Volume 1

PART I

SOURCES OF INTERNET LAW AND PRACTICE: A FRAMEWORK FOR DEVELOPING NEW LAW

CHAPTER 1	CONTEXT FOR DEVELOPING THE
	LAW OF THE INTERNET

1.01	Defir	ning Cyberspace	
1.02			
	Stan	dard-Setting Bodies	
1.03	Digit	al Revolution	
1.04	How	the Internet Operates: TCP/IP	
		d Wide Web, HTML and Open	
		ronments	
1.06	How	the Internet Differs from Terra Firma	
1.	06[1]	Overview	
1.	06[2]	Anonymity	
		No Economic or Social Barriers or	
		Identifying Traits	
1.	06[4]	New Modes of Interaction	
1.	06[5]	No International or Physical	
		Boundaries	
1.	06[6]	Time As a Commodity	
1.	0 6 [7]	· · · · · · · · · · · · · · · · · · ·	
	- -	Cyberspace	

1.06[8] Content Is Immortal

1.06[9] Internet Content Is Believed to Be Credible

1.06[10] Transformation As a Constant: Measuring Change in Dog Years

1.06[11] Low Barriers to Entry

1.06[12] Web 2.0 and the Culture of Blogging and Self-Publication

Pub. 1/2019 lxvii

1.07 Legal Developments Lag Far Behind Technological Advancements

CHAPTER 2 A FRAMEWORK FOR DEVELOPING NEW LAW

- 2.01 Law of Convergence: Defining the Substantive Law of the Internet
- 2.02 The Development of the Common Law of the Internet (and Why Internet-Specific Sui Generis Legal Protection Generally Is Inappropriate)
 - **2.02**[1] In General
 - 2.02[2] Sources of Internet Common Law
- 2.03 Role of Unpublished Opinions in the Development of Internet Law
 - 2.03[1] In General
 - 2.03[2] Citing Unpublished Opinions
 - 2.03[3] Other Resources
- 2.04 The Value of Agreements in a World Where the Laws May Be Unclear or Impose Inconsistent Obligations
- 2.05 Looking to Industry Standards and Best Practices in the Absence of Governing Law
- 2.06 Netiquette As a Source of Internet Law and Custom
- 2.07 Technology Trends as a Predictor of Future Legal Developments
- 2.08 Looking to Unrelated Areas of Law for Treatment of Similar Challenges Posed by Technology
- 2.09 Government Studies and Proposed Legislation as a Source of Potential Authority
- 2.10 Jurisdiction in Cyberspace
- 2.11 The Lack of Uniformity in International Legal Standards
- 2.12 Your Role in Making New Law
- 2.13 Checklist for Analyzing New Legal Issues in the Absence of Any Authority

CHAPTER 3 [RESERVED]

PART II INTELLECTUAL PROPERTY

CHAPTER 4 COPYRIGHT PROTECTION IN CYBERSPACE

- 4.01 Overview
- 4.02 Expression Protected by U.S. Copyright Law
- 4.03 When Is a Copy "Fixed" in Cyberspace?
 - **4.03[1]** Overview
 - 4.03[2] Post-MAI Case Law and Analysis
 - 4.03[3] Cartoon Network (the Cablevision Case)
- 4.04 Rights in Copyrighted Works
 - 4.04[1] Copyright Owner's Exclusive Rights: Reproduction, Distribution, Public Performance, Public Display, Digital Audio Transmission and Adaptation
 - 4.04[2] [RESERVED]
 - 4.04[3] Overlapping Protection in Cyberspace
 - 4.04[4] Moral Rights
 - 4.04[5] Archival or Back-up Copies of Software
 - 4.04[6] Motion Picture Content Made Imperceptible (The Family Movie Act)
- 4.05 Website Development: Obtaining Clearance for Multimedia Works and Other Content
 - 4.05[1] Multimedia Defined
 - 4.05[2] The Importance of Obtaining Clearance
 - 4.05[3] Derivative Works, Collective Works and Compilations
 - 4.05[4] The Complexity of Multimedia Clearance
 - 4.05[5] Information in the Public Domain
 - 4.05[5][A] In General
 - 4.05[5][B] Works Unprotectable Due to Lack of Requisite Creativity

Pub. 1/2019 lxix

- 4.05[5][C] Expired Works and the Term of a Copyright
- 4.05[5][D] Works in the Public Domain Because of the Owner's Failure to Comply with Formalities Required Prior to the Berne Convention Implementation Act of 1988
- 4.05[5][E] Works Restored Pursuant to the Berne Convention
- 4.05[6] Government Works
- 4.05[7] Exclusive, Non-Exclusive and Implied Licenses to Copyrighted Material
- 4.05[8] Protected Content Authorized By Fair Use
- 4.05[9] Limited Access Government, Religious or Educational Copying
 - 4.05[9][A] Overview
 - 4.05[9][B] Educational and Instructional Transmissions
 - 4.05[9][C] Works Used in Religious Services or a Library or Archive Copies (Including Preservation of Orphan Works)
 - 4.05[9][D] Educational, Religious and Charitable Performances
 - 4.05[9][E] Transmissions to the Deaf or Blind
- 4.06 Copyright Protection for World Wide Websites
- 4.07 Copyright Protection for Computer Code and Website and Other Software Interfaces
 - **4.07**[1] In General
 - **4.07**[2] *Lotus v. Borland*
 - 4.07[2][A] Background
 - 4.07[2][B] First Circuit's Ruling
 - 4.07[2][C] Supreme Court's Decision
 - 4.07[3] Different Approaches Among the Circuits
 - 4.07[4] Law After Lotus v. Borland

4.07[5] [Reserved] 4.07[6] Checklist of Unprotectable Software Elements 4.08 Copyright Litigation 4.08[1] Elements of A Claim and Proving Infringement—In General 4.08[2] Ownership and Registration 4.08[3] **Infringement by Piracy (Including** Literal Code Copying) Infringement by Nonliteral Copying/ 4.08[4] User Interface or "Look and Feel" Infringement 4.08[5] **Infringement Based on Exceeding the** Scope of a License—"Virtual Identicality" Required in Some **Instances** 4.08[6] Infringement On Foreign Servers. Overseas or Through Unauthorized **Exports or Imports** 4.08[7] Statute of Limitations 4.09 Liability Under the Computer Software **Rental Amendments Act** 4.10 Fair Use Defense and the Concept of Time in Cyberspace 4.10[1] The Fair Use Defense—In General 4.10[2] Case Study: Grappling with Technology American Geophysical Union v. Texaco, Inc. Internet Time As a Relevant Fair Use 4.10[3] Factor in Cyberspace Service Provider Liability and Fair 4.10[4] Use Criticism: The Church of Scientology Cases **New Technologies and Business** 4.10[5]Models (including P2P Technology, MP3.com and Napster) **4.10**[5][A] In General 4.10[5][B] UMG Recordings, Inc. v.

Pub. 1/2019 lxxi

MP3.com, Inc.
4.10[5][C] A&M Records, Inc. v. Napster,

Inc.

- 4.10[5][D] In re Aimster Copyright Litigation
- 4.10[5][E] Arista Records, Inc. v. MP3Board, Inc.
- 4.11 Third-Party Liability (Including Liability for User Generated Content)
 - 4.11[1] Third Party Liability—In General
 - 4.11[2] Direct Liability
 - 4.11[3] Contributory Infringement
 - 4.11[3][A] Contributory Infringement—In General
 - 4.11[3][B] Contributory Infringement—The Materiality Requirement
 - 4.11[3][C] Contributory Infringement— Actual and Imputed Knowledge and the Potential Applicability of the Sony Safe Harbor
 - 4.11[4] Vicarious Liability
 - 4.11[4][A] In General
 - 4.11[4][B] Direct Financial Interest
 - 4.11[4][C] Right and Ability to Control and the Potential Applicability of the Sony Safe Harbor
 - 4.11[5] Owner and Investor Liability and More Aggressive Assertions of Secondary Liability
 - **4.11[5][A]** In General
 - 4.11[5][B] Individual Liability for the Conduct of Business Entities (Including the Potential Liability of Investors, Venture Capitalists, Officers, Directors and Owners)
 - 4.11[5][C] The Perfect 10 Cases: Financial Institution, Credit Card Processor, Search Engine/Advertiser and Affiliate Marketing Liability
 - 4.11[6] Inducing Copyright Infringement 4.11[6][A] MGM Studios, Inc. v. Grokster,

	Ltd., and the Elements of a
4 44 [0][D]	Claim for Inducement
4.11[6][B]	
	and Its Inapplicability to
4 11[0][0]	Inducement Cases
4.11[6][C]	Proving Inducement in Litigation
4.11[6][D]	_
4.11[0][D]	Distributors of New
	Technologies
4.11[6][E]	
4.11[6][F]	
1.11[0][1]	Inducement
4.11[7] The	Potential Applicability of the
	and DMCA Safe Harbors in
	ndary Liability Cases
	Development of Digital Copyright
Law	
4.11[8][A]	Early Cases
	Religious Technology Center v.
	Netcom On-Line Communication
	Services, Inc.
4.11[8][C]	Actual vs. Potential Control:
	Revisiting <i>Netcom's</i> Vicarious
	Liability Analysis in the Context
	of Legitimate Service Providers
	and Those That Primarily
	Enable Piracy
4.11[8][D]	Netcom Settlement and Policy
	Statement
4.11[9] Post-	Netcom Case Law
4.11[9][A]	Overview
4.11[9][B]	The Sega Cases
4.11[9][C]	Marobie-FL, Inc. v. National
	Association of Fire Equipment
	Distributors
4. 11[9][D]	Playboy Enterprises, Inc. v. Russ
	Hardenburgh, Inc.
4.11[9][E]	Playboy Enterprises, Inc. v.
	Webbworld, Inc.

Pub. 1/2019 lxxiii

4.11[9][F] A&M Records, Inc. v. Napster, Inc. 4.11[9][F][i] Overview 4.11[9][F][ii] Contributory Infringement 4.11[9][F][iii] Vicarious Liability 4.11[9][F][iv] The District Court's **Original Injunction Order** 4.11[9][F][v] Judge Patel's Order on Remand and the Second Ninth Circuit Appeal 4.11[9][F][vi] Broader Implications 4.11[10] Case Study: Software Publishers **Association's ISP Code of Conduct** 4.11[10][A] Overview 4.11[10][B] ISP Code of Conduct 4.11[10][C] SPA Demand Letters 4.11[10][D] Related Litigation 4.12 Third-Party Liability Limitations Available to Service Providers Under the Digital Millennium Copyright Act **4.12**[1] In General 4.12[2] Definition of a Service Provider 4.12[3] Threshold Prerequisites 4.12[3][A] In General 4.12[3][B] Adoption, Reasonable Implementation and Notice of the Policy 4.12[3][B][i] Adoption, Reasonable **Implementation and Notice** of the Policy—In General 4.12[3][B][ii] Operational Considerations and the Obligation to Inform Subscribers and Account **Holders** 4.12[3][B][iii] Adopting a Policy and **Defining "Repeat** Infringer" 4.12[3][B][iv] Reasonable Implementation of A

Service's	Repeat	Infringer
Policy	_	

- 4.12[3][C] Standard Technical Measures
- 4.12[4] Transitory Digital Network Communications
- 4.12[5] System Caching
 - 4.12[5][A] System Caching—In General
 - 4.12[5][B] Transmission from a "Person Other than the Service Provider" Through the Service Provider's System or Network to A "Person Other than" that Person
 - 4.12[5][C] Intermediate and Temporary Storage
- 4.12[6] Information Residing on Systems or Networks at the Direction of Users (User Storage)
 - **4.12**[6][A] In General
 - 4.12[6][B] Designation of an Agent and the Obligation to Disable Access to or Remove Material in Response to Substantially Complying Notifications
 - 4.12[6][C] Knowledge, Awareness or Corrective Measures
 - 4.12[6][D] Direct Financial Benefit/Right and Ability to Control
- 4.12[7] Information Location Tools
- 4.12[8] Exemption from Liability to Subscribers for Removing or Disabling Access to Material Believed to be Infringing
- 4.12[9] Agent Designation, Notification, Counter Notification and Sanctions Under the System Caching, User Storage and Information Location Tools Limitations
 - 4.12[9][A] Designation of an Agent
 - 4.12[9][B] Notifications (and Service

Pub. 1/2019 lxxv

	Provider Obligations in
4.10[0][0]	Response to Notifications)
4.12[9][C]	
4.12[9][D]	v
	Misrepresentations (Pursuant to Section 512(f))
4.12[9][E]	` ' / '
4.12[0][11]	Infringers
4.12[9][F]	
	Over Notifications
4.12[9]	F][i] Suits By Users Who Are
	Accused Infringers
	F][ii] Suits by Service Providers
	bility Limitation for Nonprofit acation Institutions
4.12[11] Inju	anctive Relief
4.12[12] Ext	ra-Judicial Remedies Available to
Coj	pyright Owners
	npliance Burdens Imposed on
ISF	
	bility of NSPs and Downstream
	vice Providers Under the Digital
	lennium Copyright Act
	ecklist of Service Provider
	npliance Issues
	oyright Owners' Compliance
	ecklist
	er Generated Content Principles
	In General
] UGC Principles
4.12[18] Dis	covery Issues and Spoliation of
	dence in DMCA Litigation
	e DMCA's Applicability to State
Sta	tutory and Common Law
	pyright Claims
4.13 Equitable Litigation	Remedies and Defenses in Civil
U	
	nctive Relief and Equitable enses (including waiver, estoppel,
	es and unclean hands)
lacii	es and ancican names,

4.13[2] Seizure and Destruction
4.13[3] Security for Preliminary Equitable
Relief
4.13[4] Asset-Freeze Injunctions
4.14 Copyright Damages in Internet and
Software Infringement Litigation
4.14[1] Overview
4.14[2] Statutory Damages
4.14[2][A] In General
4.14[2][A][i] Overview
4.14[2][A][ii] Willful Infringement
4.14[2][A][iii] Innocent Infringement
4.14[2][A][iv] Fair Use, Nonprofit
Educational Institutions
and Public Broadcasting
Entities
4.14[2][A][v] Infringement That is
Neither Willful Nor
Innocent
4.14[2][A][vi] Assessing Damages
4.14[2][A][vii] Providing Materially
False Contact
Information for a
Domain Name Used in
Connection with the
Infringement
4.14[2][B] Multiple Awards and What
Constitutes a "Work" in
Software and Internet Cases
4.14[2][B][i] In General
4.14[2][B][ii] Derivative Works,
Compilations and
Different Versions of
Software Programs
4.14[2][B][iii] Multiple Infringers and
Joint and Several
Liability
4.14[2][C] Failure to Timely Register as a
Bar to Recovery
4.14[2][D] Due Process Limitations on the

Pub. 1/2019 lxxvii

	Size of a Statutory Damage
	Award and Remittitur
4 14[9] A otus	al Damages and Profits
4.14[3][A]	•
4 1 4[0][T]	Shifting Burdens of Proof
4.14[3][B]	
4 1 4[0][0]	and Infringer's Profits
4.14 [3][C]	
4 1 4[0][4	Expenses
	C][i] In General
	C][ii] Overhead Expenses
	Apportionment of Profits
4.14[3][E]	Actual Damages Based on
	Revenues or Profits From
	Outside the United States
4.14 [3][F]	Reduction of Profits for Delay in
	Bringing Suit
	native Theories of Recovery in
	met-Related Cases
4.14[4][A]	
	Lost Sales Cases
4.14[4][C]	The Value of Use Theory and
	Retroactive License Fees
4.14[4][D]	
	to Sales of Noninfringing
	Products
4.14[4][E]	Post-Infringement Damages
4.14[4][F]	Research and Development
	Costs
4.14[4][G]	Lost Attribution/Removal of
	Copyright Notice
4.14[4][H]	Emotional Injuries
4.14[5] Preju	adgment Interest
	tive Damages and Damages
	er Related Statutes
4.14[7] Remi	ittitur
	ages for Contempt
4.15 Attorneys'	_
4.15[1] In Ge	
TITOLII III OK	V-1-V-1 W-1

4.15[2	Pre-Infringement Registration Required
4.16 Cu	stoms Remedies/ Liability for Imports
	iminal Copyright Infringement
] Legal Framework
	New Opportunities for Online
	Infringement and Enforcement
4.18 Pr	eemption of Related Claims in Litigation
	d Common Law Copyrights
4.18[1] Copyright Preemption
	2] Common Law and State Statutory
	Copyrights
4.19 Co	pyright Registration Practice
] Benefits of Registration
	Registration Forms and Practice
4.19[3	B] Preregistration of Prerelease Versions
	of Works
4.20 Eu	ropean Union Law
4.21 Ad	ditional Remedies Under the Anti-
	rcumvention and Copyright Management
Inf	formation Provisions of the Digital
	llennium Copyright Act
4.21[1	
	Circumvention and Copyright
	Management Information Provisions
	of the DMCA
4.21[2	2] Circumvention of Copyright
	Protection Systems (Section 1201)
4.2	1[2][A] In General
	[2][B] Exemptions
4.21 [3	B] Removal, Alteration or Falsification of
	Copyright Management Information
	(Section 1202)
4.2 1[4] Registration not Required
4.21[5	5] Damages, Other Remedies and
	Attorneys' Fees
4.2	1[5][A] In General
4.2	1[5][B] Statutory Damages for
	Violations of Section 1201
	(Anti-Circumvention)

Pub. 1/2019 lxxix

- 4.21[5][C] Statutory Damages for Violations of Section 1202 (False Copyright Management Information)
- 4.21[6] Secondary Liability
- 4.22 Copyright Class Action Litigation
 - **4.22**[1] Overview
 - 4.22[2] Rule 23(a) Issues
 - 4.22[2][A] Numerosity
 - 4.22[2][B] Lack of Typicality
 - 4.22[2][C] Adequacy of Representation
 - 4.22[2][D] Commonality
 - 4.22[3] Rule 23(b)(1) Classes
 - 4.22[4] Rule 23(b)(2) Classes
 - 4.22[5] Rule 23(b)(3) Classes
- Appendix 1. Copyright Registration for Multimedia Works
- Appendix 2. Copyright Registration for Computer Program
- Appendix 3. Copyright Registration for Automated Databases
- Appendix 4. Sample Digital Millennium Copyright Act Notice (including Counter Notification procedures)
- Appendix 5. Email Acknowledging Receipt of Counter Notification
- Appendix 6. Email Notifying Copyright Owner of a Counter Notification
- Appendix 7. Email Notice to Users Affected By and Attaching a Takedown Notice [No Counter Notice]
- Appendix 8. Website Notice to Digital
 Millennium Copyright Act
 Complainants Documenting and
 Confirming Action

CHAPIER	SCRAPING AND THE USE OF BOTS AND ARTIFICIAL INTELLIGENCE TO GATHER CONTENT AND INFORMATION	
5.01 Data	base Law—In General	
5.02 Copy	right Protection for Databases	
5.02[1]	Scope of Protection	
5.02[2]	Enforcement of Database Copyrights	
	and the Virtual Identicality Standard	
5.03 Cont	ractual and Licensing Restrictions	
5.03 [1]	In General	
5.03[2]	Database Contract Case Law	
	The Scope of Contractual Restrictions	
5.03[4]	Forms	
5.03[5]	Interference with Contract or	
	Prospective Economic Advantage	
5.03[6]	Unjust Enrichment	
5.04 Com	mon Law Misappropriation and Unfair	
Com	petition	
5.04 [1]	Misappropriation (including the "Hot News" Doctrine)	
5.04[2]	Unfair Competition	
5.04[3]	Patent Preemption of State Law Claims	
5.05 Tres	pass and Conversion	
5.05[1]	Trespass to Chattels	
5.05[2]	Conversion	
5.06 Com	puter Fraud and Abuse Act	
5.07 DMC	A and BOTS Act Claims	
5.07[1]	DMCA Anti-Circumvention Provisions	
5.07[2]	Removing, Altering or Falsifying	
	Copyright Management Information	
5.07[3]	BOTS Act Anticircumvention	
	nam Act Remedies	
5.09 Trade Secret Protection		
5.10 EU Database Directive		
5.10[1]	Overview	
5.10[2]	Copyright Protection for Databases	

Pub. 1/2019 lxxxi

- 5.10[3] Sui Generis Protection
 - **5.10**[3][A] In General
 - 5.10[3][B] Territorial Scope of Protection
 - 5.10[3][C] Term of Protection
- 5.11 Sample Injunction Order
 - **5.11**[1] **Overview**
 - 5.11[2] FORM
- 5.12 Anti-Scraping Measures Pursuant to the Cybersecurity Information Sharing Act
- 5.13 Checklist of Potential Ways to Protect Database Content
- 5.14 Checklist for Ethical Scraping Practices
- 5.15 Managing the IP Risks of Artificial Intelligence By Contract
- CHAPTER 6 TRADEMARK, SERVICE MARK,
 TRADE NAME AND TRADE DRESS
 PROTECTION IN CYBERSPACE
- 6.01 Trademark Law in Cyberspace
- 6.02 Trademark Acquisition, Registration and Protection
 - 6.02[1] Trademark, Service Mark, Trade Name and Trade Dress Defined
 - 6.02[2] Measuring the Strength of a Proposed Mark and Evaluating its Entitlement to Protection: Inherent Distinctiveness and Secondary Meaning
 - 6.02[3] How Marks Are Created, Developed or Acquired
 - 6.02[4] Shapes, Sounds, Smells, Letters and Colors: Defining the Outer Contours of a Protectable Mark
 - 6.02[5] Items Excluded from Trademark Protection
 - **6.02**[6] **Duration**
- 6.03 Benefits of Federal Trademark Registration in Litigation and in Cyberspace
- 6.04 Benefits of State Trademark Registration in Cyberspace Disputes

- 6.05 Establishing Common Law Rights in Lieu of Registration
- **6.06 Federal Trademark Registration Practice** and Procedure
 - 6.06[1] Intent to Use vs. Actual Use Applications
 - 6.06[2] Registration on the Principal and Supplemental Registers
 - **6.06**[3] Concurrent Use Applications
 - 6.06[4] Classification System
 - **6.06**[5] Registration Process and PTO Office Actions
- 6.07 Corporate Policies to Protect and Enhance Trademarks and Prevent Marks from Becoming Generic
 - **6.07**[1] In General
 - 6.07[2] Policies and Practices to Promote Proper Use By Employees, Licensees and Third Parties
 - 6.07[3] Reconsidering the Rules to Prevent A
 Mark From Becoming Generic When
 Dealing With Internet Marks
 - 6.07[4] Jurisdictional Considerations
- 6.08 Trademark Infringement and the Elements of an Infringement Claim
- 6.09 How Internet Infringement Differs from Cases on Terra Firma
 - **6.09**[1] Overview
 - 6.09[2] What Constitutes Commercialization of a Trademark in Cyberspace
 - 6.09[3] Strength of a Mark in Cyberspace
 - 6.09[3][A] Inherent Distinctiveness and the Problem of Internet Time
 - 6.09[3][B] Secondary Meaning and the Limitations of Internet Evidence
 - 6.09[4] Likelihood of Internet Confusion
 - 6.09[5] Consumer Criticism Sites and First Amendment Rights

Pub. 1/2019 lxxxiii

6.09[6] Assessing Geographic Restrictions Online

6.10 Third—Party Liability for User Content and Misconduct

6.10[1] In General

6.10[2] Case Law on Secondary Liability for User Content and Misconduct

6.10[2][A] Overview

6.10[2][B] Playboy Enterprises, Inc. v. Frena

6.10[2][C] Sega Enterprises Ltd. v. MAPHIA

6.10[2][D] Other Early Cases Brought Against Online Sites and Services

6.10[2][E] Lockheed Martin Corp. v.
Network Solutions, Inc., and
Other Cases Against Domain
Name Registrars

6.10[2][F] Domain Name Auction Sites

6.10[2][G] Liability for Affiliate Advertisers: Fare Deals, Ltd. v. WorldChoiceTravel.com, Inc.

6.10[2][H] Perfect 10, Inc. v. VISA Int'l Service Ass'n.

6.10[2][I] Tiffany (NJ) Inc. v. eBay, Inc.

6.10[2][I][i] Overview

6.10[2][I][ii] Applicability of *Inwood* to Service Providers and Venues

6.10[2][I][iii] Generalized Knowledge and Reason to Know

6.10[2][I][iv] Willful Blindness

6.10[2][I][v] Repeat Infringers and A
Rights Owner's Obligation
to Monitor for

Infringement

6.10[2][I][vi] Other Rulings

6.10[2][J] Sellify Inc. v. Amazon.com, Inc.

6.10[3] Limiting Third—Party Liability
Through Policies and Online
Contracts

6.10[4]		idual Liability for Corporate
		ngement
6.11 Trad		
6.11[1]		
6.11[2]		
		In General
6.11[Duration of Use and the
		Phenomenon of Internet Time
		ing and Tarnishment
		Overview
		Tarnishment
		Blurring
6.11[4]		
$\boldsymbol{6.11[5]}$		
6.11[6]	Secon	dary Liability for Dilution
		Law Dilution
		cations Online
		de Practices and Related Claims
		tion 1125(a) and State Law
6.12[1]		r Trade Practices Under Section
0.40507		a)—In General
		ing Off and Reverse Palming Off
		Designation of Origin
_		In General
		Spoofing and Click Fraud
		Digital Copying
		rse Confusion in Cyberspace
		Advertising
		In General
6.12[5][B]	Puffing
		Comparative Advertising
6.12	5][D]	Test Results and Compatibility
		Standards
6.12[5][E]	The Importance of Updating A Website
6.12[5][F]	Standing to Bring a False
0.10[0]	Q	Advertising Claim
		Unfair Competition Laws
		ss Protection for Screen Displays
and '	Websit	e Interfaces

Pub. 1/2019 lxxxv

- **6.13[1]** Overview
- 6.13[2] Functionality As a Bar to Protection
- 6.13[3] A Website or Software Interface As Trade Dress
- 6.14 Fair Use in Internet Cases
 - **6.14**[1] In General
 - 6.14[2] Statutory Fair Use
 - **6.14**[2][A] Overview
 - 6.14[2][B] Section 1115(b)(4)
 - 6.14[2][C] Fair Use in Dilution Cases
 - 6.14[2][D] Fair Use Under the Anticybersquatting Consumer Protection Act
 - 6.14[3] Nominative Fair Use
 - 6.14[3.5] Logos, Thumbnail Images and Favicons
 - **6.14[4]** Parody
 - 6.14[5] Fair Use and First Amendment Issues Involving Consumer Criticism and Gripe Sites, Blogs and Personal Homepages
 - 6.14[6] Checklist of Issues to Consider in Evaluating Critic, Fan, Parodist, Gripe, Consumer and Former Employee Sites
- 6.15 The *De minimis* Infringement Defense
- 6.16 Remedies in Internet Litigation
 - 6.16[1] Injunctive Relief: Potential Remedies, Availability and Delay in Seeking Action
 - **6.16**[1][A] In General
 - 6.16[1][B] Restrictions on Injunctive
 Relief Against Newspapers,
 Magazines, Other Similar
 Periodicals and Electronic
 Communication Services
 (Including Websites and Blogs)
 - 6.16[1][C] Waiver, Estoppel, Unclean Hands, Acquiescence, Laches and Delay

6.16		ages, Profits and Other Monetary
	Reme	
6	.16[2][A]	Monetary Remedies—In General
		Infringer's Profits
6	3.16[2][C]	Damages
	6.16[2][0	C][i] In General
	6.16[2][0	C][ii] Damages in
		Counterfeiting Cases
6	3.16[2][D]	Innocent Infringement by
		Electronic Publishers and
		Printers
6	3.16[2][E]	Statutory or Treble Damages for
		Direct and Secondary Liability
		for Counterfeiting (and
		Potential Limitations on
0.10	[0] A 44	Damage Awards)
		neys' Fees
		rnet Resources to Build, Police
		Trademark Rights
		net As a Source of Information
6.17		ecting a Mark Through Internet rtising and Promotions
6.18 P		_
		and Policing Marks on Social Blogs, Microblogs and User
	,	Content Sites
		ademark Disputes Through
		Desist Letters and in Litigation
		for Improper Trademark Notices
Appen	dıx I. Xer	ox Advertisement
СНАРТ		GHTS IN INTERNET DOMAIN MES
7.01 C	Overview	
7.02 A	Brief His	story and Overview of the
		ame System (DNS) and the Roles
0	f Registra	rs and Registries

6.16[1][D] Extraterritoriality

Pub. 1/2019 lxxxvii

7.02[2] Jonathan Postel's 1996 Initiative to

7.02[1] Domain Name System (DNS)

- **Change the Domain Name System and Expand the Number of gTLDs**
- 7.02[3] U.S. Department of Commerce's Initiative and the Creation of ICANN
- 7.02[4] ICANN's Expansion of gTLDs from 2001 to 2006 and the Introduction of Sunrise Periods for Challenging Registrations in New gTLDs
- 7.02[5] Internationalized Domain Names (IDN)
- 7.02[6] Unlimited Expansion of TLDs
- 7.03 The Past as Prologue: The History of Domain Name Disputes and the Development of Dispute Resolution Policies by NSI and ICANN
 - **7.03[1]** Overview
 - 7.03[2] Early Disputes As a Precursor to Adoption of the First Policy
 - 7.03[3] NSI's 1995 Domain Dispute Policy Statement
 - 7.03[4] Extra-Judicial Remedies Through NSI "Office Actions"
 - 7.03[5] Litigation Challenging NSI's 1995 Domain Dispute Policy Statement
 - 7.03[6] NSI's 1996 Amendment to Its Policy Statement
 - 7.03[7] NSI's 1998 Policy Statement
 - 7.03[8] ICANN's 1999 Adoption of the Uniform Domain Name Dispute Resolution Policy
- 7.04 Strategic Considerations in Remedying Domain Name Disputes
 - **7.04**[1] **In General**
 - 7.04[2] Rethinking Conventional Wisdom: A Critical Comparison Between UDRP and ACPA Actions
 - 7.04[3] Chart Comparing Alternative Strategies
 - 7.04[4] List of Registrar Venues
- 7.05 Extra-Judicial Remedies Under ICANN's

Selected ccTLDs **7.05**[1] In General 7.05[2] UDRP Proceedings **7.05**[2][A] In General 7.05[2][B] Registrant Representations and Registrar Rights "Mandatory" Administrative 7.05[2][C] **Proceedings for Bad Faith** Registrations 7.05[2][D] Domain Name Transfers During **Dispute Resolution UDRP Proceedings in Practice** 7.05[3] (Including Lessons from the First **3.400 Cases**) 7.05[3][A] General 7.05[3][B] Arbitral Decisions 7.05[3][C] Case Statistics on UDRP Final **Awards** 7.06 The Anticybersquatting Consumer **Protection Act 7.06**[1] Overview 7.06[2] Bad Faith Registration, Trafficking or Use of a Domain Name 7.06[3] In Rem Jurisdiction 7.06[4] Protection for the Names of **Individuals** 7.06[5] Reverse Domain Name Hijackings and Other Suits for Declaratory Relief Brought By Domain Name Registrants to Avoid Losing their Registration Under the UDRP or Other Registrar or Registry Policies **Liability Limitations for Domain** 7.06[6] Name Registrars and Registries Remedies When Domain Names Dilute **Famous Marks Trademark Infringement and Related** 7.08 Claims Asserted When Domain Names Are

Uniform Dispute Resolution Policy (UDRP)

and Comparable Policies in Effect for

Pub. 1/2019 lxxxix

Likely to Cause Confusion

- 7.08[1] In General 7.08[2] Initial Interest Confusion
- 7.08[3] Use of Disclaimers
- **7.08**[4] Tacking
- 7.08[5] Confusion Between Different TLDs
- 7.08[6] Deceptive Domain Names and False Advertising Claims
- 7.08[7] Disputes Involving Intent-to-Use Trademark Applications and Domain Name Registrations
- 7.08[8] First Registration and Use of a Domain Name Compared to First Use in Commerce of a Trademark
- 7.08[9] Post-Domain Paths, Subdomains and Use in URLs
- 7.09 Typos and Misspelled Marks As Domain Names
- 7.10 Commercialization Requirement in Domain Name Infringement Suits
 - **7.10[1]** In General
 - 7.10[2] Statutory Definitions
 - 7.10[3] Interstate Commerce
 - 7.10[4] "Use in Commerce" in Connection with Goods, Services or Substantial Advertising Under the Lanham Act
 - **7.10[4][A]** In General
 - 7.10[4][B] [RESERVED]
 - 7.10[4][C] Website Use of Domain Names in the .net, .org, .gov, .int or .mil TLDs
 - 7.10[4][D] Website Use of a Foreign ccTLD
 - 7.10[4][E] Use of a Domain Name As an Email Address
 - 7.10[4][F] Registration Without Use
 - 7.10[5] Consumer Criticism, Fair Use and Free Speech Cases
 - 7.10[6] Use of a Mark in A Post-Domain Path of a URL

- 7.11 Dealing With Anonymous and Pseudonymous Registrants and Privacy Protection Services
- 7.12 First Amendment Rights and Fair Use of Marks As Domain Names
- 7.13 Domain Name Misuse
- 7.14 Contributory Domain Name Infringement
- 7.15 Determining Jurisdiction in Domain Name Disputes
 - **7.15**[1] In General
 - 7.15[2] Cybersquatter and Domain Name Registration Cases
 - 7.15[3] Registration and Use of a Domain Name
 - 7.15[4] Contract Disputes
 - 7.15[5] Foreign Defendants
- 7.16 Rights of Foreign Domain Name Registrants and Trademark Owners
- 7.17 State and Federal Remedies for Traffic Diversion
- 7.18 Contract Disputes over Domain Names with Web Developers, Hosts, Employees and Others
- 7.19 Publicity Rights in Domain Name Disputes
- **7.20** [RESERVED]
- 7.21 Domain Name Registrar and Registry Liability (and Exemptions from Liability)
 - **7.21[1]** In General
 - 7.21[2] Historical Background: Early Incentives and Later Disincentives to Sue Domain Name Registrars and Registries
 - 7.21[3] Statutory Immunity for Registrars, Registries and Other Domain Name Registration Authorities
 - 7.21[3][A] No Liability Under the ACPA
 - 7.21[3][B] Lanham Act Exemption for Registration or Maintenance of A Domain Name (Section 1114(2)(D)(iii))

Pub. 1/2019 xci

7.2 1[3	3][C]	Lanham Act Exemption for Various Registration Functions (Section 1114(2)(D)(i))
7 91[9	3][D]	Printer and Publisher
<i>1.2</i> 1[الطالو	Immunity from Damages in the
		Case of Innocent Infringement
7 21[4]	Conti	case of inflocent infingement
7.21[4] $7.21[5]$		lity for Allegedly Infringing
7.21[0]		trations Based on Contributory
		ngement
7.21		Overview
7.21	5][B]	Liability for Contributory
***==E	~][—]	Infringement
7.21[6]	No O	bligation to Accept Registrations
7.21[7]		Challenging the Domain Name
		m (including Antitrust Claims)
		Whether a Given Domain Name
		to Trademark Protection
7.22[1]		
7.22[2]	Doma	in Names As Marks
		ection for URLs
7.22[4]		ection for User IDs
7.22[5]		Guidelines for Registering
		in Names As Trademarks
		ames as Property Potentially
•		Levy or Sale
		and a Checklist for Protecting
		Domain Names
		egic Considerations
7.24[2]	Chec	klist
7.25 Valui	ing Do	main Names
7.25[1]		ework for Valuing Domain
	Name	es
7.25[2]		ey of Early Domain Name
	Trans	sactions and Summary of Lessons
	Learr	
7.25[3]		ey of Domain Name Registration
	Sales	2004-2017

7.27 Resolving Domain Name Disputes Without

Litigation, Suggested Approaches and				
Litigation: Suggested Approaches and Settlement Terms				
	Overview			
	Evaluating the Need to Obtain a			
***************************************	Particular Domain Name			
7.27 [3]	Approaches and Contract Terms			
	rnic: .biz, .corp and Other			
	anctioned Top Level Domains			
	e Studies of Early Domain Name			
Disp				
	Overview of Domain Name Conflicts			
7.29[2]				
	academyawards.net,			
	academy-awards.net			
7.29 [3]	, ,			
= 005.43	1sterotic.com, 1sn.com, cmmweb.com			
	acclaim.com			
7.29[5]				
	adultsrus.com			
	ajax.org			
7.29[8]	, ,			
7.29[9]				
	america.net			
	american standard.com			
	aol.com			
7.29 [13]	- ·			
7.29[14]	$\mid at lant a constitution.com$			
7.29 [15]	avery.net			
7.29[16]				
7.29[17]	BankofIreland.com			
7.29 [18]	babiesplace.com, badbarbies.com			
7.29[19]	·			
7.29[20]	bbb.com			
7.29 [21]	beaniebaby.com			
7.29[22]	beaniecollectibles.com			
7.29 [23]	beaniebrigade.com			
7.29[24]	bigmac.com			
7.29[25]	birthdayballoons.com			
7.29[26]	· ·			

Pub. 1/2019 xciii

```
7.29[27] candyland.com
7.29[28] cardservice.com
7.29[29] carlsjr.com
7.29[30] cds.com
7.29[31] cerrutiUSA.com
7.29[32] cfo2go.com
7.29[33] charliedanielsband.com
7.29[34] chasemanhattansucks.com
7.29[35] chevychase.com
7.29[36] citigroup.com
7.29[37] claywalker.org
7.29[38] clue.com
7.29[39] collinraye.com
7.29[40] colorworks.com
7.29[41]
        compassion.com, compassion.net,
         compassion.org, compassionnet.com,
         compassionnet.net,
         compassionate.net
7.29[42] cybergold.com
7.29[43] cybersell.com
7.29[44] datapharm.com
7.29[45] dci.com
7.29[46] deancarter.com
7.29[47] dellcard.com, delldiscoveryzone.com,
         dellmall.com, dellperks.com,
         dellproducts.com, dellsales.com,
         dellshop.com, dellshopping.com,
         dellshops.com, dellsupport.com
7.29[48] dennison.net
7.29[49] desknetinc.com
7.29[50] disc.com
7.29[51] dougstone.com
7.29[52] earth.com
7.29[53] empresstravel.com and
         travelimpressions.com
7.29[54] energyplace.com
7.29[55] epix.com
7.29[56] esqwire.com
7.29[57] etov.com
```

7.29[58]	faithhill.com, faithhill.org
7.29[59]	1-800-flowers
7.29[60]	frys.com
7.29[61]	fuck.com
7.29[62]	gateway.com
7.29[63]	georgejr.com
7.29 [64]	glad.com
7.29[65]	greenproducts.com
7.29 [66]	gunsareus.com
7.29[67]	gwbush.com
7.29 [68]	har ley david son. com
7.29[69]	harly davids on.com
7.29[70]	Harvarddivinity.com,
	Hardvardgraduates chool.com,
	HarvardLawschool.com, HarvardYardSale.com,
	VirtualHarvard.com
7.29[71]	hatfield.com
7.29[72]	heroes.com
7.29[73]	highsociety.com
7.29[74]	hollywood.ab.ca
7.29[75]	hotmail.com
7.29[76]	hyperion.com
7.29[77]	idiosync.com
7.29[78]	ilovebeanies.com
7.29[79]	inandout.com
7.29 [80]	inset.com
7.29 [81]	inter-law.com
7.29 [82]	intermatic.com
7.29 [83]	iquest.com
7.29 [84]	javac.com, javanco.com
7.29[85]	jcomlive.com/barbie.htm
7.29[86]	jewsforjesus.com
7.29[87]	jodeemessina.com
7.29 [88]	johnmichaelmontgomery.com
7.29 [89]	juno.com, juno-online.com
7.29[90]	juris.com
7.29[91]	kaplan.com
7.29[92]	kennychesney.com
0[04]	ivervity envelope y, ethic

Pub. 1/2019 xcv

7.29[93]	kidsareus.com		
7.29[94]	knowledgenet.com		
7.29[95]	laopinion.com, laopinion.net,		
	laopinion-losangeles.com,		
	laopinion-sa.com		
7.29[96]	leeroyparnell.com		
7.29[97]	levis.com		
7.29[98]	lies.com		
7.29[99]	localhost.com		
7.29[100]	lorriemorgan.com		
7.29[101]	lucent.com		
7.29[102]	makah.org		
7.29[103]	martinamcbride.com,		
20[100]	martinamcbride.org		
7.29[104]	masters.com		
7.29[105]	mcdonalds.com		
7.29[106]	mci.com		
7.29[107]	mcmaster.com, mcmaster-carr.com,		
20[101]	mcmaster-car.com,		
	mcmastercar.com,		
	mcmastercarrsupply.com,		
	mcmastercarrsupplyco.com,		
	macmaster-carr.com, macarco.com		
7.29[108]	michaelchang.com,		
	michael-chang.com		
7.29[109]	microsoftfrontpage.com,		
	microsoftkids.com,		
	microsoftoffice.com,		
	microsoftpress.com,		
	microsoftwindows.com, mskids.com,		
	mspublisher.com, windowsfiles.com,		
	windows5.com, wwwindows.com		
7.29[110]	micros0ft.com		
7.29[111]	mikasa.com		
7.29[112]	millenniummusic.com		
7.29[113]	mindymccready.com		
7.29[114]	mit.com		
7.29[115]	mitre.com		
7.29[116]	moviebuff.com		
7.29[117]	msdwonline.com		
••=•[11.	III WAR GIVEN COIN		

```
7.29[118] mtv.com
7.29[119] netscapesucks.com
7.29[120] newton.com
7.29[121] nikesec.com
7.29[122] nissan.com
7.29[123] nomayo.com
7.29[124] nypost.com
7.29[125] nysscpa.com
7.29[126] oreos.com
7.29[127] oscar.net, theoscars.net
7.29[128] pamtillis.com
7.29[129] panavision.com
7.29[130] papalvisit1999.com, papalvisit.com
7.29[131] parkplaza.com
7.29[132] pattyloveless.org
7.29[133] peninsulaw.com
7.29[134] peta.com
7.29[135] pga.com
7.29[136] pike.com, pike.net
7.29[137] plannedparenthood.com
7.29[138] playboyxxx.com, playmatelive.com
7.29[139] playmates-asian.com
7.29[140] playmen.it
7.29[141] pokey.org
7.29[142] porsche.com
7.29[143] porsche.net, porsche-club.net,
          porsch.com, boxster.com
7.29[144] post-it.com, post-its.com, ipost-it.com
7.29[145] primediainc.com
7.29[146] prince.com
7.29[147] purco.com
7.29[148] qualitysolutions.com
7.29[149] rambam
7.29[150] randytravis.org
7.29[151] rannoch.org
7.29[152] reaction.com
7.29[153] realpages.com
7.29[154] realworld.com
7.29[155] rebamcentire.org
```

Pub. 1/2019 xcvii

```
7.29[156]
          regis.com
          ringlingbrothers.com
7.29[157]
7.29[158]
          roadrunner.com
7.29[159]
          rockies.com
7.29[160]
          rocknbowl.com
7.29[161]
          sandals.com
          sawyerbrown.com
7.29[162]
7.29[163]
          seawind.net
7.29[164]
          securacom
7.29[165]
          seescandy.com, seecandys.com
7.29[166]
          skunkworks.net
7.29[167]
          skunkworks.net, skunkworks.com,
          skunkwerks.com and
          skunkwrks.com
7.29[168]
          skytelworldcom.com
7.29[169]
          sparkys.com
7.29[170]
          spree.com
7.29[171]
          spice.com
7.29[172]
          star-gift-registry.com
          stevewariner.com
7.29[173]
7.29[174]
          StreetFusion.com
          suncities.com
7.29[175]
7.29[176]
          sunriver.com
7.29[177]
          sylvan.com
7.29[178] teletech.com
7.29[179]
          thegap.com
7.29[180]
          theworld.com
7.29[181] timmcgraw.org
7.29[182]
          tobykeith.com
7.29[183]
          toysareus.com
7.29[184] toysrgus.com
7.29[185] traceadkins.com
7.29[186]
          tracylawrence.com
7.29[187]
          trishayearwood.com
7.29[188] ty.com
7.29[189] umbro.com
7.29[190] U-S-W-E-S-T.com
7.29[191] veronica.org
7.29[192]
          viagarafalls.com
```

```
7.29[193] vicimacintosh.com
  7.29[194] vincegill.org
  7.29[195] vw.net
  7.29[196] wallstreetjournal.com
  7.29[197] wallstreetsex.com
  7.29[198]
            washingtonspeakers.com,
             washington-speakers.com,
             washingtonspeakers.net,
             washington-speakers.net
  7.29[199]
            wawawa.com
  7.29[200]
            Webpro.com
  7.29[201]
            Wendys.org,
             WendysRestaurants.com,
             WendyIntlInc.com
  7.29[202]
            whoswhocd.com
  7.29[203]
            whoswhointheworld.com
  7.29[204]
            wire.net
  7.29[205] wivk.com
  7.29[206] worldsport.com, worldsports.com
  7.29[207] writeword.com
  7.29[208] www.hotwired.com
  7.29[209] www.painewebber.com
  7.29[210] yahooka.com
  7.29[211] zap.com
  7.29[212] zippo.com, zippo.net,
             zippo-news.com
7.30 Case Studies of Early Foreign Domain
     Name Disputes
  7.30[1] britishtelecom.com, britishtelecom.net,
           britishtelecom.co.uk, bt.org,
          cellnet.net, j-sainsbury.com,
           ladbrokes.com, marksandspencer.com,
          marksandspencer.co.uk,
          sainsbury.com, sinsburys.com,
          virgin.org (UK)
  7.30[2] cellcom.net.il (Israel)
  7.30[3] chapters-globe.com (Canada)
  7.30[4] coca-cola.co.nz (New Zealand)
  7.30[5] glaxowellcome.com (UK)
  7.30[6] harrods.com (UK)
```

Pub. 1/2019 xcix

- 7.30[7] heidelberg.de (Germany)
- 7.30[8] *pldt.com* (The Philippines)
- 7.30[9] *prince.com* (UK)
- 7.30[10] Serono.com, Ares-serono.com (Switzerland)
- 7.30[11] yahoo.co.il (Israel)
- 7.30[12] yahoo.com.cn (People's Republic of China)
- 7.31 National (ccTLD) Domain Name Policies
- Appendix 1. U.S. Patent and Trademark Office, Trademark Examination of Domain Names (Jan. 16, 1998)
- Appendix 2. NSI Domain Name Dispute Resolution Policy Statement (July 1995)
- Appendix 3. NSI Domain Dispute Policy Statement Revision 01 (Effective Nov. 23, 1995)
- Appendix 4. Network Solutions' Domain Name Dispute Policy Revision 02 (Effective Sept. 9, 1996)
- Appendix 5. Network Solutions' Domain Name Dispute Policy Revision 03 (Effective Feb. 25, 1998)
- Appendix 6. ICANN's Uniform Dispute Resolution Procedure
- Appendix 7. ICANN's Rules for the Uniform
 Domain Name Dispute Resolution
 Policy
- Appendix 8. Lockheed Martin Corp. v. Jacobs—Complaint
- Appendix 9. Lockheed Martin Corp. v. Jacobs—Injunction

Volume 2

CHAPTER 8	INTER	ENET PATENTS			
		atent Law in Cyberspace			
8.02 Theo					
		ghts, the Rights of Earlier			
		the Duration of a Patent			
		gible for Patent Protection			
8.04[1]	Overviev	V			
8.04[2]	Compute	er Software			
8.04[2		ftware Patents and			
	Ma	thematical Algorithms			
		sign Patents			
		Business Models			
8.05 Nove	ty Requi	rement and the Possibility			
		n May Be Lost Through			
	ature Di				
8.06 Nono	bviousne	ess			
8.07 Utilit 8.08 Pater	y				
8.08 Pater	t Applica	ations			
8.08[1]	Drafting	Claims and Specifications ent, Best Mode Disclosure			
8.08[2]	Enablem	ent, Best Mode Disclosure			
	and Defi				
		nt Litigation			
8.09[1]		Jurisdiction			
8.09[2]	Strict Li	ability for Patent			
	Infringe	ment			
8.09[3]	Remedie	s for Patent Infringement			
8.09[3	[A] In	General			
8.09[3	[B] Da	mages			
		torneys' Fees			
		tent Preemption of State Law			
		aims			
8.09[4]	Defenses	5			
8.09[5]	Proving	Infringement			
8.09[5][A] Lit	eral Infringement			
8.09[5][B] Th	e Doctrine of Equivalents			
_		osecution History Estoppel			
		dicial Estoppel			
		11			

Pub. 1/2019 ci

- 8.09[5][E] Reverse Doctrine of Equivalents 8.09[6] Claim Construction
- 8.10 Third—Party Patent Liability
 - **8.10[1]** Overview
 - 8.10[2] Contributory Patent Infringement
 - **8.10**[2][A] In General
 - 8.10[2][B] Claims Against Site Owners and Service Providers
 - 8.10[2][C] Damages for Contributory Infringement
 - 8.10[3] Inducement
- 8.11 Case Studies of Internet—Related Patent Disputes
 - **8.11[1]** Overview
 - 8.11[2] Litigation Over the Freeny Internet Patent
 - 8.11[3] Wang Laboratories, Inc. v. America Online, Inc.
 - 8.11[4] Home Shopping Network, Inc. v. Coupco, Inc.
 - 8.11[5] RSA Data Security v. Cylink, Inc.
 - 8.11[6] Dispute Over the Welch (GIF) Patent
 - 8.11[7] Action Technologies, Inc. v. Novell, Inc.
 - 8.11[8] CIVIX—DDI, LLC v. Microsoft Corp.
 - 8.11[9] Amazon.com, Inc. v. BarnesandNoble.com, Inc.
 - 8.11[10] Eolas Technologies, Inc. v. Microsoft Corporation
 - 8.11[11] Bascom Research, LLC v. LinkedIn, Inc.
 - 8.11[12] Peter H. Wolf v. Capstone Photography Inc.
 - 8.11[13] Genband US LLC v. Metaswitch Networks Corp.
 - 8.11[14] Credit Acceptance Corp. v. Westlake Servs.
- 8.12 Internet as a Source of Prior Art

- CHAPTER 9 UNIQUE INTELLECTUAL PROPERTY ISSUES IN SEARCH ENGINE MARKETING, OPTIMIZATION AND RELATED INDEXING, INFORMATION LOCATION TOOLS AND INTERNET AND SOCIAL MEDIA ADVERTISING PRACTICES
- 9.01 Information Distribution, Indexing and Retrieval—In General
- 9.02 Caching
 - **9.02**[1] In General
 - 9.02[2] Temporary Caching: Web Browsing
 - 9.02[3] Proxy Caching
 - 9.02[4] Potential Copyright Defenses: The DMCA Liability Limitation for System Caching, Fair Use, Implied License and the Sony Safe Harbor
 - 9.02[5] Liability for Unauthorized Caching Under Trademark and Unfair Trade Law
 - 9.02[6] Potential Patent Liability for Caching
 - 9.02[7] Caching Agreements
 - 9.02[8] Caching and Child Pornography
- 9.03 Hypertext Links
 - 9.03[1] Links and Liability for Linking—In General
 - 9.03[2] Linking Compared to Caching
 - 9.03[3] Potential Copyright Liability for Creating Hyperlinks
 - 9.03[3][A] Grounds for Liability
 - 9.03[3][A][i] In general
 - 9.03[3][A][ii] Case Law Analysis
 - 9.03[3][A][iii] Liability for unwanted links to genuine material on a copyright owner's own site

9.03[3][A][iv] Multiple links

9.03[3][B] General Defenses to Liability: Implied License, Fair Use, *De Minimis* Infringement and the Sony Safe Harbors

Pub. 1/2019 ciii

- 9.03[3][B][i] Linking Defenses—In General 9.03[3][B][ii] Implied License 9.03[3][B][iii] Linking as a Fair Use 9.03[3][B][iv] De Minimis Infringement 9.03[3][B][v] Sony Safe Harbor 9.03[3][C] DMCA Safe Harbor Liability **Limitation Defense for Information Location Tools** 9.03[3][D] Extra-Judicial Remedies Available to Copyright Owners under the DMCA 9.03[4] Significance of Web Linking Agreements 9.03[5] Historical Case Study: Shetland Times, Ltd. v. Wills **Linking Liability Under Trademark** 9.03[6] and Unfair Trade Law 9.03[6][A] In General 9.03[6][B] Trademarks As Icons and **Underlined Text** 9.03[6][C] Site Links vs. Content (or Deep) Links 9.03[7] Historical Case Study on Content Links—Ticketmaster Corp. v. Microsoft Corp. 9.03[8] Potential Patent Liability for **Hypertext Links** 9.03[9] **State Statutes Restricting Linking** and CDA Preemption of Certain Claims Based on Links 9.03[10] Liability for Refusing to Provide a
- 9.03[11] Links in Defamation and Related Tort Suits

Link

- 9.04 Frames, In-line Links and Embedded Links 9.04[1] In General
 - 9.04[2] The Washington Post Co. v. TotalNews Inc.

9.	04[3]		oric Arguments Based on Ceramic nes and Moral Rights
	9.04[Framing as a Derivative Work
			Moral Rights
		3][C]	
	000 -[0][0]	the Digital Millennium
			Copyright Act
9.05	Using	g Tecl	nnology to Block Links and
	Fran		
9.06	Chec	klist	and Practical Strategies to
	Mini	mize]	Liability for Linking or
			ng In-line or Embedded links or
0.07			g Links in Frames
9.07			ing and Printing
9.08		ots, 5 egatio	creen Scraping and Content
9.			eneral
			g Intelligent Agents or Bots to
<i>J</i> .	00[2]		Creative or Expressive Content
9.09	Sear		gine Indexing Practices: Links,
0.00			Thumbnail Images and Favicons
9.10	Meta	tags a	and Other Hidden Text
9.	10[1]	In G	eneral
9.	10[2]		Significance of Metatags and
			ement in Response to Search
		_	ne Queries
9.			tag Case Law
	9.10[3	3][A]	Early Metatag Cases and the
			Development of the Law
	9.10[3	3][B]	Brookfield Communications, Inc.
			v. West Coast Entertainment
	0.10	01[6]	Corp.
	9.10[3][C]	
0	10[4]	Fair	Metatags Under the Lanham Act
			d-Party Liability for Metatags
	ւսլ ց յ 10[6]		tical Steps to Limit Metatag
J.	το[ο]		ngement
o ·	10[7]		tags as Evidence of Intent in
U •.	TO[1]	Non-	Trademark Cases
		11011	Trademark Cases

Pub. 1/2019 cv

- 9.11 Keywords, Banner Advertisements and Sponsored Links
 - **9.11[1]** In General
 - 9.11[2] Display and Banner Advertisements
 - 9.11[3] Sponsored Links, Pop Up Ads and Search Results and Advertisements on Sales Sites
 - 9.11[4] State Law Claims and Preemption
 - **9.11**[5] Checklist
- 9.12 Blog, Message Board and Chat Room Liability
- 9.13 Strategies for Dealing with Fan and Consumer Criticism or Gripe Sites, Blogs and Social Network Pages
- Appendix 1. Adobe Systems, Inc., Claris Corp. & Traveling Software, Inc., v. Tripod, Inc. and Bo Peabody
- Appendix 2. Washington Post et al. v. Total News et al.—Complaint
- Appendix 3. Insituform v. National Envirotech Group LLC, et al.—Final Judgment on Consent
- CHAPTER 10 MISAPPROPRIATION OF TRADE SECRETS IN CYBERSPACE
- 10.01 Comparing Trade Secret Protection in Cyberspace to Terra Firma
- 10.02 Trade Secret Defined
- 10.03 Protectable Subject Matter for Internet Trade Secrets
- 10.04 Extent of Protection Afforded Trade Secrets
 - 10.04[1] In General
 - 10.04[2] Reverse Engineering
 - 10.04[3] Non-disclosure Agreements (NDAs)
- 10.05 Tension Between Trade Secret and Patent and Copyright Protection
 - 10.05[1] Trade Secrets and Patents
 - 10.05[2] Trade Secrets and Copyright Registration

Pub. 1/2019 cvii

10.16[1] Overview

- 10.16[2] Forms: Sample Stipulated
 Nondisclosure/Protective Orders
 10.16[2][A] Sample Two—Tier Agreement
 10.16[2][B] Form: Sample One—Tier
 Agreement
- 10.17 Related Claims: Unfair Trade and Common Law Misappropriation and Potential Preemption Issues
- 10.18 Service Provider and Other Third—Party Liability
 - 10.18[1] In General
 - 10.18[2] The Applicability of the Telecommunications Act of 1996
- 10.19 Criminal Trade Secret Misappropriation
- Appendix 1. Uniform Trade Secrets Act with 1985 Amendments
- CHAPTER 11 EMPLOYER RIGHTS IN THE CREATION AND PROTECTION OF INTERNET-RELATED INTELLECTUAL PROPERTY
- 11.01 Overview: Employees, Consultants and the Changing Nature of "Employment"
- 11.02 Creation of Intellectual Property
 - 11.02[1] The Shop Rights Doctrine
 - 11.02[2] The Work for Hire Doctrine
 - 11.02[3] Defining Rights to Inventions in the Era of Networked Computers
- 11.03 Continuing Protection After Termination of the Employer—Employee Relationship
 - 11.03[1] Overview
 - 11.03[2] Confidentiality Agreements
 - 11.03[3] Noncompetition Agreements
 - 11.03[3][A] Enforceability of Noncompetition Agreements
 - 11.03[3][B] Sample Clause
 - 11.03[3][C] Alternatives to Noncompetition Agreements
- 11.04 Internet Applications of the Inevitable Disclosure Doctrine

44.04543
11.04[1] Overview
11.04[2] Development of the Doctrine: UTSA
Section 2 and $PepsiCo$, $Inc. v$.
Redmond
11.04[3] National Survey of Inevitable
Disclosure Case Law
11.04[3][A] In General
11.04[3][B] Significant Cases
11.04[3][C] Internet-Related Case Studies
$11.04[3][\mathrm{C}][\mathrm{i}]$ Doubleclick, Inc. v. Henderson
11.04[3][C][ii] Wal-Mart Stores, Inc. v.
Amazon.com, Inc.
11.04[3][D] Diminished Significance of
Misconduct in Internet-Related
Claims
11.04[3][E] Employee Mobility,
Noncompete Agreements and
California and New York Law
11.04[3][E][i] In General
11.04[3][E][ii] California Law on
Employee Mobility
11.04[3][E][iii] New York Law
11.04[3][F] Scope of Injunctive Relief
11.04[3][G] Inevitable Disclosure and the
Concept of Internet Time
11.04[3][G][i] Lead Time As a
Commodity
11.04[3][G][ii] Duration of Injunctive
Relief in Internet Time
11.04[3][G][iii] Narrow Relief
11.04[3][G][iv] Proving Inevitable
Disclosure in Internet
Time
11.04[4] Proposed Test for Applying the
Doctrine to Internet Transactions
11.05 Preventing Employee Misappropriation of
Trade Secrets
11.05[1] Security
11.05[2] Civil and Criminal Remedies

Pub. 1/2019 cix

CHAPTER 12 PRIVACY AND PUBLICITY RIGHTS OF CELEBRITIES AND OTHERS IN CYBERSPACE

	\mathbf{CY}	BERSPACE
12.01 Over	view o	of Privacy and Publicity Rights
		rivacy Laws
12.02[1]	State	Law Variations and Personal
	Priva	cy Law in General
		titutional Protections
		non Law Privacy
_		Overview
12.02[3	3][B]	Unreasonable Intrusion Upon
		Seclusion
12.02[3	3][C]	Public Disclosure of Private
		Facts
12.02[3	3][D]	Showing Plaintiff in a False
10.00[4]	Q	Light
		Statutory Protections
		Overview
12.02[4	4][B]	Electronic Stalking
		Paparazzi Laws
12.02[5]		cy Rights in, and the
		nercial Exploitation of, Cookies,
	Dove	e Droppings and Other onal Data Collected on Websites
12.02[6]	Spoot	
12.02[0] $12.02[7]$	_	•
12.02[1]	Offici	by Public Figures and Public
10 00[0]		
12.02[8]		Single Publication Rule
12.02[9]		CH Act Limitations on U.S. reement of Foreign Judgments
10.00 Dialo		0 0
12.03 Righ		· ·
12.03[1]		
12.03[2]		Common Law and Statutory
10.00[city Rights
12.03[2	ZJ[A]	Scope and Nature of Rights
10.000	ollini	Protected
12.03 [2		Impersonation Claims and Protection for Fictional
		Characters

12.03[2][C] Damages and Equitable Relief

12.0	03[3]	Publi	city Rig	hts Under Federal Law
			in Name	
12.0	03[5]	Licen	ses and	Releases
				Key Words, Sponsored
			and Me	
12.0	03[7]	Unfai	r Compe	etition
12.04				y and the Preemption
	of Th	nird-Pa	arty Pub	licity Claims Against
				and Others Under the
10.05				ns Act of 1996
12.05				uses of Website Owners
10 (Publishers
		Over		
			nption	mal
	_		In Gene	
	ւ⊿.⊍əլ	∠][D]		tht Preemption of Publicity Claims
1	12.05[2][C]		st for Evaluating
-	12. 00[2][O]		tion in Publicity Cases
12.0	05[3]	Fair		
				nent Protections
			Overvie	
	_			nterest or Newsworthy
		-31-3	Content	
	12.	05[4][1	3][i] In	general
	12.	05[4][1	B][ii] Li	mitations on the
				ewsworthiness
			ex	ception: Zacchini v.
				ripps-Howard
				roadcasting Co. and the
				ffect of the
				elecommunications Act
	10	0 ME 4357		1996
	12.	05[4][1		lewsworthiness in
_	10.055	41501		rivate fact cases
				tal Use Exception
			Creative	
				f Injunctive Relief
		First		
12.0)5[6]	Aban	donment	t

Pub. 1/2019 cxi

12.05[7] Fu	nctionality
12.05[8] Voi	d and Voidable Contracts
(In	cluding Student Athlete
Cor	ntracts)
12.05[9] Lac	ehes
12.05[10] W	ebsite Owners' Checklist of
Pu	ablicity Issues
12.06 Interplay	y between Publicity and
Copyrigh	nt Law
12.07 Controll	ing a Celebrity's Image in
Cyberspa	ace
12.07[1] Ove	erview
12.07[2] Un:	ique Attributes of Cyberspace
	w Celebrities Use the Internet
12.07[4] Dea	aling with Fan Sites and User
	omitted Content on Blogs and
Oth	ner Internet Locations
12.07[4][A] Fan Sites Defined
12.07[4][B] Differing Approaches to Fan
	Sites
12.07[4][C] Assessing Potential Claims
] Publicizing a Dispute
12.07[5] And	
	naging Negative Publicity
	ooster Profiles on Social Networks
	ebrity Sex Tapes and Other
	authorized Photographs and
	eos
12.07[8][A] In General
	Digitally Altered Images
	Sex Tapes and Embarrassing
	Photos
12.07[8][D] Summary of Potential Legal
	Claims
12.07[9] Lin	nits of Enforcement of Court
Oro	lers
12.07[10] Ca	ase Study: Buffy the Vampire
Sl	ayer

12.07[11] Checklist for Protecting Celebrity
Rights in Connection with
Cyberspace Disputes
12.07[12] Sponsorships, Endorsements and
Blogging
12.08 Catalogue of Early Internet-Related
Publicity Litigation
12.08[1] [RESERVED]
12.08[2] Stern v. Delphi Internet Services
Corp.
12.08[3] Michaels v. Internet Entertainment
Group, Inc.
CHAPTER 13 IDEA PROTECTION AND
MISAPPROPRIATION
13.01 Overview
13.02 Express and Implied-in-Fact Contracts
13.03 Non-Contractual Remedies: Breach of
Confidential Relationship/Fiduciary Duty,
Conversion and Fraud
13.04 Idea Misappropriation as an Unfair Trade
Practice
13.05 Preemption of Certain Claims
13.06 Company Policies to Protect against
Internet-Related Idea Misappropriation
13.07 Form: Sample Website Disclaimer
PART III
LICENSES AND CONTRACTS
CHAPTER 14 DOCUMENTING INTERNET
TRANSACTIONS: INTRODUCTION
TO DRAFTING LICENSE
AGREEMENTS AND CONTRACTS

Pub. 1/2019 cxiii

Cornerstone of Internet Commerce

14.01 Internet Contracts and Licenses: The

14.02 Classifying Online Agreements

14.02[2] Unilateral Contracts

14.02[1] **Overview**

14.02[3]	Negotiated Contracts
	l for Flexibility in Commercial
	rnet Agreements
14.03[1]	Rapid Technological and Market
	Changes As a Driving Force for
	Renegotiation
14.03[2]	Duty of Good Faith and Fair Dealing
	in Cyberspace
	sing an Effective Negotiating Strategy
	ntial Impediments to the Electronic
	imentation of Commercial
	sactions
14.05[1]	Overview of the Perceived
	Limitations on E-Commerce
	Contract Rules Imposed by the Laws
	of Physical World
14.05[2]	Complying with Signature and
	Writings Requirements
_	Electronically
	2][A] Overview
14.05[2][B] Statute of Frauds
14.	05[2][B][i] The Requirement for
	Some Writing That Is
	Signed
14.	05[2][B][ii] Exceptions
14.	05[2][B][iii] Email As a Writing
14.	05[2][B][iv] Case Law Construing
	Statutory Signature
	Requirements
14.05[2][C] Writing and Signature
	Requirements in Contracts
14.05[3]	Applying the Mailbox Rule to
	Electronic Communications
14.05[4]	Conspicuous Print Online
	Authentication and Identification in
	Pseudonymous Internet
	Communications
14.06 Litig	ating Internet Contract and
	nsing Disputes
	In General

- 14.06[2] The Interplay Between State
 Licensing Law and Federal
 Intellectual Property Statutes in
 Determining Subject Matter
 Jurisdiction
- CHAPTER 15 DRAFTING AGREEMENTS IN LIGHT OF MODEL AND UNIFORM CONTRACT LAWS: UCITA, THE UETA, FEDERAL LEGISLATION AND THE EU DISTANCE SALES DIRECTIVE
- 15.01 Overview: Drafting Agreements in Light of Model, Uniform, Federal and EU Contract Laws
- 15.02 Electronic Signature Laws: e-SIGN, UETA and the Scope of Federal Preemption
 - 15.02[1] Overview of State and Federal Laws, Their Interrelationship and Federal Preemption
 - 15.02[2] Federal e-SIGN Statute
 - 15.02[2][A] In General
 - **15.02[2][B]** Exceptions
 - 15.02[2][C] Consumer Notification
 - 15.02[2][D] Record Retention
 - 15.02[3] Uniform Electronic Transactions Act (UETA)
 - 15.02[3][A] In General
 - 15.02[3][B] Mailbox Rule
- 15.03 Uniform Computer Information Transactions Act (UCITA)
 - 15.03[1] Overview
 - 15.03[2] UCITA's Structure and Scope (Including Opt-In and Opt-Out Rights)
 - 15.03[3] Contract Construction
 - 15.03[3][A] In General
 - 15.03[3][B] Unconscionability
 - 15.03[4] Preemption and Unenforceability
 - 15.03[5] Modern Contract Terms

Pub. 1/2019 cxv

	of Authentication and
	ction of Electronic Errors
15.03[7] Choice	
15.03[8] Choice	e of Forum
15.03[9] Electr	onic Agents (Bots)
15.03[10] Mani	festing Assent
	ation and Formalities
15.03[11][A]	
15.03[11][B]	Statute of Frauds
15.03[11][C]	
	C][i] In General
	C][ii] Electronic Agents
	C][iii] Releases
	C][iv] Idea Submissions
	C][v] Adoption and Mass-
10100[11][Market Licenses
15.03[11][0	C][vi] Contracts Formed by
	Conduct
15.03[11][0	C][vii] Pre-transaction
2 21	Disclosures
15.03[12] Cont	ract Construction
	fication and Rescission
15.03[14] Licer	
15.03[15] Licer	
15.03[15][A]	
	Express Warranties Based on
10100[10][2]	Representations,
	Demonstrations or
	Advertising
15.03[15][C]	<u> </u>
10.00[10][0]	Enjoyment and
	Noninfringement
15.03[15][D]	Implied Warranties of
10.00[10][D]	Merchantability, Fitness for a
	Particular Purpose and
	System Integration
15.03[15][E]	General Warranty
10.00[10][11]	Construction and Special
	Rules
15.03[16] Trans	sfer of Interests and Rights
19.00[10] II all	sici oi interests and mgms

```
15.03[17] Performance
     15.03[17][A] In General
     15.03[17][B] Use of Disabling Devices
     15.03[17][C] Delivery of Copies
        15.03[17][C][i] Tender and Delivery
        15.03[17][C][ii] Inspection
        15.03[17][C][iii] Acceptance
        15.03[17][C][iv] Special Types of
                        Contracts
        15.03[17][C][v] Risk of Loss
        15.03[17][C][vi] Excuse
        15.03[17][C][vii] Termination
  15.03[18] Rules Governing Breach
     15.03[18][A] What Constitutes a Breach
     15.03[18][B] Waiver
     15.03[18][C] Cure
     15.03[18][D] Defective Copies
     15.03[18][E] Repudiation and Assurances
  15.03[19] Remedies
     15.03[19][A] In General
     15.03[19][B] Cancellation
     15.03[19][C] Contractual Remedies and
                  Limitations
     15.03[19][D] Damages
        15.03[19][D][i] General Rules
        15.03[19][D][ii] Licensor's Damages
        15.03[19][D][iii] Licensee's Damages
        15.03[19][D][iv] Recoupment
     15.03[19][E] Performance Remedies
15.04 EU Directive on the Protection of
      Consumers in Respect of Distance
      Contracts
  15.04[1] Directive's Application to Electronic
           Commerce and U.S. Companies
  15.04[2] Prior Disclosures Required
  15.04[3] Right of Withdrawal
  15.04[4] Performance Obligations
  15.04[5] Unsolicited Sales and Credit Card
           Fraud
```

Pub. 1/2019 cxvii

15.04[6] Spamming and Other Modes of Communication

- CHAPTER 16 INTERNET LICENSES: RIGHTS
 SUBJECT TO LICENSE AND
 LIMITATIONS IMPOSED ON
 CONTENT, ACCESS AND
 DEVELOPMENT AGREEMENTS
- 16.01 Overview
- 16.02 Limitations on the Enforceability of a License: The First Sale Doctrine and Exhaustion
 - 16.02[1] Licensing Law and the First Sale Doctrine
 - 16.02[2] Patent Exhaustion
- 16.03 Summary of Intellectual Property Subject to License
 - 16.03[1] Copyright Licenses
 - 16.03[2] Patent Licenses
 - 16.03[3] Trademark Licenses
 - 16.03[4] Trade Secrets and Know-How Licenses
 - 16.03[5] Licensing a Celebrity's Name, Likeness or Distinctive Characteristics
 - 16.03[6] Ideas
- 16.04 Limitation on Licenses: Intellectual Property Misuse and Antitrust Law
 - 16.04[1] Misuse Doctrines—In General
 - 16.04[2] Patent Misuse
 - 16.04[3] Copyright Misuse
 - 16.04[4] Trademark Misuse
 - 16.04[5] Trade Secret Licenses
 - **16.04**[6] **Antitrust Law**

CHAPTER 17 LICENSING PRE-EXISTING CONTENT FOR USE ONLINE: MUSIC, LITERARY WORKS, VIDEO, SOFTWARE AND USER GENERATED CONTENT LICENSING PRE-**EXISTING CONTENT** 17.01 Overview of Content Licensing 17.02 Licensing Music for Online Use 17.02[1] In General 17.02[2] Industry Litigation: Understanding the Legal Risks Associated with **Unlicensed Music Ventures** 17.02[2][A] Overview 17.02[2][B] Early Litigation Involving the **Audio Home Recording Act** 17.02[2][C] Circumvention Technologies and the Anti-Circumvention **Provisions of the DMCA** 17.02[2][D] MP3.com Litigation and the **Risks of Particular New Business Models** The MP3Board Litigation and 17.02[2][E] the Use of Links to Provide **Access to Infringing Music** 17.02[2][F] Litigation Against Napster, Aimster and Grokster: File **Sharing and Peer-to-Peer Sites** 17.02[2][G] BitTorrent Trackers and **Swarms** 17.02[2][H] Suits Against Individual Users 17.02[2][I] Music Locker and Cloud **Storage Litigation** 17.02[2][J] **Suits Against Digital Music** Services for Public Performance of Pre-1972 Sound Recordings 17.02[3] Rights Subject to License 17.02[3][A] In General 17.02[3][B] Musical Compositions 17.02[3][B][i] In General

Pub. 1/2019 cxix

17.02[3][B][ii] Mechanical Licenses 17.02[3][B][iii] Derivative Works 17.02[3][B][iv] Synch License 17.02[3][B][v] Public Performance Licenses 17.02[3][C] Sound Recordings 17.02[3][C][i] In General 17.02[3][C][ii] Reproduction and **Distribution** 17.02[3][C][iii] Samples 17.02[3][C][iv] Master Use 17.02[3][C][v] Public Performance 17.02[4] Business Models and Challenges 17.02[5] User Generated Content 17.03 Literary Works, Printed Material, Text and Photos 17.03[1] Licensing—In General (Including Overcoming *Tasini* Problems) The Proposed (But Not 17.03[2] Implemented) Google Book Search **Settlement and License** 17.03[3] Use of Photos 17.03[4] FORMS: Sample Publisher and **Author Provisions** 17.03[4][A] Sample Publishers' Clause 17.03[4][B] Sample Author's Clauses 17.03[4][B][i] Alternative One 17.03[4][B][ii] Alternative Two 17.03[5] FORM: Sample Information Provider Agreement 17.04 Video and Motion Pictures **17.04**[1] In General 17.04[2] Business Model Liability Issues 17.04[2][A] In General 17.04[2][B] Retransmission of Television **Broadcasts over the Internet** 17.05 User Generated Content 17.05[1] Licensing UGC—In General 17.05[2] Mash Ups and Controlled UGC

Pub. 1/2019 cxxi

18.02[6][C] Choice of Law
18.02[6][D] Arbitration, Jury Trial Waivers
and Alternative Dispute
Resolution
18.02[6][E] Fees and Costs
18.02[7] Confidentiality, Nondisclosure,
Noncompetition and Inevitable
Disclosure
18.02[8] Indemnification, Representations and Warranties
18.02[9] Miscellaneous Provisions
18.02[10] Technology-Driven Changes to
Licensing Law
18.02[11] Disclosures and Disclaimers
18.02[12] Personal Data Transfers and Data
Security
18.02[13] Term and Termination
18.02[14] Bankruptcy
18.02[15] Most Favored Nations Clause
18.03 Software Development and Distribution
Agreements
18.03[1] Overview
18.03[2] Benchmarks and Development Criteria
18.03[3] Source Code Escrow
18.03[4] Identification of Platforms and
Compatibility Requirements
18.03[5] Service and Support
18.03[6] Prohibition on Reverse Engineering
18.03[7] Open Source Licenses for Software and Other Content
18.03[8] Outsourcing
18.04 Website Beta Testing Agreements
18.04[1] Overview
18.04[2] Open vs. Closed Websites
18.04[3] Quality Limitations
18.05 Agreements Governing Online Demo
Versions
18.06 Software Consulting Agreements

Appendix 1. Letter of Intent
Appendix 2. Software Evaluation Agreement
Appendix 3. Source Code Software License
Appendix 4. Master Software Development and Acquisition Agreement
Appendix 5. Electronic Publishing Agreement
Appendix 6. Value Added Distribution Agreements
Appendix 7. Beta Test Agreement
Appendix 8. Anti-Open Source Clause
Appendix 9. Domain Name Agreement Form
Appendix 10. Joint Marketing Agreement
Appendix 11. Game Development Agreement
CHAPTER 19 WEBSITE DEVELOPMENT AND HOSTING AGREEMENTS
19.01 Overview
19.02 Standard Terms
19.02[1] Standard Software Licensing Provisions
19.02[2] Ownership and Employment Status
19.02[3] Force Majeure
19.02[4] Dispute Resolution and Post-
Termination Issues
19.02[5] Indemnification
19.02[6] Confidentiality and Data Ownership
19.03 Developing and Clearing Website Content
19.04 Domain Name Registration and Ownership
19.05 The Term of an Agreement and the Use of
Benchmarks
19.06 Delivery and Acceptance
19.07 Representations and Warranties
19.08 Development Specifications
19.09 Payment
19.10 Monitoring Blogs, Chat Rooms and Other Interactive Components of a Website

Pub. 1/2019 cxxiii

- 19.11 Service, Maintenance and Support
- 19.12 Website Promotion, Key Word Purchases and Indexing
- 19.13 Attribution and Links
- 19.14 Privacy and Security
- Appendix 1. Web Development and Hosting Agreement
- Appendix 2. Website Development and Hosting Agreement
- Appendix 3. Sample Acceptance Testing Provisions
- Appendix 4. Sample Hosting Services Language
- Appendix 5. Sample Web Development Agreement
- Appendix 6. Sample Hosting Agreement
- CHAPTER 20 WEBSITE CROSS-PROMOTION AND COOPERATION: CO-BRANDING, WIDGET AND LINKING AGREEMENTS
- 20.01 Overview of Hybrid Cross-Promotion and Cooperation Models
- 20.02 Deciding What Model to Adopt
- 20.03 Co-Branding Agreements
 - 20.03[1] Overview and Issues Checklist
 - 20.03[2] FORM: Sample Agreement for A Co-Branded Content Delivery Site
 - 20.03[3] FORM: Sample Co-Branding Agreement
- 20.04 Linking Agreements to Generate Traffic
- 20.05 Linking Agreements that Restrict Traffic
- 20.06 Drafting Linking Agreements and Link-Related Terms and Conditions
 - 20.06[1] Key Provisions in a Linking Agreement
 - 20.06[2] Forms: Sample T & C Provisions Prohibiting Unauthorized Linking & Framing

20.06[2][A] Overview

20.06[2][B]	Sample Short Form Restricting Links
20.06[2][C]	Sample Long Form Restricting
	Links
	ole T & C Provisions
	uraging Links
20.06[3][A]	
	Form: Restriction on Content Links
20.06[3][C]	Form: Registration Required to Link
20.06[4] FORM	M: Sample Linking Agreement
CY FO AN	TAINING ASSENT IN BERSPACE: CONTRACT RMATION FOR CLICK-THROUGH D OTHER UNILATERAL NTRACTS
21.01 Overview	of Online Contract Formation
21.02 Software S	hrinkwrap Licenses and the
Developme	ent of Early Internet Case Law
21.02[1] In Ge	eneral
21.02[2] Step-	Saver Data Systems, Inc. v. Wyse
Techn	nology
	na Retail Systems, Inc. v. The
	eare Link, Inc.
	D, Inc. v. Zeidenberg
21.02[4][A]	Overview
21.02[4][B]	Facts of the Case
21.02[4][C]	District Court's Ruling
21.02[4][D]	Seventh Circuit's Decision
	Copyright Preemption
21.02[4][F]	Legal Underpinning of the
	Decision
21.02[5] Hill u	o. Gateway 2000, Inc.
21.02[6] Comp	ouServe Inc. v. Patterson and the
Signi	ficance of Choice of Law and
Dispute Resolution Case Law	
_	CompuServe, Inc. v. Patterson

Pub. 1/2019 cxxv

21.02[6][B] Distinguishing Dispute Resolution Cases

- 21.02[7] Storm Impact, Inc. v. Software of the Month Club and the Differences Between Intellectual Property Licenses and Other Unilateral Contracts
- 21.02[8] Hotmail Corp. v. Van\$ Money Pie, Inc.
- 21.02[9] M.A. Mortenson Co. v. Timberline Software Corp.
- 21.02[10] Green Book Int'l Corp. v. Inunity Corp.
- 21.03 Modern Law on the Enforceability of Unilateral Internet Contracts: Express and Implied Assent
 - 21.03[1] Unilateral Contracts—In General
 - 21.03[2] Express and Implied Assent: Click-Through and Browsewrap Agreements
 - 21.03[3] Determining Who May Be Bound When Express Assent is Obtained
 - 21.03[4] Website Policies (Including Privacy Policies)
- 21.04 Unconscionability As a Limitation on the Enforceability of Unilateral Internet Contracts
 - **21.04**[1] In General
 - 21.04[2] Practice Tips
- 21.05 Checklist for Maximizing the Enforceability of Unilateral Internet Contracts
- 21.06 Using Alternative Contracts for International Transactions
- 21.07 Adequate Record Keeping Procedures for Online Contracts
- 21.08 Mobile Issues and Apps
- Appendix 1. End User License Agreement
- Appendix 2. SilverPlatter Subscription and License Agreement

CHAPTER 22 STRUCTURING AND DRAFTING WEBSITE TERMS AND CONDITIONS

- 22.01 Overview
- 22.02 Legal Objectives of Website Terms and Conditions
- 22.03 Where and How to Present Terms and Conditions on a Website to Maximize Enforceability
 - 22.03[1] Table Illustrating Alternative Choices
 - 22.03[2] Best Practices
 - 22.03[3] Special Rules for Automatic Renewal or Continuous Service Offers
- 22.04 Updating T&Cs and Maintaining Evidence of Contract Formation
 - 22.04[1] Material Changes to Terms of Use Agreements
 - 22.04[2] Recordkeeping
- 22.05 Drafting Website Terms and Conditions
 - **22.05**[1] In General
 - 22.05[2] Widely Applicable Provisions
 - 22.05[2][A] DMCA Compliance
 - 22.05[2][B] Good Samaritan Compliance and Site Monitoring
 - 22.05[2][B][i] Policy
 - 22.05[2][B][ii] Screening Software
 - 22.05[2][B][iii] Negating Barnes v. Yahoo! Inferences
 - 22.05[2][B][iv] Failure to Warn
 - 22.05[2][C] Privacy
 - 22.05[2][D] General Notice and Takedown Procedures
 - 22.05[2][E] Use of Intellectual Property
 - 22.05[2][E][i] Protection of the Site's Own Intellectual Property
 - 22.05[2][E][ii] User Submissions and Content
 - 22.05[2][F] Liability Limitations/Warranty Disclaimers

Pub. 1/2019 cxxvii

22.05[2][G] Choice of Law and Forum
22.05[2][H] Disclosures to California Residents
22.05[2][I] Securities Act Safe Harbor
Statement and Investment
Notice
22.05[2][J] Site and Service Modifications
22.05[2][6] Site and Service Modifications 22.05[2][K] Data Security
22.05[2][K] Data Security 22.05[2][L] Consent to Receive Unsolicited
Direct Marketing
Communications
22.05[2][M] Arbitration Clauses and Class
Action Waivers
22.05[2][M][i] Arbitration Clauses and
Class Action Waivers—In
General
22.05[2][M][ii] California Law Prior to
AT&T Mobility, LLC v.
Concepcion
22.05[2][M][iii] AT&T Mobility, LLC v.
Concepcion and Its
Practical Impact on the
Enforceability of
Arbitration Provisions,
Class Action Waivers
and California Public
Policy
22.05[2][M][iv] Rent-A-Center, West, Inc.
v. Jackson
22.05[2][M][v] American Express Co. v.
Italian Colors Restaurant
22.05[2][M][vi] Drafting Tips
22.05[2][M][vii] Sample Consumer
Arbitration Form—AAA
22.05[2][M][viii] Sample Consumer
Arbitration Form—JAMS
22.05[2][N] Age Restrictions and Contracts with Minors
WITH MIHOLS

22.05[2][O]	Non-Commercial Use
22.05[2][P]	No Third-Party Beneficiaries
22.05[2][Q]	Jury Trial Waiver
22.05[2][R]	New Jersey Truth-in-Consumer
	Contract, Warranty and Notice
	Act (TCCWNA)
22.05[2][S]	Additional Considerations
	Based on the Cybersecurity
	Information Sharing Act
22.05[3] Plug	-In Components
22.05[3][A]	Overview
22.05[3][B]	Links
22.05[3][C]	Spam and Abusive Electronic
	Communications (Including
	Liquidated Damages)
22.05[3][D]	Unsolicited Idea Submissions
22.05[3][E]	Compliance With Export
	Control Laws
22.05[3][F]	Law Firm Websites
22.05[3][G]	Health-Related Websites
22.05[3][H]	Regulated Industries
22.05[3][I]	Adult Websites and Vendors of
00 075015 71	Alcohol or Tobacco Products
22.05[3][J]	Anti-Trespass Provisions/
00 05[0][17]	Database Protection
22.05[3][K]	Domain Name Registries and
22.05[3][L]	Registrars
22.05[3][L] 22.05[3][M]	Internet Dating Sites New York State Tax Issue /
22.09[9][M]	Links
22.05[3][N]	The Consumer Review
22.00[0][11]	Fairness Act and Related State
	Laws Prohibiting Restrictions
	on User Comments and
	Criticism
22.05 [3][O]	Restrictions on Requiring Age
	Disclosure
22.05[3][P]	Shortened Time to Initiate A
	Claim

Pub. 1/2019 cxxix

22.05[4] Accounting for Netiquette in Legal
Draftsmanship
22.05[4][A] Drafting Style—In General
22.05[4][B] Avoiding Incorporation by
Reference of Multiple Other
Legal Documents
22.05[4][C] Reducing the Number of
Separate T&Cs Used By A Company
22.06 Form: Sample Terms of Use
22.07 Form: Sample Perms of Use 22.07 Form: Sample Posted Website T&Cs for an
Open Site
22.08 Form: Sample Click-Through Website
T&Cs for a Closed (Subscription-Based)
Website
22.09 Form: Sample Copyright and Trademark
Notice
22.10 Form: Sample Terms of Use for a Social
Network, Blog or Interactive Website
22.11 Form: Terms of Use: Demand Entertainment, Inc.
Entertainment, mc.
CHAPTER 23 ISP SERVICE AGREEMENTS
23.01 Overview
23.02 Contract Formation
23.03 Key Terms in an ISP Agreement
23.03[1] The Scope of, and Limitations on,
the Service Provided
23.03[2] Inappropriate Behavior
23.03[3] Good Samaritan Exemption and
Required Notice about Parental
Control Protections
23.03[4] DMCA Compliance
23.03[5] Ownership of User IDs and Other
Potential Intellectual Property
23.03[6] Unsolicited Email
23.03[7] Warranty Disclaimers and Indemnification
23.03[8] Privacy
23.03[9] Dispute Resolution
20.00[3] Dispute Hesolution

23.04	Updating Unilateral ISP Agreements
23.05	Forms: Sample Service Agreements
	5[1] Overview
23.0	5[2] Form: Sample ISP Service
	Agreement
23.0	5[3] Form: America Online, Inc., Terms of Use and Rules of the Road
23.0	5[4] Form: Terms and Conditions for Use of Counsel Connect
	Volume 3
QTT 4 DF	
CHAPI	TER 24 SOFTWARE AS A SERVICE: ON- DEMAND, RENTAL AND
	APPLICATION SERVICE PROVIDER
	AGREEMENTS
24.01	Overview
	Drafting an ASP Contract
	2[1] Overview
	2[2] Access
	2[3] Ownership Rights
	2[4] Pass-Through Obligations and the
	Right to Sub-License Software
24.0	2[5] Termination, Transition Rights and
	Back-Up Data
	2[6] Confidentiality, Privacy and Security
24.0	2[7] Third Party Intellectual Property
	and Related Liability Risks
	2[8] Bankruptcy and Related Protections
24.03	Application Service Provider Form
	PART IV
PRIVA	CY, SECURITY AND INTERNET ADVERTISING
СНАРТ	TER 25 INTRODUCTION TO CONSUMER PROTECTION IN CYBERSPACE
25.01	Overview of Online Fraud and Consumer
	Protection in Cyberspace
25.02	Role of the FTC in Regulating and

Pub. 1/2019 cxxxi

Enforcing Consumer Protection in
Cyberspace
25.02[1] In General
25.02[2] Unfair or Deceptive Acts or Practices 25.02[3] Investigations and Reports
25.02[3] Investigations and Reports
25.02[4] Additional Oversight Responsibility
25.02[5] Internet-Related Activities and
Enforcement Actions
25.03 Other Federal and State Regulatory
Agencies
25.04 U.S. Consumer Protection Laws Relating
to Electronic Commerce
25.04[1] Overview
25.04[2] Federal Statutes
25.04[3] State Laws
25.05 Regulatory Jurisdiction and the Need to
Comply with International Consumer
Protection Laws
25.06 European Union Directives Governing
Consumer Protection in Cyberspace
25.07 Internet Class Action Litigation
25.07[1] In General
25.07[2] Standards for Class Certification
25.08 Online Resources
CHAPTER 26 DATA PRIVACY
26.01 Data Privacy Law—In General
26.02 Consumer Attitudes About Data Collection
26.03 Web Beacons, Cookies, Flash Cookies and
Other Online Data Gathering Mechanisms
26.04 The European Union General Data
Protection Regulation (GDPR)
26.04[1] In General
26.04[2] Scope
26.04[3] Expanded Data Protection
Principles
26.04[4] Lawfulness of the Processing
26.04[5] Consent
26.04[6] Enhanced Record-Keening

	Requirements and Accountability Requirements
26.04[7]	Appointment of a Data Protection Officer
26.04[8]	Approved Codes of Conduct and Certification
26.04[9]	Transfer of Personal Information Outside the EU
26.04[10]	
26.04[11]	-
26.04[11]	
26.04[12]	ŭ ŭ
20.04[10]	Penalties
26.04[14]	Compliance Checklist for U.S.
	Businesses
26.04A Tra	nsferring Data from the European
	on or European Economic Area
26.04A[1]	In General
26.04A[2]	EU—U.S. Privacy Shield Principles
	for U.S. Businesses
26.04A[3]	EU Standard Contractual Clauses
26.04A[4]	Binding Corporate Rules
26.04B The	e ePrivacy Directive
26.04B[1]	In General
26.04B[2]	Directive's Effect on E-Commerce
26.04B[3]	Cookies
26.04B[4]	Notice and Consent
26.04B[5]	Unsolicited Email and Other
	Communications
26.04B[6]	Processing Security
26.04B[7]	Confidentiality of Communications
26.04B[8]	•
26.04B[9]	Public Directories
	o] Controls
26.04B[11] Proposed ePrivacy Regulation
	torical Context: EU Data Privacy Law
	n 1995 to 2018 and the Now
	erseded European Union Privacy
	ectives

Pub. 1/2019 cxxxiii

26.04C[1]	EU Data Protection Directive (1995–2018)—In General
26.04C[2]	
20.040[2]	Quality
26.04C[3]	
	for Processing Personal Data
26.04C[4]	Special Categories of Data
26.04C[5]	Mandatory Disclosures to Data
	Subjects
26.04C[6]	0
26.04C[7]	· ·
26.04C[8]	
22 24 050	Data Processing
	Notification
26.04C[10	Transfer of Personal Data Outside
00 040[11	the European Union
_	Remedies
20.040[12	Implementation of the Directive and Supervisory Authorities
26.05 IIS I	Data Privacy Law—In General
	Constitutional Rights to Privacy
	Constitutional Rights to Privacy
	In General
	California Constitutional Right to
	Privacy
	Florida Constitutional Rights
	non Law Privacy
	cy Protection Under Computer
	es Statutes
26.10 Perso	onal Information Held by the
Gove	rnment
26.10 [1]	In General
26.10[2]	The Privacy Act
26.10 [3]	Freedom of Information Act
26.10[4]	DMV Records and Other Data Held
	by State Governments
26.10[5]	Federal Agency Data Mining
	Reporting Act
	onal Health Information and Medical
Reco	rds

26.12 Personal Financial Infor	rmation
26.12[1] Overview	
26.12[2] Gramm-Leach-Blile	ey Act
26.12[3] Fair Credit Report	ing Act
26.12[4] Fair Debt Collectio	n Practices Act
26.12[5] Electronic Funds T	ransfer Act
26.12[6] Fair Credit Billing	Act
26.12[7] Right to Financial	Privacy Act
26.12[8] FACTA	
26.12[9] State Financial Pri	vacy Laws
26.13 Personal Consumer Info	rmation
26.13 [1] In General	
26.13[2] Information Collec	ted from Children
26.13[2][A] COPPA Comp	liance—In
General	
26.13[2][B] Right to Revi	ew Personal
Information	
2 22 2	n and Deletion
	Confidentiality
and Integrity	of Personal
Information	• •
26.13[2][E] Voluntary Co	
	cess and Safe
Harbor Self-F Programs	tegulatory
	nent Actions and
Preemption	nent Actions and
	of Identifying
	About a Minor for
Criminal Sex	
26.13[2][H] Teen Privacy	
•	Child Privacy
26.13[3] Individual Referen	_
26.13[3][A] In General	
26.13[3][B] Source of Inf	ormation
26.13[3][C] Effect of Data	abases and
Computer Ne	tworks
26.13[3][D] Industry Pra	
26.13[3][E] Consumer Ri	

Pub. 1/2019 cxxxv

26.13[3][F] FTC Recommendations 26.13[4] FTC and Department of Commerce **Guidelines on Fair Information Practices for Consumer Transactions 26.13**[4][A] In General 26.13[4][B] FTC June 1988 Guidelines for **Fair Information Practices in Consumer Transactions** 26.13[4][C] The FTC's March 2012 Proposal: Simplified Choice, **Greater Transparency and** Privacy By Design 26.13[4][C][i] Overview 26.13[4][C][ii] Privacy By Design 26.13[4][C][iii] Simplified Choice 26.13[4][C][iv] Greater Transparency 26.13[4][C][v] Self-Regulatory Codes 26.13[4][C][vi] Data Brokers 26.13[4][D] U.S. Commerce Department **Privacy Initiative** 26.13[5] FTC Enforcement Actions 26.13[5][A] FTC Data Privacy Enforcement Actions—In General 26.13[5][B] In re GeoCities 26.13[5][B][i] Overview 26.13[5][B][ii] The FTC's Allegations 26.13[5][B][iii] Terms of the Consent **Judgment** 26.13[5][B][iv] Terms of the Required **Privacy Statement** 26.13[5][B][v] Placement of the Required Privacy Statement 26.13[5][B][vi] Express Parental Consent 26.13[5][B][vii] Previously Collected PII 26.13[5][C] Lessons Learned From FTC **Enforcement Actions** 26.13[6] Collection of Information from

California Residents

26.13[6][A]	Overview
26.13[6][B]	The Obligation to
	Conspicuously Post a Website
	or Mobile App Privacy Policy
	and Disclose Web Tracking
	Practices (California's Online
	Privacy Protection Act of 2003)
26.13[6][C]	The Obligation to Implement
	and Maintain Reasonable
	Security Procedures
26.13[6][D]	The Obligation to Disclose or
	Provide An Opt Out Right from
	Personal Information
	Transfers to Third Parties for
	Direct Marketing Purposes
	(the "Shine the Light" Law)
26.13[6][E]	Collection of PII and Zip Code
	Information in Connection
	with Credit Card Transactions
26.13[6][F]	California Bus. & Prof. Code
	§ 22580—California's "Online
	Eraser" Law for Minors
26.13[6][G]	The IMDb Age Law
	esota ISP Privacy Law
	Privacy Policy Law
	e's [Now Repealed] Predatory
	eting Practices Against Minors
Act	
	o Rental Records, the VPPA
	Equivalent State Laws
	er's Records
	netric and Genetic Data
26.13[12][A]	In General
26.13[12][B]	The Illinois Biometric
	Information Privacy Act
26.13[12][C]	Texas Law on the Capture or
	Use of Biometric Identifier
26.13[12][D]	Washington Law on the use of
	biometric data for a
	commercial purpose

Pub. 1/2019 cxxxvii

- 26.13A California Consumer Privacy Act (CCPA)
- 26.14 Website Privacy Policies
 - **26.14**[1] In General
 - 26.14[2] Components of a Privacy Policy
 - 26.14[3] Checklist for Drafting an Internet Privacy Statement
- 26.15 Class Action Litigation
- 26.16 Privacy and Reverse Engineering
- Appendix 1. European Union Model Contract Clauses Governing Transfers to Data Processors
- Appendix 2. European Union Model Contract Clauses Governing Transfers to Data Controllers
- Appendix 3. FTC Regulations Implementing the Children's Online Privacy Protection Act (2013)
- Appendix 4. FTC's FAQs on the COPPA Rule (2013)
- Appendix 5. Original (now superseded) FTC Regulations Implementing the Children's Online Privacy Protection Act (2000)
- Appendix 6. Privacy on the Go—California Attorney General Mobile App Guidelines (2014)
- Appendix 7. Sample Privacy Policy for a Social Network, Blog or Interactive Website
- Appendix 8. The California Consumer Privacy Act
- CHAPTER 27 CYBERSECURITY: INFORMATION, NETWORK AND DATA SECURITY
- 27.01 Overview of the Law of Network and Data Security
- 27.02 Understanding Network Security Risks 27.02[1] Overview

27.02[2]	
27.02[3]	
	Website (or Gateway) Security
27.02[4]	
	Security
27.02[5]	
	Horses
	yption, Cryptography and Biometrics
	Overview
	Cryptography Defined
27.03 [3]	· · · · · · · · · · · · · · · · · · ·
05 00 41	Cryptography
27.03[4]	
0 7 000	Products
	4][A] Background History
27.03[4][B] The Encryption Simplification Rule and the Publicly Available
	Mass Market Encryption
	Software Rule
27.03[5]	Biometrics
27.03[6]	
21.00[0]	Fingerprinting Technology
27.03A Blo	
	e Internet of Things (IoT)
	Patchwork of Laws Governing
	rnet Security
	Overview
27.04[1.5]	The Cybersecurity Information
_	Sharing Act
27.04[2]	•
	Protection Act
27.04 [3]	Gramm-Leach-Bliley Act of 1999
27.04 [3][A] In General
	3][B] The Privacy and Safeguards
-	Rules
27.04 [3][C] Response Programs (including
-	consumer notification)
27.04 [3][D] The Disposal Rule
	Health Care and Medical Records
	4][A] The Health Insurance

Pub. 1/2019 cxxxix

	Dowtobility and Accountability
	Portability and Accountability Act (HIPAA)
27.04[4][]	·
21.04[4][Under the American Recovery
	and Reinvestment Act of 2009
27 04[5] Ox	verview of Public Company Issues
27.04[5][
27.04[5][3	_
21.01[0][1	Disclosure Guidance
27.04[6] St	ate Data Security Statutes
27.04 [6][<i>A</i>	•
27.04[6] []	_
27.04 [6][6]	_
20001[0][and Procedures and
	Contractual Measures
27.04[6][]	D] Data Destruction and Related
	Statutes
27.04[6] []	E] The Massachusetts Information
	Security Program Statute:
	Standards for the Protection of
	Personal Information of
	Residents of the
0 = 0.450353	Commonwealth
27.04[6][]	- · · · · · · · · · · · · · · · · · · ·
27.04[6][
05 04[0][1	Other State Security Statutes
27.04[6][]	H] Ohio's Data Security Safe Harbor Law
27.04[6] []	
41.04[0][J	Destruction Policy Law
27.04[6][6	•
27. 01[0][0	Registration and
	Comprehensive Information
	Security Program Statute
27.04[6][]	
	Requirements for Financial
	Services Companies
27.04[6] []	-
	Security of Connected Devices
	ment Card Industry (PCI)
Securit	v Standard and Related State Laws

27.06 FTC Enforcement Actions
27.07 Cybersecurity and Data Breach Litigation
27.08 Analysis of State Security Breach
Notification Statutes
27.08[1] Overview and Strategic
Considerations
27.08[2] Persons Obligated to Provide Notice
27.08[3] Breaches that Trigger Notification
Obligations
27.08[3][A] In General
27.08[3][B] Data Elements That Give Rise
To A Disclosure Obligation—
Defining Personal Information
27.08[3][C] Encryption and Redaction
27.08[3][D] Data on Password-Protected
Laptops
27.08[3][E] Electronic vs. Paper Records
and Audio Recordings
27.08[3][F] Exclusion: Publicly Available
Information and Truncated
Identification Numbers
27.08[3][G] Exclusion: Criminal
Intelligence Systems
27.08[4] The Timing of Notification and Pre-
Notice Obligations
27.08[5] Methods of Notification
27.08[6] The Content and Required Text of
Consumer Notices
27.08[7] Additional Notices to Credit
Reporting Agencies
27.08[8] Additional or Alternative Notices to
State Agencies
27.08[9] The Provision of Credit Monitoring
Services to Affected Consumers
27.08[10] Claims, Defenses, Remedies and
Sanctions for Non-compliance with
Security Breach Notification Laws
27.08[10][A] In General
27.08[10][B] State Enforcement
27.08[10][C] Private Claims for Damages,

Pub. 1/2019 cxli

	Injunctive Relief and
27.08[10][D]	Attorneys' Fees Nevada's Statutory Cause of
21.00[10][D]	Action Against Data
	Collectors
27.08[10][E]	
0 = 0 0 [4 0] []	Criminal Statute
27.08[10][F]	
	Disclosures By Government Employees
27.08[10][G]	1 0
	Security Breach
27.08[11] Cont	ractual Waivers of Notice
	ations
	Destruction and Security
	ze Laws
-	pliance Checklist tional Rules for Credit and
	t Card Account Information
	of State and Territorial
	each Notification Statutes
27.09[1] Overv	
27.09[2] Alaba	ma
27.09[3] Alaska	
27.09[4] Arizon	
27.09[5] Arkan	
27.09[6] Califo	
27.09[7] Colora	
27.09[8] Conne	
27.09[9] Delaw	
27.09[10] Distr 27.09[11] Florid	
27.09[12] George 27.09[13] Guan	
27.09[13] Guan 27.09[14] Hawa	
27.09[14] Hawa	
27.09[16] Illino	
27.09[17] India	
27.09[18] Iowa	

Table of Contents

27.09[19]	Kansas
27.09[20]	Kentucky
$\boldsymbol{27.09[21]}$	Louisiana
$\boldsymbol{27.09[22]}$	Maine
27.09[23]	Maryland
$\boldsymbol{27.09[24]}$	Massachusetts
$\boldsymbol{27.09[25]}$	Michigan
27.09[26]	Minnesota
$\boldsymbol{27.09[27]}$	Mississippi
27.09[28]	Missouri
27.09[29]	Montana
27.09[30]	Nebraska
27.09 [31]	Nevada
27.09[32]	New Hampshire
27.09[33]	New Jersey
27.09[34]	New Mexico
27.09[35]	New York
27.09[36]	North Carolina
27.09[37]	North Dakota
27.09[38]	Ohio
27.09[39]	Oklahoma
27.09[40]	Oregon
27.09[41]	Pennsylvania
27.09[42]	Puerto Rico
27.09[43]	Rhode Island
27.09[44]	South Carolina
27.09[45]	South Dakota
27.09[46]	Tennessee
27.09[47]	Texas
27.09 [48]	Utah
27.09[49]	Vermont
27.09[50]	Virgin Islands
27.09[51]	
27.09[52]	Washington
27.09[53]	S
27.09[54]	<u> </u>
	Wyoming
	ity Provisions in Data Processing
Contr	

Pub. 1/2019 cxliii

- 27.11 Security Compliance Programs and Audits
 - 27.11[1] In General
 - 27.11[2] Security Audit Checklist
 - 27.11[3] Anti-Phishing Best Practices Checklist
- 27.12 Security and Authentication in Electronic Transactions: Digital Signatures Laws and Technologies
 - **27.12**[1] Overview
 - 27.12[2] Digital Signature Technology and the Potential Role of Public Key Systems for E-Commerce Transactions
 - 27.12[2][A] Digital vs. Electronic Signatures
 - 27.12[2][B] Public Key Cryptography
 - 27.12[2][C] Mechanics of Creating and Verifying Digital Signatures
 - 27.12[2][D] Certification Authorities
 - 27.12[2][E] Risk of Loss, Liability and Government Regulation
 - 27.12[3] Development of Digital Signature Laws and Guidelines
 - 27.12[3][A] Overview
 - 27.12[3][B] Utah Model
 - 27.12[3][B][i] In General
 - 27.12[3][B][ii] CA Warranties
 - 27.12[3][B][iii] Subscriber
 - Representations
 - 27.12[3][B][iv] Suspension
 - 27.12[3][B][v] Revocation
 - 27.12[3][B][vi] Repository Liability
 - 27.12[3][B][vii] CA Liability
 - 27.12[3][B][viii] Presumptions
 - 27.12[3][B][ix] Consumer Concerns
 - 27.12[3][C] California Model
 - 27.12[3][D] Illinois Model
 - 27.12[3][D][i] In General
 - 27.12[3][D][ii] Subscriber Duties

27.12[3][D][iii] CA and Repository Obligations 27.12[3][D][iv] Revocation 27.12[3][D][v] Subscriber

Representations

27.12[3][D][vi] State Approval

- 27.12[4] Federal Preemption of State Risk of Loss Rules
- 27.12[5] State Laws Governing Digital and Electronic Signatures
- 27.13 Practical Guidance For Developing A Written Information Security Program
 - 27.13[1] The Legal Requirement for a WISP
 - 27.13[2] Developing a Written Information Security Program
 - 27.13[3] Categories of Controls the Security Program Must Address
 - **27.13[4]** Resources
- Appendix 1. Interagency Guidance on Response Programs for Unauthorized Access to Consumer Information and Customer Notice, 70 Fed. Reg. 15736 (Mar. 29, 2005)
- Appendix 2. Data Security Breach Notification Laws
- Appendix 3. Consent Order, In the Matter of Petco Animal Supplies, Inc., File No. 032-3221 (FTC consent order entered Nov. 8, 2004) (allegedly deceptive security practices)
- Appendix 4. Consent Order, In the Matter of BJ's Wholesale Club, Inc., File No. 042 3160 (FTC consent order approved Sept. 2005) (allegedly unfair security practices)
- Appendix 5. Stipulated Final Judgment and Order, *United States v. Choicepoint, Inc.*, (N.D. Ga. filed Jan. 2006)

Pub. 1/2019 cxlv

- Appendix 6. North Carolina Security Breach Notification Form
- Appendix 7. North Carolina Security Breach Reporting Form
- Appendix 8. August 2009 Implementing
 Regulations for the
 Massachusetts Information
 Security Program Statute
 (effective March 1, 2010)
- Appendix 9. Health Breach Notification Rule, 16 CFR 318, issued pursuant to the American Recovery and Reinvestment Act of 2009
- Appendix 10. Cybersecurity Disclosure Guidelines (Oct 13, 2011)

CHAPTER 28 ADVERTISING IN CYBERSPACE

- 28.01 Overview of Cyberspace Advertising Law
- 28.02 First Amendment and Good Samaritan Protections for Internet Advertisements
- 28.03 FTC Regulation of False Advertising Online
 - 28.03[1] In General
 - 28.03[2] Advertising As an Unfair or Deceptive Act or Practice
 - 28.03[3] Food, Drug, Device, Service and Cosmetic Advertisements
 - 28.03[4] Substantiation
 - 28.03[5] FTC Mail or Telephone Order Merchandise Rule
 - 28.03[6] FTC Telemarketing Sales Rule
 - 28.03[7] Use of the Word "Free"
 - 28.03[7][A] In General
 - 28.03[7][B] FTC Guidelines on Use of the Word "Free"
 - 28.03[8] Endorsements and Testimonials, Including Commentary By Bloggers
- 28.04 The FTC's Dot Com Disclosure Guidelines
- 28.05 Viral or "Buzz" Marketing (including the use of User Generated Content)

28.06	Beha	vioral Advertising
28.07	Intel	lectual Property Clearance
28.08	Lanh	nam Act and State Law False
	Adve	ertising Claims
28.09	Keyv	vord Advertising: Contextual Banner
	Ads	and Sponsored Links
28.10	Meta	itags
28.11	Click	x Fraud
28.12	Link	ing and Framing
28.13	Affili	ate Marketing Programs
28.	13[1]	In General
		Best Practices Checklist
28.14	Euro	pean Union Laws on Comparative
		ertising in Cyberspace
28.15	Alco	hol Advertisements
		ests, Sweepstakes and Promotions
28.	16[1]	Overview
28.	16[2]	Jurisdictional Considerations in
		Web-Based Promotions
9		2][A] Privacy and Data Protection
	28.	16[2][A][i] In General
		16[2][A][ii] Children's Privacy
	28.16 [2][B] Infiltration of Viruses and
		Hackers
2	28.16 [2][C] Disputes Over the Identity of
		An Entrant
		2][D] Confusion Over Time
2	28.16[2][E] Loyalty Programs and Cookie Settings
28.	16[3]	
		Refer-a-Friend Promotions
28.	16[4]	Terms and Conditions (or Official
		Rules) of Internet Promotions
28.	16[5]	Registration of Sweepstakes,
		Contests, and other Promotional
		Activities
28.	16[6]	Avoiding Classification as an Illegal
	-	Lottery
28.	16[7]	Contests Involving User Generated
	- -	Content and Voting

Pub. 1/2019 cxlvii

- 28.16[7][A] Usage Rights, Ownership and Risks of User Generated Content
- 28.16[7][B] Voting-Based Promotions: Skill vs. Chance
- 28.16[7][C] Voting-Based Promotions: Integrity of the Promotion
- 28.17 Policies and Procedures to Avoid Liability for Online Advertising
- 28.18 Jurisdiction for U.S. Litigation Based on Website and Banner Advertisements
- 28.19 Deciding Which National Laws to Comply With
- 28.20 Online Resources
- Appendix 1. USA v ValueClick Complaint
- Appendix 2. USA v ValueClick Stipulated Final Judgment

Volume 4

- CHAPTER 29 EMAIL AND TEXT MARKETING, SPAM AND THE LAW OF UNSOLICITED COMMERCIAL EMAIL AND TEXT MESSAGING
- 29.01 Background and Overview
- 29.02 Constitutional Rights in Unsolicited Communications
 - **29.02**[1] In General
 - 29.02[2] First Amendment Protections
 - 29.02[2][A] Supreme Court Precedents
 - 29.02[2][B] Case Study: ACLU v. Miller
 - 29.02[2][B][i] Overview
 - 29.02[2][B][ii] Georgia Statute
 - 29.02[2][B][iii] Court's Analysis
 - 29.02[2][B][iv] Other First Amendment Issues
 - 29.02[3] Commerce Clause Limitations
 29.02[3][A] Overview of the Statute and
 Commercial vs. Transactional
 or Relationship Messages

29.02[3][B] Case Study: New York v. Lipsitz 29.03 The Federal CAN-SPAM Act **29.03[1]** In General 29.03[2] Scope of the Act's Coverage 29.03[2][A] In General 29.03[2][B] Commercial and Transactional or Relationship Messages 29.03[2][B][i] Commercial and Transactional or Relationship Messages In General (including the **Primary Purpose Rule**) 29.03[2][B][ii] Legally Mandated **Notices** 29.03[2][B][iii] Debt Collection Emails 29.03[2][B][iv] Copyright Infringement **Notices and Market** Research 29.03[2][B][v] **Transactions that May** Not Involve an Exchange of Consideration 29.03[2][B][vi] Affiliated Third Parties 29.03[2][B][vii] Messages Sent to **Effectuate or Complete** a Negotiation 29.03[2][B][viii] Employment-related Messages 29.03[2][B][ix] Electronic Newsletter **Subscriptions** 29.03[2][B][x] "Business Relationship" Messages 29.03[2][B][xi] Messages from an Association to its Membership 29.03[2][B][xii] Messages to Members of **Online Groups** The Obligations Imposed on 29.03[2][C] **Senders and Initiators of Commercial Electronic** Messages

Pub. 1/2019 cxlix

00 001011 01111 7 0
29.03[2][C][i] In General
29.03[2][C][ii] Separate Lines of
Business or Divisions
29.03[2][C][iii] Messages that Include
More than One
Promotion
29.03[2][C][iv] List Owners
29.03[2][C][v] Affiliate Networks
29.03[2][C][vi] Forward-to-a-Friend
Emails
29.03[2][C][vi][a] In General
29.03[2][C][vi][b] Web-Based
Forwarding
29.03[2][C][vi][c] Email Forwarding
29.03[3] Materially False or Materially
Misleading Header Information (in
Commercial and Transactional or
Relationship Messages)
29.03[4] Regulation of Commercial Electronic
Mail Messages
29.03[4][A] In General
29.03[4][B] Inclusion of Identifier, Opt-Out
and Physical Address
Information
29.03[4][C] Functioning Return Email
Address or Mechanism to Be
Removed from an Email List
(and the Prohibition on
Initiating Future
Transmissions to Recipients
Who Have Opted-Out)
29.03[4][D] Misleading Subject Headings
29.03[4][E] Address Harvesting and
Dictionary Attacks
29.03[4][F] Automated Creation of
Multiple Email Accounts
29.03[4][G] Relay or Retransmission
Through Unauthorized Access
29.03[5] Sexually Oriented Material
29.03[6] Businesses Knowingly Promoted by

Emails Containing False or Misleading Transmission Information 29.03[7] Civil, Criminal and Regulatory **Enforcement and Damages** 29.03[7][A] In General 29.03[7][B] FTC and State Government Enforcement 29.03[7][C] Private Causes of Action by **Internet Access Services** (Including Damages and Attorneys' Fee Awards) 29.03[7][C][i] In General 29.03[7][C][ii] Standing: Internet Access Service and Adverse Affect 29.03[7][C][ii][a] In General 29.03[7][C][ii][b] Internet Access Service 29.03[7][C][ii][c] Adverse Affect 29.03[7][C][ii][d] Electronic Mail Messages 29.03[7][C][iii] Damages, Attorneys' Fees and Costs and **Injunctive Relief** 29.03[7][C][iv] Litigation and Case Law 29.03[8] Potential Liability for Affiliate and **Sub-Affiliate Misconduct** 29.03[9] Preemption of State Laws 29.03[10] Sentence Enhancements and **Criminal Enforcement** 29.03[11] **Checklist for Engaging in Lawful Email Marketing** 29.04 **Cyber Promotions Litigation: Defining the** Rights of Service Providers, Individuals and Bulk Email Distributors in Civil Litigation 29.04[1] Overview 29.04[2] America Online, Inc. v. Cyber

Pub. 1/2019 cli

Promotions, Inc.

29.04[2][A]	Procedural Background
29.04[2][B]	America Online's Allegations
29.04[2][C]	Preliminary Injunction Order
29.04[2][D]	Judge Weiner's November 4,
	1996, Partial Summary
	Judgment Order
29.04[2][E]	Cyber Promotions' Antitrust
	Claims
29.04[2][F]	
29.04 [3] Conc e	entric Network Corp. v. Wallace
	ouServe Inc. v. Cyber
	otions, Inc.
29.04[5] Post-	Trilogy Spamming Cases and
	urrent State of the Law
29.04[5][A]	Triumph of the Common Law
	and Demise of Cyber
	Promotions
29.04[5][B]	IMS, Van Money Pie, Inc. and
	LCGM, Inc.: Expanding Claims
	to Include Contract and
	Computer Crime Violations
	ation of Unsolicited
Commercia	
	Regulating Unsolicited
Commercia	
29.06[1] In Ge	
29.06[2] Alask	
29.06[3] Arizo	
29.06[4] Arka	
29.06[4][A]	
29.06[4][B]	Pre-CAN-SPAM Act Computer
	Crime Laws
29.06[4][C]	The Unsolicited Commercial
	and Sexually Explicit
	Electronic Mail Fair Practices
	Act
29.06[5] Calife	ornia
29.06[5][A]	In General
29.06[5][B]	California Statutes
29.06[6] Color	
2-3	

Table of Contents

```
29.06[7] Connecticut
29.06[8] Delaware
29.06[8.5] District of Columbia
29.06[9] Florida
29.06[10] Georgia
29.06[11] Idaho
29.06[12] Illinois
29.06[13] Indiana
29.06[14] Iowa
29.06[15] Kansas
29.06[16] Louisiana
  29.06[16][A] In General
  29.06[16][B] Pre-CAN-SPAM Act Statutes
  29.06[16][C] Post-CAN-SPAM Act Statutes
29.06[17] Maine
29.06[18] Maryland
  29.06[18][A] In General
  29.06[18][B] Pre-CAN-SPAM Act Statute
  29.06[18][C] Post-CAN-SPAM Act Statutes
29.06[19] Michigan
  29.06[19][A] In General
  29.06[19][B]
               The Michigan Unsolicited
               Commercial E-Mail Protection
               Act
  29.06[19][C] The Michigan Children's
               Protection Registry Act
29.06[20]
         Minnesota
29.06[21] Missouri
  29.06[21][A] In General
  29.06[21][B] Pre-CAN-SPAM Act Statute
  29.06[21][C] Post-CAN-SPAM Act Statute
29.06[22] Nevada
29.06[23] New Mexico
29.06[24] North Carolina
29.06[25] North Dakota
29.06[26] Ohio
29.06[27] Oklahoma
29.06[28] Pennsylvania
29.06[29] Rhode Island
```

Pub. 1/2019 cliii

```
29.06[30] South Dakota
  29.06[31]
            Tennessee
  29.06[32]
            Texas
  29.06[33] Utah
     29.06[33][A] In General
     29.06[33][B] Child Protection Registry
  29.06[34] Virginia
     29.06[34][A] In General
     29.06[34][B] Virginia Statutes
  29.06[35] Washington
  29.06[36] West Virginia
  29.06[37] Wisconsin
  29.06[38] Wyoming
29.07 Contractual Remedies and Liquidated
      Damage Provisions in Service Contracts
      Service Provider Liability to Bulk
29.08
      Emailers for Terminated Service and
      Other Anti-Spam Measures
  29.08[1] Overview
  29.08[2] Preemption of Certain Claims under
           the Telecommunications Act of 1996
  29.08[3] Denial of Service to Spammers
  29.08[4] Blocking or Screening Software
  29.08[5] Liability of Spam Reporting Services
29.09 Liability for Spoofing
29.10 Additional Issues in the Law of Spam
  29.10[1] Defining Spam and UCE
  29.10[2] Legal Significance of Netiquette
           Prohibitions on Spamming
     29.10[2][A] In General
     29.10[2][B] Historical Case Study: Tierney
                 v. EMail America Corp.
  29.10[3] Employer Efforts to Block Email
           Transmissions to Employees
           Ability of Government Agencies and
  29.10[4]
           State Universities to Limit
           Dissemination of Spam
  29.10[5] Variations in State Law
29.11 Third-Party Liability for Spamming
```

- 29.12 Liability for Cancelbots
- 29.13 Checklist and Practical Tips For Avoiding Liability for Spamming
- 29.14 Checklist and Summary of Potential Civil Claims That May be Asserted Against Spammers
- 29.15 European Union Regulation of Unsolicited Commercial Email
- 29.16 Text Messaging and the Requirements of the Telephone Consumer Protection Act (TCPA)
- Appendix 1. CompuServe v. Cyber Promotions— Temporary Restraining Order
- Appendix 2. Concentric Network v. Sanford
 Wallace—Stipulated Permanent
 Injunction
- Appendix 3. Earthlink v. Cyber Promotions— Consent Judgment
- Appendix 4. Sample state court Complaint for spoofing and identity misappropriations
- Appendix 5. Microsoft Corp. v. NeoburstNet, LLC—Stipulated order for permanent injunction entered under the CAN-SPAM Act
- Appendix 6. The Wireless Email Rule, 47 C.F.R. § 64,3100M
- Appendix 7. CAN-SPAM Act Regulations, 16 C.F.R. §§ 316.1 to 316.5
- Appendix 8. MySpace, Inc. v.
 TheGlobe.com—Complaint
- Appendix 9. Myspace, Inc. v. TheGlobe.com—
 Consent Judgment and
 Stipulated Permanent Injunction
- Appendix 10. MySpace, Inc. v. Wallace Judgment Order

Pub. 1/2019 clv

CHAPTER 30 ONLINE GAMBLING

- 30.01 Overview
- 30.02 Federal Law
 - 30.02[A] Unlawful Internet Gambling Enforcement Act
 - 30.02[B] The Wire Act
 - 30.02[C] The Travel Act
 - 30.02[D] The Paraphernalia Act
 - 30.02[E] The Organized Crime Control Act
- 30.03 Offshore Gambling Operations
- 30.04 The WTO Dispute between the United States and Antigua over Internet Gaming
- 30.05 Internet Casinos Located on Indian Reservations
- 30.06 State Laws Prohibiting Gambling
- 30.07 Internet Gambling Case Law
 - 30.07[1] State v. Granite Gate Resorts, Inc.
 - 30.07[2] Missouri v. Coeur D'Alene Tribe
 - 30.07[3] State v. Interactive Gaming & Communications Corp.
 - 30.07[4] Providian National Bank v. Haines
 - 30.07[5] State v. World Interactive Gaming Corp.
 - 30.07[6] In Re: Mastercard International Inc. Internet Gambling Litigation
 - 30.07[7] U.S. v. BetOnSports PLC
 - 30.07[8] U.S. v. Corrar
 - 30.07[9] *U.S. v. Lombardo*
 - 30.07[10] U.S. Attorney Southern District of New York Brings Charges Against Neteller PLC
 - 30.07[11] Commonwealth of Kentucky v. Interactive Media Entertainment and Gaming Association, Inc. et al.
 - 30.07[12] The Southern District of New York (SDNY) Action Against Online Poker Players

PART V THE CONDUCT AND REGULATION OF INTERNET COMMERCE

	ONLINE FINANCIAL TRANSACTIONS AND PAYMENT MECHANISMS
31.01 Overvie	
	of Online Transactions:
•	ions and Reality
_	nsumer Perceptions
31.02[2] Bu	siness Perceptions
31.02[3] Int	ternet Security
	thentication
31.02[5] Ge	neral Security
31.02[6] Se	curity and Online Banking
31.02[7] Co	mmercial Security Needs
	mmercial Responses to
	rceptions About Internet Security
	ta Breaches
31.02[10] T	he TJX Data Breach
31.03 Paymen	t Card Transactions
31.03[1] Cr	
31.03[2] De	bit-Based Payments
	ored Value Cards
31.03[3][A	A] Open Loop Cards
	B] Closed Loop Cards
	ditional Regulation of Payment
	rds
31.03[4][A	A] Disclosures and Other Laws
31.03[4][H	B] The Credit Card Accountability
	Responsibility and Disclosure
	Act of 2009
31.03[4][0	C] Electronic Disclosures
31.03[4][I	Disclosure Enforcement
	Actions Against Providers
31.03[4][H	E] Anti-Money Laundering/
	Terrorist Financing Initiatives
31.03[4][F	•

Pub. 1/2019 clvii

Applicable to Stored Value Cards—The Simon Mall Cases

- 31.04 Digital Cash and Virtual Banking
 - 31.04[1] Overview
 - 31.04[2] Electronic Payment Mechanisms
 - 31.04[2][A] Automated Clearing House Transactions
 - 31.04[2][B] Money Transmission Laws
 - 31.04[2][B][i] State Money Transmitter Statutes
 - 31.04[2][B][ii] Federal Money Service Business Requirements
 - 31.04[2][B][iii] Bank Secrecy Act and AML/Terrorist Financing

Issues

- 31.04[2][C] Deposit Brokerage Status and Possible FDIC Insurance Coverage
- 31.04[3] Alternative Payment Providers
 - 31.04[3][A] PayPal, Inc.
 - 31.04[3][B] Amazon Payments
 - 31.04[3][C] Google Checkout
 - 31.04[3][D] Revolution Money
- 31.05 Mobile Banking
- 31.06 Peer-to-Peer Electronic Lending
- 31.07 Electronic Checks
 - 31.07[1] Check 21
 - 31.07[2] Remote Deposit Capture
- 31.08 Historical Micropayment Products
 - 31.08[1] Overview
 - 31.08[2] CyberCash, Inc.'s CyberCoins
 - 31.08[3] MilliCent
 - 31.08[4] DigiCash's eCash
 - 31.08[5] IBM Micro Payments
 - 31.08[6] Open Market
 - 31.08[7] E-Money.NET
 - 31.08[8] NetBill
 - 31.08[9] NetCheque and NetCash
 - **31.08[10]** Digital Money

31.09 Technologies to Improve the Security of
Online Payments
31.09[1] Secure Socket Layer (SSL) and Secure HTTP (S-HTTP)
31.09[2] Secure Electronic Transaction (SET) Protocol
CHAPTER 32 ONLINE SECURITIES LAW
32.01 Overview of Cyberspace Securities Law
32.02 Federal Securities Statutes
32.02[1] Overview
32.02[2] 1933 Securities Act
32.02[3] 1934 Securities Exchange Act
32.02[4] Investment Company Act
32.02[5] Investment Advisers Act
32.03 Online Securities Offerings
32.03[1] Development of Internet Trading
32.03[2] Electronic Prospectuses
32.03[3] Private Placements
32.03[4] Internet Roadshows
32.03[4][A] History of SEC No Action
Letters for Internet Roadshows
32.03[4][B] Securities Offering Reform
32.03[5] Internet Offerings
32.04 Online Means of Communicating Required
Disclosures and Other Information
32.04[1] Overview
32.04[2] SEC Interpretations: Use of
Electronic Media
32.04[2][A] The 2000 & 2008 Releases 32.04[2][B] Electronic Delivery
22.04[2][D] Electronic Delivery
32.04[2][B][i] Telephonic consent 32.04[2][B][ii] Global consent
99 04[9][D][:::] Use of newtoble
32.04[2][B][iii] Use of portable document format
32.04[2][B][iv] Clarification of the
"envelope theory"
32.04[2][C] Website Content
32.04[2][C][i] Issuer responsibility for
hvnerlinked information

Pub. 1/2019 clix

32.04[2][C][ii] Issuer communications during a registered offering 32.04[2][D] Online Offerings 32.04[3] Use of Electronic Media for Delivery Purposes 32.04[3][A] The 1995 Release 32.04[3][B] Illustrative Examples 32.04[4] Use of Electronic Media by Broker-Dealers, Transfer Agents and **Investment Advisors for Delivery of Information** 32.04[4][A] Overview of the 1996 Release 32.04[4][B] The 1996 Release 32.04[4][B][i] Delivery of information to clients 32.04[4][B][ii] Transmission of information from clients 32.04[4][B][iii] Investment adviser advertisements 32.04[4][B][iv] Clarifying examples 32.04[4][C] Technical Amendments 32.04[5] Linking 32.04[6] Unintended Discussion Group and **Interactive Website Features** 32.04[6][A] Unintended Discussions 32.04[6][B] Interactive Website Features 32.04[7] Disclosure and Reporting under the 1934 Exchange Act 32.04[7][A] Periodic Annual and Quarterly **Reports and Current Reports** 32.04[7][B] Section 16 Insider Reports 32.04[7][C] Regulation G 32.04[7][D] Earnings Information 32.04[7][E] Regulation FD 32.04[7][F] Corporate Governance **32.04**[7][G] Code of Ethics 32.04[7][H] Committee Charters

32.04[7][I] Director Attendance

	Historical Information
	Summaries
	Website Format
32.05 Secu	rities Offering Reform
32.05[1]	Classification of Issuers
32.05[2]	
	Communications Made Before Filing
	a Registration Statement and During
00 0 0 0 0 0 1	the Registration Process
32.05[3]	Relaxation on the Prospectus
00.05[4]	Requirements
32.05[4]	Prospectus Delivery Reforms
	nore Securities Solicitations
32.06[1]	
32.06[2]	Websites, Email and Metatags
32.06[3]	General Guidelines
32.06[4]	Regulation S
32.06[5]	Concurrent Offshore and Private
32.06[6]	Placement Offerings Offshore Offerings by U.S. Issuers
32.06[0] $32.06[7]$	Concurrent U.S. Registered and
32.00[<i>1</i>]	Offshore Offerings
32.06[8]	Underwriters
32.06[9]	Foreign Funds
	Advisory Services
	Broker-Dealer Activities
	Activities of Foreign Exchanges
	Anti-Fraud Provisions
32.06[14]	Internet Issues Relating to Offshore
	Tender and Exchange Offers
32.07 Use o	of Credit Cards for Internet Securities
Tran	sactions
32.08 Blue	Sky Regulations Governing Internet
Direc	ct Placements
32.09 Regu	llation of Chat Rooms and Online
Inves	stment Advice
32.10 Secu	rities Fraud and Enforcement
32.10[1]	Overview
32.10[2]	SEC Enforcement Actions Involving
	Internet Solicitations

Pub. 1/2019 clxi

32.10[2][A]	Commission v. Octagon
00 10[0][D]	Technology Group, Inc.
32.10[2][B]	Commission v. William B. Sellin, II
32.10[2][C]	Commission v. Western Executive Group, Inc.
32.10[2][D]	Commission v. Samuel Aaron Meltzer
32.10[2][E]	Commission v. Kenneth Roy Weare
32.10[2][F]	Commission v. Robert E. Lane
32.10[2][G]	Commission v. Czuczko
	Commission v. Saquella
32.10[2][I]	Commission v. Marimuthu,
	Chockalingam Ramanathan &
	Thirugnanam Ramanathan
	net-Related Securities Fraud
	Action Suits
32.11 Online Sec	
32.11[1] EDGA	
32.11[2] SEC]	
32.12[3] Onlin	e Complaint Procedures
	XATION OF ELECTRONIC MMERCE
33.01 Overview	
	et Tax Freedom Act
	ss Limits on State Taxation of
	ce Transactions
33.04 New York's	s E-Commerce Sales Tax
Collection	Statute
33.05 Internation	nal Tax Issues
33.05[1] In Ge	eneral
33.05[2] The H	European Union
33.05[3] Tax H	
	onizing International Laws/U.S rnment Position
	rnet Tax Freedom Act
	York Tax Law Section 01(b)(8)

Appendix 3. New York Tax Department Guidance Memo

CHAPTER 34	ANTITRUST RESTRICTIONS ON
	TECHNOLOGY COMPANIES AND
	ELECTRONIC COMMERCE

- 34.01 Overview of Antitrust Law and Its Applicability to Cyberspace
- 34.02 Extraterritorial and Cyberspace Reach of U.S. Antitrust Law
- 34.03 Applicability of Antitrust Principles to Internet Governance
- 34.04 Sherman Act Section 1 in Cyberspace
 - **34.04**[1] In General
 - 34.04[2] The Fundamental Requirement of a Conspiracy, Agreement, or Contract
 - 34.04[3] Modes of Analysis of Alleged Violations
 - 34.04[4] United States v. Apple, Inc.—The Application of Per Se Liability to the High-Tech Industry Beyond the Criminal Prosecution of Price-Fixing Cartels.
 - 34.04[5] Tying—An Antitrust Claim with Seemingly Special Resonance in High-Tech Industries
 - 34.04[6] Internet Joint Ventures
 - 34.04[7] Internet Technological Standards and Standard-Setting Bodies
- 34.05 Sherman Act Section 2 in Cyberspace
 - 34.05[1] Summary of Statutory Section
 - 34.05[2] The Centrality of Market Definition
 - 34.05[3] Exclusionary Conduct, Lock-Ins, and the Essential Facilities Doctrine
 - 34.05[4] Monopoly Rights in Intellectual Property and Monopoly Leveraging
 - 34.05[5] Predatory Pricing
- 34.06 Exclusive Dealing
- 34.07 Robinson-Patman Act Price Discrimination

Pub. 1/2019 clxiii

34.08	Trade Com	mission Ar	t of Justice/Federal ntitrust Guidelines
	Regarding		
34.09	U		
34.10			w Enforcement
	Against In		
			Enforcement
			ce-PowerReviews
	34.10[1][B]		
	34.10[1][C]		
	34.10[1][D]	Google-Do	oubleClick
	34.10[1][E]	B2B Exch	anges
	34.10[1][F]	AOL-Time	Warner
	34.10[1][G]	Microsoft-	·Intuit
34.			t Other Alleged
	Antit	rust Violat	ions
	34.10[2][A]	1994 USD	OJ Case Against
		Microsoft	
	34.10[2][B]	Various G	overnment
			ions of Microsoft in
		Mid 1990s	
	34.10[2][C]	1997 USD	OJ Case Against
		Microsoft	
	34.10[2][0	C][i] The i	nitial trial court
		rulin	g and preliminary
		injun	ection
	34.10[2][0	C][ii] The	D.C. Circuit opinion
		on t	he preliminary
		inju	nction
	34.10[2	2][C][ii][a]	Increasing returns
			to scale and
			network
			externalities
	34.10[2	2][C][ii][b]	Interpreting the
			1995 consent decree
	34.10[2	2][C][ii][c]	The court's
			definition of
			integration
	34.10[2	2][C][ii][d]	Judge Wald's
			dissent

34.10[2][C		he trial court order to
94 10[9][6		reak up Microsoft
34.10[2][C		he <i>en banc</i> D.C. Circuit acates the break-up
		der
34.10[2][C][iv][
34.10[2][C][iv][b] The monopolization claim
34.1	0[2][C][i	v][b][1] Microsoft's monopoly
		power
34.1	0[2][C][i	
		exploitation of
		its monopoly
94 10[0	1[6][:][power
34.10[2][C][iv][c] The attempted monopolization
		claim
34.10[2][C][iv][
_][C][iv][- • • •
_		additional issues
34.10[2][C		bsequent
		velopments: The
		position and
		forcement of remedies Microsoft's conduct
34.10[2][D]		tel Corp.: the United
04.10[2][<i>D</i>]		ederal Trade
		sion Investigation and
		Concerning Intel
	The Rea Industry	l-Estate Brokerage
	•	net-Related Antitrust
Litigation	·	
34.11[1] Pac. H	Bell Tel.	Co. v. linkLine
Comm	c'ns, Inc	and Price-Squeezing
	Interne	
		eter.com, Inc. v. L.D.
	,	nd Resale Price
Maint	enance (on the Internet
Pub. 1/2019		clxv

- 34.11[3] Wallace v. International Business Machines Corp. and Open-Source Software
- 34.11[4] Tunica Web Advertising v. Tunica Casino Operators Ass'n and Group Boycotts on the Internet
- 34.11[5] Private-Party Monopolization Claims in High-Tech Industries
 - 34.11[5][A] Coalition for ICANN
 Transparency, Inc. v. Verisign,
 Inc.
 - 34.11[5][B] Intergraph Corp. v. Intel Corp and Monopoly Maintenance In High-Tech Industries
 - 34.11[5][B][1] District Court Opinion
 - 34.11[5][B][2] Federal Circuit Decision
 - 34.11[5][B][3] On Remand
 - 34.11[5][C] Cyber Promotions, Inc. v. America Online, Inc.
 - 34.11[5][D] Sun Microsystems, Inc. v. Microsoft Corp.
- 34.12 Telecommunications Mergers
 - 34.12[1] *AT&T/T-Mobile* Merger
 - 34.12[2] Comcast-NBC Universal Merger
- 34.13 Net Neutrality
- 34.14 Applying Antitrust Law to Cyberspace
 - 34.14[1] Overview
 - 34.14[2] Antitrust Law and the Problem of Internet Time
 - 34.14[3] Difficulty of Defining Products
 Markets in Internet Time
 - 34.14[4] Network Externalities
 - 34.14[5] Declining Prices and Divergent Business Models
 - 34.14[6] Interoperability and Standardization
 - 34.14[7] Antitrust Law in the Information Age

CHAPTER 35 STATE AND LOCAL REGULATION OF THE INTERNET

- 35.01 Overview of State Laws Regulating Cyberspace
- 35.02 Tenth Amendment Powers
 - **35.02**[1] In General
 - 35.02[2] Driver's Privacy Protection Act of 1994
- 35.03 Regulatory Jurisdiction of State Attorneys General
- 35.04 Commerce Clause As a Limitation on State and Local Regulation of the Internet and Electronic Commerce
 - **35.04**[1] In General
 - 35.04[2] Laws that Discriminate Directly Against Interstate Commerce
 - 35.04[3] Nondiscriminatory Laws that Burden Interstate Commerce
 - 35.04[4] American Library Association v. Pataki
 - 35.04[4][A] Overview
 - 35.04[4][B] Procedural Background
 - 35.04[4][C] The Court's Commerce Clause Analysis
 - 35.04[4][D] The Significance of Congressional Action
 - 35.04[5] Post-Pataki Case Law
- 35.05 Assessing the Constitutionality of Digital Signature, Anti-Spamming and Other State Laws Regulating Electronic Commerce
- 35.06 Internet-Related State Laws Preempted by Congress

Pub. 1/2019 clxvii

CHAPTER 36	BEST PRACTICES FOR U.S. COMPANIES IN EVALUATING GLOBAL E-COMMERCE REGULATIONS AND OPERATING INTERNATIONALLY
36.01 Overvio	ew
36.02 Overla	pping Regulatory Jurisdiction and
the Ext	raterritorial Application of Local
Law	
	ational Convergence and the
	ancy of European Law
36.03[1] Ir	
	ubstantive Areas of Convergence
	A] Overview
	B] Privacy
36.03[2][C] Contract Law and Formation
36.03[2][D] Cybersquatting, Anti-
	Circumvention and Intellectual Property Laws
36.03[2][_ ·
30. 03[2][Liability for User Content and
	Misconduct
36.04 Interne	et Law and the Law of Divergence
36.04[1] O	
	ocal Language Laws
	ornography, Hate Speech and
	efamatory Statements
	ontests, Promotions and Gambling
	omparative Advertising
	atabase Protection
	egulated Industries and
	ransactions
36.04[8] R	estricted Countries
36.05 The Im	pact of International Internet Law
	nestic Enterprises
36.05[1] In	General
36.05[2] P	hysical Presence and the Assertion
of	Extraterritorial Jurisdiction
36.05[3] O	ther Grounds for Asserting
\mathbf{J}_{1}	urisdiction

- **36.05**[4] International Treaties
- 36.05[5] Indirect Regulation
- 36.06 Minimizing Risks by Contract and Through Use of Localized Sites and Geo-filters
- 36.07 Strategies in the Absence of Governing Law
- 36.08 Developing a Global Strategy: Framework and Checklist for Evaluating Jurisdictional Risks and Which Laws to Comply With
 - **36.08[1]** Overview
 - **36.08[2]** Checklist
- 36.09 U.S. Laws and Practices That Impact International E-Commerce (including the Global Network Initiative)

PART VI

INTERNET SPEECH, DEFAMATION, ONLINE TORTS AND THE GOOD SAMARITAN EXEMPTION

- CHAPTER 37 DEFAMATION, TORTS AND THE GOOD SAMARITAN EXEMPTION (47 U.S.C.A. § 230)
- 37.01 Overview of Defamation Law and Practice in Cyberspace
- 37.02 Compelling the Disclosure of the Identity of Anonymous and Pseudonymous Bloggers, Chatroom and Message Board Posters and Other Potential Tortfeasors in Litigation
 - 37.02[1] Overview and Practical Considerations
 - 37.02[2] Legal Standards for Compelling the Disclosure of the Identity of Anonymous and Pseudonymous Tortfeasors
 - 37.02[2][A] In General
 - 37.02[2][B] Case Law
 - 37.02[3] Anti-SLAPP Motions

Pub. 1/2019 clxix

- 37.02[4] The Potential Applicability of Shield Laws to Bloggers and Other Online Posters
 - 37.02[4][A] Blogs and Bloggers
 - 37.02[4][B] Anonymous Posters as News Sources
- 37.02[5] Alternative and Substitute Service
- 37.03 Supreme Court Precedent on Defamation and the First Amendment
 - 37.03[1] Public and Private Individuals
 - 37.03[2] Third-Party Liability for Publication, Republication and Mere Distribution of Defamatory Statements
- 37.04 Republication and Distribution Case Law Pre-Dating the Enactment of the Telecommunications Act of 1996
 - 37.04[1] Background
 - 37.04[2] Cubby, Inc. v. CompuServe, Inc.
 - 37.04[3] Stratton Oakmont v. Prodigy Services, Inc.
- 37.05 The Good Samaritan Exemption (Section 230 of the CDA)
 - 37.05[1] In General
 - 37.05[1][A] Scope, Exclusions and Legislative Purpose
 - 37.05[1][B] Circuit-by-Circuit and State Court Summary
 - 37.05[1][C] Analysis and List of Claims Potentially Preempted
 - 37.05[2] Defining Interactive Computer Service
 - 37.05[3] Subpart 230(c)(1): Publisher or Speaker Liability
 - 37.05[3][A] In General
 - 37.05[3][B] Zeran v. America Online and the Development of Case Law on Preemption of Defamation and Other Claims
 - 37.05[3][B][i] Zeran v. America Online, Inc. and Preemption of Publisher Liability

37.05[3][B][ii] Third Party Conduct as **Content and Alleged** Failures to Act or Warn 37.05[3][B][iii] Seventh Circuit CDA **Analysis** 37.05[3][C] Determining When an **Interactive Computer Service** Provider or User Also May Be Held Liable As An Information Content Provider for **Developing Content: From** Zeran to Roommate.com and Accusearch and Beyond 37.05[3][D] Commercial Gripe Sites, Editing, Soliciting and Paying for Content 37.05[3][D][i] Overview 37.05[3][D][ii] Commercial Gripe Sites and Other Sites and **Services that Solicit Potentially Actionable** Content 37.05[3][D][iii] Payment and Editorial Control 37.05[3][D][iv] Blog and Forum Moderators 37.05[3][D][v] Providing Platform Tools Subpart 230(c)(2): Filtering and 37.05[4] Voluntary Actions Undertaken in Good Faith to Restrict Objectionable Material 37.05[4][A] In General **Threshold Entitlement to** 37.05[4][B] Section 230(c)(2)(A)**Exemption—Voluntary Action** Undertaken in Good Faith 37.05[4][C] Harassing and Otherwise Objectionable Content under Section 230(c)(2)(A)37.05[4][D] Enabling or Making Available

Pub. 1/2019 clxxi

the Technical Means to Restrict Access under Section 230(c)(2)(B)

- 37.05[5] Statutory Exclusions for Certain Intellectual Property, Sex Trafficking, Federal Criminal, and Other Claims
 - 37.05[5][A] In General
 - 37.05[5][B] The Exclusion for "Any Law Pertaining to Intellectual Property"
 - 37.05[5][C] The Exclusion for Sex Trafficking Claims (and Related Advertising)
- 37.05[6] Claims Against Social Networks
- 37.05[7] Procedural Issues about When to Raise the CDA Defense
- 37.05[8] Injunctive Relief and Orders
 Directing Interactive Computer
 Services to Remove Third Party
 Content
- 37.05[9] Legal Framework in Cases Where the Exemption Does Not Apply
- 37.06 Advising Clients in Disputes With Interactive Computer Services and Users
 - 37.06[1] In General
 - 37.06[2] Demand Letters and Other Communications with Site Owners and Service Providers
 - 37.06[3] Interactive Computer Service Responses to Demand Letters
- 37.07 Contractual Liability Provisions for Site Owners and Service Providers
- 37.08 The Single Publication Rule in Cyberspace
- 37.09 International Issues
 - **37.09[1]** In General
 - 37.09[2] European Union Law
 - **37.09[2][A]** Overview
 - 37.09[2][B] Mere Conduits

37.09[2][C]	Caching
37.09[2][D]	Hosting
37.09[2][E]	ADR and Codes of Conduct
37.09[2][F]	Territorial Effect
.09[3] SPEI	ECH Act

37.10 Contractual Restrictions on User Criticism and Their Potential Unenforceability under the Consumer Review Fairness Act and Related State Laws

APPENDIX

CHAPTER 38 TORT AND RELATED LIABILITY FOR HACKING, CRACKING, COMPUTER VIRUSES, DISABLING DEVICES AND OTHER NETWORK DISRUPTIONS

38.01 Overview of Civil Tort Liability

38.02 Tort Liability for Malicious Code and Computer Viruses

38.02[1] Overview

38.02[2] Nature of the Problem

38.02[3] Legal Claims and Other Considerations

- 38.03 Tort Liability for Software Time Bombs and Other Disabling Devices
- 38.04 Denial of Service/SYN-Flood, Mail Bomb and Related Disruptions
- 38.05 Tort Liability for Cancelbots
- 38.06 Privacy Claims Against Hackers and Crackers
- 38.07 Effectiveness of Contractual Disclaimers

CHAPTER 39 E-COMMERCE AND THE RIGHTS OF FREE SPEECH, PRESS AND EXPRESSION IN CYBERSPACE

39.01 Overview

39.02 E-Commerce and the First Amendment

39.02[1] U.S. Law

39.02[2] International Considerations

Pub. 1/2019 clxxiii

39.02[3]	The Impact of Internet Pornography
	on the Development of Internet
	Speech Laws
	rnet Conduct As Speech
39.03 [1]	Overview
39.03[2]	Software and Websites as Protected
	Speech
39.03 [3]	
	Communications
39.03[4]	Domain Names as Speech
39.03[5]	Spamming
39.03[6]	Speech as Trade Secret
	Misappropriation
39.03[7]	Links and Circumvention of Access
	Controls
39.03[8]	Video Games
39.04 Statu	utory Disincentives to Promoting Free
Spee	ch: Liability Limitations for
Scre	ening and Removing User Generated
Cont	cent
39.04[1]	In General
39.04[2]	Adult Material
39.04[3]	Telecommunications Act of 1996
39.04[4]	Digital Millennium Copyright Act
39.04[5]	200

PART VII

OBSCENITY, PORNOGRAPHY, ADULT ENTERTAINMENT AND THE PROTECTION OF CHILDREN

CHAPTER 40 CHILD PORNOGRAPHY AND OBSCENITY

40.01 Child Pornography

40.01[1] Child Pornography and the Exploitation of Children—In General

40.01[2] Morphing and Virtual Child Pornography

40.01[3] State Statutes

clxxiv

	ecord-keeping and Labeling
	equirements
	rvice Provider Liability and
	eporting Obligations
40.02 Obscene	
	oscenity Law—In General
	isleading Domain Names, Words ad Digital Images
40.02[3] Ca	se Study: United States v. Maxwell
	ase Study: United States v. Thomas
40.03 Sciente	r and Third-Party Liability in
	ornography and Obscenity Cases
40.03[1] In	General
40.03[2] Ex	vidence of Scienter
40.04 Civil Li	•
	nendment Constraints on the
	ion of Obscene Content
40.06 Interna	tional Regulation of Adult Content
CHAPTER 41	LAWS REGULATING NON-OBSCENE
	ADULT CONTENT DIRECTED AT
	CHILDREN
41.01 Overvie	\mathbf{w}
	nmunications Decency Act and
Reno v.	
41.02[1] Ov	verview
	atutory Framework
41.02[2][4	A] Direct Liability
	B] Third-Party Liability
	C] Employer Liability
41.02[2][]	D] Safe Harbor for Online
	Providers
41.02[2][]	
	F] State and Local Regulation
	eno v. ACLU
	A] Majority Opinion
41.02[3][]	B] Justice O'Connor's Zoning
44 005 13 -	Analysis
41.02[4] Ot	ther CDA-Related Litigation

Pub. 1/2019 clxxv

- 41.02[4][A] Shea v. Reno
- 41.02[4][B] Sanger v. Reno
- 41.02[4][C] AppolloMedia Corp. v. Reno
- 41.02[4][D] United State v. Kufrovich
- 41.03 The Child Online Protection Act
 - **41.03**[1] Overview
 - 41.03[2] Statutory Framework
 - 41.03[3] Ashcroft v. ACLU
- 41.04 Guidelines for Future Regulation of Material Harmful to Minors in Light of Reno v. ACLU and Subsequent Cases
- 41.05 Use of Screening, Filtering and Site-Blocking Software in Public Libraries and By the Government
- 41.06 The Dormant Commerce Clause
- 41.07 Employer Compliance Guidelines
- 41.08 State Attorneys General Enforcement Actions
 - 41.08[1] In General
 - 41.08[2] The Safety of Minors on Social Networks
- 41.09 Legal Issues in Adult e-Commerce
 - 41.09[1] Overview
 - 41.09[2] Terms and Conditions and Restricted Access
 - 41.09[3] Criminal and Civil Liability for Third-Party Content
 - 41.09[4] Use of Intelligent Agent Software
- CHAPTER 42 U.S. JURISDICTION, VENUE AND PROCEDURE IN OBSCENITY AND OTHER INTERNET CRIME CASES
- 42.01 General Principles
- 42.02 Venue in Cyberspace: United States v. Thomas
 - 42.02[1] Facts
 - 42.02[2] Venue
- 42.03 What are "Community Standards" in Cyberspace?
 - 42.03[1] In General

Table of Contents

42.03[2] Military Prosecutions

- 42.04 Change of Venue
- 42.05 Level of Specificity Required in an Internet Obscenity Warrant

PART VIII THEFT OF DIGITAL INFORMATION AND RELATED INTERNET CRIMES

CHAPTER 43 DETECTING AND RETRIEVING STOLEN CORPORATE DATA

- 43.01 Overview of the Problem of Corporate Theft
- 43.02 Overview of Network Security and Vulnerability
- 43.03 Formulating a Response to External Intrusions
 - 43.03[1] Overview
 - 43.03[2] Understanding the Culture of Hackers and Crackers
 - 43.03[3] Detecting Corporate Espionage
- 43.04 Network and Internal Security
 - 43.04[1] Overview
 - 43.04[2] Internal Use of Encryption
 - 43.04[3] Firewall Maintenance and Improvement
 - 43.04[4] Employee Theft and Physical Security
- 43.05 Promptly Responding to and Investigating Theft Reports
- 43.06 Choosing between Civil and Criminal Remedies
- 43.07 Adopting a Two-Pronged Criminal/Civil Response to Theft of Information

Pub. 1/2019 clxxvii

CHAPTER 44 CRIMINAL AND RELATED CIVIL REMEDIES FOR SOFTWARE AND DIGITAL INFORMATION THEFT

- 44.01 Internet Crimes—An Overview
- 44.02 National Stolen Property Act
- 44.03 Wire Fraud
- 44.04 Criminal Copyright Infringement
 - 44.04[1] Statutory Provisions
 - 44.04[2] Preemption of Certain State Prosecutions
 - 44.04[3] United States v. LaMacchia
 - 44.04[4] No Electronic Theft (NET) Act of 1997
 - 44.04[5] Limitations of Relying on Copyright Protection for Criminal and Civil Relief
- 44.05 Trade Secrets Transmitted Via the Internet
 - 44.05[1] The Economic Espionage Act of 1996
 - 44.05[2] State Statutes
 - 44.05[3] People v. Eubanks: A Case Study of the Potential Difficulties of Prosecuting Computer Crimes
- 44.06 Intercepted Wire and Electronic Communications (Title I of the Electronic Communications Privacy Act—The Wiretap Act)
 - **44.06**[1] In General
 - 44.06[2] Interception Case Law
- 44.07 Stored Wire and Electronic Communications (Title II of the Electronic Communications Privacy Act—The Stored Communications Act)
- 44.08 Computer Fraud and Abuse Act of 1986
 - 44.08[1] In General
 - 44.08[2] Internet Worm: United States v. Morris
 - 44.08[3] United States v. Sablan
 - 44.08[4] Bulk Unsolicited Email—Spam

44.0	08[5]	Software Time Bombs and Disabling Devices
44.09	State	Computer Fraud Statutes
44.10		of the Internet for Law Enforcement
44.11		Remedies for Theft of Information
44.12	Using	g RICO to Obtain Civil Relief for
		inal Violations
44.]	12[1]	Elements of a RICO Claim
44.	12[2]	Investment in a RICO Enterprise (18 U.S.C.A. § 1962(a))
44.	12[3]	Operation or Management of a RICO Enterprise (18 U.S.C.A. § 1962(c))
44.	12[4]	RICO Conspiracy (18 U.S.C.A. § 1962(d))
44.13	Desti	ruction of Military Property
44.14		eal Constraints
44.15	Chec	klists of Alternative Corporate
		onses to a Loss of Data
44.]	15[1]	Checklist for Choosing Between
		Criminal and Civil Responses to the
		Theft of Data
		Checklist of Criminal Remedies
44.]	15 [3]	Checklist of Primary Civil Remedies
CHAP	ΓER 4	CRIMES DIRECTED AT COMPUTER NETWORKS AND USERS: VIRUSES AND MALICIOUS CODE, SERVICE DISABLING ATTACKS AND THREATS TRANSMITTED BY EMAIL
45.01	Over	view
45.02	Virus	ses and Malicious Code
45.0	02[1]	Overview
45.0	02[2]	Responding to the Introduction of Malicious Code
45.0	02[3]	Choosing between Civil and Criminal Remedies
45.03	Servi	ice-Disabling Attacks
		ats Via Email
45.0	04[1]	In General
45.0	04[2]	United States v. Baker

Pub. 1/2019 clxxix

- 45.04[3] Stalking Laws
- 45.04[4] Transmission of Obscene Content or Child Pornography
- 45.05 Software Time Bombs and Other Disabling Devices

Volume 5

CHAPTER 46 IDENTITY THEFT

- 46.01 Overview
- 46.02 Phishing and Pharming
- 46.03 Criminal Liability for Phishing and Pharming
- 46.04 Targeted Companies' Response to Phishing
- 46.05 Phishing Litigation
 - 46.05[1] Civil Litigation—In General
 - 46.05[2] Form: Sample Complaint for Phishing
- 46.06 State Anti-Phishing Statutes
 - 46.06[1] In General
 - 46.06[2] Arkansas
 - 46.06[3] Arizona
 - 46.06[4] California
 - 46.06[5] Connecticut
 - 46.06[6] Florida
 - 46.06[7] Georgia
 - 46.06[8] Guam
 - 46.06[9] Hawaii
 - 46.06[10] Illinois
 - 46.06[11] Louisiana
 - 46.06[12] Maryland
 - 40.00[12] Maryland
 - **46.06**[13] **Minnesota**
 - 46.06[14] Montana
 - 46.06[15] New Mexico
 - 46.06[16] New York
 - 46.06[17] Oklahoma
 - 46.06[18] Rhode Island

Table of Contents

```
46.06[19]
            Tennessee
  46.06[20]
            Texas
  46.06[21]
            Utah
           Virginia
  46.06[22]
  46.06[23] Washington
      Consumer Responses to Identity Theft
46.07
      Security Breach Notification Obligations
46.08
      of Companies That Experience Security
      Breaches
46.09 State Identity Theft Statutes
  46.09[1] Overview
  46.09[2] Alabama
  46.09[3]
           Alaska
  46.09[4] Arizona
  46.09[5] Arkansas
  46.09[6] California
  46.09[7]
           Colorado
  46.09[8] Connecticut
  46.09[9] Delaware
  46.09[10] District of Columbia
  46.09[11] Florida
  46.09[12] Georgia
  46.09[13]
            Guam
  46.09[14]
            Hawaii
  46.09[15]
            Idaho
            Illinois
  46.09[16]
  46.09[17]
            Indiana
  46.09[18]
            Iowa
  46.09[19] Kansas
            Kentucky
  46.09[20]
  46.09[21]
            Louisiana
  46.09[22]
            Maine
  46.09[23]
            Maryland
  46.09[24]
            Massachusetts
  46.09[25]
            Michigan
  46.09[26]
            Minnesota
            Mississippi
  46.09[27]
  46.09[28]
            Missouri
  46.09[29]
            Montana
```

Pub. 1/2019 clxxxi

```
46.09[30] Nebraska
46.09[31] Nevada
46.09[32] New Hampshire
46.09[33] New Jersey
46.09[34]
         New Mexico
46.09[35] New York
46.09[36] North Carolina
46.09[37] North Dakota
46.09[38] Northern Mariana Islands
46.09[39] Ohio
46.09[40] Oklahoma
46.09[41]
         Oregon
46.09[42]
         Pennsylvania
46.09[43]
         Rhode Island
46.09[44] South Carolina
46.09[45]
         South Dakota
46.09[46]
         Tennessee
         Texas
46.09[47]
46.09[48] Utah
46.09[49] Vermont
46.09[50] Virginia
46.09[51] Virgin Islands
46.09[52] Washington
46.09[53] West Virginia
46.09[54] Wisconsin
46.09[55] Wyoming
```

Appendix 1. Indictment *United States v. Mantovani* (D.N.J. Oct. 28, 2004)

CHAPTER 47 CIVIL REMEDIES FOR UNLAWFUL SEIZURES

- 47.01 Overview of Remedies under the Electronic Communications Privacy Act and the Privacy Protection Act
- 47.02 Steve Jackson Games, Inc. v. U.S. Secret Service
 - 47.02[1] Facts
 - 47.02[2] Privacy Protection Act
 - 47.02[3] Stored Electronic Communications

47.02[4] Intercepted Electronic Communications

47.03 Davis v. Gracey

PART IX

LIABILITY OF INTERNET SITES AND SERVICES (INCLUDING SOCIAL NETWORKS AND BLOGS)

- CHAPTER 48 ASSESSING AND LIMITING LIABILITY THROUGH POLICIES, PROCEDURES AND WEBSITE AUDITS
- 48.01 Overview
- 48.02 Assessing Direct and Indirect Liability Risks
- 48.03 Assessing Content Liability: The Convergence of Commerce, Publishing and Entertainment
- 48.04 Conducting a Website Audit
- 48.05 Action Items Following a Website Audit
- 48.06 Limiting Direct Liability
 - 48.06[1] In General
 - 48.06[2] Privacy, Security and Safety
 - 48.06[3] Challenges in Controlling Corporate Communications
 - 48.06[4] Website Accessibility Under the Americans With Disabilities Act
- 48.07 ISP Obligations
- 48.08 Additional Considerations for Blogs, Social Networks and Other Web 2.0 Applications

Pub. 1/2019 clxxxiii

- CHAPTER 49 THE LIABILITY OF PLATFORMS
 (INCLUDING WEBSITE OWNERS,
 APP PROVIDERS, ECOMMERCE
 VENDORS, CLOUD STORAGE AND
 OTHER INTERNET AND MOBILE
 SERVICE PROVIDERS) FOR USER
 GENERATED CONTENT AND
 MISCONDUCT
- 49.01 Assessing and Minimizing the Liability Risks from User Content and Conduct—An Overview
- 49.02 Understanding Third-Party Liability in Cyberspace
- 49.03 Regulatory Models for Imposing Third-Party Liability in Cyberspace
- 49.04 Non-IP Claims (Including Defamation and Other Torts)
- 49.05 Copyright Liability
 - 49.05[1] Third-Party Copyright Liability—In General
 - 49.05[2] The DMCA Safe Harbors
 - 49.05[3] Direct, Contributory, Vicarious and Inducing Copyright Infringement
 - 49.05[3][A] In General
 - 49.05[3][B] Direct Liability
 - 49.05[3][C] Contributory Infringement
 - 49.05[3][D] Vicarious Infringement
 - 49.05[3][E] Inducement
 - 49.05[3][F] Individual Liability of Owners and Investors
 - 49.05[3][G] Common Carrier Exemption
 - 49.05[3][H] Fair Use
 - 49.05[3][I] The Sony Safe Harbor
 - 49.05[3][J] De minimis Doctrine
- 49.06 Direct, Contributory, Vicarious and Inducing Trademark Infringement (and other liability under the Lanham Act)
- 49.07 Right of Publicity Claims
- 49.08 Trade Secret Misappropriation
- 49.09 Direct, Contributory and Inducing Patent Infringement

49.0	09[1] In General
49.0	09[2] Direct Liability for Patent
	Infringement
	09[3] Contributory Patent Infringement
	09[4] Inducement
	Child Pornography and Obscene Content
	10[1] In General
49. 1	10[2] Child Pornography Laws and
40 -	Reporting Requirements
	10[3] Obscene Content
	10[4] Material Deemed Harmful to Minors
	10[5] Civil Liability
49.11	Advertising (including Spamming and
40.10	Viral Marketing)
	Cable Communications Policy Act
	Other Illegal Acts
49.]	8 1
40.15	Publicizing User Generated Content
49.15	v i
	Disclosures Under the Cybersecurity Information Sharing Act (CISA)
49.16	<u>e</u>
49.10	Cloud Act Liability Exemptions
CHAPT	TER 50 CLOUD, MOBILE AND INTERNET
	SERVICE PROVIDER LIABILITY
	AND COMPLIANCE WITH
	SUBPOENAS AND COURT ORDERS
50.01	In General
50.02	Liability for Cloud Service Providers and
	Business Users
50.03	Internet Storage Lockers and File Hosting
	Services
50.04	Mobile
50.05	[Reserved]
50.06	Subpoenas for Customer Information and
	the Contents of Communications Stored
	on Internet Sites and Services, Social
	Networks, Mobile Devices and in the
	Cloud
50. 0	06[1] In General

Pub. 1/2019 clxxxv

50.06[2]	DMCA Subpoenas for Copyright Violations
50.06[3]	
00100[0]	Customs Service Relating to Child
	Pornography
50.06[4]	Disclosure Restrictions Imposed By
	the Electronic Communications
	Privacy Act (ECPA)
50.06[4][A] Permissible and Prohibited
	Disclosures Under ECPA—In
5 0.005	General
90.06	4][B] Information Pertaining to a Customer or Subscriber—
	Contact Information and Other
	"Non-Content" Data
50.06	4][C] The Contents of a
30,00	Communication
50.	06[4][C][i] Stored
	Communications—In
	General
50.	06[4][C][ii] Communications While
	In Transmission—In
	General
50.	06[4][C][iii] Consent Through Terms of Use or Similar
	Agreements with Sites,
	Services or Social
	Networks
50.	06[4][C][iv] Implied Consent from
	Individual Subscribers
	and Customers
50.	06[4][C][v] Compelled Consent from
	Individual Subscribers
= 0	and Account Holders
50.	06[4][C][vi] Consent by Estate
	Executors or Other
50	Proxy Representatives 06[4][C][vii] Service Provider
30.	Operations
50.	06[4][C][viii] Communications
	L JL - JL J

2.000 01 001.201.20		
Readily Accessible to the General Public 50.06[4][D] Distinguishing Between Electronic Communication Services (ECS) and Remote Computing Services (RCS)		
50.06[5] Cable Communications Policy Act		
50.06[6] Privacy Laws Preempted by the		
Telecommunications Act of 1996		
50.06[7] State Laws and Other Limitations on		
Compelled Disclosures of Non-		
Content Data		
50.07 Orders Compelling Decryption of Locked		
Devices		
CHAPTER 51 WEB 2.0 APPLICATIONS: SOCIAL NETWORKS, BLOGS, WIKI AND UGC SITES		
51.01 Understanding Social Networks, Blogs,		
Wiki and UGC Sites		
51.02 Liability to Users and As a Result of User		
Profiles		
51.02[1] User Profiles		
51.02[2] Suits By Users Against Social		
Networks and Services		
51.02[3] Sales of Virtual Goods or Currency		
51.03 User Generated Content and the UGC		
Principles		
51.04 Privacy and Security		
51.04[1] Privacy and Security in Social		
Media—In General		
51.04[2] Revenge Porn Laws		
51.04[2][A] In General		
51.04[2][B] State Statutes		
51.04[2][B][i] Alabama		
51.04[2][B][ii] Alaska		
51.04[2][B][iii] Arizona		
51.04[2][B][iv] Arkansas		
51.04[2][B][v] California		
51.04[2][B][vi] Colorado		
OTIVE ENTERICATION COLOR CANA		

Pub. 1/2019 clxxxvii

```
51.04[2][B][vii]
                Connecticut
51.04[2][B][viii] Delaware
51.04[2][B][ix] The District of Columbia
51.04[2][B][x] Florida
51.04[2][B][xi] Georgia
51.04[2][B][xii] Hawaii
51.04[2][B][xiii] Idaho
51.04[2][B][xiv]
                 Illinois
51.04[2][B][xv] Iowa
51.04[2][B][xvi] Kansas
51.04[2][B][xvii] Louisiana
51.04[2][B][xviii] Maine
51.04[2][B][xix] Maryland
51.04[2][B][xx] Michigan
51.04[2][B][xxi] Minnesota
51.04[2][B][xxii]
                 Nevada
51.04[2][B][xxiii] New Hampshire
51.04[2][B][xxiv] New Jersey
51.04[2][B][xxv] New Mexico
51.04[2][B][xxvi] North Carolina
51.04[2][B][xxvii] North Dakota
51.04[2][B][xxviii] Oklahoma
51.04[2][B][xxix] Oregon
51.04[2][B][xxx] Pennsylvania
51.04[2][B][xxxi] Rhode Island
51.04[2][B][xxxii] South Dakota
51.04[2][B][xxxiii] Tennessee
51.04[2][B][xxxiv] Texas
51.04[2][B][xxxv] Utah
51.04[2][B][xxxvi] Vermont
51.04[2][B][xxxvii] Virginia
51.04[2][B][xxxviii] Washington
51.04[2][B][xxxix] West Virginia
51.04[2][B][xl] Wisconsin
```

51.05 User Responsibility: Spamming, Misuse and Abuse

51.06 Special Terms of Use Issues 51.06[1] Overview

- 51.06[2] Grant Clause/Ownership/Scope of License
- 51.06[3] Open Source Material
- 51.06[4] Abuse Provisions
- 51.07 Company Policies on Use of Social Networks and Blogs
- 51.08 Business Use of Social Network Profiles
- 51.09 Internet Safety
 - **51.09**[1] In General
 - 51.09[2] Internet Dating Sites
 - 51.09[2][A] In General
 - 51.09[2][B] California
 - 51.09[2][C] Illinois
 - 51.09[2][D] New Jersey
 - 51.09[2][E] New York
 - 51.09[2][F] Texas
 - **51.09[2][G]** Vermont
 - 51.09[3] Attorneys General Child Safety Settlement Guidelines
 - 51.09[4] Social Media Best Practices for Youth Audiences
- 51.10 Contests and Promotions Run on Social Networks
- 51.11 Protecting IP Rights on Social Media Sites
- Appendix 1. Joint Statement [by Myspace, Inc., and the Attorneys General of Forty-Nine states and the District of Columbia] on Key Principles of Social Network Site Safety (Jan. 14, 2008)
- Appendix 2. Joint Statement [by Facebook, Inc., and the Attorneys General of Forty-Nine states and the District of Columbia] on Key Principles of Social Network Site Safety (May 8, 2008)

Pub. 1/2019 clxxxix

PART X CIVIL JURISDICTION AND LITIGATION

CHAPTER 52 GENERAL OVERVIEW OF CYBERSPACE JURISDICTION

CIBERSPACE JURISDICTION
52.01 In General
52.02 U.S. Judicial Jurisdiction
52.02[1] Overview
52.02[2] Subject Matter Jurisdiction
52.02[3] Personal Jurisdiction Based on
Contacts in Cyberspace
52.02[4] In Rem Jurisdiction in Cyberspace
52.02[5] Quasi in rem Jurisdiction
52.03 Mitigating Doctrines that Limit the Effect
of U.S. Jurisdiction
52.04 Regulatory Jurisdiction
52.04[1] U.S. Regulatory Jurisdiction
52.04[2] Indirect Extension of Regulatory
Jurisdiction Internationally
52.04[3] Practical Considerations
52.05 Criminal Jurisdiction
52.06 International Treaties and Cooperation
52.07 Business Strategies to Limit
Extraterritorial Jurisdiction

CHAPTER 53 PERSONAL JURISDICTION IN CYBERSPACE

- 53.01 The Rules of Civil Jurisdiction—In General
- 53.02 General Jurisdiction
- 53.03 Specific Jurisdiction—Supreme Court Precedents
 - 53.03[1] The Minimum Contacts Test
 - 53.03[2] Forum Selection and Choice-of-Law Clauses
 - 53.03[3] The Effects Test and Personal Jurisdiction in Libel and Defamation Cases

53.03[3][A] Overview

53.03[3][B] Keeton v. Hustler Magazine, Inc. **53.03[3][C]** *Calder v. Jones* 53.03[4] Foreign Manufacturing 53.03[5] Financial Transactions Based in the Forum 53.03[6] Mail Order Sales 53.03[7] Contract Disputes 53.03[8] Transient Jurisdiction 53.04 Roadmap for Applying Supreme Court **Precedent to Cyberspace 53.04**[1] Overview 53.04[2] Framework for Analyzing Cyberspace Jurisdiction Based on **Supreme Court Guidelines** 53.04[2][A] In General 53.04[2][B] Controlling for the Risks of **Domestic and International Jurisdiction Through Choice of** Forum Clauses 53.04[2][C] Jurisdiction in Contract **Disputes** 53.04[2][D] Continuing Jurisdiction Based on an Existing Court Order 53.04[3] Early Case Law on Internet **Advertising and Website Operations** 53.04[3][A] Guiding Principles from **Supreme Court Cases** 53.04[3][B] Early Case Law Finding Jurisdiction 53.04[3][B][i] Cases 53.04[3][B][ii] Jurisdictional Significance of Hits on A Website 53.04[3][C] **Early Cases Declining to Find** Jurisdiction 53.04[3][D] Transitional Cases 53.04[4] Zippo Dot Com and the Limitations of Interactivity As A Guidepost for **Assessing Jurisdiction**

Pub. 1/2019 cxci

53.04[4][A]	Overview	
	Zippo Dot Com and Its	
[4][4]40.00	Limitations	
53.04[4][C]	Cases Following Zippo Dot	
0010 -[-][0]	Com and the Level of	
	Interactivity Required to	
	Obtain Jurisdiction	
53.04[4][D]		
	of Interactivity	
	ying the Effects Test to	
	erspace	
53.04[5][A]		
53.04[5][B]	Blog, Chat Room and Message Board Posts	
53.04[5][C]		
	Disputes and Trademark	
50 04[5][D]	Infringement	
53.04[5][D]	Copyright and Trade Secret Cases	
59 04[5][T]		
53.04[5][E] 53.04[5][F]	_	
03.04[0][1]	and Desist Letters and	
	Takedown Notices	
53.04[6] Juri	sdiction Based on Internet	
	merce	
	luct by Employees	
	ance of Virtual Contacts	
53.05[1] In G		
53.05[2] Cont		
	acts Based on Email	
	erlinks	
• 1	Transmission, Mirror Sites and	
Serv		
53.05[6] Auct	ion Bids	
53.05[7] Juri	sdiction Based on a URL	
	eign Defendants: Obtaining U.S.	
	on in International Internet	
Transactions		
	ent of Judgments As a	
Limitation	on Cyberspace Jurisdiction	

53.08 Catalogue of Early Internet-Related Lower Court Decisions	
53.08[1] Overview	
53.08[2] CompuServe, Inc. v. Patterson	
53.08[3] PLUS System, Inc. v. New England Network, Inc.	
53.08[4] Inset Systems, Inc. v. Instruction Set Inc.	'9
53.08[5] Playboy Enterprises, Inc. v.	
Chuckleberry Publishing, Inc.	
53.08[6] Bensusan Restaurant Corp. v. King	
53.08[7] Maritz, Inc. v. CyberGold, Inc.	
53.08[8] McDonough v. Fallon McElligott, Inc.	0
0,	U•
53.08[9] Panavision Int'l, L.P. v. Toeppen	
53.08[10] Heroes, Inc. v. Heroes Foundation	
53.08[11] Zippo Manufacturing Co. v. Zippo Dot Com, Inc.	
53.08[12] Cybersell, Inc. v. Cybersell, Inc.	
53.08[13] MHF Insurance Agency, Inc. v. Harris	
53.09 Should Different Rules Apply to	
Cyberspace?	
CHAPTER 54 VENUE AND THE DOCTRINE OF FORUM NON CONVENIENS	
54.01 Venue	
54.02 Change of Venue and Forum Non	
Conveniens	
54.02[1] Overview	
54.02[2] First-to-File Rule	
54.02[3] Exceptions to the First-to-File Rule	
CHAPTER 55 CHOICE OF LAW IN CYBERSPACE	
55.01 Overview	
55.02 State Choice of Law Rules	
55.03 Constitutional Limitations	
55.03[1] Overview	
55.03[2] Allstate Insurance Co. v. Hague	
55.03[3] Phillips Petroleum Co. v. Shutts	
ออ.บอเอา Entitips Fetroteum Co. v. Snutts	

Pub. 1/2019 cxciii

55.04 Choice of Law When a Case Is Transferred

CHAPTER 56 INTERNET ADR

- 56.01 In General
- 56.02 Early Settlement Discussions
- 56.03 Arbitration
- 56.04 Mediation
- 56.05 Judicial ADR
- 56.06 Online ADR

Appendix 1. The Federal Arbitration Act, 9 U.S.C.A. §§ 1-16

CHAPTER 57 INTERNET LITIGATION—STRATEGY AND PRACTICE

- 57.01 Overview of the Unique Aspects of Internet Litigation
- 57.02 Strategies for Successful Internet Litigation
- 57.02A The Challenges of Litigating in Internet Time
- 57.03 Online Anonymity and Pseudonymity: Strategies for Identifying Potential Defendants
 - **57.03[1]** In General
 - 57.03[2] Forms: Subpoena and Related Documents
 - 57.03[3] Alternative or Substituted Service
- 57.04 Developing Internet Common Law: New Causes of Action
 - 57.04[1] Internet Common Law—In General
 - 57.04[2] Internet Traffic
 - 57.04[3] The Value of Lead Time
 - 57.04[4] Drafting Complaints for Novel Causes of Action
 - 57.04[5] Forms: Sample Complaints
 - 57.04[5][A] Form: Sample Complaint for Injunctive Relief to Prohibit Pernicious Spoofing and Spamming

57.04 [5][B] Form: Sample Complaint for Wrongful Diversion of Internet Traffic	
57.04 [
57.05 Inter	net Remedies	
57.05[1]	Desire for Quick Resolution	
	(Including Injunctive Relief)	
$\boldsymbol{57.05[2]}$	Requirement of Exercising	
	Technological Self-Help	
57.05 [3]	Role of Netiquette in Obtaining	
FF 0FF 41	Relief	
$\mathbf{57.05[4]}$		
E# 0E[E]	Cyberspace Pursuit of Third Parties	
57.05[5]		
57.06 Internet Demand Letters and Email Transmissions		
	In General	
	Cease and Desist Letter to Direct	
01.00[2]	Infringers	
57.06 [3]	DMCA and Other Cease and Desist	
01.00[0]	and Demand Letters	
57.06[4]	Drafting an Appropriate Demand	
01100[2]	Letter	
57.06 [5]	Finding Creative Solutions to	
	Internet Disputes	
57.06[6]	Choice of Forum: The Race to the	
	Courthouse	
57.06[7]	Form: Sample Internet Cease and	
	Desist Email #1	
57.06 [8]	Form: Sample Cease and Desist	
	Email #2	
	g Internet Resources in Litigation	
	of Confidentiality Agreements in	
	net Litigation	
	tronic Discovery and Spoliation of	
Evid		
	cial Profiles	
57.10[1]	Overview	

Pub. 1/2019 cxcv

	E-Commerce and Internet 1
57.10 [2]	Federal Court Judges
	State Court Trial Judges
	of Tutorials to Educate Judges and
Juri	_
57.12 Use	of Court Appointed Experts
	itting Internet Evidence
57.13 [1]	Overview
57.13[2]	Authenticity and Authentication
	Admissibility
	Spoliation of Electronic Evidence
	and Sanctions
57.14 Settl	ement
57.14 [1]	In General
	FORM: Sample Settlement
	Agreement
57.15 The	Role of Publicity in Internet
	ation
_	In General
57.15[2]	Risks of Negative Publicity
	Using the Internet to Publicize
	Disputes
57.15[4]	Evaluating Whether to Publicize a
	Dispute
CHAPTER 5	8 ELECTRONIC BUSINESS AND

- SOCIAL NETWORK COMMUNICATIONS IN THE WORKPLACE, IN LITIGATION AND IN CORPORATE AND EMPLOYER **POLICIES**
- **Electronic Communications in the 58.01** Workplace and in Discovery and Litigation—In General
- **Creating an Invisible Paper Trail: 58.02** Discovery and the Admissibility of **Electronic Evidence**
 - 58.02[1] Discovering and Admitting Email and Other Electronic Messages
 - **58.02[2] Proving the Source of Anonymous** and Pseudonymous Communications

58. 0	O3 The	Uses, S	Shortcomings and Costs of
			ally Stored Information in
	_	ation	
Į	58.03[1]	Emai	l and Other Electronic
		Comn	nunications as Substantive
		Evide	ence
Į	58.03[2]		Potentially Prejudicial Effect of
		Elect	ronic Evidence
Į	58.03[3]	Falsif	fied Electronic Evidence
Į	58.03[4]	Autho	enticating Electronic Records
58.03[4][A] In General			In General
			Case Study in Electronic
		-313	Discovery: Fennell v. First Step
			Designs, Ltd.
Į	58.03[5]	Spolia	ation of Evidence
	58.03[6]	_	ical Strategies for Conducting
•			Responding to Requests for
			very of Electronically Stored
			mation (including Fee Shifting)
58.04 The Law of Email Retention and			
Destruction			
Į	58.04[1]	Overv	view
			aw of Document Retention and
			uction (Including Litigation
Holds)			
	58.04 [2][A]	Case Law
			Legal Obligation Imposed on
	-		Counsel
	58.04	2][C]	Statutory Retention
		32 - 3	Obligations Imposed By
			Sarbanes-Oxley
	58.04 [2][D]	Federal Acquisition
	-		Regulations
	58.04 [21[E]	Regulated Industries
ļ			Study: In re Prudential
			ance Co. Sales Practices
		Litigo	
	58.04 [Court Order
			Lasting Impact of In re
	- L	11 1	Prudential Insurance Co. Sales
			Practices Litigation
			0

Pub. 1/2019 cxcvii

- 58.04[4] Case Law Survey and Analysis of Sanctions Rulings in Electronic Discovery Cases
- 58.05 Designing, Implementing and Updating an Electronic Record Management System to Reduce the Costs, Burdens and Risks of Litigation
 - 58.05[1] Theory of an Email Retention and Destruction System
 - 58.05[2] Why Companies Underestimate the Burdens of Historical Email Discovery
 - 58.05[3] Policies Should Distinguish Business Communications from Other Electronically Stored Information
 - 58.05[4] Automatic Purges
- 58.06 Privacy Rights and Expectations in Business and Personal Email and Other Electronic Communications
 - **58.06**[1] In General
 - 58.06[2] Reasonable Expectation of Privacy Standard Under Federal and State Law
 - 58.06[3] Privacy Rights in Stored and
 Transmitted Electronic
 Communications and Limits on
 Third Party Discovery Under The
 Electronic Communications Privacy
 Act
 - 58.06[4] Home Use of Email
 - 58.06[4][A] In General
 - 58.06[4][B] United States v. Maxwell
 - 58.06[4][C] United States v. Charbonneau
 - 58.06[5] Employer Monitoring of Employee Electronic Communications
 - 58.06[5][A] Employer Monitoring of Employee Electronic Communications—Overview
 - 58.06[5][B] Diminished Privacy
 Expectations and the Impact of

	the U.S. Supreme Court's
	Decision in Ontario v. Quon
58.06[5][C]	Employer Policies and
	Employee Expectations
58.06 [5][D]	Personal Employee Email
	Accessed from Work
	oyee Use of Social Networks
	Social Media Credentials
58.06[6][A]	Employee Use of Social
	Networks and Social Media Credentials—In General
50 06[6][D]	
58.06[6][B]	§ 58.06[6][B] NLRB Guidelines on Employee Use of Social
	Media
58.06[6][C]	State Laws Restricting
00100[0][0]	Employer Access to Social
	Media Credentials and
	Communications of Employees
	and Job Applicants
58.06[6][0	C][i] State Laws Restricting
	Employer Access to Social
	Media Credentials and
	Communications of
	Employees and Job
WO 0050354	Applicants—In General
58.06[6][0	
58.06[6][0	
58.06[6][0	
58.06[6][0	
58.06[6][0	· ·
58.06[6][0	•
58.06[6][0	
58.06[6][0	
58.06[6][0	
	C][xi] Oregon
	C][xii] Utah
	C][xiii] Washington
	le Phone Records and
	ocation Data
58.07 Employer	Liability for Email

Pub. 1/2019 cxcix

Transmissions, Blog Posts, Tweets and	
Similar Communications	
58.07 [1]	Overview
58.07[2]	Minimizing Potential Exposure
	Under the Telecommunications Act
	of 1996
58.07 [3]	
20 08[4]	Policies
58.07[4]	
58.07 [5]	Pornography Downloaded from the
	Internet and Distributed by
58.07[6]	Company Employees Use of Email to Distribute Infringing
90.01[0]	Material
58.07[7]	
90.01[1]	Misappropriation
58.07[8]	
	Crimes
58.07[9]	Spoofing
58.08 Unsolicited Email Directed to and from	
Business Entities	
58.08[1]	Spamming
58.08[2]	Cancelbots
58.09 Drafting Email, Intranet, Blog, Social	
Network and Other Corporate Electronic	
Communication Policies	
	Overview
58.09[2]	
	Employee Morale
58.09 [3]	Ownership and Use
58.09 [4]	Privacy/Employer Monitoring
58.09 [5]	Good Samaritan Compliance
58.09[6]	Inappropriate Uses
58.09[7]	Intellectual Property Infringement
58.09 [8]	Intranet, Website and Blog Postings
58.09[9]	Individual Internet Postings
58.09 [10]	•
	Confidentiality
58.09[11]	Use of Encryption Software
58 09[12]	Netiquette

58.09[13] Electronic Record Retention and Destruction
58.09[13][A] Adopting an Email System
58.09[13][B] Attorney-Client Email Communications
58.09[14] Adopting a Corporate Policy for Telecommuters and Virtual Offices
58.09[15] Implementation
58.09[16] Policy Revisions
58.09[17] Non-Employee Access
58.09[17] Non-Employee Access 58.10 Electronic Communication Checklist and
Sample Policy
58.10[1] Checklist of Recommended
Provisions
58.10[2] Form
58.11 Extranet Access and Confidentiality
Agreements
58.11[1] Drafting an Extranet Agreement
58.11[2] Form: Sample Long Form Extranet
Agreement
58.12 Company and Employee Blog, Microblog
and Social Network Policies
58.12[1] In General
58.12[2] Policy Provisions for Business Use of
Social Networks, Blogs and
Microblogs
Appendix 1. 59 Report of the Acting General
Counsel Concerning Social Media
Cases
Cuses
CHAPTER 59 USE OF EMAIL IN ATTORNEY-
CLIENT COMMUNICATIONS
59.01 Overview of Attorney-Client Email
Communications
59.02 Legal Requirement of Confidentiality in
Attorney Email Communications
59.02[1] Overview
59.02[2] Ethical Rules and Guidelines
59.02[3] Attorney-Client Privilege
Pub. 1/2019 cci

59.02[4] Work Product Doctrine	
59.03 Effect of Inadequate Security and	
Unintended Disclosure	
59.03[1] Overview	
59.03[2] Ethics Rules: Protecting Client	
Confidences and Secrets	
59.03[3] Attorney-Client Privilege: Protecting	
a Client's Right to Advice and	
Counsel	
59.03[4] Work Product: Protection of the	
Adversarial System	
59.04 Security of Attorney Email	
Communications	
59.04[1] In General	
59.04[2] Internet Communications	
59.04 [2][A] In General	
59.04[2][B] Encryption	
59.04[2][C] Knowledge of Security Risks	
Associated with Technologies	
59.04[3] Security Procedures Used by	
Attorneys and Clients	
59.04 [3][A] In General	
59.04[3][B] Gateway Security	
59.04[3][C] Internal Files and Procedures	
59.05 Ethics Opinions on an Attorney's Duty to	
Preserve Client Confidences and Secrets	
59.05[1] Overview	
59.05[2] Development of Ethical Guidelines	
Governing the Confidentiality of	
Unencrypted Email Communications	
59.05[3] Disclaimers	
59.05[4] Duties of Unintended Recipients	
Glossary	