TABLE OF CONTENTS

Foreword v
Introduction. vii

CHAPTER 1

The Constant Evolution of Information Technology

§ 1.01 Introduction 1-4.1
§ 1.02 Media Formats and Underlying Technologies. . . 1-5
[1] Generally; Data Compression 1-5
[2] Still Image Formats 1-6
[3] Audio Formats 1-6
[4] Video Formats 1-7
[5] Streaming File Formats 1-9
[6] E-Books and Other Text-Viewing Formats. 1-9
[7] Digital Rights Management Systems. 1-11
[a] Watermarking. 1-12
[b] Fingerprinting. 1-13
[c] Audio Scrambler 1-14
[d] Content Identification Technologies. . . 1-15
[e] Other Emerging DRM Technologies. . . 1-16
§ 1.03 Emerging Consumer Technologies and Products. 1-19
[1] Data Storage 1-19
[a] CD-R and CD-RW 1-19
[b] DVD. 1-20
[c] Memory Cards 1-20
[d] Holographic Storage 1-21
[2] Handheld Computing Devices 1-21
[a] Text Messaging 1-22
[b] Mobile Applications 1-23
[3] Global Positioning System and Other Locational Technologies 1-24
[a] Underlying Technology. 1-24

[b] Applications 1-24
[i] Geolocation 1-25
[ii] E911 ("Enhanced 911") 1-27
[iii] Law Enforcement 1-27
[iv] Radio Frequency Identifier (RFID) Tags 1-29
[v] Related Technologies 1-31
[4] Emerging Television Technologies 1-32
[a] DTV and HDTV 1-32
[b] Interactive Television 1-33
[c] 3D Television. 1-34
[d] Digital Video Recorders 1-35
[e] Streaming TV Programming Using a Device Connected to the Internet. 1-36
[f] Streaming Internet Content and Other Programming Using a TV . . . 1-37
[5] Games 1-38
[a] Console Based 1-38
[b] Massive Multiplayer Online Role-Playing Games 1-39
[c] Social Network Games 1-40
[6] Virtual Property 1-40
[7] Software Bots and Data Scraping 1-47
[8] Other Emerging Technologies 1-52
[a] Virtual Reality Systems. 1-52
[b] Smart Appliances. 1-52
[c] Biometrics 1-53
[d] Satellite Radio 1-54
[e] HD Radio 1-56
[f] Building Information Management. . . 1-56
[g] Wayback Machine 1-58
[h] Print-on-Demand Publishing 1-59
[i] Digital Modeling 1-60
[j] Digital Currency 1-60
[k] Autonomous Cars 1-60.9
[l] Unmanned Aerial Vehicles 1-60.11
[m] Quantum Computing 1-60.12
[n] Internet of Things (IoT) 1-60.13
[9] Artificial Intelligence (AI) 1-61
§ 1.04 Technologies for Accessing Data Services 1-62.6
[1] The Internet and the World Wide Web . . . 1-62.6
[a] Generally 1-62.6
[b] Regulation of Internet Traffic, Tiered Pricing and Net Neutrality 1-62.7
[2] Communication Using TCP/IP 1-62.9

[a] Historical Uses of TCP/IP 1-62.10
[i] E-Mail—ASCII Only 1-62.10
[ii] Newsgroups and Usenet; Mailing Lists 1-62.10
[iii] Gopher 1-62.11
[iv] Telnet 1-62.11
[b] Common Uses of and Tools for TCP/IP 1-62.12
[i] E-Mail—Content Rich 1-62.12
[ii] Hypertext Markup Language (HTML) 1-62.12
[iii] Hypertext Transfer Protocol (HTTP) 1-62.12
[iv] File Transfer Protocol (FTP) . . . 1-62.13
[v] Internet Messaging Protocols (IM) 1-62.13
[vi] Java/Javascript/ActiveX 1-62.14
[vii] Rich Content Systems 1-62.16
[viii] Streaming 1-62.16
[ix] Virtual Reality Modeling Language (VRML) 1-62.16
[x] Search Engines and Internet Directories 1-62.17
[xi] Intranets 1-62.17
[xii] Extensible Markup Language (XML) 1-62.21
[xiii] Peer-to-Peer (P2P) Systems 1-62.22
[c] Emerging Uses of and Tools for TCP/IP 1-62.23
[i] Next Generation Instant Messaging 1-62.23
[ii] Internet Telephony and Videoconferencing 1-62.24
[iii] Gigabit Ethernet 1-62.25
[iv] Electronic Numbering (ENUM) 1-62.27
[v] CAPTCHA 1-62.28
[vi] RSS Technology 1-62.29
[vii] Podcasting 1-62.29
[viii] Blogs 1-62.29
[ix] Social Networks 1-62.30
[d] Web Services 1-62.31
[i] Limitations of the Web Server/Web Browser Model . . . 1-62.31
[ii] Web Services Model 1-62.32

[iii] Web Services Standards 1-62.32
[iv] Uses for Web Services 1-62.34
[3] Technology for Connecting to the Internet . . . 1-62.35
[a] Dial-Up Access; Internet Service Providers and Online Services 1-62.35
[b] Broadband Access to the Internet 1-62.35
[i] Dedicated Access Lines 1-62.36
[ii] Cable Broadband 1-62.39
[iii] BPL 1-62.40
[iv] Satellite Broadband 1-62.41
[c] Wireless Data Access Technology . . . 1-62.42
[i] Generally 1-62.42
[ii] Cellular Communications 1-62.43
[iii] Wireless Application Protocol (WAP) 1-62.47
[iv] Device Networking 1-62.48
[v] Wireless Instant Messaging 1-62.52
§ 1.05 The Content-Oriented Emerging Technology Application 1-63
[1] Content 1-63
[2] Drivers 1-64
[3] The Platform 1-64
[a] Computer Hardware 1-64
[b] Operating Systems 1-64
[c] Devices 1-65
[d] Middleware 1-65
§ 1.06 The Development Project 1-66.1
[1] Project Participants 1-66.1
[a] The Publisher/Producer 1-66.1
[b] Right Holder 1-67
[c] The Developer 1-68
[2] Development Structures 1-68
[a] Work Made for Hire 1-68
[b] Joint Venture 1-69
[3] Insurance 1-70
[4] The Role of Unions and Guilds in Application/Product Production 1-71
[a] The Screen Actors Guild 1-72
[b] The Writers Guild of America 1-75
[5] Project Planning Checklist 1-76

CHAPTER 2

Rights Acquisition

§ 2.01 Introduction 2-3
§ 2.02 Future Technologies 2-5
[1] Technologies Existing at the Time of the License 2-5
[2] Technologies Not Existing at the Time of the Grant 2-7
§ 2.03 Drafting the License Agreement 2-15
[1] Identification of Licensed Properties. 2-15
[2] The Grant 2-16
[a] Rights Being Conveyed. 2-16
[b] Scope of Use and Competing Interests 2-17
[c] Known and Unknown Future Technologies 2-18
[d] Future Technologies for Distribution 2-19
[e] Future Technologies for Exhibition . . . 2-19
[3] Reservation of Rights. 2-19
[4] Best Efforts Promotion. 2-21
[5] Reversion Provisions 2-21
[6] Approvals 2-22
[7] Representations and Warranties. 2-22
[8] Disclaimer of Warranties 2-24
[9] Indemnification/Defense Against Third Party Claims. 2-24
[10] Ownership of Proprietary Rights. 2-25
[11] Infringement by Third Parties 2-25
[12] Confidentiality 2-26
[13] Term 2-27
[14] Termination Provisions 2-27
[15] Payment Provisions 2-28
[16] Assignments and Subcontracting. 2-29
[17] Rights of First Refusal and Last Negotiation 2-29
[18] Limitation of Liability 2-30
[19] Trademark Provisions. 2-31
§ 2.04 The Review of Existing Licensing Agreements 2-33
[1] The Rights 2-33
[2] Future Technologies. 2-33
[3] General Terms 2-33

§ 2.05 *Form:* Literary Work License Agreement 2-35
§ 2.06 *Form:* Illustration License Agreement 2-41
§ 2.07 *Form:* Video License Agreement 2-44
§ 2.08 *Form:* Synchronization and Public Performance License Agreement 2-50
§ 2.09 *Form:* Photograph License Agreement 2-54
§ 2.10 *Form:* Cartoonist License and Merchandising Agreement 2-60
§ 2.11 *Form:* Celebrity License Agreement 2-73
§ 2.12 *Form:* Celebrity Promotion License Agreement 2-84
§ 2.13 *Form:* Art Work License Agreement 2-88
§ 2.14 *Form:* Narration Services and License Agreement 2-94
§ 2.15 *Form:* Graphics License Agreement 2-97
§ 2.16 *Form:* Option License Agreement for a Literary Work License 2-103
§ 2.17 *Form:* Trademark License Agreement for Use in the Educational Market 2-106
§ 2.18 *Form:* Trademark License Agreement 2-112
§ 2.19 *Form:* Licensor Oriented Content License Agreement for CD-ROMs 2-119
§ 2.20 *Form:* Clearinghouse Oriented Content License Agreement 2-132
§ 2.21 *Form:* Single Track Music License 2-146
§ 2.22 *Form:* Producer-Manager-Talent Agreement: Name and Likeness Release for Use in Product 2-154
§ 2.23 *Form:* Subject Matter Content License Agreement 2-166
§ 2.24 *Form:* Content License Agreement for Digital Product 2-174
§ 2.25 *Form:* Ring Tone License Agreement 2-184
§ 2.26 *Form:* Employee Certificate of Authorship 2-190
§ 2.27 *Form:* Content License Between a Magazine Publisher and a Website Publisher 2-193
§ 2.28 *Form:* Audiovisual Streaming/Downloading License Agreement 2-206
§ 2.29 *Form:* License Oriented Audiovisual Streaming Agreement Short Form 2-213
§ 2.30 *Form:* Audiovisual Program License Agreement 2-215
§ 2.31 *Form:* Exclusive Personal Management Agreement 2-226

CHAPTER 3

Product Development Agreements

§ 3.01 Introduction 3-4
§ 3.02 Deliverables 3-5
[1] Functional Design Specifications. 3-5
[2] Detailed Design Specifications 3-7
[3] The Master Copies 3-7
§ 3.03 Implementation Schedule 3-8
[1] Fixed Obligation. 3-8
[2] Guideline. 3-9
§ 3.04 Progress Reports and Interim Approvals 3-10
§ 3.05 Payment Schedules 3-12
[1] Fixed Fees with Milestones 3-12
[a] Change Control Procedures. 3-12
[2] Time and Materials Development 3-13
§ 3.06 Acceptance Tests. 3-15
§ 3.07 Definition of Ownership 3-16
[1] Ownership of Software 3-16
[2] Ownership of Other Aspects of the Product 3-17
[3] Cooperation and Notices 3-18
§ 3.08 Producer Owned or Controlled Rights. 3-19
§ 3.09 Third Party Rights. 3-20
§ 3.10 Reservation of Rights 3-22
§ 3.11 Confidentiality 3-23
§ 3.12 Termination Provisions 3-24
§ 3.13 Rights of First Refusal and Last Negotiation . . . 3-25
§ 3.14 Limitation of Liability 3-26
§ 3.15 Representations and Warranties 3-27
§ 3.16 Indemnification 3-28
§ 3.17 Insurance and Risk Management 3-29
[1] Product Liability Insurance 3-29
[2] Intellectual Property Risk Management . . . 3-29
[a] Intellectual Property Compliance Programs 3-30
[b] Insurance Covering Risks to Intellectual Property 3-32
[i] Commercial General Liability Policies 3-32.1
[ii] Media Liability/Errors & Omissions Policies 3-32.2
[iii] Patent and IP Infringement Policies 3-32.3

[iv] Internet Insurance/Cyber-Risk Policies 3-32.4
[v] Policies Limited to Patent Infringement Litigation Costs 3-32.4
[vi] Open Source Insurance 3-32.5
§ 3.18 Software Licensing 3-32.6
[1] Scope of License 3-32.6
[a] Authorized Uses 3-32.7
[b] Use Restrictions 3-32.8
[2] Exclusive and Non-Exclusive Licenses 3-32.9
[3] Revocable Licenses 3-33
[4] Sublicensing/Third Party Usage 3-33
[5] Ownership 3-34
[6] Maintenance and Updates 3-35
[7] Source Code 3-35
[a] Bankruptcy 3-35
[b] Source Code Escrow 3-37
[8] Warranties 3-37
[a] Ownership of Intellectual Property . . . 3-37
[b] Performance 3-38
[9] Indemnification 3-39
[10] Assignment Rights 3-39
[11] Term 3-40
[12] Modifications 3-40
[13] Confidential Information and Trade Secrets 3-41
[14] Open Source Software 3-41
[a] Introduction 3-41
[b] Open Source Software Products 3-42
[c] "Copyleft" 3-42.1
[d] The GNU General Public License . . . 3-42.1
[e] Other Open Source and Related Licenses 3-42.4
[f] Infringement of Third Party Rights 3-42.5
[g] Other Forms of Protection 3-42.8
[h] Business Considerations and Risks . . . 3-42.9
[15] Electronic Health Records 3-42.10
[a] Federal Law 3-42.10
[b] Cloud Computing Usage Models 3-42.12
§ 3.19 Website Development and Hosting Agreements 3-42.14
[1] Development Agreements 3-42.14
[a] Scope of Services 3-42.14
[b] Technical Considerations 3-42.14

[c] Promotion 3-42.15
[d] Transitioning Services 3-42.15
[e] Editorial and Artistic Control and Approval 3-42.16
[f] Intellectual Property and Confidential Information 3-42.16
[g] Development Credit 3-43
[2] Hosting 3-44
[a] Scope of Services 3-44
[b] Domain Name Registration 3-44
[c] Updates and Modifications 3-45
[d] Limitations on Alteration and Copying 3-45
[e] Performance Criteria 3-45
[f] Customer Information 3-46
[g] Termination and Transfer 3-46
[h] Hosting Services Provider Warranties 3-47
§ 3.20 *Form:* Letter of Intent for Development Agreement 3-48
§ 3.21 *Form:* Master Development Agreement 3-50
§ 3.22 *Form:* Royalty Based Development Agreement 3-68
§ 3.23 *Form:* Master Joint Development Agreement . . . 3-91
§ 3.24 *Form:* Independent Consulting Agreement 3-115
§ 3.25 *Form:* Subcontractor Agreement 3-119
§ 3.26 *Form:* License and Customization Agreement 3-122
§ 3.27 *Form:* License and Development Agreement for Online Application with Server and Client Aspects 3-135
§ 3.28 *Form:* Software License Agreement (Broad) . . . 3-156
§ 3.29 *Form:* Software License Agreement (Restrictive) 3-162
§ 3.30 *Form:* Software License Agreement for Use of Software to Create Access and Retrieval Software 3-168
§ 3.31 *Form:* Software License Agreement for Existing Access and Retrieval Software 3-172
§ 3.32 *Form:* Escrow Agreement 3-176
§ 3.33 *Form:* Focus Group Agreement 3-182
§ 3.34 *Form:* Start of Work Template 3-189
§ 3.35 *Form:* Website Development and Services Agreement 3-191
§ 3.36 *Form:* Vendor Oriented User Trial Period License Agreement 3-213

§ 3.37 *Form:* Client Oriented Website Development Agreement 3-217
§ 3.38 *Form:* Retail Website Development and Services Agreement 3-234
§ 3.39 *Form:* Live and Prerecorded Broadcast Streaming and Hosting Agreement 3-250
§ 3.40 *Form:* GNU General Public License, Version 2, June 1991 3-265
§ 3.40A *Form:* GNU General Public License, Version 3, June 2007 . . . . . 3-272.1
§ 3.41 *Form:* GNU Lesser General Public License 3-273
§ 3.42 *Form:* Open Software License v. 2.0. 3-284
§ 3.43 *Form:* Exclusive Age Verification Software License Agreement 3-289
§ 3.44 *Form:* Vendor-Oriented Website Hosting Agreement 3-306

CHAPTER 4

Product and Service Distribution

§ 4.01 Introduction 4-3
§ 4.02 The Distribution Channels 4-4
[1] Retail Channels of Trade 4-4
[2] Direct Response 4-5
[3] Bundled Distribution 4-5
[4] Catalog Distribution 4-6
[5] OEM Distribution. 4-6
[6] Internet and Wireless Direct Distribution Methods 4-7
[a] Content and Software 4-8
[i] Downloading: Shareware, Freeware, and Mobile Applications 4-9
[ii] Streaming and Broadcasting. . . . 4-11
[iii] File Sharing. 4-11
[b] Services 4-13
[i] Application Services. 4-13
[ii] B2B Internet Marketplace. 4-13
[7] Future Distribution Methods 4-16
§ 4.03 The Third Party Distribution Agreement. 4-18
[1] Territory 4-18
[2] "Best Effort" Obligations. 4-18
[3] Scope of Authority. 4-18.1
[4] Producer's Marketing Assistance. 4-18.1

[5] Producer's License 4-18.2
[6] Compensation 4-18.2
[a] Resellers 4-18.3
[b] Sales Agents. 4-18.3
[7] Term 4-18.3
§ 4.04 Licensing Software to the United States Government. 4-18.5
[1] Restricted Rights 4-18.5
[2] Limited Rights 4-19
[3] Unlimited Rights 4-20
[4] Government Purpose Rights 4-20
§ 4.05 Exporting Regulations. 4-21
[1] Rationale and Implementation of Export Regulations. 4-21
[2] The Wassenaar Arrangement and the Export of Encryption Technology. 4-22.1
§ 4.06 Products Licenses 4-22.3
[1] Custom or Specialty Products 4-22.3
[2] Shrink-Wrap Licenses 4-22.3
[3] Click-Wrap Agreements. 4-22.5
[4] Browse-Wrap Agreements 4-22.10
§ 4.07 The Uniform Commercial Code. 4-23
§ 4.08 The Uniform Computer Information Transactions Act 4-24.2
§ 4.09 The Magnuson-Moss Act 4-24.5
§ 4.10 *Form:* Reseller Distribution Agreement. 4-25
§ 4.11 *Form:* Large Quality Sales Distribution Agreement 4-36
§ 4.12 *Form:* Product Distribution Agreement with Optional Duplication Services 4-41
§ 4.13 *Form:* Producer Favorable Distribution Agreement 4-51
§ 4.14 *Form:* Original Equipment Manufacture Distribution Agreement 4-61
§ 4.15 *Form:* Strategic Alliance Agreement 4-66
§ 4.15A *Form:* Interactive Distribution License Agreement 4-80.7
§ 4.16 *Form:* Publisher Oriented Product Marketing and Distribution Agreement 4-80.21
§ 4.17 *Form:* Sales Representative Agreement. 4-89
§ 4.18 *Form:* Individual or Network Use Shrink-Wrap License Agreement. 4-93
§ 4.19 *Form:* Product Bundling and Enhancement Agreement 4-96

§ 4.20 *Form:* Vendor-Friendly Customer Referral Agreement 4-112
§ 4.21 *Form:* Application Services Provider (ASP) Agreement 4-122
§ 4.22 *Form:* Clickwrap End-User Product License Agreement 4-132
§ 4.23 *Form:* License and Distribution Agreement (Utilizing "Push" Technology). 4-136
§ 4.24 *Form:* Content Provider Oriented Wireless Content License and Distribution Agreement 4-148
§ 4.25 *Form:* Internet Audio Distribution and Marketing Agreement 4-159
§ 4.26 *Form:* Content Provider Oriented Webcasting and Radio Broadcast Agreement 4-172
§ 4.27 *Form:* Vendor Exchange Member Agreement . . . 4-201
§ 4.28 *Form:* Vendor Services Terms and Conditions of Use 4-210
§ 4.29 *Form:* Web-Based Services Reseller Agreement 4-215
§ 4.30 *Form:* Program Support and Maintenance Agreement 4-226

TABLE OF CONTENTS

CHAPTER 5

Copyright, Attribution and Integrity Rights and the Development of Emerging Technology Products

§ 5.01 Introduction 5-4
§ 5.02 Copyright Analysis Checklist 5-6
§ 5.03 The Rights Protected by Copyright 5-11
§ 5.04 International Protection of Intellectual Property 5-12.1
[1] WIPO Agreements 5-12.1
[2] Anti-Counterfeiting Trade Agreement 5-16
§ 5.05 European Union 5-19
[1] Copyright Harmonization Directive 5-19
[2] Database Directive 5-20
§ 5.06 Determining Whether a Work Is Copyrightable 5-20.2
[1] Generally 5-20.2
[2] The Copyrightability of Factual Compilations 5-20.7
[a] The Copyrightability of Compilations Before *Feist* 5-21
[b] The *Feist* Decision 5-21
[c] The Emerging Technology Implications of *Feist* 5-23
[3] The Copyrightability of Fonts 5-24
§ 5.07 Duration of Protection 5-26
[1] Works Created On or After January 1, 1978 5-26
[2] Works Created Before January 1, 1978 5-27
[3] The Copyright Renewal Act of 1992 5-27
[4] Copyright Restoration 5-28
§ 5.08 Copyright Notices 5-30
§ 5.09 Ownership of Copyright 5-31
[1] Works Made for Hire 5-31

[a] Works Made for Hire in the Emerging Technology Industry . . . 5-32
[b] Work Made for Hire and Tracing the Chain of Copyright Ownership 5-32
[2] Collective Works 5-36
[3] Joint Works. 5-38
[4] Derivative Works 5-38.1
[5] Transfer of Copyright. 5-38.3
[a] Transfer Under the Act of 1909 . . . . . 5-38.3
[b] Transfer Under the Copyright Act of 1976 . . . . . 5-38.4
[c] Termination of Copyright Transfers . . . 5-38.5
§ 5.10 The Fair Use Doctrine 5-38.6
§ 5.10A Educational Use Copyright Exemption (The "Teach Act") 5-39
§ 5.11 Attribution and Integrity Rights 5-41
§ 5.12 Art Collections, Copyright Issues and Emerging Technologies 5-42.2
§ 5.13 Identification of Copyright Owners 5-42.3
[1] Copyright Office Records 5-42.3
[2] Unions, Guilds and Collective Bargaining Associations. 5-42.3
[3] Professional Rights Clearance Organizations 5-42.3
§ 5.13A Television Copyright Issues 5-44
§ 5.14 Music Copyright Issues 5-50.2
[1] Public Performance License. 5-50.3
[2] Synchronization License 5-50.6
[3] Mechanical License 5-50.7
[4] Music Publishing License 5-50.8
§ 5.15 Copyright Registration Procedures. 5-50.9
§ 5.16 Registration of Computer Programs and Databases Not Fixed in CD-ROM. 5-50.11
[1] Computer Programs 5-50.11
[2] Databases 5-51
§ 5.17 Registration of Machine Readable Multimedia Works (Other Than Computer Programs, Databases or CD-ROM Products) 5-52
[1] Pictorial or Graphic Works 5-52
[2] Audio-Visual Works. 5-52
[3] Musical Compositions 5-52
[4] Sound Recordings. 5-53
[5] Literary Works 5-53

§ 5.18 Registration of Multimedia Works Fixed in CD-ROM Format 5-54
§ 5.19 Registration of Certain Multimedia "Kits" 5-55
[1] Deposit Requirements 5-56
[a] Generally 5-56
[b] Authorship Fixed Only in Machine-Readable Form 5-56
[2] Registration Forms 5-56
§ 5.20 Rental of Multimedia and Other Emerging Technology Applications 5-57
§ 5.21 Copyright Infringement 5-59
[1] Direct, Contributory and Vicarious Infringement 5-60
[2] Remedies 5-65
[3] The No Electronic Theft (NET) Act 5-68.2
§ 5.22 Proving Infringement 5-69
[1] *Prima Facie* Case 5-69
[2] Direct Liability 5-70.1
[3] Secondary Liability 5-70.3
[4] Active Inducement 5-70.4
§ 5.23 Copyright Infringement of Computer Software 5-70.6
[1] Literal and Non-Literal Copying and Elements 5-70.7
[2] Early Approaches 5-70.8
[3] The *Altai* Test and Variations 5-70.9
[a] Protection of the User Interface 5-70.14
[b] User Interfaces and Virtual Reality 5-70.17
§ 5.24 Technological Methods of Preventing Infringement 5-71
[1] The Audio Home Recording Act of 1992 5-72
[2] The WIPO Treaties Act 5-73
[3] Copyright Management Information 5-74
[4] The Threat of Circumvention and the Digital Millennium Copyright Act 5-75
[5] Remedies 5-78
§ 5.25 Copyright on the Internet 5-80
[1] Introduction 5-80
[2] Copyright Infringement on the Internet 5-80
[3] Liability 5-80
[a] Electronic Bulletin Boards 5-80
[b] Individuals 5-82
[c] Internet Service Providers 5-83
[d] Website Operators 5-86
[e] Internet File-Sharing 5-88

[4] The Digital Millennium Copyright Act. . . . 5-99
[a] Routing and Intermediate Storage. . . . 5-101
[b] Network Caching. 5-101
[c] Storing, Referring to, or Linking to Infringing Material 5-102
[d] Other Provisions 5-109
[e] Copyright Management Information . . . 5-110.1
[f] Exemptions to Circumvention. 5-110.4
[i] Generally 5-110.4
[ii] Jailbreaking 5-110.7
[5] The Family Entertainment and Copyright Act. 5-110.8
[6] Sound Recordings. 5-110.10
[7] Legal Issues Arising from Hyperlinking. . . 5-111
[a] Types of Hyperlinks 5-111
[i] Hypertext Links. 5-111
[ii] Inline Links 5-112
[iii] Framing 5-112
[b] Implications of Linking. 5-112.1
[i] Hypertext. 5-112.1
[ii] Inline Linking and Framing 5-112.3
[iii] Copyright and Trademark Concerns 5-112.6
[8] Search Engines and Digital Cataloging. . . . 5-112.7
[a] Online Library Projects 5-112.7
[b] Databases and Thumbnails 5-112.11
[c] Infringement and Fair Use 5-112.12
[9] Hot News Misappropriation. 5-112.13
§ 5.26 *Form:* Copyright Assignment. 5-113
§ 5.27 *Form:* Work Made for Hire—Author Contract . . . 5-115
§ 5.28 *Form:* Interim Designation of Agent to Receive Notification of Claimed Infringement 5-117
§ 5.29 *Form:* Copyright Ownership Agreement 5-118
§ 5.30 *Form:* Copyright Transfer Agreement 5-120
§ 5.31 *Form:* Producer Digital Millennium Copyright Act Policy 5-128
§ 5.32 *Form:* DMCA Takedown Notice 5-132
§ 5.33 *Form:* Exclusive License Agreement. 5-134

CHAPTER 6

Trademark Law and the Development of Emerging Technology Products

§ 6.01 Introduction 6-3
§ 6.02 Emerging Technology Trademark Checklist 6-4

§ 6.03 Overview of Trademark Law and Emerging Technology 6-7
§ 6.04 Categories 6-10
[1] Fanciful and Arbitrary Marks 6-10
[2] Suggestive Marks 6-11
[3] Descriptive Marks 6-12
[4] Generic Marks 6-12.2
§ 6.05 Identifying Characteristics Subject to Protection 6-13
[1] Abbreviations and Nicknames 6-13
[2] Slogans 6-13
[3] Titles 6-13
[4] Characters 6-14
[5] Celebrities 6-15
[6] Trade Dress. 6-16
[a] Generally 6-16
[b] Website Look and Feel 6-18
[7] Internet Domain Names 6-22
[a] Domain Name System. 6-22
[b] Strategies for Registering Domain Names as Trademarks 6-24
[i] Choosing a Mark. 6-25
[ii] Clearing a Mark for Use 6-26
§ 6.06 Federal Trademark Registration 6-26.1
§ 6.07 Selecting Marks for Emerging Technology Products. 6-26.5
[1] Descriptive vs. Suggestive Marks 6-26.5
[2] Conducting a Trademark Search 6-26.6
§ 6.08 Emerging Technology Trademark Applications 6-26.7
[1] Preparing an Application 6-26.7
[2] Prosecuting an Application 6-29
[3] Principal and Supplemental Registers 6-30
[4] Notice of Registration 6-31
§ 6.09 Trademark Related Actions 6-32
[1] Infringement Generally 6-32
[a] Strength of the Mark 6-36
[b] Similarity Between the Marks. 6-37
[c] Relatedness of the Goods 6-38
[d] Evidence of Actual Confusion 6-38
[e] Sophistication of Buyers 6-41
[f] Defendant's Intent 6-41
[g] Likelihood of Expansion 6-42
[h] Marketing Channels. 6-43

[2] Contributory Trademark Infringement. 6-44
[3] Unfair Competition. 6-45
[a] False Advertising. 6-45
[b] Reverse Passing Off 6-46.1
[c] Trademark Disparagement. 6-46.1
[d] False Designation of Origin 6-46.2
[4] Dilution 6-46.5
[a] State Trademark Dilution Statutes . . . 6-46.5
[b] Federal Trademark Dilution Act of 1995. . . . . 6-46.8
[5] Causing Marks to Become Generic. 6-46.9
[6] Free Speech 6-46.11
§ 6.10 Proper Use of Emerging Technology Marks. . . . 6-47
§ 6.11 Trademark Protection on the Internet 6-49
[1] Domain Names and Domain Name Disputes 6-49
[a] The ICANN Domain Name Dispute Resolution Policy (UDRP) 6-50.1
[b] Anticybersquatting Consumer Protection Act of 1999 6-54
[2] Trademark Infringement in Website Content, Metatags, Search Terms and Search Engine Keywords 6-56.5
[a] Website Content. 6-56.11
[b] Metatags, Search Terms and Uniform Resource Locators (URLs) 6-56.15
§ 6.12 *Form:* Trademark Assignment 6-56.22
§ 6.13 *Form:* Cease and Desist Letter for Trademark Infringement in Internet Domain Name 6-57
§ 6.14 *Form:* Settlement Agreement Providing for Transfer of Domain Name 6-59
§ 6.15 *Form:* Sample Trademark Opinion 6-64

CHAPTER 7

Trade Secret Law and the Development of Emerging Technology Products

§ 7.01 Introduction 7-2
§ 7.02 Emerging Technology Trade Secret Checklist . . . 7-3
§ 7.03 Trade Secrets and Emerging Technology 7-5
[1] Confidential Business Information 7-5
[2] Software 7-6
[3] The Entire Application. 7-6
[4] Works Incorporated into the Application . . . 7-7

§ 7.04 Overview of Trade Secret Law 7-8
§ 7.05 Mass-Marketed Emerging Technology Applications Containing Trade Secrets 7-13
§ 7.06 Misappropriation 7-14
[1] Determining Misappropriation 7-14
[2] Employee Misappropriation 7-15
[a] The Doctrine of Inevitable Disclosure 7-16.3
[b] Covenants Not to Compete 7-17
[3] Third Party Misappropriation. 7-19
[4] Section 337 Investigations 7-20.1
§ 7.07 Establishing Trade Secrets in Emerging Technologies 7-20.3
§ 7.08 Criminal Liability 7-20.5
[1] State Law 7-20.5
[2] Economic Espionage Act of 1996. . . . . 7-20.5
[3] Defend Trade Secrets Act of 2016 . . . . . 7-20.8
§ 7.09 *Form:* Evaluation Nondisclosure Letter Agreement Between Company and Potential Distributor 7-21
§ 7.10 *Form:* Employee Confidentiality and Assignment of Interventions Agreement 7-24
§ 7.11 *Form:* Exit Interview Form 7-26
§ 7.12 *Form:* Employee System Use Warning 7-27

CHAPTER 8

Patent Law and the Development of Emerging Technology Products

§ 8.01 Introduction 8-2
§ 8.02 Overview of Patent Law. 8-4
[1] The Public Use and On Sale Bars. 8-6
[2] Participation in Standards Setting Bodies 8-9
§ 8.03 Examples of Emerging Technology Related Patentable Subject Matter. 8-11
[1] Software 8-11
[2] Data Transmission and Data Compression. 8-12
[3] Television 8-12
[4] Multimedia 8-13
[5] Internet-Based and Electronic Commerce. 8-13
§ 8.04 Emerging Technology Patent Checklists 8-14

[1] Checklist to Minimize Likelihood of Infringement 8-14
[2] Patent Protection Checklist 8-16
§ 8.05 Patentable Subject Matter and Emerging Technology 8-21
[1] Generally 8-21
[2] The Patentability of Emerging Technology Software 8-24
[3] The Patentability of Emerging Technology Methods of Doing Business 8-28
[4] The Patentability of Emerging Technology Database Structures 8-38
[5] The Patenting of Emerging Technology: Risks of Aging Out 8-38
§ 8.06 Novelty, Nonobviousness, and Definiteness Requirements 8-40
[1] Novelty 8-40
[2] Nonobviousness 8-45
[3] Definiteness 8-47
§ 8.07 Patent Applications 8-48.2
[1] The Application Process 8-48.2
[2] Enablement and Best Mode Requirements 8-48.3
[3] Submission of Source Code 8-48.5
[4] Drafting of Claims 8-49
[5] International Patent Protection 8-50
§ 8.08 Claim Construction 8-54
§ 8.09 Patent Infringement 8-56.1
[1] Standards 8-56.2
[2] Remedies 8-62
[3] Options for Potential Infringers 8-68
[4] Infringement and Imported/Exported Software 8-68.4
[a] Exported Software 8-68.4
[b] Section 271(f) 8-68.4
[c] Litigation 8-68.5
[d] Imported Software 8-68.9
[5] Patent Assertion Entities 8-68.12
§ 8.10 Design Patents and Emerging Technology 8-68.21
[1] Overview 8-68.21
[2] Designs Displayed as Part of Content 8-69
§ 8.11 Ownership 8-72
[1] Inventorship 8-72
[2] Assignment 8-73

[3] Licensing 8-75
[4] Cross-Licensing 8-76.2
[5] Patent Licensing and the Development of Open Standards 8-76.5
§ 8.12 *Form:* Patent Assignment 8-77
§ 8.13 *Form:* Patent License Agreement (Exclusive) . . . 8-80
§ 8.14 *Form:* Patent License Agreement (Non-Exclusive) 8-84
§ 8.15 *Form:* Assignment of Patent Application 8-93

CHAPTER 9

Rights of Privacy and Publicity; Defamation

§ 9.01 Introduction 9-4
§ 9.02 Rights of Privacy and Publicity 9-5
[1] Overview 9-5
[2] Privacy and Publicity Checklist 9-5
§ 9.03 Right of Privacy 9-8
[1] Intrusion Upon Seclusion 9-8
[2] Public Disclosure of Private Facts 9-9
[3] False Light 9-10
[4] Appropriation of Name or Likeness 9-11
[5] Survival and Transfer of Right of Privacy 9-11
§ 9.04 Privacy Rights and Emerging Technologies 9-13
[1] The Scope of the Personal Information Problem 9-13
[a] Locational Technologies 9-13
[b] Data Mining 9-15
[c] Surveillance and Security Technologies 9-16
[d] Internet Technology 9-22
[i] Clickstream Data 9-22
[ii] Tracking Technology 9-23
[iii] Unauthorized Interception and Access 9-26
[iv] Voluntary Provision of Private Information 9-27
[v] Spyware 9-27
[vi] Data Security Concerns 9-33
[vii] Credential Stuffing 9-38
[e] User Provided Information 9-41
[i] Generally 9-41

[ii] Search Engines and Data Retention 9-42
[iii] Social Networks and Behavioral Advertising 9-44
[2] Selected Privacy Laws 9-44.5
[a] Privacy-Related Federal Laws in the United States 9-44.5
[i] Gramm-Leach-Bliley Act 9-44.6
[ii] Health Insurance Portability and Accountability Act of 1996 (HIPAA) 9-44.7
[iii] Children's Online Privacy Protection Act (COPPA) 9-44.8
[iv] The Electronic Communications Privacy Act (ECPA) 9-44.12
[v] Fair Credit Reporting Act (FCRA) 9-49
[vi] Computer Fraud and Abuse Act (CFAA) 9-51
[vii] The Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) 9-56.3
[viii] Identity Theft Penalty Enhancement Act (ITPEA) . . . 9-56.8
[ix] Telephone Consumer Protection Act (TCPA) 9-56.10
[x] Video Privacy Protection Act . . . 9-56.19
[b] Privacy-Related State Laws in the United States 9-56.21
[c] Privacy-Related International Laws . . . 9-56.30
[i] European Union (EU) 9-56.30
[ii] Data Protection Laws in Canada 9-56.40
[3] Constitutional Protections 9-56.41
[4] Electronic Banking Security 9-56.44
[a] Fraudulent Electronic Funds Transfers 9-56.44
[b] Online Banking Security Procedures . . . 9-56.46
[c] Litigation 9-56.48
[5] Government Actions and Industry Self-Regulation 9-56.49
[a] World Wide Web Consortium 9-56.55
[b] The TRUSTe Privacy Program 9-56.56
[c] The ANA Guidelines 9-56.57

[d] Children's Advertising Review Unit Guidelines 9-56.59
[e] Payment Card Industry Data Security Standards 9-56.60
§ 9.05 Right of Publicity 9-56.64
[1] Consent to Use Names or Likenesses in Content 9-56.67
[2] Incidental Use in Content 9-56.70
[3] First Amendment Protection for Emerging Technology Products 9-56.71
[4] Survival and Transfer of Right of Publicity 9-56.74
[5] Right of Publicity on the Internet 9-56.75
§ 9.06 Defamation 9-56.78
[1] Defamation Checklist 9-56.78
[2] Elements 9-56.80
[a] Statement 9-56.81
[b] Defamatory in Nature 9-56.81
[c] Reference to or Concerning the Party 9-56.82
[d] Falsity and Capability of Being Proven False 9-56.83
[e] Publication to a Third Party 9-56.84
[f] Injury 9-56.87
[g] Fault by the Person Publishing the Statement 9-56.87
[3] First Amendment Limitations 9-56.88
[a] Standards for Defamation of Private Persons 9-56.89
[b] Standards for Defamation of Public Figures 9-56.90
[c] Responsibilities of a Producer 9-56.92
[4] Libel and Defamation on the Internet 9-56.96
[a] Application of Traditional Defamation Law to Internet Communications 9-56.96
[b] Single Publication Rule 9-56.98
[c] Revealing the Identity of Anonymous Speakers 9-56.101
§ 9.07 Liability for Inaccurate Data 9-56.105
[1] Negligence 9-56.105
[2] Product Liability 9-56.106
§ 9.08 The Role of Indemnification and Insurance 9-59
§ 9.09 *Form:* Picture and Name Release 9-60.3
§ 9.10 *Form:* Talent Contract 9-62

§ 9.11 *Form:* User Protective Website Data Collection Policy 9-64
§ 9.12 *Form:* Website Privacy Policy 9-66
§ 9.13 *Form:* Sample Privacy Policy Notice Provisions Appropriate for Website Directed Toward Children 9-69
§ 9.14 *Form:* Gramm-Leach-Bliley Act Model Privacy Notice Form (with Opt-Out) 9-71
§ 9.15 *Form:* Cookie Policy 9-73
§ 9.16 *Form:* Sample Privacy Policy 9-76

CHAPTER 10

The Internet and Data Access Networks

§ 10.01 Regulating Online Indecency 10-3
[1] Communications Decency Act of 1996 (CDA) 10-3
[a] Background 10-3
[b] Section 230 10-4
[c] Other Defenses 10-14.5
[i] The Good Faith Defense 10-14.5
[ii] The Access Provider Defense . . . 10-14.5
[iii] The Good Samaritan Defense . . . 10-14.6
[2] Limiting Access to Obscene and Indecent Content 10-15
[3] Transmission of Obscenity Over Bulletin Boards 10-16.2
§ 10.02 Corporate Internet Access Policies 10-16.3
[1] Initial Procedures 10-16.3
[a] Security 10-16.3
[b] Limited Access 10-16.4
[c] Viruses 10-16.4
[2] E-Mail, Confidentiality and a Workplace Policy 10-16.5
[a] Generally 10-16.5
[b] Electronic Communication and Privacy Act (ECPA) Concerns 10-16.6
[c] State Law 10-16.9
[d] Attorney-Client Privilege 10-16.10
[e] E-Mail Use Policies 10-16.14
[3] Offensive and Obscene Communications . . . 10-16.15
[4] Trade Secrets and Unsolicited Ideas 10-16.15
[5] Online Copyright Infringement 10-16.17
[6] Website Privacy Policies 10-16.17

[a] Generally 10-16.17
[b] FTC Enforcement Actions. 10-16.21
[7] Social Media Policies. 10-16.22
§ 10.02A The Federal Records Act, Electronic Records and E-Mail 10-16.26
§ 10.03 Internet and Wireless Commerce 10-17
[1] Electronic and Digital Signatures 10-17
[a] Enforceability Prior to Federal and State Legislation. 10-18
[b] UETA and Other State Electronic Signatures Legislation 10-20
[c] Electronic Signatures in Global and National Commerce Act (E-Sign). . . 10-22
[i] Purpose and Scope 10-22
[ii] Requirement of Consumer Notice and Consent 10-23
[iii] Reasonably Demonstrating the Consumer's Ability to Access 10-25
[iv] Effect of E-Sign's UETA Preemption Provisions on Consent 10-26
[v] Withdrawal of Consent. 10-27
[vi] Electronic Agents 10-28.2
[vii] Exemptions from E-Sign 10-28.2
[d] ABA Digital Signature Guidelines . . . 10-28.3
[e] International Recognition of Electronic Signatures. 10-28.3
[f] Security Issues 10-28.3
[2] Export Restrictions on Encryption. 10-28.5
§ 10.04 Wrongful Conduct on the Internet 10-29
[1] Identity Theft 10-29
[2] Disclosure of Embarrassing or Private Information 10-32
[3] Click Fraud 10-36
[4] Catfishing 10-39
[5] Cyberstalking 10-41
[6] Deepfakes 10-44
§ 10.05 Internet Jurisdiction. 10-46
[1] Online Contract Formation 10-46.4
[2] Websites and Jurisdiction: Is a Website Enough? 10-46.9
[3] Conduct Directed Toward the Jurisdiction 10-46.16
[4] Jurisdiction Across National Boundaries. . . 10-46.20

§ 10.06 *Form:* Corporate Internet Use Policy..... 10-46.26
§ 10.07 *Form:* Web Linking Referral Fee Agreement... 10-49
§ 10.08 *Form:* Retail Internet Site Agreement..... 10-58
§ 10.09 *Form:* Web Hosting Agreement..... 10-63
§ 10.10 *Form:* Search Engine Services Agreement 10-77
§ 10.11 *Form:* Withdrawal of Consent to Electronic Notices and Records..... 10-88
§ 10.12 *Form:* Wireless Services Enterprise Agreement..... 10-91
§ 10.13 *Form:* Employee Internet Use Policy Statement.... 10-123

CHAPTER 11

Joint Ventures in Emerging Technologies

§ 11.01 Introduction..... 11-3
§ 11.02 Form of Joint Venture 11-4
[1] Introduction..... 11-4
[2] Corporation..... 11-4
[a] Introduction 11-4
[b] Regulatory and Reporting Requirements..... 11-5
[c] Governing Documents..... 11-5
[d] Creation 11-5
[e] Taxation 11-5
[f] Management..... 11-5
[3] Partnership 11-6
[a] Introduction 11-6
[b] Taxation 11-6
[c] Management..... 11-6
[d] Liability 11-6
[e] Partnership Agreement 11-7
[f] Reporting Obligations 11-7
[g] Formation Costs..... 11-7
[h] Term of Existence 11-7
[4] Limited Liability Company 11-7
[a] Introduction 11-7
[b] Management..... 11-8
[c] Operating Agreement..... 11-8
[d] Formation..... 11-8
[e] Liability 11-8
[f] Fiduciary Duty..... 11-8
[g] Advantages Over Other Forms 11-8
§ 11.03 Contributions..... 11-10
[1] Introduction..... 11-10

[2] Form of Contributions 11-10
[3] Intellectual Property 11-10
[4] Contractual Relationships. 11-11
[5] Other Assets 11-11
§ 11.04 Intellectual Property Licensing. 11-12
[1] Introduction. 11-12
[2] Technology License 11-12
[a] Definition of Licensed Technology. . . . 11-12
[b] Term of Licensed Technology 11-12
[c] Scope of License 11-12
[d] Source Code. 11-13
[e] Title to Technology 11-13
[f] Warranties 11-13
[g] Indemnity and Limits on Liability . . . 11-14
[h] Delivery Schedule 11-14
[i] Maintenance. 11-14
[3] Content Licensing. 11-14
[a] Identification of Licensed Properties 11-15
[b] Grant of Rights 11-15
[c] Reservation of Rights and Exclusivity 11-15
[d] Approvals 11-15
[e] Representations and Warranties 11-16
[f] Disclaimer of Warranties. 11-16
[g] Indemnification/Defense Against Third Party Claims 11-16
[h] Limitation of Liability. 11-17
§ 11.05 Confidentiality. 11-18
§ 11.06 Management and Employees 11-19
[1] Personnel. 11-19
[2] Non-Solicitation of Employees 11-19
[3] Equity Options for Management and Employees 11-20
§ 11.07 Financial Provisions 11-21
§ 11.08 Services Agreements. 11-22
§ 11.09 Non-Compete and Exclusivity Issues. 11-23
[1] Non-Competition Agreements 11-23
[2] Exclusivity Agreements 11-23
§ 11.10 Transfers of Interest 11-24
[1] Introduction. 11-24
[2] Restrictions 11-24
[a] Right of First Offer 11-24
[b] Right of First Refusal 11-24
[c] Buy/Sell 11-25

§ 11.11 Promotion 11-26
§ 11.12 Antitrust Issues 11-27
§ 11.13 Termination 11-28
§ 11.14 *Form:* Emerging Technology Joint Venture Checklist 11-29
§ 11.15 *Form:* Memorandum of Understanding for Emerging Technology Joint Venture ABC, INC. 11-31
§ 11.16 *Form:* Non-Exclusive Online Affiliate Form . . . 11-58

CHAPTER 12

Regulation of Emerging Technology

§ 12.01 Introduction 12-2
§ 12.02 Federal Trade Commission 12-3
[1] Introduction 12-3
[2] Antitrust 12-3
[a] Antitrust Laws 12-4
[b] Antitrust Limits on the Licensing of Intellectual Property 12-5
[i] Duty to License to Third Parties 12-6
[ii] Price Restrictions in Licensing Agreements 12-7
[iii] Exclusive Licensing and Exclusive Dealing 12-8
[iv] Cross-Licensing and Pooling Arrangements 12-8.1
[v] Grantbacks 12-10
[vi] Tying 12-11
[vii] Enforcement of Invalid Intellectual Property Rights . . . 12-11
[c] Antitrust Concerns Arising from E-Commerce Collaborations 12-13
[i] Antitrust Issues in Collaborations 12-14
[ii] Collaboration Guidelines 12-16.2
[d] Standard Setting 12-16.3
[3] Protection of Consumers 12-17
§ 12.03 International Trade Commission 12-21
[1] Introduction 12-21
[2] Proceedings Under Section 337 12-22
§ 12.04 Department of Commerce 12-24
§ 12.05 Federal Communications Commission 12-25

[1] Introduction 12-25
[2] Bureaus and Offices 12-26
[a] Bureaus 12-27
[i] Media 12-27
[ii] Wireless Telecommunications . . . 12-27
[iii] Wireline Competition 12-27
[iv] Enforcement 12-27
[b] Offices 12-28
[i] Engineering and Technology . . . 12-28
[ii] General Counsel 12-28
[iii] Administrative Law Judges 12-28
[iv] Managing Director 12-28
[v] Legislative Affairs 12-29
[3] Regulation of Specific Emerging Technologies 12-29
[a] Television 12-29
[i] Digital Television (DTV) 12-29
[ii] V-Chip 12-30
[b] Voice-Over-Internet Protocol (VoIP) 12-31
[c] E911 12-34
[d] Spectrum Allocation 12-35
[i] Leasing 12-37
[ii] Cognitive Radio 12-37
[e] Broadband 12-38
[i] BPL 12-38
[ii] Net Neutrality 12-40

Appendices

APPENDIX A: Copyright Materials A-1
APPENDIX B: Trademark Materials B-1
APPENDIX C: Patent Materials C-1
APPENDIX D: Privacy and Publicity Statutes D-1
APPENDIX E: Glossary of Terminology for Emerging Technologies E-1

INDEX I-1