	ActiveX. . . . .	1-22
	[5]	Push/Pull Technology . . . . .	1-22
	[6]	Online Advertising Terminology. . . . .	1-23
	[a]	CPM . . . . .	1-23
	[b]	Impressions and Caching. . . . .	1-23
	[c]	Clickrate . . . . .	1-24
	[d]	Pop-ups and Pop-overs . . . . .	1-24
	[e]	Interstitials . . . . .	1-24
	[f]	Rich Media. . . . .	1-24
	[g]	Programmatic Advertising. . . . .	1-25
	[7]	Web Services . . . . .	1-25
	[8]	RSS Technology. . . . .	1-26
	[9]	Podcasting. . . . .	1-26.1
	[10]	Internet of Things . . . . .	1-26.1

## TABLE OF CONTENTS

xi

§ 1.09	Intranets . . . . .	1-26.4
§ 1.10	Extranets . . . . .	1-28
§ 1.11	Virtual Private Networks . . . . .	1-30

## CHAPTER 2

### Establishing a Business Presence on the Internet

§ 2.01	Evaluating the Need . . . . .	2-4
	[1] Requirements Analysis . . . . .	2-4
	[2] Financial Analysis . . . . .	2-4
	[3] In-House Development Versus Using Outside Service Providers . . . . .	2-5
§ 2.02	Evaluating the Risks . . . . .	2-7
	[1] Introduction . . . . .	2-7
	[2] Security . . . . .	2-7
	[a] Internal Security: Firewalls . . . . .	2-8
	[b] External Security: Protecting Transactions . . . . .	2-8
	[3] Intellectual Property . . . . .	2-9
	[4] Click Fraud . . . . .	2-11
	[a] Early Litigation . . . . .	2-13
	[b] Industry Response . . . . .	2-14
	[5] Digital Currency . . . . .	2-14.1
	[a] Bitcoin and Digital Currency Generally . . . . .	2-14.1
	[b] Digital Currency Regulation . . . . .	2-14.4
	[c] Stablecoins . . . . .	2-14.8
	[6] Products Liability and Online Marketplaces . . . . .	2-14.11
§ 2.03	Domain Names . . . . .	2-15
	[1] The Domain Name Registration System . . . . .	2-15
	[a] Domain Name System Governance . . . . .	2-15
	[b] Domain Name Registrars . . . . .	2-16
	[2] Registering a Domain Name . . . . .	2-17
§ 2.04	Contracting with Third Parties for Internet Services . . . . .	2-19
	[1] Introduction . . . . .	2-19
	[2] Requests for Proposals . . . . .	2-19
	[3] Web Site Development Agreements in General . . . . .	2-20
	[4] Elements of Web Site Development Agreements . . . . .	2-21
	[a] Services . . . . .	2-21

## INTERNET FORMS

	[b]	Technical Considerations . . . . .	2-22
	[c]	Advertising and Promotion . . . . .	2-23
	[d]	Editorial and Artistic Control and Approval . . . . .	2-23
	[e]	Transitioning Services . . . . .	2-23
	[f]	Delivery and Acceptance . . . . .	2-24
	[g]	Change Control . . . . .	2-24
	[h]	Proprietary Rights and Confidentiality . . . . .	2-25
	[i]	Development Credit . . . . .	2-26
[5]		Web Site Hosting Agreements in General . . . . .	2-27
[6]		Elements of Web Site Hosting Agreements . . . . .	2-27
	[a]	Scope of Services . . . . .	2-28
	[b]	Domain Name Registration . . . . .	2-28
	[c]	Updates and Modifications . . . . .	2-28
	[d]	Limitations on Alteration and Copying . . . . .	2-28
	[e]	Performance Criteria . . . . .	2-29
	[f]	Customer Information . . . . .	2-29
	[g]	Termination and Transfer . . . . .	2-30
	[h]	Hosting Services Provider Warranties . . . . .	2-30
§ 2.04A		Establishing a B2B Internet Marketplace . . . . .	2-32
	[1]	What Is a B2B Marketplace? . . . . .	2-32
		[a] Aggregated Catalogues . . . . .	2-32
		[b] Auctions, Reverse Auctions and Variations . . . . .	2-32
		[c] Exchanges . . . . .	2-32.1
	[2]	Legal Considerations for B2B Marketplaces . . . . .	2-32.1
		[a] Membership Standards and Criteria . . . . .	2-32.1
		[b] Establishing Marketplace Rules . . . . .	2-32.1
		[c] Minimizing Antitrust Concerns . . . . .	2-32.3
§ 2.04B		E-Commerce Joint Ventures . . . . .	2-32.5
	[1]	Form of Joint Venture . . . . .	2-32.5
		[a] Corporation . . . . .	2-32.5
		[b] Partnership . . . . .	2-32.6
		[c] Limited Liability Company . . . . .	2-32.8
	[2]	Contributions . . . . .	2-32.9
	[3]	Intellectual Property Licensing . . . . .	2-32.10
		[a] Technology License . . . . .	2-32.10
		[i] Definition of Licensed Technology . . . . .	2-32.10
		[ii] Term of Licensed Technology . . . . .	2-32.11

**TABLE OF CONTENTS**

	[iii]	Scope of License . . . . .	2-32.11
	[iv]	Source Code . . . . .	2-32.11
	[v]	Title to Technology . . . . .	2-32.11
	[vi]	Warranties . . . . .	2-32.11
	[vii]	Indemnity and Limits on Liability . . . . .	2-32.12
	[viii]	Delivery Schedule . . . . .	2-32.12
	[ix]	Maintenance . . . . .	2-32.12
[b]		Content Licensing . . . . .	2-32.12
	[i]	Identification of Licensed Properties . . . . .	2-32.13
	[ii]	Grant of Rights . . . . .	2-32.13
	[iii]	Reservation of Rights and Exclusivity . . . . .	2-32.13
	[iv]	Approvals . . . . .	2-32.13
	[v]	Representations and Warranties . . . . .	2-32.14
	[vi]	Disclaimer of Warranties . . . . .	2-32.14
	[vii]	Indemnification/Defense Against Third Party Claims . . . . .	2-32.14
	[viii]	Limitation of Liability . . . . .	2-32.15
[4]		Confidentiality . . . . .	2-32.15
[5]		Management and Employees . . . . .	2-32.15
[6]		Financial Provisions . . . . .	2-32.17
[7]		Service Agreements, Non-Compete Agreements, and Exclusivity Agreements . . . . .	2-32.18
	[a]	Service Agreements . . . . .	2-32.18
	[b]	Non-Compete Agreements . . . . .	2-32.18
	[c]	Exclusivity Agreements . . . . .	2-32.19
[8]		Transfers of Interest . . . . .	2-32.19
[9]		Promotion . . . . .	2-32.20
[10]		Antitrust Issues . . . . .	2-32.20
	[a]	Price Transparency . . . . .	2-32.22
	[b]	Size of the B2B Marketplace . . . . .	2-32.22
	[c]	Marketplace Rules . . . . .	2-32.23
[11]		Termination . . . . .	2-32.24
§ 2.05		<i>Form: Vendor-Oriented Web Site Development Agreement . . . . .</i>	2-32.25
§ 2.06		<i>Form: Vendor-Oriented Web Site Hosting Agreement . . . . .</i>	2-46
§ 2.07		<i>Form: Client-Oriented Web Site Development and Services Agreement . . . . .</i>	2-59
§ 2.08		<i>Form: Client-Oriented Development, Hosting and Services Agreement . . . . .</i>	2-80

**INTERNET FORMS**

§ 2.09	<i>Form: Client-Oriented Web Site Development Agreement . . . . .</i>	2-97
§ 2.10	<i>Form: Client-Oriented Web Site Hosting Agreement. . . . .</i>	2-121
§ 2.11	<i>Form: Employee Internet Use Policy Statement. . . . .</i>	2-131
§ 2.12	<i>Form: Web Linking Referral Fee Agreement . . .</i>	2-134
§ 2.13	<i>Form: Non-Exclusive Online Affiliate Form (Short) . . . . .</i>	2-144
§ 2.14	<i>Form: E-Commerce Joint Venture Checklist . . .</i>	2-151
§ 2.15	<i>Form: Memorandum of Understanding for E-Commerce Joint Ventures . . . . .</i>	2-152
§ 2.16	<i>Form: Web Site Update Checklist. . . . .</i>	2-177

**CHAPTER 3****Copyright**

§ 3.01	Introduction . . . . .	3-4
§ 3.02	International Copyright Environment. . . . .	3-6
	[1] WIPO Copyright Agreements . . . . .	3-6
	[a] World Intellectual Property Organization (WIPO). . . . .	3-6
	[b] The Berne Convention. . . . .	3-7
	[c] 1996 WIPO Treaties . . . . .	3-8
	[2] GATT and the WTO . . . . .	3-11
	[a] The General Agreement on Tariffs and Trade (GATT) . . . . .	3-11
	[b] The WTO and TRIPs. . . . .	3-11
	[3] Other International Conventions and Directives . . . . .	3-13
	[4] Trade Agreements . . . . .	3-16
§ 3.03	Copyright Protection in the United States. . . . .	3-18
	[1] Copyright Essentials/Scope of Copyright Protection . . . . .	3-18
	[a] Generally. . . . .	3-18
	[b] Information Infrastructure Task Force and the NII White Paper . . . . .	3-23
	[2] The Copyrightability of Factual Compilations . . . . .	3-24
	[3] The Rights Protected by Copyright. . . . .	3-27
	[4] Duration of Protection . . . . .	3-28
	[a] Copyright Duration Under the Acts . . . . .	3-29
	[i] The 1909 Copyright Act . . . . .	3-29

**TABLE OF CONTENTS**

xv

[ii] The 1976 Copyright Act . . . 3-30

[b] Selected Duration-Related  
Amendments to the 1976  
Copyright Act. . . . . 3-32

[i] The Berne Convention  
Implementation Act of  
1988 (BCIA). . . . . 3-33

[ii] The Copyright Renewal Act  
of 1992 (CRA). . . . . 3-33

[iii] Uruguay Round  
Agreements Act of 1994  
(URAA) and WIPO  
Copyright and  
Performances and  
Phonograms Treaties  
Implementation Act of  
1998 (WIPO  
Treaties Act). . . . . 3-34

[5] Copyright Notices . . . . . 3-36

[6] Ownership of Copyright . . . . . 3-37

[a] Works Made for Hire. . . . . 3-39

[b] Collective Works . . . . . 3-44

[c] Derivative Works . . . . . 3-47

[d] Joint Works. . . . . 3-49

[e] Chat Rooms and Listserves . . . . . 3-49

[f] Transfer of Copyright . . . . . 3-49

[i] Transfer Under the 1909  
Copyright Act. . . . . 3-49

[ii] Transfer Under the 1976  
Copyright Act. . . . . 3-50

[7] The Fair Use Doctrine . . . . . 3-51

[8] Educational Use Copyright Exemption  
(The “Teach Act”). . . . . 3-56

[9] Attribution and Integrity Rights . . . . . 3-57

[10] Traditional Music Copyright Issues . . . . . 3-59

[a] Public Performance Licenses. . . . . 3-60.1

[i] Compositions . . . . . 3-60.1

[ii] Sound Recordings. . . . . 3-60.2

[b] Synchronization License . . . . . 3-62

[c] Mechanical License . . . . . 3-62.1

[d] Music Publishing License . . . . . 3-63

[e] Exemptions from Music  
Licensing . . . . . 3-64

[11] Copyright Registration Procedures . . . . . 3-65

[12] Registration of Computer Programs  
and Databases Not Fixed in  
CD-ROM . . . . . 3-66

## INTERNET FORMS

	[a]	Computer Programs . . . . .	3-66
	[b]	Databases . . . . .	3-69
[13]		Registration of Machine Readable Multimedia Works (Other Than Computer Programs, Databases or CD-ROM Products) . . . . .	3-69
	[a]	Pictorial or Graphic Works . . . . .	3-70
	[b]	Audio-Visual Works . . . . .	3-70
	[c]	Musical Compositions . . . . .	3-70
	[d]	Sound Recordings . . . . .	3-70
	[e]	Literary Works . . . . .	3-70
§ 3.04		Infringement . . . . .	3-71
	[1]	Civil Remedies . . . . .	3-71
	[2]	Criminal Penalties . . . . .	3-74
	[3]	Proving Infringement . . . . .	3-76
	[a]	<i>Prima Facie</i> Case . . . . .	3-76
	[b]	Direct Liability Generally . . . . .	3-77
	[c]	Secondary Liability Generally . . . . .	3-78
	[d]	Active Inducement . . . . .	3-78.1
	[4]	Copyright Infringement of Computer Software . . . . .	3-78.1
	[a]	Literal and Non-Literal Copying and Elements . . . . .	3-78.2
	[b]	Early Approaches . . . . .	3-79
	[c]	The <i>Altai</i> Test and Variations . . . . .	3-80
	[d]	Protection of the User Interface . . . . .	3-83
	[e]	Protection of Fonts . . . . .	3-85
	[5]	Copyright Infringement on the Internet . . . . .	3-86
	[a]	Generally . . . . .	3-86
	[b]	Website Operators . . . . .	3-87
	[c]	Service Provider Liability . . . . .	3-89
	[i]	Direct Liability . . . . .	3-89
	[ii]	Contributory Liability . . . . .	3-91
	[iii]	Vicarious Liability . . . . .	3-95
	[iv]	The “Fair Use” Exception . . . . .	3-97
	[v]	Copyright Protection Systems . . . . .	3-100
	[d]	The Family Entertainment and Copyright Act . . . . .	3-100
	[e]	Publisher Liability . . . . .	3-102
	[f]	Individual Liability . . . . .	3-103
	[g]	Online Television and Video Distribution . . . . .	3-106.1
§ 3.05		Technological Methods of Preventing Infringement . . . . .	3-107



**TABLE OF CONTENTS**

xvii

	[1] The Audio Home Recording Act of 1992 (AHRA) . . . . .	3-108
	[2] The Digital Millennium Copyright Act . . .	3-110
	[a] Anti-Circumvention of Copyright Protection Systems . . . . .	3-112
	[i] Exception for Reverse Engineering in the Interest of Interoperability . . . . .	3-115
	[ii] Exception for Encryption Research . . . . .	3-116
	[iii] Exception for Security Testing . . . . .	3-116
	[iv] Exception for Technologies Involving Personal Privacy . . . . .	3-116.1
	[b] Civil Remedies and Criminal Penalties Under the DMCA . . .	3-117
	[c] Online Copyright Infringement Liability Limitation Act (The DMCA Safe Harbors) . . . .	3-118
	[i] Routing and Intermediate Storage . . . . .	3-122
	[ii] Network Caching . . . . .	3-123
	[iii] Storing, Referring to, or Linking to Infringing Material. . . . .	3-124
	[iv] Notice-and-Takedown Procedures . . . . .	3-126
	[3] International Legislation . . . . .	3-126.5
§ 3.06	Links and Copyright Liability . . . . .	3-127
	[1] Introduction . . . . .	3-127
	[a] Hypertext Links . . . . .	3-128
	[b] Inlining Images. . . . .	3-129
	[c] Framing. . . . .	3-130
	[2] Disputes Arising from Linking and Framing . . . . .	3-131
	[3] Search Engines and Digital Cataloguing . . . . .	3-134.3
§ 3.07	<i>Form:</i> Copyright Assignment. . . . .	3-135
§ 3.08	<i>Form:</i> Work Made for Hire Writer Contract. . . . .	3-136
§ 3.09	<i>Form:</i> Interim Designation of Agent to Receive Notification of Claimed Infringement . . . . .	3-138
§ 3.10	<i>Form:</i> Amended Interim Designation of Agent to Receive Notification of Claimed Infringement . . . . .	3-139

## CHAPTER 4

## Trademarks

§ 4.01	Introduction . . . . .	4-3
§ 4.02	Internet Trademark Checklist . . . . .	4-4
§ 4.03	Trademark Essentials . . . . .	4-6
[1]	Categories . . . . .	4-7
	[a] Fanciful Marks . . . . .	4-8
	[b] Arbitrary Marks . . . . .	4-8
	[c] Suggestive Marks . . . . .	4-8.1
	[d] Descriptive Marks . . . . .	4-9
	[e] Generic “Marks” . . . . .	4-10
[2]	Identifying Characteristics Subject to Protection . . . . .	4-11
	[a] Abbreviations and Nicknames . . . . .	4-11
	[b] Slogans . . . . .	4-11
	[c] Titles . . . . .	4-11
	[d] Characters . . . . .	4-12
	[e] Celebrities . . . . .	4-13
	[f] Trade Dress . . . . .	4-14
[3]	Internet Domain Names . . . . .	4-16
[4]	Federal Trademark Registration . . . . .	4-19
[5]	Selecting Marks for Internet-Related Products and Services . . . . .	4-21
	[a] Descriptive Versus Suggestive Marks . . . . .	4-21
	[b] Conducting a Trademark Search . . . . .	4-22
[6]	Trademark Applications . . . . .	4-22
	[a] Preparing an Application . . . . .	4-22
	[b] Prosecuting an Application . . . . .	4-25
	[c] Principal and Supplemental Registers . . . . .	4-26
	[d] Notice of Registration . . . . .	4-26
[7]	Actions for Trademark Infringement . . . . .	4-27
	[a] Trademark Infringement . . . . .	4-27
	[i] Strength of the Mark . . . . .	4-28.1
	[ii] Similarity Between the Marks . . . . .	4-29
	[iii] Relatedness of the Goods . . . . .	4-30
	[iv] Evidence of Actual Confusion . . . . .	4-30
	[v] Sophistication of Buyers . . . . .	4-31
	[vi] Defendant’s Intent . . . . .	4-32
	[vii] Likelihood of Expansion . . . . .	4-32
	[b] Contributory Trademark Infringement . . . . .	4-33

**TABLE OF CONTENTS**

xix

	[c]	Unfair Competition . . . . .	4-34
		[i] False Advertising . . . . .	4-35
		[ii] Reverse Passing Off . . . . .	4-35
	[d]	Dilution . . . . .	4-36
		[i] State Anti-Dilution Statutes . . . . .	4-36
		[ii] The Federal Trademark Dilution Act of 1995 . . . . .	4-38
	[e]	Causing Marks to Become Generic . . . . .	4-40
	[f]	Counterfeiting of Trademarked Goods . . . . .	4-40.1
[8]		Internet-Specific Trademark Actions and Issues . . . . .	4-40.1
	[a]	Website Content . . . . .	4-40.2
		[i] Content Located on Website . . . . .	4-40.2
		[ii] Hyperlinked Content . . . . .	4-42
	[b]	Domain Name Disputes . . . . .	4-44
		[i] Uniform Domain Name Dispute Resolution Policy (UDRP) . . . . .	4-44.1
		[ii] Uniform Rapid Suspension System (URS) . . . . .	4-44.9
		[iii] Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) . . . . .	4-44.10
		[iv] The Anticybersquatting Consumer Protection Act of 1999 . . . . .	4-44.11
		[v] Trademark Infringement and Dilution . . . . .	4-44.17
		[vi] Liability of Domain Name Registrars . . . . .	4-44.18
	[c]	Meta Tags, URLs and Keyword Advertising . . . . .	4-44.19
	[d]	Internet Initial Interest Confusion . . . . .	4-44.24
§ 4.04		<i>Form:</i> Trademark Assignment . . . . .	4-44.27
§ 4.05		<i>Form:</i> Non-Exclusive Trademark License Agreement . . . . .	4-45
§ 4.06		<i>Form:</i> Exclusive Trademark License Agreement . . . . .	4-51
§ 4.07		<i>Form:</i> Settlement Agreement Providing for Transfer of Domain Name . . . . .	4-59

## CHAPTER 5

## Patents

§ 5.01	Introduction . . . . .	5-2
§ 5.02	[Reserved] . . . . .	5-3
§ 5.03	Overview of Patent Law . . . . .	5-4
	[1] Internet Communications and Patent Rights . . . . .	5-6
	[2] Internet Technology and the Development of Open Standards . . . . .	5-8
§ 5.04	Patent Checklists . . . . .	5-10
	[1] Checklist to Assess Likelihood of Infringement . . . . .	5-10
	[2] Patent Protection Checklist . . . . .	5-12
§ 5.05	Patentable Subject Matter . . . . .	5-16
	[1] Generally . . . . .	5-16
	[2] The Patentability of Software . . . . .	5-17
	[3] The Patentability of Methods of Doing Business . . . . .	5-23
	[4] The Patentability of Database Structures . . . . .	5-26.1
§ 5.06	Novelty and Nonobviousness Requirements . . . . .	5-26.2
	[1] Novelty . . . . .	5-26.2
	[2] Nonobviousness . . . . .	5-31
§ 5.07	Patent Applications . . . . .	5-33
	[1] The Application Process . . . . .	5-33
	[2] Enablement and Best Mode Requirements . . . . .	5-34
	[3] Submission of Source Code . . . . .	5-36
	[4] Drafting of Claims . . . . .	5-38
	[5] International Patent Protection . . . . .	5-39
§ 5.08	Claim Construction . . . . .	5-43
§ 5.09	Patent Infringement . . . . .	5-45
	[1] Standards . . . . .	5-45
	[2] Remedies for Patent Infringement . . . . .	5-52
	[3] Options for Potential Infringers . . . . .	5-52.2
§ 5.10	Design Patents . . . . .	5-52.6
	[1] Overview . . . . .	5-52.6
	[2] Designs Displayed as Part of Online Content . . . . .	5-52.7
§ 5.11	Ownership . . . . .	5-55
	[1] Inventorship . . . . .	5-55
	[2] Assignment . . . . .	5-56
	[3] Licensing . . . . .	5-58
	[4] Cross-Licensing . . . . .	5-59
§ 5.11A	American Inventors Protection Act of 1999 . . . . .	5-60.3
§ 5.12	<i>Form:</i> Patent Assignment . . . . .	5-60.5
§ 5.13	<i>Form:</i> Patent License Agreement . . . . .	5-63

**CHAPTER 6**

**Trade Secrets**

§ 6.01	Introduction . . . . .	6-2
§ 6.02	Internet Trade Secret Checklist . . . . .	6-3
§ 6.03	Trade Secrets and the Internet . . . . .	6-5
	[1] Confidential Business Information . . . . .	6-5
	[2] Software . . . . .	6-6
	[3] The Entire Internet Application. . . . .	6-6
	[4] Works Incorporated into an Internet Application. . . . .	6-7
§ 6.04	Overview of Trade Secret Law . . . . .	6-8
	[1] State Trade Secret Law . . . . .	6-8
	[2] Federal Law . . . . .	6-12
§ 6.05	Misappropriation . . . . .	6-14.1
	[1] Determining Misappropriation. . . . .	6-14.1
	[2] Employee Misappropriation. . . . .	6-14.1
	[a] The Doctrine of Inevitable Disclosure. . . . .	6-14.2
	[b] Covenants Not to Compete . . . . .	6-14.5
	[3] Third Party Misappropriation . . . . .	6-14.6
§ 6.06	Establishing Trade Secrets in the Internet Industry . . . . .	6-15
§ 6.07	Criminal Liability . . . . .	6-17
	[1] State Law . . . . .	6-17
	[2] Economic Espionage Act of 1996. . . . .	6-17
§ 6.08	Dissemination of Trade Secrets on the Internet. . . . .	6-20
§ 6.09	<i>Form:</i> Evaluation Letter Agreement Between Producer and Potential Joint Venturer. . . . .	6-21
§ 6.10	<i>Form:</i> Employee Confidentiality and Assignment of Inventions Agreement . . . . .	6-23
§ 6.11	<i>Form:</i> Exit Interview Form . . . . .	6-25
§ 6.12	<i>Form:</i> Corporate Internet Use Policy . . . . .	6-26
§ 6.13	<i>Form:</i> Employee Database Warning . . . . .	6-30

**CHAPTER 7**

**Licensing Content on the Internet**

§ 7.01	Introduction . . . . .	7-3
§ 7.02	Content Licenses and the Internet . . . . .	7-5
	[1] Control over the Use of Licensed Content. . . . .	7-5
	[2] Retaining Artistic Control over the Use of Content. . . . .	7-6

## INTERNET FORMS

	[3]	Intellectual Property Issues . . . . .	7-7
	[4]	Indemnification. . . . .	7-7
	[5]	Assignment of Rights . . . . .	7-8
	[6]	Future Technologies and Opportunities . . . . .	7-8.1
	[7]	Credits and Attribution . . . . .	7-8.1
	[8]	Maximizing Revenue . . . . .	7-9
	[9]	Third Party Infringers . . . . .	7-10
	[10]	Post-Termination Issues and Procedures . . . . .	7-10
§ 7.03		Checklist for Reviewing Content Licenses . . . . .	7-11
§ 7.04		Elements of Content Licenses . . . . .	7-13
	[1]	Identification of Licensed Properties . . . . .	7-13
	[2]	The Grant of Rights. . . . .	7-14
	[a]	What Rights Are Being Conveyed. . . . .	7-14
	[b]	Scope of Use . . . . .	7-15
	[c]	Known and Unknown Future Technologies . . . . .	7-16
	[3]	Reservation of Rights . . . . .	7-17
	[4]	Approvals . . . . .	7-19
	[5]	Reversion Provisions . . . . .	7-19
	[6]	Representations and Warranties. . . . .	7-20
	[7]	Disclaimer of Warranties. . . . .	7-21
	[8]	Indemnification/Defense Against Third Party Claims . . . . .	7-22
	[9]	Ownership of Proprietary Rights. . . . .	7-23
	[10]	Infringement by Third Parties . . . . .	7-23
	[11]	Confidentiality . . . . .	7-24
	[12]	Term . . . . .	7-25
	[13]	Termination Provisions . . . . .	7-26
	[14]	Payment Provisions . . . . .	7-27
	[15]	Assignment Rights . . . . .	7-28
	[16]	Sublicensing/Third Party Usage . . . . .	7-29
	[17]	Limitation of Liability . . . . .	7-29
	[18]	Trademark Provisions . . . . .	7-30
§ 7.04A		The Right of Publicity . . . . .	7-32
	[1]	Elements . . . . .	7-32
	[2]	Statutes Covering Rights of Publicity . . . . .	7-32.3
	[3]	Proof of Damages for Violation . . . . .	7-32.5
	[4]	Applicability to the Internet . . . . .	7-32.6
	[5]	First Amendment Issues . . . . .	7-32.7
	[6]	Key Issues in Negotiating and Drafting Licenses of Publicity . . . . .	7-32.9
	[a]	Consent to Use Names or Likenesses in Content . . . . .	7-32.10

## TABLE OF CONTENTS

xxiii

	[b] Exclusivity . . . . .	7-32.10
	[c] The Right Being Licensed . . . . .	7-32.11
	[d] Territory . . . . .	7-32.11
	[e] Other Scope of Use Issues . . . . .	7-32.12
	[f] Release and Waiver . . . . .	7-32.12
	[g] Survival and Transfer of Right of Publicity . . . . .	7-32.12
	[h] Other Issues . . . . .	7-32.13
§ 7.04B	Search Engine and Portal Agreements . . . . .	7-32.15
§ 7.05	<i>Form:</i> Content License Agreement Between Author and Web Site Owner . . . . .	7-32.17
§ 7.06	<i>Form:</i> Content License Agreement Between Magazine Publisher and Media Company . . . . .	7-37
§ 7.07	<i>Form:</i> Vendor-Oriented Software License Agreement . . . . .	7-50
§ 7.08	<i>Form:</i> User-Oriented Software License Agreement . . . . .	7-62
§ 7.09	<i>Form:</i> Intellectual Property Rights Assignment . . . . .	7-72
§ 7.10	<i>Form:</i> Online Promotion and License Agreement Between Online Service and Portal Site . . . . .	7-74
§ 7.11	<i>Form:</i> Online Marketing Agreement . . . . .	7-90
§ 7.12	<i>Form:</i> Linking Agreement . . . . .	7-105
§ 7.13	<i>Form:</i> Audio Streaming/Downloading License Agreement . . . . .	7-107
§ 7.14	<i>Form:</i> Video Streaming/Downloading License Agreement . . . . .	7-108
§ 7.15	<i>Form:</i> Audio/Video Streaming/Downloading License Agreement . . . . .	7-115

## CHAPTER 8

### Electronic Contracting

§ 8.01	Overview . . . . .	8-4
§ 8.02	Using the Internet in the Contracting Process . . . . .	8-5
	[1] Online Contract Formation . . . . .	8-5
	[2] Electronic Data Interchange (EDI) . . . . .	8-6
	[3] Blockchain . . . . .	8-7
	[a] Blockchain Generally . . . . .	8-7
	[b] Initial Coin Offerings . . . . .	8-10
	[c] Non-Fungible Tokens (NFTs) . . . . .	8-10.2
§ 8.03	Key Issues in Electronic Contracting . . . . .	8-10.6
	[1] Online Identity . . . . .	8-10.6
	[2] Security and Integrity in Online Contracts . . . . .	8-10.7

## INTERNET FORMS

	[3]	Contracting Using Standard Forms . . . . .	8-10.7
	[4]	Jurisdictional Concerns . . . . .	8-10.8
	[5]	Screen Scraping . . . . .	8-10.9
§ 8.04		Contract Law and Business Practices in the Information Age . . . . .	8-11
	[1]	International Sources of Contract Law . . . . .	8-11
	[a]	The United Nations Convention on Contracts for the International Sale of Goods . . . . .	8-11
	[b]	The European Union Distance Selling Directive . . . . .	8-11
	[2]	Sources of United States Contract Law . . . . .	8-13
	[a]	The Common Law and <i>Restatements</i> . . . . .	8-13
	[b]	The Uniform Commercial Code (UCC) . . . . .	8-14
	[i]	UCC Article 2 and Software . . . . .	8-14
	[ii]	Beyond Software: Computer Information Transactions . . . . .	8-17
	[c]	The Uniform Computer Information Transactions Act (UCITA) . . . . .	8-18
	[d]	Procedural Laws . . . . .	8-21
	[i]	The Uniform Electronic Transactions Act (UETA) . . . . .	8-21
	[ii]	Electronic Signatures in Global and National Commerce Act . . . . .	8-24
	[3]	Contract Formation Under the <i>Restatement</i> , UCC and UCITA . . . . .	8-29
	[a]	What Is a Contract? . . . . .	8-29
	[i]	Offer . . . . .	8-30
	[ii]	Acceptance . . . . .	8-33
	[4]	Contract Enforceability: The Statute of Frauds . . . . .	8-38
	[a]	In General . . . . .	8-38
	[i]	The Common Law Statute of Frauds . . . . .	8-39
	[ii]	The Statute of Frauds Under the UCC and UCITA . . . . .	8-40
	[b]	The Writing/Record Requirement in the Information Age . . . . .	8-40.1
	[c]	The Signature/Authentication Requirement in the Information Age . . . . .	8-40.5



**TABLE OF CONTENTS**

[5]	Enforceability of Specialized Contracts and Business Practices . . . . .	8-40.8
	[a] Shrink-Wrap, Click-Wrap, and Web-Wrap or Browse-Wrap Agreements. . . . .	8-40.8
	[i] Contracting by Means of a Single Writing. . . . .	8-40.11
	[ii] Contracting by Means of Multiple Writings. . . . .	8-40.18
	[b] Mass-Market Licenses Under UCITA . . . . .	8-40.20
	[i] Scope. . . . .	8-40.20
	[ii] Enforceability and the Right of Return . . . . .	8-40.20
	[c] Access Contracts Under UCITA. . .	8-40.21
	[d] Support and Service Contracts Under UCITA . . . . .	8-40.22
	[e] Electronic Self-Help Under UCITA . . . . .	8-40.23
	[f] UCITA’s Fundamental Public Policy Defense to Enforcement . . . . .	8-40.25
	[g] Unconscionability. . . . .	8-40.25
	[h] Consumer Review Fairness Act. . .	8-40.27
[6]	Warranties. . . . .	8-40.28
	[a] Express Warranties. . . . .	8-40.28
	[b] Implied Warranties of Title and Against Infringement/Warranty and Obligations Concerning Noninterference and Noninfringement . . . . .	8-40.28
	[c] Implied Warranty of Merchantability . . . . .	8-40.29
	[d] Implied Warranty of Fitness for a Particular Purpose; System Integration . . . . .	8-40.31
	[e] UCITA’s Implied Warranty of Informational Content . . . . .	8-40.32
	[f] Exclusion or Modification of Implied Warranties. . . . .	8-40.33
	[g] Breach of Warranty . . . . .	8-40.34
	[h] The Magnuson-Moss Act. . . . .	8-40.34
§ 8.05	Encryption and Digital Signatures . . . . .	8-40.35
	[1] In General. . . . .	8-40.35
	[2] How Digital Signatures Work. . . . .	8-40.37
	[a] Public Key Cryptography . . . . .	8-40.37
	[b] Hash Functions. . . . .	8-41

**INTERNET FORMS**

	[c] Creating and Using a Digital Signature . . . . .	8-42
	[3] Certification Authorities and Electronic Notarization . . . . .	8-43
	[4] ABA Digital Signature and PKI Assessment Guidelines . . . . .	8-45
	[5] Digital Signature Legislation . . . . .	8-46
	[a] State Laws . . . . .	8-46
	[b] Federal Laws . . . . .	8-48
§ 8.06	Examples of Certain Types of Online Contracts . . . . .	8-67
	[1] Internet Access Agreements . . . . .	8-67
	[2] Internet Services Agreements . . . . .	8-68
	[3] Online Subscription Agreements . . . . .	8-69
	[4] Rules for Online Use . . . . .	8-70
	[5] The Online Advertising and Sale of Goods and Services . . . . .	8-72
	[6] Online Sweepstakes and Contests . . . . .	8-72.1
§ 8.06A	Checklist for the Display and Advertisement of Goods for Sale in Online Media . . . . .	8-72.3
§ 8.07	<i>Form: Agreement to Contract Electronically . . . . .</i>	8-72.5
§ 8.08	<i>Form: Guidelines for Drafting Shrink-Wrap and Click-Wrap Agreements . . . . .</i>	8-73
§ 8.09	<i>Form: Web Site Use Agreement . . . . .</i>	8-74
§ 8.10	<i>Form: Internet Access Agreement . . . . .</i>	8-78
§ 8.11	<i>Form: Clickable Internet Services Agreement . . . . .</i>	8-84
§ 8.12	<i>Form: Clickable End-User Software License Agreement . . . . .</i>	8-90
§ 8.13	<i>Form: Terms of Service . . . . .</i>	8-94
§ 8.14	<i>Form: Official Rules for Online Sweepstakes . . . . .</i>	8-96
§ 8.15	<i>Form: Web-Wrap Agreement for Electronic Mail Service . . . . .</i>	8-99

**CHAPTER 9****Taxation of Transactions  
on the Internet**

§ 9.01	Introduction . . . . .	9-2
§ 9.02	Tax Administration and Compliance Issues . . . . .	9-4
	[1] The Internet's Effect on Determining Physical Location . . . . .	9-4
	[2] Determining Identity Online . . . . .	9-5

## TABLE OF CONTENTS

xxvii

	[3]	Distinguishing Commercial and Noncommercial Internet Transmissions. . . . .	9-5
§ 9.03		State Taxation of Electronic Commerce . . . . .	9-7
	[1]	Sales and Use Tax in General. . . . .	9-8
	[2]	Nexus . . . . .	9-9
		[a] Nexus Under the United States Constitution: The Due Process and Commerce Clauses . . . . .	9-10
		[b] Nexus by Attribution . . . . .	9-14
		[i] Nexus Based on the Activities of Agents and Affiliate Entities. . . . .	9-14
		[ii] Nexus and Internet Access Providers. . . . .	9-15
		[iii] Nexus Based on the Presence of Intangibles . . . . .	9-16.1
	[c]	Limitations on State Income and Franchise Taxes . . . . .	9-17
	[3]	Classification Issues Under Sales and Use Tax . . . . .	9-17
		[a] Classification for Purposes of Sales and Use Tax in General. . . . .	9-18
		[b] Classification of Electronic Transactions . . . . .	9-19
		[i] Internet Access Services . . . . .	9-19
		[ii] Classifying Transactions in Electronic Content . . . . .	9-22
§ 9.04		International Taxation of Electronic Commerce . . . . .	9-26
	[1]	A Framework for Global Electronic Commerce . . . . .	9-26
	[2]	United States Income Taxation. . . . .	9-27
	[3]	Classification of Income from Computer Programs . . . . .	9-28
	[4]	European Taxation Issues . . . . .	9-29

## CHAPTER 10

### Privacy on the Internet

§ 10.01		Introduction . . . . .	10-3
§ 10.02		Personal Information Online. . . . .	10-4
	[1]	Collection of Information . . . . .	10-4
		[a] Clickstream Data . . . . .	10-4
		[b] Internet Cookies . . . . .	10-4.1

## INTERNET FORMS

	[c]	Web Bugs . . . . .	10-7
	[d]	Tracking Technology . . . . .	10-8
	[e]	Spyware . . . . .	10-10
	[f]	Session Replay . . . . .	10-14
	[g]	Location Data . . . . .	10-17
	[2]	User-Provided Information . . . . .	10-20.1
	[a]	Generally . . . . .	10-20.1
	[b]	Data Retention and Search Engines . . . . .	10-20.2
§ 10.03		Selected Privacy Laws . . . . .	10-20.5
	[1]	United States Privacy-Related Laws . . . . .	10-20.5
	[a]	Gramm-Leach-Bliley Act . . . . .	10-22
	[b]	Children's Online Privacy Protection Act . . . . .	10-24
	[c]	Electronic Communications Privacy Act . . . . .	10-25
	[i]	Generally . . . . .	10-25
	[ii]	Differing Interpretations of the Wiretap Act . . . . .	10-27
	[iii]	Damages . . . . .	10-29
	[iv]	The CLOUD Act . . . . .	10-31
	[d]	Computer Fraud and Abuse Act . . . . .	10-33
	[e]	FTC Enforcement Actions . . . . .	10-38
	[f]	The Health Insurance Portability and Accountability Act . . . . .	10-40.3
	[g]	The Controlling the Assault of Non-Solicited Pornography and Marketing Act . . . . .	10-41
	[h]	USA Patriot Act . . . . .	10-44
	[i]	ECPA Pen/Trap Provisions Expanded to Internet Communications . . . . .	10-45
	[ii]	Subpoenas for Electronic Evidence . . . . .	10-46
	[iii]	Internet Access by Cable Subscribers . . . . .	10-46
	[iv]	Disclosures by Service Providers . . . . .	10-46
	[v]	Section 2709 and National Security Letters (NSLs) . . . . .	10-47
	[i]	The Homeland Security Act . . . . .	10-48
	[j]	Identity Theft Penalty Enhancement Act . . . . .	10-49
	[2]	State Privacy and Consumer Protection Laws . . . . .	10-50

**TABLE OF CONTENTS**

	[a] Generally . . . . .	10-50
	[b] Spoofing and Phishing . . . . .	10-57
	[c] Biometric Privacy . . . . .	10-60
	[3] International Privacy-Related Laws . . . . .	10-64.1
	[a] European Union . . . . .	10-64.1
	[b] Canada . . . . .	10-64.8
§ 10.04	Self-Regulation and Industry Guidelines . . . . .	10-64.11
	[1] The ANA Guidelines . . . . .	10-64.11
	[2] Privacy Seals . . . . .	10-64.12
	[3] Online Privacy and Children . . . . .	10-64.13
	[a] Children’s Advertising Review Unit Guidelines . . . . .	10-64.13
	[4] Self-Regulatory Principles for Online Behavioral Advertising . . . . .	10-64.14
§ 10.04A	Privacy Policies . . . . .	10-64.16
	[1] Drafting a Privacy Policy . . . . .	10-64.16
	[2] Changing a Privacy Policy . . . . .	10-65
	[3] Mobile App Privacy Policies . . . . .	10-66
§ 10.05	E-Mail and Internet Use in the Workplace . . . . .	10-68
	[1] Regulating and Monitoring Employee E-Mail . . . . .	10-68
	[2] E-Mail Communication and Attorney-Client Privilege . . . . .	10-70
	[3] The Importance of E-Mail and Internet Policies . . . . .	10-74
§ 10.05A	Electronic Banking Security . . . . .	10-76
	[1] Fraudulent Electronic Funds Transfers . . . . .	10-76
	[2] Online Banking Security Procedures . . . . .	10-77
	[3] Litigation . . . . .	10-79
§ 10.05B	Data Security . . . . .	10-80
	[1] In General . . . . .	10-80
	[2] Data Breach Litigation . . . . .	10-80
	[3] Payment Card Industry Standards . . . . .	10-84
§ 10.05C	The Federal Records Act, Electronic Records, and E-Mail . . . . .	10-85
§ 10.06	<i>Form:</i> Sample “Notice” to Children . . . . .	10-86
§ 10.07	<i>Form:</i> Notice to Parents/Guardians . . . . .	10-87
§ 10.08	<i>Form:</i> Sample Privacy Policy Notice Provisions Appropriate for Web Site Directed Toward Children . . . . .	10-89
§ 10.09	<i>Form:</i> Sample Information Collection Notice Appropriate for Adults . . . . .	10-91
§ 10.10	<i>Form:</i> Sample Opt-Out Disclosure . . . . .	10-92
§ 10.11	<i>Form:</i> General Clause for Updating of Personal Information . . . . .	10-93
§ 10.12	<i>Form:</i> Web Site Privacy Policy . . . . .	10-94

## CHAPTER 11

**Jurisdiction, Obscenity and Defamation**

§ 11.01	Introduction . . . . .	11-2
§ 11.02	Jurisdiction . . . . .	11-4
	[1] Personal Jurisdiction and the United States Constitution. . . . .	11-4
	[a] Obtaining Jurisdiction Over Nonresident Defendants. . . . .	11-5
	[b] Due Process Considerations. . . . .	11-6
	[2] Jurisdiction and the Internet . . . . .	11-8
	[a] Online Contract Formation . . . . .	11-9
	[b] Websites and Jurisdiction: Is a Website Enough? . . . . .	11-15
	[c] Conduct Directed Toward the Jurisdiction . . . . .	11-22
	[3] Jurisdiction Across National Boundaries . . . . .	11-24.1
	[a] Extraterritorial Application of United States Law . . . . .	11-24.1
	[b] Extraterritorial Application of Non-United States Law to United States Citizens. . . . .	11-24.6
§ 11.03	Obscenity. . . . .	11-25
	[1] In General. . . . .	11-25
	[2] Regulation of Obscenity and First Amendment Concerns . . . . .	11-25
	[3] Indecent Material . . . . .	11-30
	[a] Regulation of Indecency in General . . . . .	11-30
	[b] Indecency and the Internet. . . . .	11-33
	[c] Liability for Transmissions of Indecent and Obscene Content . . . . .	11-37
	[d] Limiting Internet Access from Universities and Libraries . . . . .	11-40
	[4] Solutions for Limiting Access to Obscene and Indecent Content . . . . .	11-41
	[a] Legislative Solutions . . . . .	11-41
	[b] Technical Solutions . . . . .	11-43
	[c] Contractual Solutions for ISPs and Content Providers . . . . .	11-44
§ 11.04	Defamation . . . . .	11-45
	[1] “Distributor”/“Publisher” Liability of Online Service Providers. . . . .	11-45

**TABLE OF CONTENTS**

xxxi

	[2] Elements of Defamation Claims . . . . .	11-46
	[a] Defamatory Statement . . . . .	11-46
	[b] Reference to or Concerning the Party . . . . .	11-47
	[c] Falsity . . . . .	11-48
	[d] Publication to a Third Party . . . . .	11-49
	[e] Fault by the Person Publishing the Statement . . . . .	11-52
	[3] First Amendment Limitations on State Defamation Laws . . . . .	11-53
	[a] Standards for Defamation of Private Persons . . . . .	11-53
	[b] Standards for Defamation of Public Figures . . . . .	11-54
	[c] Internet-Based Defamation . . . . .	11-56
	[4] Identifying Anonymous Defendants . . . . .	11-60
	[5] Defamation Checklist . . . . .	11-62
§ 11.05	Section 230 of the Communications Decency Act . . . . .	11-62.3
	[1] CDA Section 230 Immunity . . . . .	11-62.3
	[2] FOSTA . . . . .	11-62.15
§ 11.06	<i>Form:</i> Terms of Use for an Adult-Oriented Web Site . . . . .	11-63
§ 11.07	<i>Form:</i> Right of Publicity: Talent Contract . . . . .	11-64
§ 11.08	<i>Form:</i> Right of Publicity: Celebrity Promotion License Agreement . . . . .	11-66
§ 11.09	<i>Form:</i> Celebrity Name and Likeness Release for Use on a Web Site . . . . .	11-70
§ 11.10	<i>Form:</i> Right of Publicity: Picture and Name Release . . . . .	11-82
<b>INDEX</b>	. . . . .	I-1

