Table of Contents

Volume 1

PART I. INTELLECTUAL PROPERTY RIGHTS

CHAPTER 1. COPYRIGHT: COMPUTER TECHNOLOGY AND THE INTERNET

I. UNITED STATES COPYRIGHT ACT

A. GENERAL CONSIDERATIONS

§ 1:1 Copyright law and computer technology
§ 1:2 Extraterritorial application of United States Copyright Act
§ 1:3 Copyright notice and registration

B. SCOPE OF COPYRIGHT PROTECTION

1. In General

§ 1:4 Derivative works
§ 1:5 Merger and "scenes a faire"
§ 1:6 Compilations and revisions
§ 1:7 Limitations on exclusive rights—Secondary transmissions of broadcast programming by cable

2. Protection of Particular Digital Works

§ 1:8 Computer programs and software—Framing the software copyright issues
§ 1:9 —Copyrightable works, generally
§ 1:10 —Program structure or sequence
§ 1:11 —Object code and subroutines
§ 1:12 —Display, output, and user interface
§ 1:13 Computer and video games
§ 1:14 Website content and design
§ 1:15 Other digital works

C. OWNERSHIP OF COPYRIGHT

§ 1:16 Generally
§ 1:17 Employee-developers
§ 1:18 Work-for-hire status
§ 1:19 Joint authorship

§ 1:20 Transfer of copyright ownership

D. INFRINGEMENT CLAIMS

1. In General

§ 1:21 Jurisdiction
§ 1:22 —Based on Internet conduct
§ 1:23 International choice of law
§ 1:24 Parties
§ 1:25 Ownership of copyright

2. Particular Conduct as Infringement

§ 1:26 Copying
§ 1:27 —Computer programs and software
§ 1:28 —Computer and video games
§ 1:29 —Loading or scanning copyrighted works onto computer
§ 1:30 Unauthorized distribution of copyrighted works
§ 1:31 Public performance or display of copyrighted works
§ 1:32 Posting or sharing copyrighted works on the Internet
§ 1:33 Interference with websites

3. Defenses

§ 1:34 Statute of limitations
§ 1:35 Adaptation or modification of owner's authorized copy
§ 1:36 Fair use
§ 1:37 —Computer programs, software, and video games
§ 1:38 —Posting and sharing copyrighted works on the Internet
§ 1:39 First sale
§ 1:40 Misuse of copyright
§ 1:41 Laches

4. Third-Party Claims

§ 1:42 Direct infringement by third parties
§ 1:43 Contributory and vicarious infringement by third parties

5. Remedies

§ 1:44 Pretrial remedies
§ 1:45 Damages
§ 1:46 Permanent injunction
§ 1:47 Attorney's fees, costs, and interest

II. DIGITAL MILLENNIUM COPYRIGHT ACT

§ 1:48 Generally
§ 1:49 Direct liability of Internet service providers for infringement
§ 1:50 False copyright management information
§ 1:51 Security measures—Circumvention
§ 1:52 —Trafficking in circumvention devices

§ 1:53 Safe harbors—Maintenance or repair
§ 1:54 —Reverse engineering
§ 1:55 —Storage at direction of user
§ 1:56 —Notice to Internet service provider of website's infringing material
§ 1:57 — —Misrepresentation of infringement
§ 1:58 Subpoena requiring disclosure of subscribers' identifying information

CHAPTER 2. PATENT LAW: SOFTWARE AND SYSTEMS PROTECTION

I. GENERALLY

§ 2:1 Patent system overview
§ 2:2 Extraterritorial application of United States Patent Act
§ 2:3 Patent applications
§ 2:4 —Best mode requirement
§ 2:5 Patentability, generally
§ 2:6 Patentability of process
§ 2:7 Patentability of mathematical algorithms
§ 2:8 —Computer programs
§ 2:9 Patent construction and scope
§ 2:10 Semiconductor Chip Protection Act

II. PATENT VALIDITY

§ 2:11 On-sale bar
§ 2:12 Anticipation by prior art
§ 2:13 Obviousness
§ 2:14 —Computer hardware
§ 2:15 —Computer programs
§ 2:16 Indefiniteness
§ 2:17 Design patents
§ 2:18 Jurisdiction
§ 2:19 Venue

III. INFRINGEMENT

§ 2:20 Internet jurisdiction
§ 2:21 Grounds
§ 2:22 —Inducing infringement
§ 2:23 —Contributory infringement
§ 2:24 —Willful infringement
§ 2:25 Defenses
§ 2:26 —Patent exhaustion
§ 2:27 Remedies

CHAPTER 3. TRADE SECRETS AND CONFIDENTIALITY

I. WHAT CONSTITUTES TRADE SECRET

A. PARTICULAR MATTERS AS TRADE SECRETS

§ 3:1 Business data
§ 3:2 —Customer lists
§ 3:3 Products

B. DISCLOSURE AND SECRECY

§ 3:4 Effect of public availability or disclosure of information
§ 3:5 Effect of public availability or disclosure—Copyright or patent application
§ 3:6 Reasonableness of internal procedures to protect trade secrets

II. CLAIMS BASED ON MISAPPROPRIATION OR DISCLOSURE OF INFORMATION

A. GENERAL CONSIDERATIONS

§ 3:7 Federal preemption
§ 3:8 Discovery
§ 3:9 Internet jurisdiction

B. MISAPPROPRIATION OF TRADE SECRETS

§ 3:10 Elements, generally
§ 3:11 Particular conduct as misappropriation
§ 3:12 Remedies—Compensatory damages
§ 3:13 —Exemplary or punitive damages
§ 3:14 —Injunctive relief
§ 3:15 —Discovery
§ 3:16 —Claims asserted in bad faith

C. CLAIMS BASED ON DISCLOSURE OF CONFIDENTIAL INFORMATION

1. Contract Claims

§ 3:17 Breach of confidentiality or nondisclosure agreement
§ 3:18 —By current or former employees
§ 3:19 —Remedies
§ 3:20 Breach of noncompetition agreement
§ 3:21 —Remedies

2. State Common–Law Claims

§ 3:22 Breach of duty to employer or usurpation of corporation opportunity

§ 3:23 Breach of confidential relationship
§ 3:24 Conversion or trespass to chattels
§ 3:25 Tortious inference with business, contract, or economic advantage

3. Statutory Claims

§ 3:26 Claims under federal law
§ 3:27 Claims under state law

CHAPTER 4. TRADEMARKS: COMPUTER TECHNOLOGY AND THE INTERNET

I. LANHAM ACT INFRINGEMENT CLAIMS

§ 4:1 Generally
§ 4:2 Internet jurisdiction
§ 4:3 Claims involving computer hardware and software
§ 4:4 Claims involving Internet use of trademarks
§ 4:5 —Domain names
§ 4:6 —Advertising
§ 4:7 —Metatags
§ 4:8 Fair use
§ 4:9 Other defenses
§ 4:10 Liability of domain-name registrars, ISPs, and other third parties
§ 4:11 Remedies

II. OTHER TRADEMARK CLAIMS

§ 4:12 Claims under federal law
§ 4:13 —Trademark Dilution Act
§ 4:14 Claims under state law

III. ANTICYBERSQUATTING CONSUMER PROTECTION ACT

§ 4:15 Generally
§ 4:16 Elements—Ownership of distinctive or famous mark
§ 4:17 —Registering, using, trafficking in identical or confusingly similar mark
§ 4:18 —Bad-faith intent to profit
§ 4:19 Reverse anticybersquatting actions
§ 4:20 In rem actions
§ 4:21 Remedies—Injunctive relief
§ 4:22 —Cancellation or transfer of domain name
§ 4:23 —Statutory damages; attorney's fees

PART II. TRANSACTIONS AND COMMERCE

CHAPTER 5. CONTRACTS FOR SALE OR LEASE OF COMPUTER TECHNOLOGY

I. CONTRACTS FOR SALE

A. GENERAL CONSIDERATIONS

§ 5:1 Oral contracts and parol evidence
§ 5:2 Execution
§ 5:3 Modification
§ 5:4 Goods or services: Applicability of Uniform Commercial Code
§ 5:5 Tax consequences

B. CONTRACTUAL PROVISIONS

§ 5:6 Dispute resolution clauses
§ 5:7 Disclaimers and limitations of warranties or remedies
§ 5:8 Express warranties
§ 5:9 Implied warranties

C. BREACH OF CONTRACT

1. Elements and Defenses

§ 5:10 Internet jurisdiction
§ 5:11 Parties and class certification
§ 5:12 Purchaser's acceptance of product
§ 5:13 Seller's breach of contractual obligations
§ 5:14 —Warranties
§ 5:15 Purchaser's compliance with contractual obligations
§ 5:16 Notice of breach
§ 5:17 Statute of limitations
§ 5:18 Impossibility of performance

2. Remedies

§ 5:19 Damages
§ 5:20 Avoidance, rescission, and revocation

D. TORT CLAIMS

§ 5:21 Negligence and professional malpractice
§ 5:22 Interference with business relationship or contract
§ 5:23 Fraud

II. LEASE AGREEMENTS

§ 5:24 Formation of agreements
§ 5:25 Agreement as lease or sale

§ 5:26 —Applicability of Uniform Commercial Code
§ 5:27 —Tax issues
§ 5:28 Ownership of enhancements of leased equipment
§ 5:29 Assignment or sublease
§ 5:30 Contractual terms—Disclaimers and limitations of warranties or remedies
§ 5:31 —Obsolescence provisions
§ 5:32 —Payment provisions
§ 5:33 —Termination provisions
§ 5:34 Breach or default
§ 5:35 —Parties
§ 5:36 —Defenses
§ 5:37 —Remedies
§ 5:38 Tort claims

CHAPTER 6. CONTRACTS FOR TECHNOLOGY AND INTERNET SERVICES

I. CONSULTING AND PROGRAMMING SERVICES

§ 6:1 Formation of contracts
§ 6:2 Ownership of copyright
§ 6:3 Goods or services: Applicability of Uniform Commercial Code
§ 6:4 Contractual terms—Choice of law and forum selection clauses
§ 6:5 —Dispute resolution clauses
§ 6:6 —Warranties
§ 6:7 —Disclaimers and limitations of warranties or remedies
§ 6:8 Federal preemption of claims
§ 6:9 Breach of contract
§ 6:10 —Defenses
§ 6:11 —Remedies
§ 6:12 Other causes of action
§ 6:13 —Negligence
§ 6:14 —Professional malpractice
§ 6:15 —Fraud
§ 6:16 —Interference with contract

II. CONTRACTS RELATING TO INTERNET USE

A. AGREEMENTS FOR INTERNET SERVICE

§ 6:17 Terms of contracts
§ 6:18 Breach of contract—By Internet service provider
§ 6:19 —By subscriber
§ 6:20 —Remedies
§ 6:21 Tort claims

B. OTHER CONTRACTS

§ 6:22 Agreements for web site design

§ 6:23 —Tort claims
§ 6:24 Agreements for use of Internet web sites or services provided over Internet
§ 6:25 Contracts for registration of domain names
§ 6:26 —Breach of contract
§ 6:27 —Causes of action other than breach of contract

III. OTHER CONTRACTS

A. DATA PROCESSING, DATA SHARING, AND OUTSOURCING CONTRACTS

§ 6:28 Contractual terms
§ 6:29 Tax consequences
§ 6:30 Breach of contract
§ 6:31 —Remedies

B. MAINTENANCE AND REPAIR CONTRACTS

§ 6:32 Formation of contract
§ 6:33 Contractual terms—Dispute resolution clauses
§ 6:34 —Disclaimers and limitations of warranties or remedies
§ 6:35 Tax consequences
§ 6:36 Breach of contract
§ 6:37 Tort claims

Volume 2

CHAPTER 7. LICENSE AND DISTRIBUTION AGREEMENTS

I. FORMATION AND TERMS OF AGREEMENT

§ 7:1 Necessity and sufficiency of writing
§ 7:2 —Implied license
§ 7:3 Acceptance of terms—Package, shrinkwrap, or clickwrap agreement
§ 7:4 Goods or services: applicability of Uniform Commercial Code
§ 7:5 Scope of license
§ 7:6 Copyright transfer
§ 7:7 Terms of agreement—Alternative dispute resolution clauses
§ 7:8 —Choice of law and forum selection clauses
§ 7:9 —Disclaimer or limitation of warranties or remedies
§ 7:10 —Noncompetition clauses
§ 7:11 —Most-favored licensee clauses
§ 7:12 —Liquidated damages clauses
§ 7:13 Distribution licenses

§ 7:13.50 Open source or public licenses
§ 7:14 Royalty issues
§ 7:15 Bankruptcy issues
§ 7:16 Termination of agreement
§ 7:16.50 Taxation

II. LICENSEE'S RIGHTS AND OBLIGATIONS

§ 7:17 Assignment of rights
§ 7:18 Copying, adapting, or modifying software
§ 7:19 Reverse engineering
§ 7:20 Resale and use of licensed technology
§ 7:20.50 Internet jurisdiction

III. CLAIMS ARISING FROM LICENSES AGREEMENT

§ 7:21 Preemption by federal copyright law
§ 7:22 Breach of contract or warranty
§ 7:23 —Remedies
§ 7:24 Common—law tort claims
§ 7:25 Common law tort claims—Damages
§ 7:26 Claims under federal or state statutes

CHAPTER 8. ELECTRONIC TRANSACTIONS

I. BANKING

§ 8:1 General considerations
§ 8:2 Electronic funds transfers

II. ELECTRONIC CONTRACTS AND DOCUMENTS

§ 8:3 Writings and records
§ 8:4 Validity of electronic contracts
§ 8:5 —Signature requirements
§ 8:6 —Acceptance by clicking
§ 8:7 —Providing hyperlink to contract provisions
§ 8:8 Breach of electronic contracts—Internet jurisdiction

CHAPTER 9. ANTITRUST AND TRADE REGULATION

I. ANTITRUST CLAIMS

A. MONOPOLIZATION

§ 9:1 Integrated systems innovation and integrated product superiority
§ 9:2 Antecedent contract, combination, or conspiracy inquiry
§ 9:3 Computer software
§ 9:4 —Refusal to enter into license agreement

§ 9:5 —Terms of copyright license
§ 9:6 —Standing of indirect purchasers under end-user license agreement—Federal antitrust laws
§ 9:7 — —State antitrust laws
§ 9:8 Computer hardware
§ 9:9 —Conspiracy
§ 9:10 —Refusal to enter into license agreement for maintenance or repair
§ 9:11 —Terms of patent license

B. OTHER ANTITRUST CLAIMS

§ 9:12 Predatory pricing
§ 9:13 Price squeezing
§ 9:14 Tying arrangements

C. ANTITRUST CLAIMS INVOLVING SPECIAL CIRCUMSTANCES

§ 9:15 Maintenance and repair services
§ 9:16 Computer information systems
§ 9:17 Internet conduct
§ 9:18 —Jurisdiction
§ 9:19 Conduct involving trade or commerce with foreign nations
§ 9:20 Reverse payment settlement agreements by patentees
§ 9:21 Statute of limitations

II. TRADE REGULATION

A. FEDERAL LAW

§ 9:22 Statutes regulating credit reporting
§ 9:23 Other statutory provisions

B. STATE LAW

§ 9:24 Internet jurisdiction
§ 9:25 Preemption by federal copyright law
§ 9:26 Consumer protection and unfair competition or trade practices acts
§ 9:27 Consumer protection and deceptive or unfair competition or trade practices acts—End-user license agreements
§ 9:28 Warranty statutes
§ 9:29 Statutes regulating recordings
§ 9:30 Other state statutes
§ 9:31 Taxation of Internet transactions
§ 9:32 Common-law unfair business practices or competition claims

CHAPTER 10. INTERNATIONAL TECHNOLOGY EXPORT AND IMPORT

I. IMPORTATION LAW

§ 10:1 General issues affecting importation law
§ 10:2 Imports and intellectual property rights
§ 10:3 —Customs Enforcement beyond Section 337

II. EXPORT REGULATION

§ 10:4 Regulatory framework: Export licensing
§ 10:5 National security interests
§ 10:6 Encryption software export

PART III. INFORMATION AGE ISSUES

CHAPTER 11. CIVIL LIABILITY: COMPUTER TECHNOLOGY AND THE INTERNET

I. SYSTEM ADEQUACY, ERROR, AND USE

§ 11:1 Tort liability based on computer system error or inadequacy
§ 11:2 —Misrepresentation of system capability
§ 11:3 Effect of data entry errors
§ 11:4 Liability for failure to adopt or use computer system
§ 11:5 Reliance on computer system
§ 11:6 —Computer-generated notices
§ 11:7 Sufficiency of computer models or systems to comply with regulatory requirements
§ 11:8 Error or inadequacy of governmental computer systems
§ 11:9 —Law enforcement systems
§ 11:10 —Court filing systems

II. PRODUCT LIABILITY AND NEGLIGENCE

§ 11:11 Computer software and video games
§ 11:12 —First Amendment issues
§ 11:13 Claims for physical injury

III. UNAUTHORIZED USE OR DESTRUCTION OF COMPUTER DATA, SOFTWARE, OR SYSTEMS

§ 11:14 Internet jurisdiction
§ 11:15 Conversion of data
§ 11:16 Conversion or misappropriation of software
§ 11:17 —Preemption by federal copyright law
§ 11:18 Unauthorized access to computer system—Violation of Computer Fraud and Abuse Act

§ 11:19 —Trespass
§ 11:20 —Violation of state computer crime law

IV. TORTIOUS INTERNET CONDUCT

§ 11:21 Internet jurisdiction
§ 11:22 Standing
§ 11:23 Pre-emption of federal law
§ 11:24 Negligence
§ 11:25 Fraud
§ 11:26 Trespass
§ 11:27 Conversion
§ 11:28 Defamation or libel
§ 11:29 Invasion of privacy
§ 11:30 Harassment or stalking
§ 11:31 Immunity of interactive computer service under Communications Decency Act
§ 11:32 —Blocking or screening offensive material

CHAPTER 12. ACCESS TO INFORMATION, DATA DISCLOSURE, AND PRIVACY

I. REGULATION OF COMMUNICATIONS, AND INTERNET SERVICE AND USE

§ 12:1 Federal statutes regulating communications or telecommunications
§ 12:2 Federal statutes regulating communication services—Civil liability for descrambling or intercepting cable and satellite transmissions
§ 12:3 Other federal statutes
§ 12:4 Federal preemption of state and local regulation
§ 12:5 State and local regulation
§ 12:6 Federal and state constitutional issues
§ 12:7 Internet jurisdiction

II. COMPUTER SYSTEMS, ELECTRONIC COMMUNICATIONS, AND PRIVACY

A. PRIVACY: COMPUTER SYSTEMS

§ 12:8 Expectation of privacy, generally
§ 12:9 Expectation of privacy—Employers' computer systems

B. PRIVACY: ELECTRONIC COMMUNICATIONS

§ 12:10 Civil discovery or subpoena for disclosure of ISP subscriber's identity
§ 12:11 Civil discovery or subpoena for disclosure of stored communications
§ 12:12 Civil discovery or subpoena for disclosure of website user's identity

§ 12:13 Liability for accessing stored communications
§ 12:14 —Divulging contents of communication
§ 12:15 Liability for intercepting electronic communications
§ 12:16 —Exception based on party's consent
§ 12:17 —Application to pirate access devices

III. DISCLOSURE OF GOVERNMENT INFORMATION AND PRIVACY

§ 12:18 Disclosure of government information—Federal Privacy and Freedom of Information Acts
§ 12:19 —Reverse Freedom of Information Act claims
§ 12:20 —Other federal statutes
§ 12:21 —State statutes
§ 12:22 —Electronic format
§ 12:23 Regulation of government record-keeping
§ 12:24 Government use of data
§ 12:25 —Data matching
§ 12:26 Publication of information concerning individuals charged with or convicted of crimes
§ 12:27 —Sex offenses
§ 12:28 Access to court documents

CHAPTER 13. COMPUTER AND INTERNET CRIME

I. SEARCH AND SEIZURE ISSUES

§ 13:1 Generally
§ 13:2 Compliance with privacy and wiretapping statutes
§ 13:3 —Subscriber information held by Internet service providers

II. PARTICULAR CRIMINAL CONDUCT

A. CRIMES INVOLVING INTELLECTUAL PROPERTY

§ 13:4 Generally
§ 13:5 Copyrighted works
§ 13:6 —Software
§ 13:7 Trade secrets

B. UNAUTHORIZED ACCESS TO COMPUTER SYSTEMS

§ 13:8 Violation of Computer Fraud and Abuse Act
§ 13:9 Electronic transfer of funds
§ 13:10 Computer trespass
§ 13:11 State computer crime law

C. THEFT OF, OR DAMAGE TO, COMPUTER SYSTEMS

§ 13:12 Generally

§ 13:13 Stored data or software
§ 13:14 Interstate transportation of stolen goods via electronic transmission

D. OBSCENITY-RELATED CONDUCT

§ 13:15 Display, possession, or transmission of obscene or pornographic material
§ 13:16 Child pornography
§ 13:17 Nonconsensual dissemination of private sexual images

E. OTHER CRIMINAL CONDUCT

§ 13:18 Computer fraud
§ 13:19 Counterfeit access devices
§ 13:20 Interception of electronic communications
§ 13:21 Electronic communication of threats
§ 13:22 Crimes against children involving use of Internet
§ 13:23 Transmission of abortion-related information
§ 13:24 Internet gambling
§ 13:25 Internet communication related to elections
§ 13:26 Harassment
§ 13:27 Internet jurisdiction
§ 13:28 Criminal discovery
§ 13:29 Evidentiary issues
§ 13:30 Use of internet by sex offenders
§ 13:31 Use of portable electronic device while driving

III. PENALTY CONSIDERATIONS

§ 13:32 Sentencing
§ 13:33 Forfeiture and restitution

Table of Cases

Index