

TABLE OF CONTENTS

Acknowledgements	iii
Table of Cases	xvii
Chapter 1 — What is the Internet?	1
1. Introduction	1
2. Speaking About the Internet	1
3. Functional Description of the Internet	3
4. Web 3.0	8
5. Internet Legal Issues	9
Chapter 2 — Regulation of the Internet.	13
1. Introduction	13
2. Jurisdiction Generally	14
3. Jurisdiction in the Context of Local Law Regulation	17
4. Canadian Radio-television and Telecommunications Commission . . .	18
(a) Internet-Related Conduct Pertaining to Broadcasting or Telecommunications	20
(b) Selected Key Internet Related Decisions of the CRTC	22
(i) Internet Regulation	22
(ii) New Media Exemption Order	23
(iii) ISPs as Broadcasters	24
(iv) Regulation of Redistribution of Local Signals	26
(v) User-Based Billing	27
(A) Capacity-Based Billing	29
(B) Flat Rate Billing	29
(C) Charges for the New Models	30
(D) Billing Practices for Wholesale Business High-Speed Access Services	30
5. Regulation of Unsolicited Commercial Email	32
6. ICANN	34
Chapter 3 — Free Speech Balanced Against Other Values.	37
1. Introduction	37
2. Protection of Free Speech on the Internet	37
(a) United States	38
(b) Canada	40
3. Balancing Freedom of Expression and the Media	43
4. Balancing Privacy Rights against Freedom of Expression	44

TABLE OF CONTENTS

5.	The Open Court Principle and the Protection of Privacy and Children in a Cyberbullying Context	48
6.	Freedom of Expression in the Context of Trade-mark Rights	50
7.	Freedom of Expression and the Protection of Reputation	51
	(a) Defamation.	51
	(i) Freedom of Expression	53
	(ii) The Reputation of the Individual	54
	(b) Elements of an Action in Defamation	55
	(i) Defamatory Words	55
	(ii) Reference to the Plaintiff	57
	(iii) Publication.	59
	(A) Links to Defamatory Content are not Publication by Themselves	61
	(c) Defamation in the Context of an Internet Intermediary.	62
	(d) Defenses to a Defamation Action.	72
	(i) Absolute and Qualified Privilege	73
	(ii) Fair Comment	74
	(iii) Justification/Truth	75
	(iv) Innocent Dissemination.	75
	(v) Responsible Communication on Matters of Public Interest.	76
	(A) The Seriousness of the Allegation	77
	(B) The Public Importance of the Matter	78
	(C) The Urgency of the Matter.	78
	(D) The Status and Reliability of the Source	78
	(E) Whether the Plaintiff’s Side of the Story was Sought and Accurately Reported	78
	(F) Whether Inclusion of the Defamatory Statement was Justifiable	78
	(G) Whether the Defamatory Statement’s Public Interest Lay in the Fact that it was Made Rather than its Truth (“Reportage”).	79
	(H) Other Considerations	79
8.	Jurisdiction over U.S. Websites.	80
9.	Freedom of Expression and Commercial Speech	86
	(a) Introduction	86
	(b) Legislation and Codes	87
	(c) The Competition Act	88
	(d) Codes and Standards	89
	(e) Material Misrepresentation	90
	(f) Substantiation of Allegations	92
	(g) FTC Guides on Endorsements and Testimonials	92

TABLE OF CONTENTS

Chapter 4 — Copyright Law and the Internet	95
1. Introduction	95
2. Kinds of Works Protected	100
3. Scope of Rights	102
(a) Reproduction Right	104
Browsing	107
Email	109
Downloading	109
Link	109
Frames	110
Caching	111
Hosting	112
(b) Right to Control the Making of Derivative Works	113
(c) Droit de destination	114
(d) Production Right	115
(e) Public Performance Right	116
(f) Publication Right	117
(g) Translation Right	118
(h) Adaptation Right	118
(i) Mechanical Reproduction Right	119
(j) Cinematographic Presentation Right	120
(k) Communication Right	120
Email	127
Downloading	128
Streaming	129
Link	129
Frame	129
Cache	130
(l) Exhibition Right	130
(m) Rental Rights	130
(n) Making Available Right	131
(p) Authorization	134
(q) Commercial Action / Importation	134
(r) Rights to Control Exclusive Distribution of Books	136
4. Limits on Copyright	136
5. User's Rights — Exemptions under the <i>Copyright Act</i>	137
(a) Fair Dealing Exemption	138
(i) The Purpose of the Dealing	140
(ii) The Character of the Dealing	141
(iii) The Amount of the Dealing	143
(iv) Alternatives to the Dealing	144
(v) The Nature of the Work	145
(vi) Effect of the Dealing on the Work	145

TABLE OF CONTENTS

(b)	Private Copying of Sound Recordings	146
(c)	Backup Copies	148
(d)	Format shifting	148
(e)	Personal Copying	149
(f)	Time Shifting	149
(g)	Mash Up	150
(h)	Incidental Inclusion	150
(i)	More Specific Exemptions	150
(j)	Library, Museum and Archive Exemptions	152
(k)	Caching/Temporary Copies as Part of Communication Process	153
(l)	Redistribution of Local Signals	154
(m)	Reverse Engineering	156
(n)	Public Policy	156
(o)	Other Common Exemptions	157
6.	Enforcement Action	158
(a)	Basic Principles	158
(b)	Statutory Damages	161
(c)	Other Damages	162
(d)	Intermediaries	163
7.	Types of Things Protected	174
(a)	Literary Works	174
(b)	Dramatic Works	175
(c)	Musical Works	176
(d)	Artistic Works	177
(e)	Sound Recordings/Mechanical Contrivances	178
(f)	Communications Signal	179
8.	Formal Requirements for Protection	179
(a)	Characteristics of the Author	180
(b)	Character of the Work	180
(i)	Original Work	180
(ii)	Requirement of Fixation	181
9.	Term of Protection	182
10.	Ownership of the Rights	183
11.	Special Copyright Issues	186
(a)	Technological Protection Measures	186
(b)	Registration	192
(c)	Notice	193
(d)	Overlapping Rights	194
(e)	Databases/Compilations	195
12.	Moral Rights	196
13.	Scope of Moral Rights	199
(a)	Paternity Right	200

TABLE OF CONTENTS

(b) Integrity Right	201
(c) Association Right	204
14. Enforcement of Moral Rights	204
15. Ownership of the Moral Rights	206
16. Special Moral Rights Issues “Mash Up” Right	207
17. Neighbouring Rights	210
18. Scope of Rights — Performers Rights	211
(a) Fixation Right	211
(b) Reproduction Right	213
(c) Communication Right	213
(d) Performance Right	213
(e) Rental Right	213
(f) Making Available Right	213
(g) Distribution Right	214
19. Limits on Performers’ Rights	214
20. Scope of Rights — Broadcasters’ Rights	215
(a) Fixation Right	216
(b) Reproduction Right	216
(c) Retransmission Right	216
(d) Communication Right	216
21. Limits on Broadcasters’ Rights	217
22. Scope of Rights — Makers of Sound Recordings	219
(a) Publication Right	219
(b) Compensation for a Public Performance	220
(c) Reproduction Right	220
(d) Rental Right	220
(e) Making Available Right	220
(f) Distribution Right	220
23. Limits on Rights of Makers of Sound Recordings	221
24. Formal Requirements for Protection	221
(a) Performers’ Rights	221
(b) Communications Signal	222
(c) Sound Recordings	222
25. Term of Protection	222
(a) Performers’ Rights	222
(b) Communications Signal	222
(c) Sound Recordings	223
26. Ownership of the Rights	223
(a) Performers’ Rights	223
(b) Communications Signal	223
(c) Sound Recordings	223
27. Special Rules	224

TABLE OF CONTENTS

Chapter 5 — Trade-Marks and the Internet225

1. Introduction225
2. Scope of Rights227
 - (a) Exclusive Use229
 - (b) Confusion229
 - (c) Depreciation of Goodwill231
 - (d) Right to Authorize Others234
3. Enforcement Action234
4. Limits on Trade-mark Enforcement237
5. Types of Things Protected238
6. Formal Requirements for Registration239
 - (a) Internal Review240
 - (b) External Review240
7. Term of Protection241
8. Ownership of the Rights241
 - (a) First Use241
 - (b) Making Known242
 - (c) Filing an Application242
9. Special Rules242
 - (a) “Use” of a Trade-mark on the Internet242
 - (b) Trade-marks in Blogs245
 - (c) Copyright and Trade-marks246
 - (d) Trade-mark Notices246
 - (i) Own Trade-marks247
 - (ii) Licensed Trade-marks247
 - (iii) Unlicensed Use of Other’s Trade-marks247
 - (e) Parallel Imports248
 - (f) Famous Marks248
10. Rights in Unregistered Trade-marks249
11. Scope of Rights in Unregistered Trade-marks249
 - (a) Common Law Passing-off Action250
 - (i) The Existence of Goodwill251
 - (ii) Deception of the Public Due to a Misrepresentation252
 - (iii) Actual or Potential Damage to the Plaintiff253
 - (b) The Extended Passing-Off Action253
 - (c) Statutory Action255
 - (d) Instruments of Fraud257
12. Limits on Enforcing Rights in Unregistered Trade-marks258
13. Personality Rights259
14. Scope of Personality Rights259
 - (a) The Extended Passing-off Action in the Personality Context260
 - (b) Misappropriation of Personality Action261

TABLE OF CONTENTS

(c) Trade-marks Act	262
(d) Privacy Legislation	263
15. Limits on a Misappropriation of Personality Action	265
Chapter 6 — Confidential Information and the Internet	267
1. Introduction	267
2. Scope of Rights	268
(a) Restriction on Disclosure	268
(b) Use Restriction Right	269
3. Elements of the Cause of Action	269
(a) A Relationship of Confidence	269
(b) Confidential Information	271
(c) Unauthorized Use or Disclosure to the Detriment of the Discloser	273
(d) No Lawful Excuse	275
4. Limits on the Action	275
5. Types of Things Protected	275
6. Formal Requirements for Protection	276
7. Term of Protection	276
8. Ownership of the Rights	276
9. Special Rules	277
(a) Participation in Blogs	277
(b) Use of Search Engines and Cookies	279
(c) Monitoring Employees	279
(d) Co-existence with Other Rights	281
Chapter 7 — Patents and the Internet	283
1. Introduction	283
2. Scope of Rights	285
(a) Use Right	286
(b) Right to Manufacture	287
(c) Right to Sell	288
3. Interpretation of the Claims	288
4. Infringement	289
5. Term of Protection	290
6. Limits on Patent Rights	291
7. Types of Things Protected	291
8. Formal Requirements for Protection	294
9. Ownership of the Rights	295
(a) Hired to Invent	295
(b) Fiduciaries	297
(c) Shop Right	297
(d) Contract to the Contrary	298

TABLE OF CONTENTS

10. Special Rules	298
(a) Patentability of Business Methods	298
(b) Co-existence with Other Rights	300
(c) Notice	301
Chapter 8 — Electronic Commerce	303
1. Introduction	303
2. Statutory Reform	303
(a) Electronic Commerce Legislation	303
(i) Federal – PIPEDA	304
(ii) Provincial – Electronic Commerce Legislation	305
(b) Consumer Protection Regulations and Best Practices	309
3. Internet Agreements	310
(a) Introduction	310
(b) Implied License	311
(c) Shrink-Wrap Agreements	317
(d) Click-Wrap Agreements	320
(e) Browse-Wrap Agreements	323
(f) Unusually Harsh Terms	330
(g) Website Terms Checklist	331
(h) Free and Open Source Licences	335
(i) Free Software	335
(ii) Open Source Software	337
(i) Trespass to Chattels	343
Chapter 9 — Privacy	345
1. Introduction	345
2. Scope of Rights	353
(a) Consent Right	355
(b) Access Right	359
(c) Correction Right	361
(d) Complaints	361
(e) Court Challenges	364
3. Limits on Rights in Personal Information	365
4. Key Canadian Privacy Principles	369
5. Special Rules	372
(a) Constitutional Limits to Privacy	372
(b) Cloud Computing	374
(c) Online Behavioural Advertising	380
(d) Social Media	383
(i) Social Media Advertising	384
(ii) Social Media Used for Background Checks	387

TABLE OF CONTENTS

(e) Employee Personal Information	392
(f) Business Transactions	394
(g) Civil Claims for Violation of Privacy Rights	397
(h) Employer Access to Employee Workplace Computers — Intrusion Upon Seclusion	400
(i) Discovery in Litigation	402
(j) ISP Required Disclosure of Anonymous Parties	404
(k) Reasonable Expectation of Privacy	407
(l) Privilege	419
Chapter 10 — Domain Names	423
1. Introduction	423
2. Scope of Rights	424
(a) Exclusive Use of the Domain Name	425
(b) Controlling Uses of the Domain Name	425
3. Domain Name Disputes	426
(a) Domain Name Dispute Resolution Policies	428
(i) CIRA Top-Level Domain Dispute Resolution Policy	429
(ii) Generic Top-Level Domains — Uniform Domain Name Dispute Resolution Policy (UDRP)	434
(A) Identical or Confusingly Similar Marks	435
(B) Rights and Legitimate Interest	437
(C) Bad Faith Conduct	438
(iii) Other Country Code Top-Level Domains	442
(b) Legal Remedies	442
(i) Interaction Between Domain Name Dispute Resolution Policies and Litigation	443
(ii) Trade-mark Infringement / Passing Off / Instruments of Fraud	444
(iii) The U.S. Specialized Legislation	447
(A) U.S. Dilution Law	447
(B) Anti-Cybersquatting Consumer Protection Act	449
4. Formal Requirements for Protection	453
(a) Registration on the .ca Top-Level Domain	453
(b) Registration on a Generic Top-Level Domain	455
(c) Registration on Other Country Code Top-Level Domain	456
5. Term of Protection	456
6. Ownership of the Rights	456
7. Transfer of Rights in a Domain Name	458
(a) .ca Top-Level Domain	459
(b) Generic Top-Level Domains	459
(c) Other Country Code Top-Level Domains	459

TABLE OF CONTENTS

8. Special Problems	459
(a) Use of the Trade-mark	459
(b) Free Speech	460
Chapter 11 — Anti-Spam Legislation	463
1. Introduction	463
2. The Regulatory Framework	466
3. The Prohibitions Under the Anti-Spam Act	467
(a) Prohibition on Sending of Commercial Electronic Messages.	467
(i) Identity of the Sender/Contact Information	469
(ii) Unsubscribe Mechanism	470
(iii) Exceptions	471
(iv) Implied Consent	473
(v) Express Consent	475
(b) Prohibition on Alteration of an Electronic Message’s Transmission Data	477
(c) Prohibition on Installation of Computer Programs on Other Person’s Computers and Sending of Electronic Messages from that Computer	478
(d) Prohibition on Aiding, Inducing, Procuring or Causing to be Procured Any of the Prohibited Activities	480
4. Liability for Violation of the Prohibitions.	480
(a) Penalties for Violation	480
(b) Private Right of Action.	481
(c) Other Remedies for Unsolicited Email	482
5. Compliance Activities	484
(a) Transition Period	484
(b) Compliance	485
Chapter 12 — Cloud Computing.	487
1. Introduction	487
2. What is Cloud Computing?	488
3. Types of Cloud Computing	489
(a) Infrastructure as a Service (IaaS)	489
(b) Platform as a Service (PaaS)	489
(c) Software as a Service (SaaS)	490
4. Cloud Computing Arrangements.	490
(a) Considerations when Using Cloud Computing	492
(b) Control vs. Shared Services	494
(c) Security	494
(d) Privacy	495
(e) Due Diligence.	498

TABLE OF CONTENTS

(f) Social Networking Collaboration Services	499
(g) Contract Checklist	500
Chapter 13 — Social Media	503
1. Introduction	503
(a) General Legal Issues	504
(i) Defamation	504
(ii) Copyright Law	504
(b) Other Implications of the Statements Made Using Social Media	505
(c) Protection of Children	506
(i) Children’s Online Privacy Protection Act (COPPA)	508
(ii) Children’s Internet Protection Act (CIPA)	510
(d) Privacy Issues	511
(e) Regulation of Endorsements	515
2. Social Media Policies	516
Appendix A: Electronic Privacy and Commerce Legislation	521
Appendix B: Internet Registries	541
Appendix C: Canadian Code of Practice for Consumer Protection in Electronic Commerce	557
Appendix D: Confidentiality Agreements	569
Index	577