

TABLE OF CONTENTS

PART I RECOVERY OF MONEY DAMAGES

CHAPTER 1

Introduction to Monetary Damages

§ 1.01	Introduction	1-1
§ 1.02	Historical Background to Monetary Damages	1-4
§ 1.03	General Principles of Monetary Damages	1-7
	[1] Determining Whether Injuries May Be Compensated by Damages	1-7
	[a] Proximate Cause	1-7
	[b] Joint and Several Liability	1-10
	[c] The Standard of Certainty	1-10
	[2] Calculating the Damages Award	1-12
	[a] Compensatory Damages	1-13
	[i] Market Value Measure	1-13
	[ii] Lost Opportunity Measure	1-14
	[iii] Disclosure of Compensatory Damages	1-14.1
	[b] Unjust Enrichment	1-14.1
	[c] Augmented Damages	1-17
	[i] Punitive Damages	1-18
	[ii] Statutory Enhanced Damages	1-19
	[d] Interest	1-21
	[e] Attorneys' Fees and Costs	1-23

CHAPTER 2

Copyright Infringement Damages

§ 2.01	Introduction	2-3
§ 2.02	Recovery of Monetary Damages	2-5
[1]	Actual Damages Attributable to the Infringement	2-5
[a]	Requirement of Causal Connection and Some Loss of Anticipated Revenue	2-6
[i]	Damages Too Speculative in Nature	2-7
[b]	Joint and Several Liability	2-8
[c]	Measures of Actual Damages	2-9
[i]	Lost Sales (a.k.a. Lost Profits)	2-9
[ii]	Reasonable Royalty	2-15
[iii]	Market Value Test	2-18.1
[d]	Other Compensable Elements of Actual Damages	2-21
[i]	Loss of the Value of Being Credited as Author of Work, and the Loss of Good Will Derived Therefrom	2-22
[ii]	Value of Sales Lost on Non-Infringed Items	2-22
[iii]	Additional Costs	2-22
[e]	Punitive Damages	2-23
[2]	The Infringer's Profits Attributable to the Infringement	2-23
[a]	Joint and Several Liability	2-25
[b]	Burden of Proof	2-26
[c]	Measure of Infringer's Profits	2-27
[i]	Profit Apportionment	2-28
[ii]	Deductible Expenses	2-31
[iii]	Indirect Profits	2-33
[d]	Right to a Jury Trial on Defendant's Profits	2-36
[3]	Statutory Damages	2-36
[a]	Registration Requirement	2-38
[b]	Recovery of Statutory Damages at Copyright Owner's Election	2-40
[c]	The 1976 Act and the Berne Implementation Act	2-41

TABLE OF CONTENTS

xv

	[d] The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999	2-42
	[e] Digital Millennium Copyright Act	2-43
	[f] Benchmarks for Setting Statutory Damages	2-45
	[g] Exceptions to the Statutory Minimum	2-49
	[i] The Teacher-Librarian-Broadcaster Exception	2-51
	[h] Exceptions to the Statutory Maximum	2-52
	[i] Failure to Obtain a License	2-55
	[i] Multiple Works and Multiple Infringements	2-56
	[i] The Infringement of Multiple Works Owned by the Plaintiff	2-57
	[ii] The Infringement of Compilations and Derivative Works	2-58
	[iii] The Infringement of a Single Copyrighted Work by More than One Infringing Act	2-62
	[iv] Multiple Infringers	2-63
	[j] Constitutional Limits on Statutory Damages	2-64
	[k] Some Statistics on Statutory Damages Awards	2-67
	[l] Right to Jury on Statutory Damages	2-68
	[m] Evidentiary Hearing on Statutory Damages	2-70
	[4] Extraterritorial Damages	2-70
	[5] Interaction of Copyright and Contract Damages	2-71
§ 2.03	The United States as Infringer	2-74
	[1] Prejudgment Interest	2-75

CHAPTER 3

Patent Infringement Damages

§ 3.01	Introduction	3-4
§ 3.02	Lost Profits	3-7
	[1] Statutory Basis for Lost Profits	
	Damage Awards	3-8
	[2] The Standard of Proof	3-9
	[3] Proving Causation	3-11
	[a] “But-For” Causation	3-11
	[i] The Panduit Test	3-11
	[ii] Market Share Approach: The Modified Panduit Test	3-12
	[iii] The Two-Supplier Market	3-13
	[iv] Identical Infringing Products	3-14
	[b] Proximate Causation	3-15
	[i] Foreseeability of Remote Losses	3-16
	[ii] When the Product at Issue Is Not the Patented Invention	3-17
	[iii] When a Patent Owner Does Not Make or Sell the Patented Device	3-17
	[iv] Balancing the Market	3-19
	[4] The <i>Panduit</i> Test and Its Progeny	3-19
	[a] Demand for the Patented Product	3-20
	[i] Demand and Customer Preference	3-21
	[ii] Demand and Marketing Capability	3-22
	[iii] Demand for the Patented Feature or Demand for the Patented Product?	3-22
	[iv] Defensive Strategies	3-23
	[b] Absence of Acceptable Non-Infringing Substitutes	3-23
	[i] In the Same Market	3-26
	[ii] Price/Characteristics Differential	3-27
	[iii] Lacking One or More Features	3-27
	[iv] On the Market or Merely Available	3-28

TABLE OF CONTENTS

xvii

	[v]	Collateral Estoppel	3-29
	[vi]	Conclusions on the Acceptable Non-Infringing Substitutes Prong	3-30
	[c]	Manufacturing and Marketing Capability to Exploit the Demand.	3-31
	[i]	Standard of Proof for Potential Capability/ Capacity	3-32
	[ii]	Capacity to Make Foreign Sales	3-33
	[d]	Proof of Amount of Lost Profits	3-33
§ 3.03		Quantifying Lost Profits	3-35
	[1]	Price Component	3-38
	[2]	Costs	3-41
	[3]	Taxes.	3-44
	[4]	Infringer's Profit Margin	3-44
	[5]	Split Awards.	3-44
	[6]	Experts	3-45
	[7]	Extraterritorial Lost Profits	3-47
§ 3.04		Profits on Non-Infringing Products	3-48
§ 3.04A		Future Lost Profits	3-50
§ 3.05		Apportionment.	3-51
	[1]	When Applicable	3-52
	[2]	When Not Applicable	3-53
	[a]	Entire Market Value Rule	3-53
	[b]	Calculating Lost Profits Based on Direct Evidence of Lost Sales	3-54.2
	[3]	Difficulties with Apportionment	3-54.2
§ 3.06		Review of Damages Awards	3-54.5
§ 3.07		Established Royalty.	3-54.7
	[1]	The Established Royalty Criteria	3-54.7
	[a]	When the Prior Transactions Were Made.	3-54.7
	[b]	Number of Past Royalties	3-55
	[c]	Uniformity	3-56
	[d]	Threat of Suit or Settlement	3-56
	[e]	Comparable Rights Licensed.	3-57
	[2]	Minimum or Maximum Recovery.	3-57
§ 3.08		Reasonable Royalty.	3-59
	[1]	The Reasonable Royalty Rate	3-60
	[a]	The Analytical Method	3-61

	[b]	The Hypothetical Negotiation	3-62
	[i]	Factors Relating to Licensing Activity	3-67
	[ii]	Factors Relating to the Value of the Patent	3-70.1
	[c]	The “25% Rule”	3-70.4
	[d]	The Nash Bargaining Solution . . .	3-70.6
	[2]	The Reasonable Royalty Base	3-70.7
	[3]	Inability to Derive a Reasonable Royalty . .	3-70.10
	[4]	Ongoing Royalties	3-70.10
	[5]	Provisional Rights	3-70.11
§ 3.09		Special Damages Cases	3-70.14
	[1]	Design Patents	3-70.14
	[2]	The United States As Infringer	3-70.16
	[a]	The Different Valuation Methods	3-70.18
	[b]	Compensation for Delay	3-71
	[3]	A State As Infringer	3-73
§ 3.10		Collateral Assessments	3-74
§ 3.11		Limitations on Award of Damages	3-75
	[1]	Time Period for Recovery of Damages	3-75
	[2]	The Six-Year “Lookback”	3-76
	[3]	Marking	3-78
	[a]	Requirements of Constructive Notice	3-80
	[i]	Duty to Mark	3-81
	[ii]	Sufficiency of Notice	3-83
	[b]	Actual Notice in Lieu of Marking	3-87
	[c]	Lack of Sufficient Notice as a Limitation on Recovery	3-89
	[i]	Burden of Proof	3-89
	[ii]	Effect of Failure to Mark or Notify	3-91
	[4]	Laches	3-92
	[a]	Early Development of Laches in Patent Cases	3-92
	[b]	Elements of Laches Under <i>Aukerman</i> and Its Progeny	3-93
	[i]	Unreasonable and Inexcusable Delay	3-95
	[ii]	Prejudice Resulting from the Delay	3-98
	[iii]	The “Bursting Bubble” Presumption and the Burden of Proof	3-100

TABLE OF CONTENTS

xix

	[iv] Relation to Equitable Estoppel	3-101
	[c] Laches After <i>SCA Hygiene Products</i>	3-102.1
	[5] Double Recovery	3-103
§ 3.12	Relief for Ongoing Infringement	3-104
§ 3.13	Subsequent Invalidity	3-105

CHAPTER 4

Trademark Infringement Damages

§ 4.01	Introduction	4-2
§ 4.02	When Monetary Damages Are Available	4-5
	[1] Historical Development of Monetary Damages for Trademark Infringement.	4-6
	[2] The Contemporary Rule on Monetary Damages for Trademark Infringement.	4-7
	[a] Actual Confusion	4-8
	[b] Willful Infringement.	4-9
§ 4.03	Recovery of Monetary Damages	4-15
	[1] Actual Damages Attributable to the Infringement	4-16
	[a] Lost Profits	4-17
	[i] Price Component	4-18
	[ii] Cost Component.	4-18
	[iii] Lost Sales	4-19
	[b] Price Erosion	4-20
	[c] Damage to the Mark	4-21
	[d] Cost of Corrective Advertising	4-23
	[2] Reasonable Royalty	4-25
	[3] The Infringer's Profits	4-27
	[a] The Infringer's Sales	4-30
	[b] Apportionment of the Infringer's Profits	4-31
	[c] The Infringer's Costs and Other Deductions/Specific Items	4-33
	[i] Overhead and General Administrative Costs	4-35
	[ii] Cost of Goods or Raw Materials	4-36
	[iii] Labor Costs and Management Salaries	4-36
	[iv] Taxes.	4-37

INTELLECTUAL PROPERTY DAMAGES

	[v]	Advertising Costs	4-38
	[vi]	Start-Up Costs	4-38
	[vii]	Depreciation	4-38
	[viii]	Transportation and Storage Costs	4-39
	[ix]	Discounts, Bad Debts, Returns and Unsold Inventory	4-39
	[x]	Costs of Corrective Action . . .	4-39
	[xi]	Costs of the Accounting . . .	4-39
	[xii]	Pass-Through Profits	4-40
	[d]	The Accounting Period	4-40
	[e]	Right to a Jury Trial	4-40
[4]		Preemption of State Law Remedies . . .	4-44
[5]		Statutory Damages for Counterfeiting . . .	4-45
	[a]	“As the Court Considers Just” . . .	4-48
	[b]	“Per Counterfeit Mark Per Type of Goods or Services”	4-51
[6]		Statutory Damages for Cybersquatting . . .	4-52

CHAPTER 5**Damages for the Misappropriation
of Trade Secrets**

§ 5.01	Introduction	5-1
§ 5.02	Reasonable Royalty Under Section 2 of the Uniform Trade Secrets Act	5-5
§ 5.03	Damages Under Section 3 of the Uniform Trade Secrets Act	5-7
	[1] Actual Loss	5-7
	[a] Lost Sales	5-8
	[b] Other Lost Revenue	5-10
	[c] Loss of Value of the Misappropriated Trade Secret . . .	5-11
	[2] Unjust Enrichment	5-12
	[3] Reasonable Royalty	5-20
§ 5.04	Limitations on Damage Awards	5-23
	[1] Equitable Limitations	5-23
	[2] Temporal Limitations	5-24
§ 5.05	Review of Damage Awards	5-27
§ 5.06	The Defend Trade Secrets Act of 2016	5-29
	[1] Monetary Damages	5-29
	[2] Injunctive Relief	5-29
	[3] Civil Seizures	5-30

CHAPTER 6

Remedies for Internet Infringement

§ 6.01	Introduction	6-2
	[1] The Internet and the World	
	Wide Web	6-3
	[2] Intellectual Property Infringement	
	on the Internet	6-4
	[3] Infringement and Internet Service	
	Providers	6-7
§ 6.02	Copyright Infringement on the Internet	6-9
	[1] Types of Infringement	6-9
	[a] Artificial Intelligence	
	and Copyright.	6-11
	[2] Remedies	6-12.2
	[a] Summary of Remedies for	
	Copyright Infringement	6-12.2
	[b] Remedies Against Direct	
	Infringers	6-12.3
	[i] Damages	6-12.3
	[ii] Injunctive Relief.	6-14
	[c] Remedies Against ISPs	6-16
	[i] Pre-Digital Millennium	
	Copyright Act.	6-17
	[ii] Post-Digital Millennium	
	Copyright Act.	6-18
§ 6.03	Trademark Infringement and Dilution on	
	the Internet	6-28
	[1] Types of Infringement	6-28
	[a] Generally.	6-28
	[b] Types of Internet Infringement	6-30
	[i] Domain Names and	
	Trademark Rights.	6-30
	[ii] Linking and Framing	6-36
	[iii] Search Engines, Metatags	
	and Key Words	6-37
	[iv] The Metaverse	6-40
	[2] Unique Remedies Issues	6-40.1
	[a] Summary of Remedies for	
	Trademark Infringement	6-40.1
	[b] Damages	6-41
	[c] Injunctive Relief.	6-41
	[d] Injunctive Relief Against	
	Domain Name Registrars.	6-45
	[e] Attorneys' Fees and Costs.	6-47

	[f]	Statutory Damages for Cybersquatting	6-47
§ 6.04	Trade Secret Infringement on the Internet. . . .		6-50
	[1]	Generally	6-50
	[2]	Unauthorized Disclosures of Trade Secrets on the Internet.	6-50
	[a]	Summary of Remedies for Trade Secret Infringement	6-50
	[b]	Remedies for Unauthorized Disclosure of Trade Secrets on the Internet	6-51
	[c]	Remedies under the DTSA	6-53
		[i] Monetary Damages.	6-53
		[ii] Injunctive Relief.	6-54

CHAPTER 7

Augmented Damages

§ 7.01	Introduction	7-2
§ 7.02	Augmented Damages for Copyright Infringement	7-3
	[1] Increased Damages Under the Copyright Act of 1976	7-3
	[2] State Law Claims.	7-5
§ 7.03	Augmented Damages for Patent Infringement	7-7
	[1] Increased Damages Under the Patent Act	7-7
	[2] Willful Patent Infringement.	7-11
	[3] The <i>Halo Electronics</i> Decision	7-14
	[4] Pre- <i>Seagate Technology</i> Caselaw	7-16.1
	[a] Knowledge	7-18
	[b] Affirmative Duty of Due Care.	7-20
	[i] Opinion Regarding Infringement	7-21
	[ii] Competence of Opinion.	7-23
	[iii] Good Faith Reliance on Opinion.	7-28
	[c] Good Faith Attempts to Design Around/Avoid Copying	7-29
	[d] Good Faith Challenges to Infringement.	7-30
	[e] Other Factors	7-32
	[5] Procedural Issues	7-33
	[6] Amount of Increased Damages	7-35

TABLE OF CONTENTS

xxiii

§ 7.04	Augmented Damages for Trademark Infringement	7-38
	[1] Increased Damages Under the Lanham Act	7-38
	[2] Factors	7-40
	[3] Procedural Issues	7-42.1
	[4] Amount of Increases	7-42.2
	[5] Increased Damages for Trademark Counterfeiting	7-42.3
	[6] State Law Claims	7-43
§ 7.05	Augmented Damages for Trade Secret Misappropriation	7-47
	[1] Increased Damages Under the Uniform Trade Secrets Act	7-47
	[2] State Law Claims	7-48
	[3] Increased Damages Under the Defend Trade Secrets Act	7-52
	[4] Constitutional Limits on Increased Damages for Misappropriation of Trade Secrets	7-52

CHAPTER 8

Recovery of Attorneys' Fees and Costs

§ 8.01	Introduction	8-2
§ 8.02	The "American Rule"	8-5
§ 8.03	Statutory Basis for Recovery of Attorneys' Fees' in Intellectual Property Litigation	8-8
	[1] Timing of Motion for Attorneys' Fees	8-10
	[2] Non-Statutory Recovery of Attorneys' Fees	8-11
§ 8.04	Award of Attorneys' Fees Under the Copyright Act of 1976	8-12
	[1] Registration as a Prerequisite	8-12
	[2] Prevailing Party Defined	8-13
	[a] Multiple Causes of Action	8-14
	[b] Multiple Works at Issue	8-15
	[c] Multiple Parties	8-15
	[d] Minimal or Nominal Recovery by Copyright Owner	8-16
	[3] Awards to Defendants	8-16
	[4] Awards in the Court's Discretion	8-19
	[a] Factors Favoring an Award	8-21
	[i] Willful Infringement	8-23
	[ii] Litigation Misconduct	8-25

INTELLECTUAL PROPERTY DAMAGES

	[b] Factors Disfavoring an Award . . .	8-27
	[i] Innocent Infringement	8-27
	[ii] Conduct of the Litigation . . .	8-28
	[5] Reasonable Fees	8-29
	[6] Standard of Review on Appeal	8-36
§ 8.05	Award of Attorneys' Fees Under the	
	Patent Act	8-37
	[1] Prevailing Party	8-38
	[a] Arising Under the Patent Laws . . .	8-40
	[b] Multiple Causes of Action	8-42
	[c] "Split" Verdicts	8-42
	[2] "Exceptional" Cases	8-44
	[a] Awards to Prevailing Patent	
	Owners	8-47
	[b] Awards to Prevailing	
	Defendants	8-48
	[i] Bad Faith Filing of a Patent	
	Infringement Action	8-49
	[ii] Litigation Misconduct	8-51
	[iii] Fraud or Inequitable	
	Conduct During the	
	Patent Prosecution	8-54
	[3] Discretion	8-55
	[4] Reasonable Attorneys' Fees	8-58
	[5] Standard of Review on Appeal	8-63
	[6] Award of Attorneys' Fees Outside	
	the Patent Act	8-64
	[7] Attorneys' Fees on Appeal	
	of a PTAB Decision	8-66
§ 8.06	Award of Attorneys' Fees in Trademark	
	Litigation	8-67
	[1] Prevailing Party	8-67
	[2] "Exceptional" Cases	8-68.1
	[a] Awards to Trademark Owners . . .	8-72
	[b] Awards to Alleged Infringers . . .	8-75
	[3] Discretion	8-77
	[4] Trademark Counterfeiting	8-79
	[5] Reasonable Attorneys' Fees	8-80
	[6] Attorneys' Fees on Appeal	8-82.1
	[7] Attorneys' Fees on Appeal of a	
	TTAB Decision	8-82.2
§ 8.07	Award of Attorneys' Fees in Trade Secret	
	Litigation	8-83
	[1] Prevailing Party Defined	8-84
	[2] Special Circumstances	8-85
	[3] Discretion	8-87
	[4] Reasonable Fees	8-88

TABLE OF CONTENTS

xxv

	[5] The Defend Trade Secrets Act	8-90
§ 8.08	Award of Attorneys' Fees Against the United States	8-91
§ 8.09	Costs	8-93
	[1] Electronic Discovery Costs	8-96
	[2] Expert Witness Fees	8-99
	[3] Other Expenses	8-102

CHAPTER 9

Interest on Monetary Awards

§ 9.01	Introduction	9-1
§ 9.02	Prejudgment Interest	9-4
	[1] Under the Patent Act	9-4
	[a] Historical Standard	9-4
	[b] Modern Standard	9-6
	[c] Federal Circuit Cases	9-7
	[d] Calculating the Award	9-9
	[2] Under the Copyright Act	9-14
	[a] Decisions Under the 1909 Act	9-14
	[b] Decisions Under the 1976 Act	9-14.1
	[c] Calculating the Award	9-18
	[3] Under Trademark Law	9-18.1
	[a] Ordinary Trademark Infringement	9-19
	[i] Calculating the Award	9-21
	[b] Trademark Counterfeiting	9-22
	[i] Calculating the Award	9-23
	[4] Under the Uniform Trade Secrets Act	9-24
§ 9.03	Postjudgment Interest	9-27
	[1] Federal Cases	9-27
	[2] Misappropriation of Trade Secret Cases	9-30

PART II

STOPPING FURTHER INFRINGEMENT

CHAPTER 10

Introduction to Nonmonetary Remedies

§ 10.01	Introduction	10-1
§ 10.02	Historical Background to the Development of Equity	10-3

§ 10.03	General Principles of Equity	10-7
	[1] Procedural Aspects of Equity	10-7
	[a] No Jury	10-7
	[b] Equitable Defenses	10-8
	[i] Laches	10-8
	[ii] Unclean Hands	10-9
	[2] Remedial Aspects of Equity	10-11
	[a] No Adequate Remedy at Law	10-11
	[b] The Balance of the Hardships	10-13
	[c] The Public Interest	10-13
§ 10.04	Nonjudicial Remedies	10-15
	[1] The Customs Service	10-15
	[2] The International Trade Commission	10-16

CHAPTER 11

Injunctive Relief in Intellectual Property Cases

§ 11.01	Introduction	11-3
§ 11.02	General Federal Statutes, Rules and Case Law Governing Injunctive Relief	11-5
	[1] Preliminary Injunctions	11-5
	[a] Governing Statutes and Rules	11-5
	[b] The “Four-Factor” and “Either-Or” Tests	11-7
	[c] Other General Considerations	11-10
	[2] Temporary Restraining Orders	11-11
	[a] Grounds for Issuing a TRO	11-11
	[b] Format of a TRO	11-12
	[c] <i>Ex Parte</i> TROs	11-13
	[3] Prohibitory, Mandatory and All-Relief Injunctions	11-16
	[a] Mandatory Injunctions	11-16.1
	[b] All-Relief Injunctions	11-18
	[4] Bond Requirement	11-19
	[5] Remedies for Violations or Improper Grant of Injunctions	11-20
	[6] Permanent Injunctions	11-22
	[7] Applicability to Third Parties	11-23
	[8] Appeal of Injunctive Relief	11-24
	[a] Temporary Restraining Orders	11-24.1
	[b] Preliminary Injunctions	11-24.1
	[c] Permanent Injunctions	11-24.2
	[d] Stay of Injunction Pending Appeal or Reconsideration	11-24.2

TABLE OF CONTENTS

xxvii

	[e] Right to Expedited Appeal	11-24.3
§ 11.03	Injunctive Relief Under the Copyright Act	11-24.4
	[1] The Presumption of Irreparable Harm . . .	11-24.4
	[2] Factors to Consider in Analyzing Irreparable Harm	11-27
	[a] Inadequacy of Money Damages	11-27
	[i] Infringer's Ability to Pay Damages	11-27
	[ii] Loss of Customers and Goodwill	11-27
	[b] Duration or Time-Value of Copyright	11-28
	[c] Delay	11-29
	[d] Cessation of Infringement	11-30
	[3] Preliminary Injunctions	11-31
	[a] Likelihood of Success	11-31
	[i] Validity and Right to Enforce	11-31
	[ii] Infringement	11-32
	[b] The Balance of Hardships	11-33
	[c] The Public Interest	11-34
	[4] Temporary Restraining Orders	11-35
	[5] Permanent Injunctions	11-36
§ 11.04	Injunctive Relief Under the Patent Act	11-38
	[1] Irreparable Harm	11-38
	[a] Inadequacy of Money Damages . . .	11-39
	[i] Infringer's Ability to Pay Damages	11-40
	[ii] Loss of Market Share	11-41
	[iii] Loss of Goodwill and Reputational Harm	11-42
	[b] Delay and Selective Enforcement . .	11-43
	[c] Cessation of Infringement	11-44
	[d] Length of Patent Term	11-44
	[e] Standard Essential Patents	11-44
	[2] Preliminary Injunctions	11-45
	[a] Likelihood of Success	11-46
	[i] Title	11-47
	[ii] Validity	11-47
	[iii] Infringement	11-50
	[b] The Balance of Hardships	11-51
	[c] The Public Interest	11-52
	[d] Preliminary Injunctions Against a Patent Owner Communicating its Patent Rights	11-52

	[3]	Temporary Restraining Orders	11-53
	[4]	Stay Pending Reexamination	11-54
	[5]	Permanent Injunctions	11-55
	[a]	No Double Recovery	11-56.1
	[b]	Laches	11-56.1
§ 11.05		Injunctive Relief Under the Lanham Act	11-56.3
	[1]	The Presumption of Irreparable Harm	11-56.3
	[2]	Considerations for Irreparable Harm	11-56.7
	[a]	The Trademark Owner's Considerations	11-56.7
	[i]	Loss of Customers and Goodwill	11-56.7
	[ii]	Infringer's Ability to Pay Damages	11-56.8
	[b]	The Defendant's Considerations: Rebutting the Presumption of Irreparable Harm	11-56.9
	[c]	Cessation of Infringement	11-57
	[3]	Preliminary Injunctions	11-58
	[a]	Likelihood of Success	11-58
	[i]	Validity and Right to Enforce	11-58
	[ii]	Infringement and Likelihood of Confusion	11-59
	[b]	The Balance of Hardships	11-61
	[c]	The Public Interest	11-62
	[4]	Temporary Restraining Orders	11-63
	[5]	Permanent Injunctions	11-64
§ 11.06		Injunctive Relief for Misappropriation of Trade Secrets	11-68
	[1]	The Presumption, or Lack of Presumption, of Irreparable Harm	11-70
	[2]	Factors for Analysis of Irreparable Harm	11-72.1
	[a]	Loss of Customers and Goodwill	11-72.1
	[b]	Delay	11-72.2
	[3]	Preliminary Injunctions	11-72.3
	[a]	Likelihood of Success	11-72.3
	[i]	Existence of a Trade Secret	11-73
	[ii]	Likelihood of Misappropriation and Inevitable Disclosure	11-73
	[b]	The Balance of Hardships	11-76
	[c]	The Public Interest	11-77
	[4]	Temporary Restraining Orders	11-77
	[5]	Permanent Injunctions	11-79

CHAPTER 12**Exclusion of Infringing Products from Importation and
Other International Trade Remedies**

§ 12.01	Introduction	12-3
§ 12.02	Problems in Extraterritorial Enforcement	12-6
	[1] Different Perceptions of Intellectual Property Abroad	12-6
	[2] Difficulties in Obtaining Adequate Remedies Against Intellectual Property Infringement Abroad	12-7
§ 12.03	Exclusion by Customs	12-9
	[1] Imported Products Infringing a United States Patent	12-9
	[2] Imported Products Infringing a United States Trademark	12-11
	[3] Imported Products Infringing a United States Copyright	12-14
	[4] Imported Products Infringing a Trade Name/Trade Style	12-18
	[5] Customs' Dissemination of Information to the Field	12-19
§ 12.04	Remedies Against the Importation of Gray Market Goods	12-21
	[1] Definition of Gray Market Goods	12-21
	[2] Trademarks	12-23
	[a] Primary Statutory Bases for Trademark Protection from Gray Market Goods	12-23
	[b] Common Ownership and Control Exception to Section 526 and Section 42	12-24
	[c] Denial of Entry, Detention, and Seizure of Trademarked Gray Market Goods	12-27
	[d] Exceptions to Customs Regulations	12-27
	[e] Procedural Aspects of Trademark Enforcement by Customs	12-29
	[i] Recordation with Customs	12-29
	[ii] Obtaining Lever Brothers Protection	12-30
	[3] Copyright	12-31
	[a] Primary Statutory Bases for Copyright Protection from Gray Market Goods	12-31

INTELLECTUAL PROPERTY DAMAGES

	[b] Copyright Enforcement by Customs	12-32
	[c] First Sale Doctrine	12-33
	[4] International Trade Commission Remedies	12-34
§ 12.05	Exclusion of Infringing Merchandise Under Section 337 of the Tariff Act	12-36
	[1] Introduction to Section 337 Proceedings	12-36
	[2] Exclusion Orders	12-36
	[3] Cease and Desist Orders	12-39
	[4] Modification or Revocation of Exclusion or Cease and Desist Orders	12-39
§ 12.06	Other International Trade Remedies for Intellectual Property Rights Violations	12-41
	[1] Section 301	12-41
	[2] The World Trade Organization (WTO)	12-44
	[a] Rights Protected Under the Agreement on Trade Related Aspects of Intellectual Property	12-45
	[b] Copyrights and Related Rights ...	12-46
	[c] Trademarks and Service Marks	12-46.1
	[d] Geographical Indications	12-46.2
	[e] Industrial Designs	12-47
	[f] Patents	12-47
	[g] Layout Designs (Topographies) of Integrated Circuits	12-49
	[h] Protection of Undisclosed Information	12-50
	[i] Enforcement of Intellectual Property Rights Under TRIPS	12-50
	[i] Dispute Prevention and Settlement: Departures from GATT	12-50
	[ii] Transitional Arrangements ...	12-52
	[j] Provisions of Enforcement: General Obligations of the Member Nations to Provide Adjudicatory and Enforcement Mechanisms	12-53
	[k] Civil and Administrative Procedures and Remedies	12-54

TABLE OF CONTENTS

xxxi

[l]	Provisional Measures	12-56
[m]	Special Requirements Related to Border Measures	12-57
[n]	Criminal Procedures	12-59
[o]	The Dispute Settlement Understanding: Provisions Governing Disputes Between Member Nations	12-60
[p]	The Future of Special 301 Within the WTO Framework . . .	12-63
[3]	The North American Free Trade Agreement	12-64
[a]	Areas Protected: Additions to TRIPS Protections	12-64
[b]	Enforcement Provisions: Internal Requirements	12-66
[i]	Civil and Administrative Procedures	12-67
[ii]	Criminal Procedures and Penalties	12-67
[iii]	Border Enforcement	12-67
[iv]	Dispute Settlement Provisions	12-68

CHAPTER 13

Civil Raids and Seizures

§ 13.01	Introduction	13-2
§ 13.02	Civil Seizures in Copyright Litigation	13-5
[1]	The Copyright Act of 1976	13-5
[2]	The Copyright Rules of Practice	13-7
§ 13.03	Civil Seizures in Trademark Litigation	13-10
[1]	Seizures in Ordinary Trademark Litigation	13-10
[2]	<i>Ex Parte</i> Pretrial Seizures in Trademark Counterfeiting Litigation	13-11
[a]	Procedural Requirements for Obtaining an <i>Ex Parte</i> Seizure Order	13-13
[b]	Substantive Requirements for Obtaining an <i>Ex Parte</i> Seizure Order	13-15
[c]	Conducting a Raid to Execute the Seizure Order	13-16
[d]	The Post-Seizure Hearing	13-17

	[e] Wrongful Seizures	13-18
	[f] Appellate Review	13-18.1
§ 13.04	Civil Seizures in Trade Secret Cases	13-19
	[1] The Uniform Trade Secrets Act	13-19
	[2] Other State Law Remedies	13-20
	[3] The Defend Trade Secrets Act	13-21
§ 13.05	Establishing the Required Facts to Obtain a Civil Seizure Order	13-22.2
	[1] The Infringement Has Taken a Particular, Tangible Form	13-22.2
	[2] The Infringement is Occurring Within the Jurisdiction of the Court	13-23
	[3] The Infringement Will Continue Absent a Seizure Order	13-23
	[4] The Harm to the Intellectual Property Owner Can Be Halted by a Seizure Order	13-24
§ 13.06	Constitutional Issues in Civil Raids and Seizures	13-25
	[1] Due Process Concerns	13-25
	[2] Unreasonable Search Concerns	13-26
	[a] Who May Conduct the Search and Seizure	13-27
	[b] What Premises May Be Searched	13-28
	[c] What May Be Seized	13-29
§ 13.07	Destruction and Other Disposition of Infringing Articles	13-31
INDEX		I-1