

Table of Contents

CHAPTER 1. COPYRIGHT LAW

I. INTRODUCTION

- § 1:1 Generally
- § 1:2 Overview
- § 1:3 Historical background
- § 1:4 British copyright development
- § 1:5 U.S. copyright development

II. SUBJECT MATTER OF COPYRIGHT

- § 1:6 Current statutory scope
- § 1:7 Originality
- § 1:8 Authorship
- § 1:9 Fixation
- § 1:10 Protected works
- § 1:11 —Literary works
- § 1:12 —Musical works
- § 1:13 —Sound recordings
- § 1:14 —Dramatic works
- § 1:15 —Pantomimes and choreographic works
- § 1:16 —Pictorial, graphics, and sculptural works
- § 1:17 —Motion pictures and other audiovisual works
- § 1:18 —Architectural works
- § 1:19 —Short phrases and slogans
- § 1:20 —Titles
- § 1:21 —Computer programs
- § 1:22 —Video games
- § 1:23 —Websites
- § 1:24 —Translations
- § 1:25 —Magic tricks
- § 1:26 —Tattoos

III. THE EXCLUSIVE RIGHTS

- § 1:27 Generally
- § 1:28 Reproduction
- § 1:29 Creation of derivative works
- § 1:30 Distribution

- § 1:31 Public performance
- § 1:32 Public display
- § 1:33 Author's rights re attribution and integrity
- § 1:34 Importation

IV. IDEA V. EXPRESSION

- § 1:35 Generally
- § 1:36 Access
- § 1:37 Copying
- § 1:38 Idea v. expression and substantial similarity analysis
- § 1:39 Extant analytic methodologies
- § 1:40 The “abstractions” test
- § 1:41 Analytic dissection
- § 1:42 The “total concept and feel” approach
- § 1:43 The “extrinsic/intrinsic” test
- § 1:44 Computer programs and expression analysis
- § 1:45 The “audience” and expression analysis
- § 1:46 Original combinations of unprotectable elements
- § 1:47 Limiting doctrines
- § 1:48 —The “merger” doctrine
- § 1:49 —Scenes-a-faire materials

V. FAIR USE AND PARODY

- § 1:50 Background
- § 1:51 The statutory “four factors”
- § 1:52 Transformativeness
- § 1:53 Parody
- § 1:54 Specific “fair use” statutes
- § 1:55 —Library copying
- § 1:56 —Secondary sales
- § 1:57 —Classroom performances and displays
- § 1:58 —Ephemeral copying and other limited uses
- § 1:59 —Archival copying of computer programs
- § 1:60 —Home recording of audio works
- § 1:61 —Compulsory licenses

VI. OWNERSHIP

- § 1:62 Authorship and ownership
- § 1:63 Work made for hire doctrine
- § 1:64 —1909 Act definition
- § 1:65 —1976 Act definition
- § 1:66 Assignments, licenses, and transfers

TABLE OF CONTENTS

VII. FORMALITIES

- § 1:67 Generally
- § 1:68 Notice
- § 1:69 Publication
- § 1:70 Registration

VIII. DURATION, TERMINATION, AND RENEWAL

- § 1:71 Duration—The 1909 Act
- § 1:72 —The 1976 Act
- § 1:73 — —Unpublished works
- § 1:74 — —1909 Act works
- § 1:75 — —1976 Act works
- § 1:76 — —Computing duration of copyright
- § 1:77 — — —Works published or registered before 1923
- § 1:78 — — —Works published or registered from 1923 through 1963
- § 1:79 — — —Works published or registered between 1964 and 1977
- § 1:80 — — —Unpublished works created before 1978
- § 1:81 — — —Works created from 1978 to February 28, 1989
- § 1:82 — — —Works created from March 1, 1989 to the present
- § 1:83 Restoration of lost copyright
- § 1:84 Renewal rights
- § 1:85 Statutory termination by author or heirs
- § 1:86 —Pre-1978 grants
- § 1:87 —1978 and post-1978 grants
- § 1:88 Statutory termination by authors or heirs—Pre-1978 grants of post-1978 works
- § 1:89 Statutory termination by authors or heirs—Post-1978 grants or regrants of pre-1978 works
- § 1:90 —Limitations on termination rights
- § 1:91 Termination under state law
- § 1:92 Termination or reversion under foreign law

IX. PROCEDURAL ASPECTS OF COPYRIGHT

- § 1:93 Subject matter jurisdiction
- § 1:94 Standing
- § 1:95 Preemption
- § 1:96 Direct, contributory, vicarious, and inducement liability
- § 1:97 Remedies
- § 1:98 Statute of limitations

- § 1:99 Laches
- § 1:100 Copyright misuse

X. INTERNATIONAL ASPECTS OF COPYRIGHT LAW

- § 1:101 The copyright treaty system
- § 1:102 National treatment
- § 1:103 Territorial limits of U.S. copyright law
- § 1:104 Transnational infringements

XI. COPYRIGHT AND DIGITAL TECHNOLOGY

- § 1:105 The celestial jukebox
- § 1:106 The DMCA
- § 1:107 Copy protection standards and fair use
- § 1:108 Online distribution and secondary liability
- § 1:109 Online content aggregation and fair use

CHAPTER 2. TRADEMARK LAW

I. INTRODUCTION

- § 2:1 Generally
- § 2:2 Overview
- § 2:3 Historical background
- § 2:4 British trademark development
- § 2:5 U.S. trademark development

II. TRADEMARK LAW DEFINITIONS

- § 2:6 Introduction
- § 2:7 General definitions—Trademark
- § 2:8 —Service mark
- § 2:9 —Trade names
- § 2:10 —Trade dress
- § 2:11 Purpose of marks
- § 2:12 —Origin
- § 2:13 —Quality assurance

III. TRADEMARK DISTINCTIVENESS

- § 2:14 Introduction
- § 2:15 “Fanciful” or “arbitrary” marks
- § 2:16 “Suggestive” marks
- § 2:17 Descriptive marks and secondary meaning
- § 2:18 Unprotectible generic terms

TABLE OF CONTENTS

IV. EXAMPLES OF TRADEMARKS

- § 2:19 Introduction
- § 2:20 Letters
- § 2:21 Words
- § 2:22 Numbers
- § 2:23 Slogans
- § 2:24 Symbols, designs and artistic renderings
- § 2:25 Geometric shapes
- § 2:26 Colors
- § 2:27 Musical notes and sounds
- § 2:28 Smells
- § 2:29 Clothing
- § 2:30 Product shapes
- § 2:31 Moving images
- § 2:32 Immoral or scandalous matter
- § 2:33 Statutory restrictions

V. PROTECTION AFFORDED

- § 2:34 Trademark uses
- § 2:35 Non-trademark uses—Noncompeting uses
- § 2:36 —Descriptive uses
- § 2:37 —“Fair” uses
- § 2:38 — —Traditional fair use
- § 2:39 — —Nominative fair use
- § 2:40 —Functional uses
- § 2:41 — —Utilitarian functionality
- § 2:42 — —Aesthetic functionality
- § 2:43 — —“Ornamental” uses
- § 2:44 —“Parallel meaning” uses

VI. SOURCES AND SCOPE OF TRADEMARK PROTECTION

- § 2:45 Common law basis
- § 2:46 State registration
- § 2:47 Federal registration—Requirements
- § 2:48 —Procedure
- § 2:49 —Advantages of the principal register
- § 2:50 —Advantages of the supplemental register
- § 2:51 International registration
- § 2:52 Trademark clearance

VII. TRADEMARK INFRINGEMENT

- § 2:53 Basis of liability

ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW

- § 2:54 Likelihood of confusion
- § 2:55 —Strength of the mark
- § 2:56 —Proximity
- § 2:57 —Similarity of the marks
- § 2:58 —Marketing channels
- § 2:59 —Actual confusion
- § 2:60 —Degree of consumer care
- § 2:61 —Defendant's intent
- § 2:62 —Likelihood of expansion into competing product lines
- § 2:63 Types of "confusion" relevant to trademark law
- § 2:64 —Initial interest confusion
- § 2:65 —Aftermarket or post-sale confusion
- § 2:66 —Non-purchaser confusion
- § 2:67 —Subliminal or unconscious confusion
- § 2:68 —Reverse confusion
- § 2:69 —The likelihood of confusion on the internet
- § 2:70 Counterfeiting and trademark infringement
- § 2:71 Remedies
- § 2:72 —Injunctive relief
- § 2:73 —Seizure orders
- § 2:74 —Asset freezes
- § 2:75 —Constructive trusts
- § 2:76 —Actual damages and profits
- § 2:77 —Statutory damages
- § 2:78 —Attorney's fees
- § 2:79 Secondary liability for trademark infringement
- § 2:80 Defenses
- § 2:81 —Laches
- § 2:82 —Waiver/acquiescence
- § 2:83 —Estoppel
- § 2:84 —Abandonment
- § 2:85 —First Amendment
- § 2:86 —Lack of standing

VIII. RELATED LEGAL PROTECTIONS

- § 2:87 Unfair competition
- § 2:88 —Passing off
- § 2:89 —Reverse passing off
- § 2:90 —False association or designation of origin
- § 2:91 —False advertising
- § 2:92 —False attribution
- § 2:93 Trademark dilution
- § 2:94 —State dilution law
- § 2:95 —Federal dilution law

TABLE OF CONTENTS

- § 2:96 Trade dress
- § 2:97 Copyright law

IX. DURATION AND TRANSFER

- § 2:98 Duration
- § 2:99 —Abandonment
- § 2:100 —Genericness
- § 2:101 Transfer of trademark rights
- § 2:102 —Assignment
- § 2:103 —License
- § 2:104 —Oral transfers

X. PROTECTING MARKS

- § 2:105 Generally
- § 2:106 “TM”
- § 2:107 “SM”
- § 2:108 “®”
- § 2:109 Textual use
- § 2:110 Protection programs

XI. INTERNATIONAL ASPECTS OF TRADEMARK LAW

- § 2:111 Territorial nature of trademark law
- § 2:112 Territorial priority
- § 2:113 Territorial meaning
- § 2:114 Exceptions to the territoriality doctrine
- § 2:115 The Trademark Treaty System
- § 2:116 —The Inter-American Convention
- § 2:117 —The Paris Convention
- § 2:118 —The Trademark Law Treaty
- § 2:119 —The Trademark Registration Treaty
- § 2:120 —The Madrid Protocol

XII. TRADEMARKS AND TECHNOLOGY

- § 2:121 The global shopping mall
- § 2:122 The international treaty system
- § 2:123 Cybersquatting statutes
- § 2:124 ICANN arbitration
- § 2:125 Use of marks in sponsored links and metatags
- § 2:126 OSP liability infringing material posted by users

CHAPTER 3. RIGHT OF PUBLICITY LAW

I. INTRODUCTION

- § 3:1 Generally
- § 3:2 Overview
- § 3:3 Historical background
- § 3:4 Policies underlying the right

II. STATE LAW NATURE OF THE RIGHT OF PUBLICITY

- § 3:5 Generally
- § 3:6 Alabama
- § 3:7 Alaska
- § 3:8 Arizona
- § 3:9 Arkansas
- § 3:10 California
- § 3:11 Colorado
- § 3:12 Connecticut
- § 3:13 Delaware
- § 3:14 Florida
- § 3:15 Georgia
- § 3:16 Hawaii
- § 3:17 Idaho
- § 3:18 Illinois
- § 3:19 Indiana
- § 3:20 Kansas
- § 3:21 Kentucky
- § 3:22 Louisiana
- § 3:23 Maine
- § 3:24 Maryland
- § 3:25 Massachusetts
- § 3:26 Michigan
- § 3:27 Minnesota
- § 3:28 Mississippi
- § 3:29 Missouri
- § 3:30 Montana
- § 3:31 Nebraska
- § 3:32 Nevada
- § 3:33 New Hampshire
- § 3:34 New Jersey
- § 3:35 New Mexico
- § 3:36 New York
- § 3:37 North Carolina

TABLE OF CONTENTS

§ 3:38	North Dakota
§ 3:39	Ohio
§ 3:40	Oklahoma
§ 3:41	Oregon
§ 3:42	Pennsylvania
§ 3:43	Rhode Island
§ 3:44	South Carolina
§ 3:45	South Dakota
§ 3:46	Tennessee
§ 3:47	Texas
§ 3:48	Utah
§ 3:49	Vermont
§ 3:50	Virginia
§ 3:51	Washington
§ 3:52	West Virginia
§ 3:53	Wisconsin
§ 3:54	Wyoming
§ 3:55	Puerto Rico

III. PROBLEMS ARISING FROM STATE LAW NATURE OF PUBLICITY RIGHT

§ 3:56	Generally
§ 3:57	Unpredictable protections
§ 3:58	Unpredictable scope of protection
§ 3:59	Inconsistent terms of protection
§ 3:60	Unpredictable application
§ 3:61	A federal right of publicity?

IV. SCOPE OF PROTECTION

§ 3:62	Generally
§ 3:63	Name variations
§ 3:64	Look alikes
§ 3:65	Sound alikes
§ 3:66	Pose
§ 3:67	Distinctive object
§ 3:68	Distinctive phrase
§ 3:69	Evocative setting
§ 3:70	Signature musical stylings
§ 3:71	Fictional character
§ 3:72	Performance
§ 3:73	Other indicia of identity

V. PROHIBITED USES

§ 3:74	Generally
--------	-----------

- § 3:75 Advertising uses
- § 3:76 Merchandising uses
- § 3:77 Predominantly exploitative media uses

VI. “PERSONS” PROTECTED BY THE RIGHT OF PUBLICITY

- § 3:78 Individuals
- § 3:79 Musical groups
- § 3:80 Corporations and organizations

VII. DURATION AND TRANSFER

- § 3:81 Fictional characters
- § 3:82 Duration
- § 3:83 Transfer

VIII. PROCEDURAL ISSUES

- § 3:84 Personal jurisdiction
- § 3:85 Federal question jurisdiction
- § 3:86 Choice of law issues
- § 3:87 —Restatement (Second) approach
- § 3:88 —The “governmental interest” approach
- § 3:89 —The “lex loci delicti” approach
- § 3:90 —The “domicile” approach
- § 3:91 Remedies—Injunctions
- § 3:92 —Actual damages
- § 3:93 —Punitive damages
- § 3:94 —Attorneys’ fees
- § 3:95 Defenses—“First sale” limitations
- § 3:96 —“Incidental” uses
- § 3:97 —Abandonment
- § 3:98 —Judicial estoppel
- § 3:99 —Preemption
- § 3:100 —Statutory interpretations and exemptions
- § 3:101 —Statutes of limitations
- § 3:102 —Signed release or agreement
- § 3:103 —Unconstitutionally retroactive application
- § 3:104 Defenses-Communications Decency Act (“CDA”)
- § 3:105 Defenses—First Amendment defenses
- § 3:106 — —The “merchandise vs. media” result
- § 3:107 — —The Zacchini decision
- § 3:108 — —Fair use and the “transformative” test
- § 3:109 — —Malice
- § 3:110 — —Balancing

TABLE OF CONTENTS

- § 3:111 — —The “relatedness” test
- § 3:112 — —The “predominant use” test
- § 3:113 — —Secondary liability

IX. INTERNATIONAL RIGHT OF PUBLICITY LAW

- § 3:114 Generally
- § 3:115 Argentina
- § 3:116 Australia
- § 3:117 Brazil
- § 3:118 Canada
- § 3:119 China
- § 3:120 Denmark
- § 3:121 The United Kingdom
- § 3:122 France
- § 3:123 Germany
- § 3:124 Italy
- § 3:125 Japan
- § 3:126 Spain

X. RIGHT OF PUBLICITY AND THE FUTURE

- § 3:127 The right of publicity and the global shopping mall
- § 3:128 Cybersquatting statutes
- § 3:129 —Federal anti-cybersquatting statutes
- § 3:130 —State anti-cybersquatting statutes
- § 3:131 ICANN arbitration
- § 3:132 Right of publicity/Internet case law
- § 3:133 Video games
- § 3:134 The virtual superstar

CHAPTER 4. PATENT LAW

I. INTRODUCTION

- § 4:1 Generally
- § 4:2 Overview
- § 4:3 Historical background—Ancient origins
- § 4:4 —British patent law development
- § 4:5 —U.S. patent law development

II. SUBSTANTIVE PATENT REQUIREMENTS

- § 4:6 Generally
- § 4:7 Patentable subject matter
- § 4:8 Originality and novelty

§ 4:9 Nonobviousness

§ 4:10 Utility

III. NATURE AND SCOPE OF PATENT PROTECTION

§ 4:11 Generally

§ 4:12 Duration of patent rights

§ 4:13 Territorial scope of protection

§ 4:14 Examples of patentable subject matter

§ 4:15 —Plots

§ 4:16 —Video games

§ 4:17 —Architectural designs

§ 4:18 —Business and other methods

§ 4:19 —Food products

§ 4:20 —Talking posters and digital animation

§ 4:21 —Products of nature and living organisms

IV. DESIGN PATENTS

§ 4:22 Generally

V. OWNERSHIP AND ASSIGNMENT OF PATENTS

§ 4:23 Generally

VI. PATENT INFRINGEMENT

§ 4:24 Generally

§ 4:25 Elements of patent infringement claim

§ 4:26 —Markman hearing

§ 4:27 —Literal infringement

§ 4:28 —Infringement under the “doctrine of equivalents”

§ 4:29 —Remedies

§ 4:30 —Defenses

§ 4:31 — —Venue

§ 4:32 — —Exhaustion

§ 4:33 — —Invalidity

§ 4:34 — —Patent misuse

§ 4:35 — —Fraudulent procurement

§ 4:36 — —Laches and estoppel

VII. PROCEDURAL REQUIREMENTS FOR PATENT PROTECTION

§ 4:37 Generally

§ 4:38 Overview

TABLE OF CONTENTS

§ 4:39	The patent application process
§ 4:40	—Nonprovisional patent application
§ 4:41	—Provisional patent application
§ 4:42	—Patent applicants
§ 4:43	—Foreign patent applicants
§ 4:44	—PTO examinations and proceedings
§ 4:45	— —Rejections and office action
§ 4:46	— —Applicant’s reply
§ 4:47	— —Final rejection
§ 4:48	—Appeal and litigation rights
§ 4:49	—Patent allowance and issuance allowance
§ 4:50	—Patent marking and “patent pending”
§ 4:51	Post issuance challenge—The America Invents Act (AIA)

VIII. FOREIGN PATENT RIGHTS

§ 4:52	Generally
§ 4:53	The Paris Convention
§ 4:54	The Patent Cooperation Treaty

IX. PATENTS AND THE FUTURE

§ 4:55	Generally
--------	-----------

CHAPTER 5. RELATED RIGHTS

I. MISAPPROPRIATION

§ 5:1	Generally
§ 5:2	Overview
§ 5:3	Historical background
§ 5:4	State law nature
§ 5:5	Elements of misappropriation claims
§ 5:6	Scope of protection
§ 5:7	—“Hot” news
§ 5:8	—Uncopyrighted performances
§ 5:9	—Fashion designs
§ 5:10	—Source code
§ 5:11	—Sound recordings
§ 5:12	—Another’s commercial advantage
§ 5:13	Federal preemption

II. IDEAS

§ 5:14	Overview
--------	----------

ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW

- § 5:15 Introduction to the law of ideas
- § 5:16 State law nature
- § 5:17 Theoretical bases
- § 5:18 —“Property” theory and idea requirements
- § 5:19 —“Express contract” theory
- § 5:20 —“Implied in fact” contract theory
- § 5:21 —“Implied in law” contract theory
- § 5:22 —Confidential or fiduciary relationship theory
- § 5:23 Elements of idea submission claims
- § 5:24 Types of idea submission cases
- § 5:25 —Story “pitches”
- § 5:26 —Story “treatments”
- § 5:27 —Radio formats
- § 5:28 —TV formats
- § 5:29 —Slogans
- § 5:30 —Gags
- § 5:31 Remedies
- § 5:32 Copyright preemption

III. COMMON LAW COPYRIGHT

- § 5:33 Overview
- § 5:34 Historical background
- § 5:35 Nature of common law copyright protection
- § 5:36 Copyright preemption
- § 5:37 Current common law copyrights
- § 5:38 —Pre-February 15, 1972 sound recordings?
- § 5:39 —Unfixed works of authorship
- § 5:40 —Trade values

IV. TRADE SECRETS

- § 5:41 Overview
- § 5:42 Historical background
- § 5:43 Traditional state law nature
- § 5:44 The Defend Trade Secrets Act of 2016
- § 5:45 Elements of trade secret claim—UTSA requirements
- § 5:46 —Judicial application
- § 5:47 — —Confidential relationship
- § 5:48 — —Secrecy
- § 5:49 — —Novelty
- § 5:50 — —Disclosure
- § 5:51 Remedies

CHAPTER 6. BOOKS AND PERIODICALS

I. INTRODUCTION

§ 6:1 Generally

II. BOOKS

- § 6:2 Historical background
- § 6:3 Copyright issues—Protectability
- § 6:4 — —Book titles
- § 6:5 — —Book covers
- § 6:6 — —Book text, photographs, graphics and facts
- § 6:7 — —Short phrases
- § 6:8 — —Literary elements
- § 6:9 — —Authorship
- § 6:10 — —Ownership
- § 6:11 — —The manufacturing clause
- § 6:12 — —1909 Act manufacturing clause
- § 6:13 — —1976 Act manufacturing clause
- § 6:14 — —Infringement
- § 6:15 — —Access
- § 6:16 — —Substantial similarity
- § 6:17 — —Fair use
- § 6:18 — —Quantum of copying
- § 6:19 — —Fair use of visual art
- § 6:20 — —Fair use and parody
- § 6:21 — —Fair use and derivative books
- § 6:22 — —Renewal rights
- § 6:23 — —Termination rights
- § 6:24 Trademark issues
- § 6:25 — —Titles—Book titles as trademarks
- § 6:26 — —Use of name in biography title
- § 6:27 — —Use of trademarks, celebrity name, or fictional character in other book titles
- § 6:28 — —Use of previous title in new book title
- § 6:29 — —Limitation on protection—Descriptive use
- § 6:30 — —Cover art and packaging
- § 6:31 — —Textual use
- § 6:32 Right of publicity issues
- § 6:33 — —Use of name in book title
- § 6:34 — —Use of image on book cover
- § 6:35 — —Biographies and histories
- § 6:36 — —Use of real person as “character” in book
- § 6:37 Other tort issues

- § 6:38 —Privacy
- § 6:39 —Libel
- § 6:40 —Illegal instructions
- § 6:41 Contract issues
- § 6:42 —Publisher’s duty to provide editorial assistance
- § 6:43 —Publisher’s duty to accept or reject in good faith
- § 6:44 —Publishers’ “best efforts” obligations
- § 6:45 —Publisher’s duty to accurately describe authorship and ownership
- § 6:46 —Book publishing agreements and “new uses”
- § 6:47 Books and the future

III. PERIODICALS

- § 6:48 Historical background
- § 6:49 Copyright issues—Periodicals and books
- § 6:50 —Protectability
- § 6:51 —Authorship, ownership, and copyright formalities
- § 6:52 — —Copyright notice and the doctrine of indivisibility
- § 6:53 — —Copyright registration and collective works
- § 6:54 —Collective works and “new uses”
- § 6:55 Trademark issues
- § 6:56 —Titles—Periodical titles as trademarks
- § 6:57 — —Use of third-party trademarks in magazine title
- § 6:58 — —Use of individual name in title
- § 6:59 —Cover art and packaging
- § 6:60 —Textual use
- § 6:61 Right of publicity issues
- § 6:62 —Use of name in periodical title
- § 6:63 —Use of name or likeness in periodical
- § 6:64 —Use of identity to advertise a periodical
- § 6:65 Other torts
- § 6:66 —Privacy
- § 6:67 —Libel
- § 6:68 Periodicals and the future

CHAPTER 7. MUSIC

I. HISTORICAL BACKGROUND

- § 7:1 Generally

II. COPYRIGHT ISSUES

- § 7:2 Generally
- § 7:3 Musical compositions

TABLE OF CONTENTS

§ 7:4	—Fixation
§ 7:5	—Publication
§ 7:6	—Scope of protection
§ 7:7	— —Reproduction
§ 7:8	— —Preparation of derivative works
§ 7:9	— —Distribution
§ 7:10	— —Performance
§ 7:11	— —Display
§ 7:12	Musical Compositions—Scope of Protection—Deposit copy limitations
§ 7:13	Musical compositions—Originality—Originality in music
§ 7:14	— —Originality in song lyrics
§ 7:15	— —Originality in musical arrangements
§ 7:16	—Authorship
§ 7:17	—Music composition rights and licenses
§ 7:18	— —Performance rights and compulsory mechanical licenses
§ 7:19	— —Public performance or “small” performance rights and licenses
§ 7:20	— —“Per program” licenses
§ 7:21	— —“Grand rights” licenses
§ 7:22	— —Printed music licenses
§ 7:23	— —Synchronization or “sync” licenses
§ 7:24	— —Transcription licenses
§ 7:25	—Ephemeral recordings
§ 7:26	—Infringement and substantial similarity
§ 7:27	— —“Access”
§ 7:28	— —Substantial similarity
§ 7:29	Sound recordings
§ 7:30	—Nature of protection
§ 7:31	— —Pre-February 15, 1972 sound recordings
§ 7:32	— —February 15, 1972—December 31, 1977 sound recordings
§ 7:33	— —January 1, 1978—Present sound recordings
§ 7:34	— —Duration of protection
§ 7:35	—Scope of protection
§ 7:36	— —Limitation on reproduction right
§ 7:37	— —Derivative works
§ 7:38	— —Performance rights
§ 7:39	— —Musical compositions vs. sound recordings
§ 7:40	—Originality
§ 7:41	—Authorship
§ 7:42	—Ownership
§ 7:43	—Sound recording licenses

ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW

- § 7:44 — —Compulsory digital transmission license
- § 7:45 — —Interactive subscription services
- § 7:46 — —Digital phonorecord delivery
- § 7:47 — —Digital reproduction and/or digital performance
- § 7:48 — —Synchronization or “sync” licenses
- § 7:49 —Ephemeral recording exemption
- § 7:50 —Termination rights
- § 7:51 — —Pre-February 15, 1972 sound recordings
- § 7:52 — —February 15, 1972—December 31, 1977 sound recordings
- § 7:53 — —January 1, 1978—Present sound recordings
- § 7:54 DMCA protection for pre-February 15, 1972 sound recordings
- § 7:55 Issues common to musical compositions and sound recordings
- § 7:56 —Termination under state and foreign law
- § 7:57 —Digital reproduction and distribution
- § 7:58 —Sampling and fair use
- § 7:59 —Audio Home Recording Act
- § 7:60 Live musical performances
- § 7:61 —Ownership
- § 7:62 —Liability
- § 7:63 —Defenses
- § 7:64 —Term of protection
- § 7:65 —Prospective or retroactive application
- § 7:66 —Interaction with state law

III. TRADEMARK ISSUES

- § 7:67 Generally
- § 7:68 Music as a trademark
- § 7:69 —Music generally
- § 7:70 —For itself
- § 7:71 —For the performer
- § 7:72 —For a third party
- § 7:73 Musical “styles” as trademarks
- § 7:74 Use of trademarks and celebrity names in music
- § 7:75 Song titles as trademarks
- § 7:76 Musical group names
- § 7:77 —Protectability as a trademark
- § 7:78 —Ownership
- § 7:79 — —Contractual assignment
- § 7:80 — —General trademark or partnership law
- § 7:81 — — —Band vs. manager or agent
- § 7:82 — — —Group vs. present or former members

TABLE OF CONTENTS

- § 7:83 — — — Group vs. group
- § 7:84 — — — Unauthorized use of group name on merchandise
- § 7:85 — State law protections
- § 7:86 Album packaging and cover art
- § 7:87 Imitation of musical performance

IV. RIGHT OF PUBLICITY ISSUES

- § 7:88 Generally
- § 7:89 The right of publicity and musical group names
- § 7:90 Sound-alike recordings and performances
- § 7:91 Use of actual voice in advertising and performance
- § 7:92 Distinctive musical styles

V. MUSIC AND THE FUTURE

- § 7:93 Generally

CHAPTER 8. DANCE

I. HISTORICAL BACKGROUND

- § 8:1 Generally

II. COPYRIGHT ISSUES

- § 8:2 Generally
- § 8:3 Development of copyright protection
- § 8:4 Defining “choreography”
- § 8:5 Originality in and protectability of choreography
- § 8:6 Dance authorship
- § 8:7 — Joint authorship
- § 8:8 — Work made for hire
- § 8:9 Dance ownership
- § 8:10 Fixation of dance
- § 8:11 Idea v. expression
- § 8:12 Substantial similarity
- § 8:13 Dance and derivative works
- § 8:14 Pre-1978 choreography
- § 8:15 Publication

III. TRADEMARK ISSUES

- § 8:16 Generally
- § 8:17 Name of choreographer or dance company as trademark

- § 8:18 Choreographic movement as trademark
- § 8:19 Title of choreographic work as trademark

IV. RIGHT OF PUBLICITY ISSUES

- § 8:20 Generally
- § 8:21 Name and likeness
- § 8:22 Pose
- § 8:23 Performance
- § 8:24 Signature “style”

V. DANCE AND THE FUTURE

- § 8:25 Generally

CHAPTER 9. THEATER

I. HISTORICAL BACKGROUND

- § 9:1 Generally

II. COPYRIGHT ISSUES

- § 9:2 Generally
- § 9:3 Copyright protection for “dramatic works”
- § 9:4 Scope of protection
- § 9:5 Authorship
 - § 9:6 —Derivative, collective, and joint works
 - § 9:7 —Joint authorship
 - § 9:8 — —Producers and theater owners
 - § 9:9 — —Actors
 - § 9:10 — —Dramaturgs
 - § 9:11 — —Stage directors
 - § 9:12 —Works made for hire
 - § 9:13 —Copyright infringement and defenses

III. GUILD-BASED RIGHTS

- § 9:14 Generally
- § 9:15 Dramatists Guild Approved Production Contract (APC)
- § 9:16 Society of Stage Directors and Choreographers
Collective Bargaining Agreement (SSDC CBA)
- § 9:17 Literary Managers and Dramaturgs of America

IV. TRADEMARK ISSUES

- § 9:18 Generally

TABLE OF CONTENTS

- § 9:19 Play titles
- § 9:20 Use of trademarks in theatrical productions
- § 9:21 Use of stage direction as unfair competition

V. RIGHT OF PUBLICITY ISSUES

- § 9:22 Generally
- § 9:23 Tribute shows
- § 9:24 Communication of false facts about an individual
- § 9:25 Use of name or image in advertising

VI. THEATRE AND THE FUTURE

- § 9:26 Generally

CHAPTER 10. VISUAL ART

I. HISTORICAL BACKGROUND

- § 10:1 Generally

II. COPYRIGHT ISSUES

- § 10:2 Generally
- § 10:3 Definition of “visual art”
- § 10:4 Creativity and art
- § 10:5 “Publication” of visual art
- § 10:6 Useful articles and applied art
- § 10:7 Art reproductions
- § 10:8 Moral rights and the Visual Arts Rights Act (VARA)—
Moral rights
- § 10:9 —Moral rights in the U.S
- § 10:10 —Scope and duration of VARA
- § 10:11 — —Definition of “visual arts”
- § 10:12 — —Protection afforded “visual arts” in VARA
- § 10:13 — —Limitations and exceptions in VARA
- § 10:14 — —Art affixed to buildings
- § 10:15 — —Duration of VARA protection
- § 10:16 —Procedural requirements for VARA protection
- § 10:17 Copyrightability, Authorship and AI
- § 10:18 Moral rights and the Visual Arts Rights Act (VARA)—
VARA and state law
- § 10:19 Fair use
- § 10:20 —Use of visual art in audiovisual work
- § 10:21 —Use of visual art in book or other visual art or
media

- § 10:22 —Use of visual art in website
- § 10:23 —“Fair use” and postmodern art
- § 10:24 Procedural issues—Statute of limitations

III. TRADEMARK ISSUES

- § 10:25 Artist’s names
- § 10:26 Art titles
- § 10:27 Visual art as a trademark
- § 10:28 “Artistic style” as a trademark
- § 10:29 Third party trademarks in art
- § 10:30 Use of image in art

IV. RIGHT OF PUBLICITY ISSUES

- § 10:31 Artist’s names
- § 10:32 Art as indicia of “persona”
- § 10:33 Use of image in art

V. STATE LAW PROTECTIONS

- § 10:34 Generally

VI. VISUAL ART AND THE FUTURE

- § 10:35 Generally

CHAPTER 11. SCRIPTS

I. HISTORICAL BACKGROUND

- § 11:1 Generally

II. COPYRIGHT ISSUES

- § 11:2 Generally
- § 11:3 Protectability of scripts
- § 11:4 Script & authorship
- § 11:5 —Derivative, collective, and joint works
- § 11:6 Script & ownership
- § 11:7 —“Spec” scripts and copyright assignments
- § 11:8 —Works made for hire
- § 11:9 —“Work made for hire” scripts from “spec” pitches and treatments
- § 11:10 Duration of copyright protection
- § 11:11 Scripts & publication
- § 11:12 Termination rights in scripts, pitches, and treatments

TABLE OF CONTENTS

- § 11:13 Renewal rights and the Abend decision
- § 11:14 Infringement
- § 11:15 —Access
- § 11:16 —Substantial similarity
- § 11:17 — —Plot
- § 11:18 — —Theme
- § 11:19 — —Dialogue
- § 11:20 — —Mood
- § 11:21 — —Character
- § 11:22 — —Setting
- § 11:23 — —Pace
- § 11:24 — —Sequence of events
- § 11:25 — —Combination of factors

III. TRADEMARK ISSUES

- § 11:26 Generally
- § 11:27 Script title
- § 11:28 Use of trademarks or celebrity name in script title
- § 11:29 Use of trademarks or celebrities in body of script
- § 11:30 Use of fictional characters in title and body of script

IV. RIGHT OF PUBLICITY ISSUES

- § 11:31 Generally
- § 11:32 Use of celebrity name in title of script
- § 11:33 Biopics and docudramas
- § 11:34 Use of person as character in script

V. OTHER TORTS

- § 11:35 Generally
- § 11:36 Invasion of privacy
- § 11:37 Misappropriation
- § 11:38 Libel

VI. GUILD-BASED RIGHTS

- § 11:39 Generally
- § 11:40 Credits
- § 11:41 WGA credits arbitration
- § 11:42 Separated rights
- § 11:43 —Substance of separated rights
- § 11:44 —Qualifying for separated rights

CHAPTER 12. MOTION PICTURES AND TELEVISION

I. INTRODUCTION

§ 12:1 Generally

II. MOTION PICTURES

- § 12:2 Historical background
- § 12:3 Copyright issues
- § 12:4 —Authorship
- § 12:5 — —Motion pictures and the “work made for hire” doctrine—1909 Act “work made for hire” doctrine
- § 12:6 — — —1976 Act “work made for hire” doctrine
- § 12:7 — —Motion pictures as joint works
- § 12:8 — —Motion pictures as collective works
- § 12:9 — —Motion pictures as derivative works
- § 12:10 —Motion picture “publication”
- § 12:11 — —1909 Act publication
- § 12:12 — —1976 Act publication
- § 12:13 — —Publication consequences
- § 12:14 —Termination rights and motion pictures
- § 12:15 —Renewal rights and the Abend decision
- § 12:16 —Infringement by reproduction
- § 12:17 —Consumer editing of motion pictures or television programs
- § 12:18 —Fair use and film clips
- § 12:19 Substantial similarity
- § 12:20 Trademark issues
- § 12:21 —Titles—Movie title as trademark
- § 12:22 — —Use of trademark or name in title
- § 12:23 — —Use of previous movie title in new movie title
- § 12:24 — —MPAA Title Registration Bureau
- § 12:25 —Nontitle elements and trademark law
- § 12:26 — —Film posters
- § 12:27 — —Advertising slogans
- § 12:28 — —Miscellaneous distinctive elements
- § 12:29 —Misattribution in movie credits
- § 12:30 —Attribution and altered works
- § 12:31 —Portraying person as character in motion pictures
- § 12:32 —Use of performance clips in motion pictures
- § 12:33 —Use of third party trademarks in motion picture
- § 12:34 —Modified exteriors in motion pictures
- § 12:35 Right of publicity issues

TABLE OF CONTENTS

- § 12:36 —Use of name in title
- § 12:37 —Biopics and docudrama
- § 12:38 —Portraying person as character in motion picture
- § 12:39 —Imitation of performance
- § 12:40 —Use of performance clips in motion picture
- § 12:41 Contract issues
- § 12:42 —Acquiring character rights
- § 12:43 —Contracts and “new uses”
- § 12:44 —Idea submission issues
- § 12:45 —Guild-based rights
- § 12:46 Other tort issues
- § 12:47 —Libel
- § 12:48 —Rights of privacy
- § 12:49 Content regulation—Historical background
- § 12:50 —The Hays Code
- § 12:51 —The MPAA “rating” system

III. MOVIE TRAILERS

- § 12:52 Movie trailers and the statutory formalities
- § 12:53 Fair use right to create movie trailers?

IV. TELEVISION

- § 12:54 Generally
- § 12:55 Historical background
- § 12:56 Copyright issues—Authorship
- § 12:57 —Publication
- § 12:58 — —1909 Act publication
- § 12:59 — —1976 Act publication
- § 12:60 Internet “display or performance” of television program
- § 12:61 Trademark issues—Titles
- § 12:62 —Nontitle elements and trademark law
- § 12:63 Right of publicity issues
- § 12:64 Contract issues
- § 12:65 Other tort issues
- § 12:66 Content regulation

V. MOTION PICTURES, TELEVISION, AND THE FUTURE

- § 12:67 Generally

CHAPTER 13. PEOPLE

I. INTRODUCTION

§ 13:1 Generally

II. COPYRIGHTS IN PEOPLE

§ 13:2 People as “works of authorship”

§ 13:3 Depictions of people as “works of authorship”

§ 13:4 Performances of people as “works of authorship”

III. TRADEMARKS IN PEOPLE

§ 13:5 Generally

IV. “TRADEMARKS” IN FALSE ENDORSEMENT CASES

§ 13:6 Generally

§ 13:7 “Persona as trademark” cases

§ 13:8 Restrictive “celebrity mark” cases

§ 13:9 Names as “marks”

§ 13:10 —Name as source of entertainment services

§ 13:11 —Name in advertising

§ 13:12 —Name in title of biography

§ 13:13 —Name in title of other creative works

§ 13:14 —Name in truthful attribution

§ 13:15 —Name in false attribution

§ 13:16 —Attribution and altered works

§ 13:17 Likeness or image as a “mark”

§ 13:18 Lookalikes

§ 13:19 Voice

§ 13:20 Soundalikes

§ 13:21 Distinctive performance or artistic style

§ 13:22 Distinctive musical “signatures”

V. THE RIGHT OF PUBLICITY

§ 13:23 Generally

§ 13:24 Scope of protection

§ 13:25 Duration of protection

§ 13:26 Soldiers’ rights of publicity

§ 13:27 AI “deepfake” uses

VI. GUILD-BASED RIGHTS

§ 13:28 Generally

TABLE OF CONTENTS

- § 13:29 Reuse and AI provisions of SAG agreement
- § 13:30 “Credit” provisions in WGA agreement
- § 13:31 “Credit” provisions in DGA agreement

VII. A RIGHT OF BIOGRAPHY?

- § 13:32 Generally

VIII. CONTRACT-BASED RIGHTS

- § 13:33 Generally

IX. CONFIDENTIAL INFORMATION

- § 13:34 Generally

X. REPUTATIONAL INTERESTS

- § 13:35 Generally
- § 13:36 Defamation
- § 13:37 —Libel
- § 13:38 —Slander
- § 13:39 —Defenses—Truth
- § 13:40 — —Lack of “malice”
- § 13:41 —Duration and assignability
- § 13:42 —Based on dramatic works
- § 13:43 Privacy rights
- § 13:44 —False light invasion of privacy
- § 13:45 —Public disclosure of private facts
- § 13:46 —Intrusion
- § 13:47 —Appropriation

XI. PEOPLE AND THE FUTURE

- § 13:48 Generally

CHAPTER 14. FICTIONAL CHARACTERS

I. HISTORICAL BACKGROUND

- § 14:1 Generally

II. COPYRIGHT LAW

- § 14:2 Generally
- § 14:3 Character protectability
- § 14:4 —Visually depicted characters
- § 14:5 —Literary characters

ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW

- § 14:6 Authorship and ownership
- § 14:7 “Publication” and character rights
- § 14:8 Termination rights and characters
- § 14:9 Scope of character protection
- § 14:10 —Name
- § 14:11 —Appearance
- § 14:12 —The “totality” of the character
- § 14:13 Access, similarity, and independent creation
- § 14:14 Duration of protection

III. TRADEMARK RIGHTS

- § 14:15 Generally
- § 14:16 Nature of protection
- § 14:17 Characters and secondary meaning
- § 14:18 Scope of protection
- § 14:19 —Name
- § 14:20 —Insignia
- § 14:21 —Costume
- § 14:22 —Appearance
- § 14:23 — —Specific images of a character
- § 14:24 — —General “physical appearance”
- § 14:25 — —Various artistic renderings of a character
- § 14:26 — —Recognizable variations of a character
- § 14:27 —Signature actions
- § 14:28 —Signature sounds
- § 14:29 —Signature locations
- § 14:30 —Subsidiary characters
- § 14:31 —Signature words or phrases
- § 14:32 —Other recognizable indicia of a character
- § 14:33 —Unprotectable elements
- § 14:34 —Secondary meaning in specific elements
- § 14:35 Duration of protection
- § 14:36 Characters, copyright, and trademark law
- § 14:37 —Nature of protection
- § 14:38 —Duration
- § 14:39 —Impact of multiple copyright owners on trademark protection
- § 14:40 —Impact of copyright public domain status on trademark protection

IV. PATENT RIGHTS

- § 14:41 Generally

V. CONTRACTUAL RIGHTS IN CHARACTERS

- § 14:42 Generally

TABLE OF CONTENTS

VI. CHARACTERS AND THE FUTURE

§ 14:43 Generally

CHAPTER 15. TITLES

I. HISTORICAL BACKGROUND

§ 15:1 Generally

II. COPYRIGHT PROTECTION

§ 15:2 Generally

III. TRADEMARK PROTECTION FOR TITLES

- § 15:3 Generally
- § 15:4 Titles similar to other titles
- § 15:5 Titles to single works
- § 15:6 Series titles
- § 15:7 Cross media title use
- § 15:8 Titles on commercial products
- § 15:9 Titles to works out of copyright
- § 15:10 Titles of works owned by others
- § 15:11 Limitation on protection

**IV. USE OF OTHERS' INTELLECTUAL PROPERTY
IN TITLES**

- § 15:12 Generally
- § 15:13 Use of trademark in title
- § 15:14 Use of person's name in title
- § 15:15 —Use of name in biography or biopic title
- § 15:16 —Other uses of name in title
- § 15:17 Use of fictional character's name in title

**V. RIGHT OF PUBLICITY ISSUES INVOLVING
TITLES**

§ 15:18 Generally

VI. GUILD-BASED TITLE RIGHTS

- § 15:19 Generally
- § 15:20 The MPAA Title Registration Bureau (TRB)
- § 15:21 —TRB process
- § 15:22 —Legal impact of TRB ruling

§ 15:23 WGA registration procedures

VII. TITLES AND INTERNET DOMAIN NAMES

§ 15:24 Generally

VIII. TITLES AND THE FUTURE

§ 15:25 Generally

CHAPTER 16. VIDEO GAMES

I. HISTORICAL BACKGROUND

§ 16:1 Generally

II. COPYRIGHT LAW

- § 16:2 Generally
- § 16:3 Scope of protection
- § 16:4 Authorship and ownership
- § 16:5 Notice
- § 16:6 Registration
- § 16:7 —Infringement—Acts in excess of license
- § 16:8 Exclusive rights—Generally
- § 16:9 —Reproduction
- § 16:10 —Derivative works
- § 16:11 Substantial similarity—Generally
- § 16:12 —“Unoriginal” elements
- § 16:13 —Ideas
- § 16:14 —“Functional” elements
- § 16:15 —The “Rules of a Game”
- § 16:16 —“Scènes-à-Faire” elements
- § 16:17 —Need for expert testimony
- § 16:18 Fair use—Generally
- § 16:19 —Reverse engineering
- § 16:20 —Modifying audiovisual displays
- § 16:21 —Copying of code
- § 16:22 —Tattoos
- § 16:23 —The DMCA
- § 16:24 Contributory infringement
- § 16:25 First sale doctrine

III. TRADEMARK ISSUES

§ 16:26 Video game titles as trademarks

TABLE OF CONTENTS

- § 16:27 Use of third-party mark in the title or body of video games
- § 16:28 Secondary liability
- § 16:29 Trademark dilution
- § 16:30 Trade dress and video games
- § 16:31 Product placement issues

IV. RIGHT OF PUBLICITY LAW

- § 16:32 Generally
- § 16:33 Use of names, likenesses, and other indicia of identity in video games
- § 16:34 Use of “scrambled” or altered images in video games
- § 16:35 Use of voice in video games
- § 16:36 Copyright preemption

V. PATENT LAW

- § 16:37 Patentability
- § 16:38 Means plus function and the doctrine of equivalence

VI. STATUTORY DEFENSES AND IMMUNITIES

- § 16:39 Generally
- § 16:40 The Communications Decency Act (“CDA”)
- § 16:41 Digital Millennium Copyright Act (DMCA)

VII. CONTRACT ISSUES

- § 16:42 Generally

VIII. VIDEO GAMES AND THE FUTURE

- § 16:43 Generally

CHAPTER 17. INTELLECTUAL PROPERTY AND FREE SPEECH

I. INTRODUCTION

- § 17:1 Generally

II. PROPERTY AND SPEECH

- § 17:2 Background regarding “property”
- § 17:3 Background regarding “free speech”
- § 17:4 Free speech and use of others’ property

III. INTELLECTUAL PROPERTY AND THE FIRST AMENDMENT

- § 17:5 Generally
- § 17:6 Copyright law
- § 17:7 Trademark law
- § 17:8 —The “alternative means” test
- § 17:9 —The Supreme Court’s “intermediate review” standard
- § 17:10 —*Rogers v. Grimaldi* “Balancing”
- § 17:11 —The “likelihood of confusion” standard
- § 17:12 —Constitutional “malice”
- § 17:13 Right of publicity law
- § 17:14 —The “merchandise v. media” result
- § 17:15 —The Supreme Court’s *Zacchini* decision
- § 17:16 —Fair use and the “transformativeness” test
- § 17:17 —Malice
- § 17:18 —*Rogers v. Grimaldi* “Balancing”
- § 17:19 —The “relatedness” test
- § 17:20 —The “alternative means” test
- § 17:21 —The “predominant use” test
- § 17:22 —The “Economic Value/Advertising” approach
- § 17:23 The rise of commercial speech
- § 17:24 Observations and suggestions

CHAPTER 18. INTELLECTUAL PROPERTY AND ARTIFICIAL INTELLIGENCE

I. INTRODUCTION

- § 18:1 Generally

II. HISTORICAL BACKGROUND

- § 18:2 Overview

III. COPYRIGHT LAW

- § 18:3 Generally
- § 18:4 Authorship and Artificial Intelligence
- § 18:5 Registration
- § 18:6 Protectability and Scope of Protection
- § 18:7 Infringement—Generative Copying
- § 18:8 —AI Output
- § 18:9 Fair Use-Generative Copying

IV. TRADEMARK LAW

- § 18:10 Generally

TABLE OF CONTENTS

§ 18:11 AI and Likelihood of Confusion

V. RIGHT OF PUBLICITY LAW

§ 18:12 Generally

§ 18:13 Background

§ 18:14 AI and the Right of Publicity

§ 18:15 “Deepfake” Legislation

VI. DEFAMATION LAW

§ 18:16 Generally

VII. PATENT LAW

§ 18:17 Patentability-Inventorship

VIII. CONTRACTS AND COLLECTIVE BARGAINING

§ 18:18 Talent Guild Collective Bargaining Agreements

IX. FEDERAL REGULATION

§ 18:19 FTC Regulation

X. ARTIFICIAL INTELLIGENCE AND THE FUTURE

§ 18:20 Generally

Appendix A STATE LAWS RELATING TO RIGHT OF PUBLICITY AND PRIVACY

Appendix A-1. California

Appendix A-2. Florida

Appendix A-3. Hawaii

Appendix A-4. Illinois

Appendix A-5. Indiana

Appendix A-6. Kentucky

Appendix A-7. Louisiana

Appendix A-8. Massachusetts

Appendix A-9. Nebraska

Appendix A-10. Nevada

Appendix A-11. New York

Appendix A-12. Ohio

ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW

Appendix A-13.	Oklahoma
Appendix A-14.	Pennsylvania
Appendix A-15.	Rhode Island
Appendix A-16.	Tennessee
Appendix A-17.	Texas
Appendix A-18.	Utah
Appendix A-19.	Virginia
Appendix A-20.	Washington
Appendix A-21.	Wisconsin

Table of Laws and Rules

Table of Cases

Index