

# TABLE OF CONTENTS

Foreword .....	v
Introduction.....	vii

## CHAPTER 1

### The Constant Evolution of Information Technology

§ 1.01	Introduction .....	1-4.1
§ 1.02	Media Formats and Underlying Technologies...	1-5
	[1] Generally; Data Compression .....	1-5
	[2] Still Image Formats .....	1-6
	[3] Audio Formats .....	1-6
	[4] Video Formats .....	1-7
	[5] Streaming File Formats .....	1-9
	[6] E-Books and Other Text-Viewing Formats .....	1-9
	[7] Digital Rights Management Systems.....	1-11
	[a] Watermarking.....	1-12
	[b] Fingerprinting.....	1-13
	[c] Audio Scrambler .....	1-14
	[d] Content Identification Technologies...	1-15
	[e] Other Emerging DRM Technologies...	1-16
§ 1.03	Emerging Consumer Technologies and Products.....	1-19
	[1] Data Storage .....	1-19
	[a] CD-R and CD-RW .....	1-19
	[b] DVD .....	1-20
	[c] Memory Cards .....	1-20
	[d] Holographic Storage .....	1-21
	[2] Handheld Computing Devices.....	1-21
	[a] Text Messaging .....	1-22
	[b] Mobile Applications .....	1-23
	[3] Global Positioning System and Other Locational Technologies .....	1-24
	[a] Underlying Technology.....	1-24

**EMERGING TECHNOLOGIES AND THE LAW**

	[b] Applications . . . . .	1-24
	[i] Geolocation . . . . .	1-25
	[ii] E911 (“Enhanced 911”) . . . . .	1-27
	[iii] Law Enforcement . . . . .	1-27
	[iv] Radio Frequency Identifier (RFID) Tags . . . . .	1-29
	[v] Related Technologies . . . . .	1-31
[4]	Emerging Television Technologies . . . . .	1-32
	[a] DTV and HDTV . . . . .	1-32
	[b] Interactive Television . . . . .	1-33
	[c] 3D Television. . . . .	1-34
	[d] Digital Video Recorders . . . . .	1-35
	[e] Streaming TV Programming Using a Device Connected to the Internet. . . . .	1-36
	[f] Streaming Internet Content and Other Programming Using a TV. . . . .	1-37
[5]	Games . . . . .	1-38
	[a] Console Based . . . . .	1-38
	[b] Massive Multiplayer Online Role-Playing Games . . . . .	1-39
	[c] Social Network Games . . . . .	1-40
[6]	Virtual Property . . . . .	1-40
[7]	Software Bots and Data Scraping . . . . .	1-47
[8]	Other Emerging Technologies . . . . .	1-53
	[a] Virtual Reality Systems. . . . .	1-53
	[b] Smart Appliances. . . . .	1-53
	[c] Biometrics . . . . .	1-54
	[d] Satellite Radio . . . . .	1-56
	[e] HD Radio . . . . .	1-57
	[f] Building Information Management. . . . .	1-58
	[g] Wayback Machine . . . . .	1-59
	[h] Print-on-Demand Publishing. . . . .	1-60
	[i] Digital Modeling . . . . .	1-61
	[j] Digital Currency . . . . .	1-62
	[k] Autonomous Cars . . . . .	1-62.11
	[l] Unmanned Aerial Vehicles . . . . .	1-62.13
	[m] Quantum Computing . . . . .	1-62.15
	[n] Internet of Things (IoT) . . . . .	1-62.16
[9]	Artificial Intelligence (“AI”) . . . . .	1-62.19
	[a] Generally . . . . .	1-62.19
	[b] Generative AI. . . . .	1-62.26
[10]	The Metaverse . . . . .	1-62.32
§ 1.04	Technologies for Accessing Data Services . . . . .	1-62.37
	[1] The Internet and the World Wide Web . . . . .	1-62.37

## TABLE OF CONTENTS

xi

[a]	Generally . . . . .	1-62.37
[b]	Regulation of Internet Traffic, Tiered Pricing and Net Neutrality . . . . .	1-62.38
[2]	Communication Using TCP/IP . . . . .	1-62.40
[a]	Historical Uses of TCP/IP . . . . .	1-62.41
[i]	E-Mail—ASCII Only . . . . .	1-62.41
[ii]	Newsgroups and Usenet; Mailing Lists . . . . .	1-62.41
[iii]	Gopher . . . . .	1-62.42
[iv]	Telnet . . . . .	1-62.42
[b]	Common Uses of and Tools for TCP/IP . . . . .	1-62.43
[i]	E-Mail—Content Rich . . . . .	1-62.43
[ii]	Hypertext Markup Language (HTML) . . . . .	1-62.43
[iii]	Hypertext Transfer Protocol (HTTP) . . . . .	1-62.43
[iv]	File Transfer Protocol (FTP) . . . . .	1-62.44
[v]	Internet Messaging Protocols (IM) . . . . .	1-62.44
[vi]	Java/Javascript/ActiveX . . . . .	1-62.45
[vii]	Rich Content Systems . . . . .	1-62.47
[viii]	Streaming . . . . .	1-62.47
[ix]	Virtual Reality Modeling Language (VRML) . . . . .	1-62.47
[x]	Search Engines and Internet Directories . . . . .	1-62.48
[xi]	Intranets . . . . .	1-62.48
[xii]	Extensible Markup Language (XML) . . . . .	1-62.52
[xiii]	Peer-to-Peer (P2P) Systems . . . . .	1-62.53
[c]	Emerging Uses of and Tools for TCP/IP . . . . .	1-62.54
[i]	Next Generation Instant Messaging . . . . .	1-62.54
[ii]	Internet Telephony and Videoconferencing . . . . .	1-62.55
[iii]	Gigabit Ethernet . . . . .	1-62.56
[iv]	Electronic Numbering (ENUM) . . . . .	1-62.59
[v]	CAPTCHA . . . . .	1-62.59
[vi]	RSS Technology . . . . .	1-62.60
[vii]	Podcasting . . . . .	1-62.60
[viii]	Blogs . . . . .	1-62.61
[ix]	Social Networks . . . . .	1-62.61

	[d]	Web Services . . . . .	1-62.62
	[i]	Limitations of the Web Server/ Web Browser Model . . . . .	1-62.62
	[ii]	Web Services Model . . . . .	1-62.63
	[iii]	Web Services Standards . . . . .	1-62.64
	[iv]	Uses for Web Services . . . . .	1-62.65
[3]		Technology for Connecting to the Internet . . . . .	1-62.66
	[a]	Dial-Up Access; Internet Service Providers and Online Services . . . . .	1-62.66
	[b]	Broadband Access to the Internet . . . . .	1-62.67
	[i]	Dedicated Access Lines . . . . .	1-62.68
	[ii]	Cable Broadband . . . . .	1-62.70
	[iii]	BPL . . . . .	1-62.71
	[iv]	Satellite Broadband . . . . .	1-62.73
	[c]	Wireless Data Access Technology . . . . .	1-62.73
	[i]	Generally . . . . .	1-62.73
	[ii]	Cellular Communications . . . . .	1-62.75
	[iii]	Wireless Application Protocol (WAP) . . . . .	1-62.78
	[iv]	Device Networking . . . . .	1-62.79
	[v]	Wireless Instant Messaging . . . . .	1-62.84
§ 1.05		The Content-Oriented Emerging Technology Application . . . . .	1-63
	[1]	Content . . . . .	1-63
	[2]	Drivers . . . . .	1-64
	[3]	The Platform . . . . .	1-64
	[a]	Computer Hardware . . . . .	1-64
	[b]	Operating Systems . . . . .	1-64
	[c]	Devices . . . . .	1-65
	[d]	Middleware . . . . .	1-65
§ 1.06		The Development Project . . . . .	1-66.1
	[1]	Project Participants . . . . .	1-66.1
	[a]	The Publisher/Producer . . . . .	1-66.1
	[b]	Right Holder . . . . .	1-67
	[c]	The Developer . . . . .	1-68
	[2]	Development Structures . . . . .	1-68
	[a]	Work Made for Hire . . . . .	1-68
	[b]	Joint Venture . . . . .	1-69
	[3]	Insurance . . . . .	1-70
	[4]	The Role of Unions and Guilds in Application/Product Production . . . . .	1-71
	[a]	The Screen Actors Guild . . . . .	1-72
	[b]	The Writers Guild of America . . . . .	1-75
	[5]	Project Planning Checklist . . . . .	1-76

CHAPTER 2

Rights Acquisition

§ 2.01	Introduction . . . . .	2-3
§ 2.02	Future Technologies . . . . .	2-5
	[1] Technologies Existing at the Time of the License . . . . .	2-5
	[2] Technologies Not Existing at the Time of the Grant . . . . .	2-7
§ 2.03	Drafting the License Agreement . . . . .	2-15
	[1] Identification of Licensed Properties . . . . .	2-15
	[2] The Grant . . . . .	2-16
	[a] Rights Being Conveyed . . . . .	2-16
	[b] Scope of Use and Competing Interests . . . . .	2-17
	[c] Known and Unknown Future Technologies . . . . .	2-18
	[d] Future Technologies for Distribution . . . . .	2-19
	[e] Future Technologies for Exhibition . . . . .	2-19
	[3] Reservation of Rights . . . . .	2-19
	[4] Best Efforts Promotion . . . . .	2-21
	[5] Reversion Provisions . . . . .	2-22
	[6] Approvals . . . . .	2-22
	[7] Representations and Warranties . . . . .	2-22.1
	[8] Disclaimer of Warranties . . . . .	2-24
	[9] Indemnification/Defense Against Third Party Claims . . . . .	2-24
	[10] Ownership of Proprietary Rights . . . . .	2-25
	[11] Infringement by Third Parties . . . . .	2-25
	[12] Confidentiality . . . . .	2-26
	[13] Term . . . . .	2-27
	[14] Termination Provisions . . . . .	2-27
	[15] Payment Provisions . . . . .	2-28
	[16] Assignments and Subcontracting . . . . .	2-29
	[17] Rights of First Refusal and Last Negotiation . . . . .	2-29
	[18] Limitation of Liability . . . . .	2-30
	[19] Trademark Provisions . . . . .	2-31
§ 2.04	The Review of Existing Licensing Agreements . . . . .	2-33
	[1] The Rights . . . . .	2-33
	[2] Future Technologies . . . . .	2-33
	[3] General Terms . . . . .	2-33
§ 2.05	<i>Form: Literary Work License Agreement</i> . . . . .	2-35

§ 2.06	<i>Form: Illustration License Agreement</i> . . . . .	2-41
§ 2.07	<i>Form: Video License Agreement</i> . . . . .	2-44
§ 2.08	<i>Form: Synchronization and Public Performance License Agreement</i> . . . . .	2-50
§ 2.09	<i>Form: Photograph License Agreement</i> . . . . .	2-54
§ 2.10	<i>Form: Cartoonist License and Merchandising Agreement</i> . . . . .	2-60
§ 2.11	<i>Form: Celebrity License Agreement</i> . . . . .	2-73
§ 2.12	<i>Form: Celebrity Promotion License Agreement</i> . . . . .	2-84
§ 2.13	<i>Form: Art Work License Agreement</i> . . . . .	2-88
§ 2.14	<i>Form: Narration Services and License Agreement</i> . . . . .	2-94
§ 2.15	<i>Form: Graphics License Agreement</i> . . . . .	2-97
§ 2.16	<i>Form: Option License Agreement for a Literary Work License</i> . . . . .	2-103
§ 2.17	<i>Form: Trademark License Agreement</i> . . . . .	2-106
§ 2.18	<i>Form: Trademark License Agreement for Use in the Educational Marke</i> . . . . .	2-112
§ 2.19	<i>Form: Licensor Oriented Content License Agreement for CD-ROMs</i> . . . . .	2-119
§ 2.20	<i>Form: Clearinghouse Oriented Content License Agreement</i> . . . . .	2-132
§ 2.21	<i>Form: Single Track Music License</i> . . . . .	2-146
§ 2.22	<i>Form: Producer-Manager-Talent Agreement: Name and Likeness Release for Use in Product</i> . . . . .	2-154
§ 2.23	<i>Form: Subject Matter Content License Agreement</i> . . . . .	2-166
§ 2.24	<i>Form: Content License Agreement for Digital Product</i> . . . . .	2-174
§ 2.25	<i>Form: Ring Tone License Agreement</i> . . . . .	2-184
§ 2.26	<i>Form: Employee Certificate of Authorship</i> . . . . .	2-190
§ 2.27	<i>Form: Content License Between a Magazine Publisher and a Website Publisher</i> . . . . .	2-193
§ 2.28	<i>Form: Audiovisual Streaming/Downloading License Agreement</i> . . . . .	2-206
§ 2.29	<i>Form: License Oriented Audiovisual Streaming Agreement Short Form</i> . . . . .	2-213
§ 2.30	<i>Form: Audiovisual Program License Agreement</i> . . . . .	2-215
§ 2.31	<i>Form: Exclusive Personal Management Agreement</i> . . . . .	2-226

## CHAPTER 3

## Product Development Agreements

§ 3.01	Introduction . . . . .	3-4
§ 3.02	Deliverables . . . . .	3-5
	[1] Functional Design Specifications . . . . .	3-5
	[2] Detailed Design Specifications . . . . .	3-7
	[3] The Master Copies . . . . .	3-7
§ 3.03	Implementation Schedule . . . . .	3-8
	[1] Fixed Obligation . . . . .	3-8
	[2] Guideline . . . . .	3-9
§ 3.04	Progress Reports and Interim Approvals . . . . .	3-10
§ 3.05	Payment Schedules . . . . .	3-12
	[1] Fixed Fees with Milestones . . . . .	3-12
	[a] Change Control Procedures . . . . .	3-12
	[2] Time and Materials Development . . . . .	3-13
§ 3.06	Acceptance Tests . . . . .	3-15
§ 3.07	Definition of Ownership . . . . .	3-16
	[1] Ownership of Software . . . . .	3-16
	[2] Ownership of Other Aspects of the Product . . . . .	3-17
	[3] Cooperation and Notices . . . . .	3-18
§ 3.08	Producer Owned or Controlled Rights . . . . .	3-19
§ 3.09	Third Party Rights . . . . .	3-20
§ 3.10	Reservation of Rights . . . . .	3-22
§ 3.11	Confidentiality . . . . .	3-23
§ 3.12	Termination Provisions . . . . .	3-24
§ 3.13	Rights of First Refusal and Last Negotiation . . . . .	3-25
§ 3.14	Limitation of Liability . . . . .	3-26
§ 3.15	Representations and Warranties . . . . .	3-27
§ 3.16	Indemnification . . . . .	3-28
§ 3.17	Insurance and Risk Management . . . . .	3-29
	[1] Product Liability Insurance . . . . .	3-29
	[2] Intellectual Property Risk Management . . . . .	3-29
	[a] Intellectual Property Compliance Programs . . . . .	3-30
	[b] Insurance Covering Risks to Intellectual Property . . . . .	3-32
	[i] Commercial General Liability Policies . . . . .	3-32.1
	[ii] Media Liability/Errors & Omissions Policies . . . . .	3-32.2
	[iii] Patent and IP Infringement Policies . . . . .	3-32.3

	[iv] Internet Insurance/Cyber-Risk Policies . . . . .	3-32.4
	[v] Policies Limited to Patent Infringement Litigation Costs . . . . .	3-32.4
	[vi] Open Source Insurance . . . . .	3-32.5
§ 3.18	Software Licensing . . . . .	3-32.6
	[1] Scope of License . . . . .	3-32.6
	[a] Authorized Uses . . . . .	3-32.7
	[b] Use Restrictions . . . . .	3-32.8
	[2] Exclusive and Non-Exclusive Licenses . . . . .	3-32.9
	[3] Revocable Licenses . . . . .	3-33
	[4] Sublicensing/Third Party Usage . . . . .	3-33
	[5] Ownership . . . . .	3-34
	[6] Maintenance and Updates . . . . .	3-35
	[7] Source Code . . . . .	3-35
	[a] Bankruptcy . . . . .	3-35
	[b] Source Code Escrow . . . . .	3-37
	[8] Warranties . . . . .	3-37
	[a] Ownership of Intellectual Property . . . . .	3-37
	[b] Performance . . . . .	3-38
	[9] Indemnification . . . . .	3-39
	[10] Assignment Rights . . . . .	3-39
	[11] Term . . . . .	3-40
	[12] Modifications . . . . .	3-40
	[13] Confidential Information and Trade Secrets . . . . .	3-41
	[14] Open Source Software . . . . .	3-41
	[a] Introduction . . . . .	3-41
	[b] Open Source Software Products . . . . .	3-42
	[c] “Copyleft” . . . . .	3-42
	[d] The GNU General Public License . . . . .	3-42.1
	[e] Other Open Source and Related Licenses . . . . .	3-42.4
	[f] Infringement of Third Party Rights . . . . .	3-42.5
	[g] Other Forms of Protection . . . . .	3-42.8
	[h] Business Considerations and Risks . . . . .	3-42.9
	[15] Electronic Health Records . . . . .	3-42.10
	[a] Federal Law . . . . .	3-42.10
	[b] Cloud Computing Usage Models . . . . .	3-42.12
§ 3.19	Website Development and Hosting Agreements . . . . .	3-42.14
	[1] Development Agreements . . . . .	3-42.14
	[a] Scope of Services . . . . .	3-42.14
	[b] Technical Considerations . . . . .	3-42.14



## TABLE OF CONTENTS

xvii

	[c] Promotion . . . . .	3-42.15
	[d] Transitioning Services . . . . .	3-42.15
	[e] Editorial and Artistic Control and Approval . . . . .	3-42.16
	[f] Intellectual Property and Confidential Information . . . . .	3-42.16
	[g] Development Credit . . . . .	3-43
[2]	Hosting . . . . .	3-44
	[a] Scope of Services . . . . .	3-44
	[b] Domain Name Registration . . . . .	3-44
	[c] Updates and Modifications . . . . .	3-45
	[d] Limitations on Alteration and Copying . . . . .	3-45
	[e] Performance Criteria . . . . .	3-45
	[f] Customer Information . . . . .	3-46
	[g] Termination and Transfer . . . . .	3-46
	[h] Hosting Services Provider Warranties . . . . .	3-47
§ 3.20	<i>Form: Letter of Intent for Development Agreement . . . . .</i>	3-48
§ 3.21	<i>Form: Master Development Agreement . . . . .</i>	3-50
§ 3.22	<i>Form: Royalty Based Development Agreement . . . . .</i>	3-68
§ 3.23	<i>Form: Master Joint Development Agreement . . . . .</i>	3-91
§ 3.24	<i>Form: Independent Consulting Agreement . . . . .</i>	3-115
§ 3.25	<i>Form: Subcontractor Agreement . . . . .</i>	3-119
§ 3.26	<i>Form: License and Customization Agreement . . . . .</i>	3-122
§ 3.27	<i>Form: License and Development Agreement for Online Application with Server and Client Aspects . . . . .</i>	3-135
§ 3.28	<i>Form: Software License Agreement (Broad) . . . . .</i>	3-156
§ 3.29	<i>Form: Software License Agreement (Restrictive) . . . . .</i>	3-162
§ 3.30	<i>Form: Software License Agreement for Use of Software to Create Access and Retrieval Software . . . . .</i>	3-168
§ 3.31	<i>Form: Software License Agreement for Existing Access and Retrieval Software . . . . .</i>	3-172
§ 3.32	<i>Form: Escrow Agreement . . . . .</i>	3-176
§ 3.33	<i>Form: Focus Group Agreement . . . . .</i>	3-182
§ 3.34	<i>Form: Start of Work Template . . . . .</i>	3-189
§ 3.35	<i>Form: Website Development and Services Agreement . . . . .</i>	3-191
§ 3.36	<i>Form: Vendor Oriented User Trial Period License Agreement . . . . .</i>	3-213

§ 3.37	<i>Form: Client Oriented Website Development Agreement</i> . . . . .	3-217
§ 3.38	<i>Form: Retail Website Development and Services Agreement</i> . . . . .	3-234
§ 3.39	<i>Form: Live and Prerecorded Broadcast Streaming and Hosting Agreement</i> . . . . .	3-250
§ 3.40	<i>Form: GNU General Public License, Version 2, June 1991</i> . . . . .	3-265
§ 3.40A	<i>Form: GNU General Public License, Version 3, June 2007</i> . . . . .	3-272.1
§ 3.41	<i>Form: GNU Lesser General Public License</i> . . . . .	3-273
§ 3.42	<i>Form: Open Software License v. 2.0</i> . . . . .	3-284
§ 3.43	<i>Form: Exclusive Age Verification Software License Agreement</i> . . . . .	3-289
§ 3.44	<i>Form: Vendor-Oriented Website Hosting Agreement</i> . . . . .	3-306

## CHAPTER 4

### Product and Service Distribution

§ 4.01	Introduction . . . . .	4-3
§ 4.02	The Distribution Channels . . . . .	4-4
	[1] Retail Channels of Trade . . . . .	4-4
	[2] Direct Response . . . . .	4-5
	[3] Bundled Distribution . . . . .	4-5
	[4] Catalog Distribution . . . . .	4-6
	[5] OEM Distribution . . . . .	4-6
	[6] Internet and Wireless Direct Distribution Methods . . . . .	4-7
	[a] Content and Software . . . . .	4-8
	[i] Downloading: Shareware, Freeware, and Mobile Applications . . . . .	4-9
	[ii] Streaming and Broadcasting . . . . .	4-11
	[iii] File Sharing . . . . .	4-11
	[b] Services . . . . .	4-13
	[i] Application Services . . . . .	4-13
	[ii] B2B Internet Marketplace . . . . .	4-13
	[7] Future Distribution Methods . . . . .	4-16
§ 4.03	The Third Party Distribution Agreement . . . . .	4-18
	[1] Territory . . . . .	4-18
	[2] “Best Effort” Obligations . . . . .	4-18
	[3] Scope of Authority . . . . .	4-18.1
	[4] Producer’s Marketing Assistance . . . . .	4-18.1

**TABLE OF CONTENTS**

xix

	[5] Producer’s License . . . . .	4-18.2
	[6] Compensation . . . . .	4-18.2
	[a] Resellers . . . . .	4-18.3
	[b] Sales Agents . . . . .	4-18.3
	[7] Term . . . . .	4-18.3
§ 4.04	Licensing Software to the United States	
	Government . . . . .	4-18.5
	[1] Restricted Rights . . . . .	4-18.5
	[2] Limited Rights . . . . .	4-19
	[3] Unlimited Rights . . . . .	4-20
	[4] Government Purpose Rights . . . . .	4-20
§ 4.05	Exporting Regulations . . . . .	4-21
	[1] Rationale and Implementation of	
	Export Regulations . . . . .	4-21
	[2] The Wassenaar Arrangement and the	
	Export of Encryption Technology . . . . .	4-22.1
§ 4.06	Products Licenses . . . . .	4-22.3
	[1] Custom or Specialty Products . . . . .	4-22.3
	[2] Shrink-Wrap Licenses . . . . .	4-22.3
	[3] Click-Wrap Agreements . . . . .	4-22.5
	[4] Browse-Wrap Agreements . . . . .	4-22.10
§ 4.07	The Uniform Commercial Code . . . . .	4-23
§ 4.08	The Uniform Computer Information	
	Transactions Act . . . . .	4-24.2
§ 4.09	The Magnuson-Moss Act . . . . .	4-24.5
§ 4.10	<i>Form: Reseller Distribution Agreement</i> . . . . .	4-25
§ 4.11	<i>Form: Large Quality Sales Distribution</i>	
	<i>Agreement</i> . . . . .	4-36
§ 4.12	<i>Form: Product Distribution Agreement with</i>	
	<i>Optional Duplication Services</i> . . . . .	4-41
§ 4.13	<i>Form: Producer Favorable Distribution</i>	
	<i>Agreement</i> . . . . .	4-51
§ 4.14	<i>Form: Original Equipment Manufacture</i>	
	<i>Distribution Agreement</i> . . . . .	4-61
§ 4.15	<i>Form: Strategic Alliance Agreement</i> . . . . .	4-66
§ 4.15A	<i>Form: Interactive Distribution License</i>	
	<i>Agreement</i> . . . . .	4-80.7
§ 4.16	<i>Form: Publisher Oriented Product Marketing</i>	
	<i>and Distribution Agreement</i> . . . . .	4-80.21
§ 4.17	<i>Form: Sales Representative Agreement</i> . . . . .	4-89
§ 4.18	<i>Form: Individual or Network Use</i>	
	<i>Shrink-Wrap License Agreement</i> . . . . .	4-93
§ 4.19	<i>Form: Product Bundling and Enhancement</i>	
	<i>Agreement</i> . . . . .	4-96

§ 4.20	<i>Form: Vendor-Friendly Customer Referral Agreement</i> . . . . .	4-112
§ 4.21	<i>Form: Application Services Provider (ASP) Agreement</i> . . . . .	4-122
§ 4.22	<i>Form: Clickwrap End-User Product License Agreement</i> . . . . .	4-132
§ 4.23	<i>Form: License and Distribution Agreement (Utilizing “Push” Technology)</i> . . . . .	4-136
§ 4.24	<i>Form: Content Provider Oriented Wireless Content License and Distribution Agreement</i> . . . . .	4-148
§ 4.25	<i>Form: Internet Audio Distribution and Marketing Agreement</i> . . . . .	4-159
§ 4.26	<i>Form: Content Provider Oriented Webcasting and Radio Broadcast Agreement</i> . . . . .	4-172
§ 4.27	<i>Form: Vendor Exchange Member Agreement</i> . . . . .	4-201
§ 4.28	<i>Form: Vendor Services Terms and Conditions of Use</i> . . . . .	4-210
§ 4.29	<i>Form: Web-Based Services Reseller Agreement</i> . . . . .	4-215
§ 4.30	<i>Form: Program Support and Maintenance Agreement</i> . . . . .	4-226

# TABLE OF CONTENTS

## CHAPTER 5

### Copyright, Attribution and Integrity Rights and the Development of Emerging Technology Products

§ 5.01	Introduction . . . . .	5-4
§ 5.02	Copyright Analysis Checklist . . . . .	5-6
§ 5.03	The Rights Protected by Copyright . . . . .	5-11
§ 5.04	International Protection of Intellectual Property . . . . .	5-12.1
	[1] WIPO Agreements . . . . .	5-12.1
	[2] Anti-Counterfeiting Trade Agreement . . . . .	5-16
§ 5.05	European Union . . . . .	5-19
	[1] Copyright Harmonization Directive . . . . .	5-19
	[2] Database Directive . . . . .	5-20
§ 5.06	Determining Whether a Work Is Copyrightable . . . . .	5-20.2
	[1] Generally . . . . .	5-20.2
	[2] The Copyrightability of Factual Compilations . . . . .	5-20.7
	[a] The Copyrightability of Compilations Before <i>Feist</i> . . . . .	5-21
	[b] The <i>Feist</i> Decision . . . . .	5-21
	[c] The Emerging Technology Implications of <i>Feist</i> . . . . .	5-23
	[3] The Copyrightability of Fonts . . . . .	5-24
§ 5.07	Duration of Protection . . . . .	5-26
	[1] Works Created On or After January 1, 1978 . . . . .	5-26
	[2] Works Created Before January 1, 1978 . . . . .	5-27
	[3] The Copyright Renewal Act of 1992 . . . . .	5-27
	[4] Copyright Restoration . . . . .	5-28
§ 5.08	Copyright Notices . . . . .	5-30
§ 5.09	Ownership of Copyright . . . . .	5-31
	[1] Works Made for Hire . . . . .	5-31

	[a] Works Made for Hire in the Emerging Technology Industry . . .	5-32
	[b] Work Made for Hire and Tracing the Chain of Copyright Ownership . . . . .	5-32
	[2] Collective Works . . . . .	5-36
	[3] Joint Works . . . . .	5-38
	[4] Derivative Works . . . . .	5-38.1
	[5] Transfer of Copyright. . . . .	5-38.4
	[a] Transfer Under the Act of 1909 . . . . .	5-38.4
	[b] Transfer Under the Copyright Act of 1976 . . . . .	5-38.4
	[c] Termination of Copyright Transfers . . . . .	5-38.5
§ 5.10	The Fair Use Doctrine . . . . .	5-38.7
§ 5.10A	Educational Use Copyright Exemption (The “Teach Act”) . . . . .	5-39
§ 5.11	Attribution and Integrity Rights . . . . .	5-41
§ 5.12	Art Collections, Copyright Issues and Emerging Technologies . . . . .	5-42.2
§ 5.13	Identification of Copyright Owners . . . . .	5-42.3
	[1] Copyright Office Records . . . . .	5-42.3
	[2] Unions, Guilds and Collective Bargaining Associations. . . . .	5-42.3
	[3] Professional Rights Clearance Organizations . . . . .	5-42.3
§ 5.13A	Television Copyright Issues . . . . .	5-44
§ 5.14	Music Copyright Issues . . . . .	5-50.2
	[1] Public Performance License. . . . .	5-50.3
	[2] Synchronization License . . . . .	5-50.6
	[3] Mechanical License . . . . .	5-50.7
	[4] Music Publishing License . . . . .	5-50.8
§ 5.15	Copyright Registration Procedures. . . . .	5-50.9
§ 5.16	Registration of Computer Programs and Databases Not Fixed in CD-ROM. . . . .	5-50.11
	[1] Computer Programs . . . . .	5-50.11
	[2] Databases . . . . .	5-51
§ 5.17	Registration of Machine Readable Multimedia Works (Other Than Computer Programs, Databases or CD-ROM Products) . . . . .	5-52
	[1] Pictorial or Graphic Works . . . . .	5-52
	[2] Audio-Visual Works. . . . .	5-52
	[3] Musical Compositions . . . . .	5-52
	[4] Sound Recordings. . . . .	5-53
	[5] Literary Works . . . . .	5-53

**TABLE OF CONTENTS**

vii

§ 5.18	Registration of Multimedia Works Fixed in CD-ROM Format . . . . .	5-54
§ 5.19	Registration of Certain Multimedia “Kits” . . . . .	5-55
	[1] Deposit Requirements . . . . .	5-56
	[a] Generally . . . . .	5-56
	[b] Authorship Fixed Only in Machine-Readable Form . . . . .	5-56
	[2] Registration Forms . . . . .	5-56
§ 5.20	Rental of Multimedia and Other Emerging Technology Applications . . . . .	5-57
§ 5.21	Copyright Infringement. . . . .	5-59
	[1] Direct, Contributory, and Vicarious Infringement . . . . .	5-60
	[2] Remedies . . . . .	5-65
	[3] The No Electronic Theft (NET) Act . . . . .	5-68.2
§ 5.22	Proving Infringement . . . . .	5-69
	[1] <i>Prima Facie</i> Case . . . . .	5-69
	[2] Direct Liability . . . . .	5-70.2
	[3] Secondary Liability . . . . .	5-70.3
	[4] Active Inducement . . . . .	5-70.5
§ 5.23	Copyright Infringement of Computer Software . . . . .	5-70.6
	[1] Literal and Non-Literal Copying and Elements . . . . .	5-70.7
	[2] Early Approaches . . . . .	5-70.8
	[3] The <i>Altai</i> Test and Variations . . . . .	5-70.9
	[a] Protection of the User Interface . . . . .	5-70.14
	[b] User Interfaces and Virtual Reality . . . . .	5-70.17
§ 5.24	Technological Methods of Preventing Infringement . . . . .	5-71
	[1] The Audio Home Recording Act of 1992 . . . . .	5-72
	[2] The WIPO Treaties Act . . . . .	5-73
	[3] Copyright Management Information . . . . .	5-74
	[4] The Threat of Circumvention and the Digital Millennium Copyright Act . . . . .	5-75
	[5] Remedies . . . . .	5-78
§ 5.25	Copyright on the Internet . . . . .	5-80
	[1] Introduction . . . . .	5-80
	[2] Copyright Infringement on the Internet . . . . .	5-80
	[3] Liability . . . . .	5-80
	[a] Electronic Bulletin Boards . . . . .	5-80
	[b] Individuals . . . . .	5-82
	[c] Internet Service Providers . . . . .	5-83
	[d] Website Operators . . . . .	5-86
	[e] Internet File-Sharing . . . . .	5-88

[4]	The Digital Millennium Copyright Act. . . .	5-99
	[a] Routing and Intermediate Storage. . . .	5-101
	[b] Network Caching. . . . .	5-101
	[c] Storing, Referring to, or Linking to Infringing Material . . . . .	5-102
	[d] Other Provisions . . . . .	5-109
	[e] Copyright Management Information . . .	5-110.1
	[f] Exemptions to Circumvention. . . . .	5-110.4
	[i] Generally. . . . .	5-110.4
	[ii] Jailbreaking . . . . .	5-110.7
[5]	The Family Entertainment and Copyright Act. . . . .	5-110.8
[6]	Sound Recordings. . . . .	5-110.10
[7]	Legal Issues Arising from Hyperlinking. . .	5-111
	[a] Types of Hyperlinks . . . . .	5-111
	[i] Hypertext Links. . . . .	5-111
	[ii] Inline Links . . . . .	5-112
	[iii] Framing . . . . .	5-112
	[b] Implications of Linking. . . . .	5-112.1
	[i] Hypertext. . . . .	5-112.1
	[ii] Inline Linking and Framing . . . .	5-112.3
	[iii] Copyright and Trademark Concerns . . . . .	5-112.6
[8]	Search Engines and Digital Cataloging. . . .	5-112.7
	[a] Online Library Projects . . . . .	5-112.7
	[b] Databases and Thumbnails . . . . .	5-112.12
	[c] Infringement and Fair Use . . . . .	5-112.13
[9]	Hot News Misappropriation. . . . .	5-112.14
§ 5.26	<i>Form: Copyright Assignment. . . . .</i>	5-113
§ 5.27	<i>Form: Work Made for Hire—Author Contract . . .</i>	5-115
§ 5.28	<i>Form: Interim Designation of Agent to Receive Notification of Claimed Infringement . . . . .</i>	5-117
§ 5.29	<i>Form: Copyright Ownership Agreement . . . . .</i>	5-118
§ 5.30	<i>Form: Copyright Transfer Agreement. . . . .</i>	5-120
§ 5.31	<i>Form: Producer Digital Millennium Copyright Act Policy . . . . .</i>	5-128
§ 5.32	<i>Form: DMCA Takedown Notice . . . . .</i>	5-132
§ 5.33	<i>Form: Exclusive License Agreement. . . . .</i>	5-134

## CHAPTER 6

### Trademark Law and the Development of Emerging Technology Products

§ 6.01	Introduction . . . . .	6-3
§ 6.02	Emerging Technology Trademark Checklist . . . .	6-4



## TABLE OF CONTENTS

ix

§ 6.03	Overview of Trademark Law and Emerging Technology .....	6-7
§ 6.04	Categories .....	6-10
	[1] Fanciful and Arbitrary Marks .....	6-10
	[2] Suggestive Marks .....	6-11
	[3] Descriptive Marks .....	6-12
	[4] Generic Marks .....	6-12.2
§ 6.05	Identifying Characteristics Subject to Protection .....	6-13
	[1] Abbreviations and Nicknames .....	6-13
	[2] Slogans .....	6-13
	[3] Titles .....	6-13
	[4] Characters .....	6-14
	[5] Celebrities .....	6-15
	[6] Trade Dress .....	6-16
	[a] Generally .....	6-16
	[b] Website Look and Feel .....	6-18
	[7] Internet Domain Names .....	6-22
	[a] Domain Name System .....	6-22
	[b] Strategies for Registering Domain Names as Trademarks .....	6-24
	[i] Choosing a Mark .....	6-25
	[ii] Clearing a Mark for Use .....	6-26
§ 6.06	Federal Trademark Registration .....	6-26.1
§ 6.07	Selecting Marks for Emerging Technology Products .....	6-26.5
	[1] Descriptive vs. Suggestive Marks .....	6-26.5
	[2] Conducting a Trademark Search .....	6-26.6
§ 6.08	Emerging Technology Trademark Applications .....	6-26.7
	[1] Preparing an Application .....	6-26.7
	[2] Prosecuting an Application .....	6-29
	[3] Principal and Supplemental Registers .....	6-30
	[4] Notice of Registration .....	6-31
§ 6.09	Trademark Related Actions .....	6-32
	[1] Infringement Generally .....	6-32
	[a] Strength of the Mark .....	6-37
	[b] Similarity Between the Marks .....	6-37
	[c] Relatedness of the Goods .....	6-38
	[d] Evidence of Actual Confusion .....	6-38
	[e] Sophistication of Buyers .....	6-41
	[f] Defendant's Intent .....	6-41
	[g] Likelihood of Expansion .....	6-42
	[h] Marketing Channels .....	6-43

## EMERGING TECHNOLOGIES AND THE LAW

	[2] Contributory Trademark Infringement . . . . .	6-44
	[3] Unfair Competition . . . . .	6-45
	[a] False Advertising . . . . .	6-45
	[b] Reverse Passing Off . . . . .	6-46.2
	[c] Trademark Disparagement . . . . .	6-46.2
	[d] False Designation of Origin . . . . .	6-46.3
	[4] Dilution . . . . .	6-46.6
	[a] State Trademark Dilution Statutes . . . . .	6-46.6
	[b] Federal Trademark Dilution Act of 1995 . . . . .	6-46.9
	[5] Causing Marks to Become Generic . . . . .	6-46.10
	[6] Free Speech . . . . .	6-46.12
§ 6.10	Proper Use of Emerging Technology Marks . . . . .	6-47
§ 6.11	Trademark Protection on the Internet . . . . .	6-49
	[1] Domain Names and Domain Name Disputes . . . . .	6-49
	[a] The ICANN Domain Name Dispute Resolution Policy (UDRP) . . . . .	6-51
	[b] Anticybersquatting Consumer Protection Act of 1999 . . . . .	6-54
	[2] Trademark Infringement in Website Content, Metatags, Search Terms and Search Engine Keywords . . . . .	6-56.6
	[a] Website Content . . . . .	6-56.11
	[b] Metatags, Search Terms and Uniform Resource Locators (URLs) . . . . .	6-56.15
§ 6.12	<i>Form:</i> Trademark Assignment . . . . .	6-56.22
§ 6.13	<i>Form:</i> Cease and Desist Letter for Trademark Infringement in Internet Domain Name . . . . .	6-57
§ 6.14	<i>Form:</i> Settlement Agreement Providing for Transfer of Domain Name . . . . .	6-59
§ 6.15	<i>Form:</i> Sample Trademark Opinion . . . . .	6-64

## CHAPTER 7

### Trade Secret Law and the Development of Emerging Technology Products

§ 7.01	Introduction . . . . .	7-2
§ 7.02	Emerging Technology Trade Secret Checklist . . . . .	7-3
§ 7.03	Trade Secrets and Emerging Technology . . . . .	7-5
	[1] Confidential Business Information . . . . .	7-5
	[2] Software . . . . .	7-6
	[3] The Entire Application . . . . .	7-6
	[4] Works Incorporated into the Application . . . . .	7-7

## TABLE OF CONTENTS

xi

§ 7.04	Overview of Trade Secret Law . . . . .	7-8
§ 7.05	Mass-Marketed Emerging Technology Applications Containing Trade Secrets . . . . .	7-13
§ 7.06	Misappropriation . . . . .	7-14
	[1] Determining Misappropriation . . . . .	7-14
	[2] Employee Misappropriation . . . . .	7-15
	[a] The Doctrine of Inevitable Disclosure . . . . .	7-18.1
	[b] Covenants Not to Compete . . . . .	7-18.3
	[3] Third Party Misappropriation . . . . .	7-19
	[4] Section 337 Investigations . . . . .	7-20.1
§ 7.07	Establishing Trade Secrets in Emerging Technologies . . . . .	7-20.3
§ 7.08	Criminal Liability . . . . .	7-20.5
	[1] State Law . . . . .	7-20.5
	[2] Economic Espionage Act of 1996 . . . . .	7-20.5
	[3] Defend Trade Secrets Act of 2016 . . . . .	7-20.8
§ 7.09	<i>Form</i> : Evaluation Nondisclosure Letter Agreement Between Company and Potential Distributor . . . . .	7-21
§ 7.10	<i>Form</i> : Employee Confidentiality and Assignment of Interventions Agreement . . . . .	7-24
§ 7.11	<i>Form</i> : Exit Interview Form . . . . .	7-26
§ 7.12	<i>Form</i> : Employee System Use Warning . . . . .	7-27

## CHAPTER 8

### Patent Law and the Development of Emerging Technology Products

§ 8.01	Introduction . . . . .	8-2
§ 8.02	Overview of Patent Law . . . . .	8-4
	[1] The Public Use and On Sale Bars . . . . .	8-6
	[2] Participation in Standards Setting Bodies . . . . .	8-9
§ 8.03	Examples of Emerging Technology Related Patentable Subject Matter . . . . .	8-11
	[1] Software . . . . .	8-11
	[2] Data Transmission and Data Compression . . . . .	8-12
	[3] Television . . . . .	8-12
	[4] Multimedia . . . . .	8-13
	[5] Internet-Based and Electronic Commerce . . . . .	8-13
§ 8.04	Emerging Technology Patent Checklists . . . . .	8-14

	[1] Checklist to Minimize Likelihood of Infringement . . . . .	8-14
	[2] Patent Protection Checklist . . . . .	8-16
§ 8.05	Patentable Subject Matter and Emerging Technology . . . . .	8-21
	[1] Generally . . . . .	8-21
	[2] The Patentability of Emerging Technology Software . . . . .	8-24
	[3] The Patentability of Emerging Technology Methods of Doing Business . . . . .	8-28
	[4] The Patentability of Emerging Technology Database Structures . . . . .	8-38
	[5] The Patenting of Emerging Technology: Risks of Aging Out . . . . .	8-38
§ 8.06	Novelty, Nonobviousness, and Definiteness Requirements . . . . .	8-40
	[1] Novelty . . . . .	8-40
	[2] Nonobviousness . . . . .	8-45
	[3] Definiteness . . . . .	8-47
§ 8.07	Patent Applications . . . . .	8-48.2
	[1] The Application Process . . . . .	8-48.2
	[2] Enablement and Best Mode Requirements . . . . .	8-48.3
	[3] Submission of Source Code . . . . .	8-48.5
	[4] Drafting of Claims . . . . .	8-49
	[5] International Patent Protection . . . . .	8-50
§ 8.08	Claim Construction . . . . .	8-54
§ 8.09	Patent Infringement . . . . .	8-56.1
	[1] Standards . . . . .	8-56.2
	[2] Remedies . . . . .	8-62
	[3] Options for Potential Infringers . . . . .	8-68
	[4] Infringement and Imported/Exported Software . . . . .	8-68.4
	[a] Exported Software . . . . .	8-68.4
	[b] Section 271(f) . . . . .	8-68.4
	[c] Litigation . . . . .	8-68.5
	[d] Imported Software . . . . .	8-68.9
	[5] Patent Assertion Entities . . . . .	8-68.12
§ 8.10	Design Patents and Emerging Technology . . . . .	8-68.21
	[1] Overview . . . . .	8-68.21
	[2] Designs Displayed as Part of Content . . . . .	8-69
§ 8.11	Ownership . . . . .	8-72
	[1] Inventorship . . . . .	8-72
	[2] Assignment . . . . .	8-73

## TABLE OF CONTENTS

xiii

[3]	Licensing . . . . .	8-75
[4]	Cross-Licensing . . . . .	8-76.2
[5]	Patent Licensing and the Development of Open Standards . . . . .	8-76.5
§ 8.12	<i>Form</i> : Patent Assignment . . . . .	8-77
§ 8.13	<i>Form</i> : Patent License Agreement (Exclusive) . . . . .	8-80
§ 8.14	<i>Form</i> : Patent License Agreement (Non-Exclusive) . . . . .	8-84
§ 8.15	<i>Form</i> : Assignment of Patent Application . . . . .	8-93

## CHAPTER 9

### Rights of Privacy and Publicity; Defamation

§ 9.01	Introduction . . . . .	9-4
§ 9.02	Rights of Privacy and Publicity . . . . .	9-5
	[1] Overview . . . . .	9-5
	[2] Privacy and Publicity Checklist . . . . .	9-5
§ 9.03	Right of Privacy . . . . .	9-8
	[1] Intrusion Upon Seclusion . . . . .	9-8
	[2] Public Disclosure of Private Facts . . . . .	9-9
	[3] False Light . . . . .	9-10
	[4] Appropriation of Name or Likeness . . . . .	9-11
	[5] Survival and Transfer of Right of Privacy . . . . .	9-11
§ 9.04	Privacy Rights and Emerging Technologies . . . . .	9-13
	[1] The Scope of the Personal Information Problem . . . . .	9-13
	[a] Locational Technologies . . . . .	9-13
	[b] Data Mining . . . . .	9-15
	[c] Surveillance and Security Technologies . . . . .	9-17
	[d] Internet Technology . . . . .	9-22
	[i] Clickstream Data . . . . .	9-23
	[ii] Tracking Technology . . . . .	9-23
	[iii] Unauthorized Interception and Access . . . . .	9-27
	[iv] Voluntary Provision of Private Information . . . . .	9-28
	[v] Spyware . . . . .	9-28
	[vi] Data Security Concerns . . . . .	9-34
	[vii] Credential Stuffing . . . . .	9-40
	[e] User Provided Information . . . . .	9-43
	[i] Generally . . . . .	9-43

	[ii]	Search Engines and Data Retention . . . . .	9-43
	[iii]	Social Networks and Behavioral Advertising . . . . .	9-44.2
[2]		Selected Privacy Laws . . . . .	9-44.7
	[a]	Privacy-Related Federal Laws in the United States . . . . .	9-44.7
	[i]	Gramm-Leach-Bliley Act . . . . .	9-44.8
	[ii]	Health Insurance Portability and Accountability Act of 1996 (HIPAA) . . . . .	9-44.9
	[iii]	Children’s Online Privacy Protection Act (COPPA) . . . . .	9-44.10
	[iv]	The Electronic Communications Privacy Act (ECPA) . . . . .	9-44.15
	[v]	Fair Credit Reporting Act (FCRA) . . . . .	9-49
	[vi]	Computer Fraud and Abuse Act (CFAA) . . . . .	9-52
	[vii]	The Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) . . . . .	9-56.2
	[viii]	Identity Theft Penalty Enhancement Act (ITPEA) . . . . .	9-56.7
	[ix]	Telephone Consumer Protection Act (TCPA) . . . . .	9-56.10
	[x]	Video Privacy Protection Act . . . . .	9-56.18
	[b]	Privacy-Related State Laws in the United States . . . . .	9-56.19
	[c]	Privacy-Related International Laws . . . . .	9-56.32
	[i]	European Union (EU) . . . . .	9-56.32
	[ii]	Data Protection Laws in Canada . . . . .	9-56.43
[3]		Constitutional Protections . . . . .	9-56.44
[4]		Electronic Banking Security . . . . .	9-56.46
	[a]	Fraudulent Electronic Funds Transfers . . . . .	9-56.46
	[b]	Online Banking Security Procedures . . . . .	9-56.48
	[c]	Litigation . . . . .	9-56.50
[5]		Government Actions and Industry Self-Regulation . . . . .	9-56.51
	[a]	World Wide Web Consortium . . . . .	9-56.57
	[b]	The TRUSTe Privacy Program . . . . .	9-56.58
	[c]	The ANA Guidelines . . . . .	9-56.59

**TABLE OF CONTENTS**

xv

	[d] Children’s Advertising Review Unit Guidelines . . . . .	9-56.61
	[e] Payment Card Industry Data Security Standards . . . . .	9-56.62
§ 9.05	Right of Publicity . . . . .	9-56.66
	[1] Consent to Use Names or Likenesses in Content . . . . .	9-56.69
	[2] Incidental Use in Content . . . . .	9-56.72
	[3] First Amendment Protection for Emerging Technology Products . . . . .	9-56.73
	[4] Survival and Transfer of Right of Publicity . . . . .	9-56.76
	[5] Right of Publicity on the Internet . . . . .	9-56.77
§ 9.06	Defamation . . . . .	9-56.80
	[1] Defamation Checklist . . . . .	9-56.80
	[2] Elements . . . . .	9-56.82
	[a] Statement . . . . .	9-56.83
	[b] Defamatory in Nature . . . . .	9-56.83
	[c] Reference to or Concerning the Party . . . . .	9-56.84
	[d] Falsity and Capability of Being Proven False . . . . .	9-56.85
	[e] Publication to a Third Party . . . . .	9-56.86
	[f] Injury . . . . .	9-56.89
	[g] Fault by the Person Publishing the Statement . . . . .	9-56.89
	[3] First Amendment Limitations . . . . .	9-56.90
	[a] Standards for Defamation of Private Persons . . . . .	9-56.91
	[b] Standards for Defamation of Public Figures . . . . .	9-56.92
	[c] Responsibilities of a Producer . . . . .	9-56.94
	[4] Libel and Defamation on the Internet . . . . .	9-56.98
	[a] Application of Traditional Defamation Law to Internet Communications . . . . .	9-56.98
	[b] Single Publication Rule . . . . .	9-56.100
	[c] Revealing the Identity of Anonymous Speakers . . . . .	9-56.103
§ 9.07	Liability for Inaccurate Data . . . . .	9-56.107
	[1] Negligence . . . . .	9-56.107
	[2] Product Liability . . . . .	9-56.108
§ 9.08	The Role of Indemnification and Insurance . . . . .	9-59
§ 9.09	<i>Form: Picture and Name Release</i> . . . . .	9-60.3
§ 9.10	<i>Form: Talent Contract</i> . . . . .	9-62

§ 9.11	<i>Form: User Protective Website Data Collection Policy</i> . . . . .	9-64
§ 9.12	<i>Form: Website Privacy Policy</i> . . . . .	9-66
§ 9.13	<i>Form: Sample Privacy Policy Notice Provisions Appropriate for Website Directed Toward Children</i> . . . . .	9-69
§ 9.14	<i>Form: Gramm-Leach-Bliley Act Model Privacy Notice Form (with Opt-Out)</i> . . . . .	9-71
§ 9.15	<i>Form: Cookie Policy</i> . . . . .	9-73
§ 9.16	<i>Form: Sample Privacy Policy</i> . . . . .	9-76

## CHAPTER 10

### The Internet and Data Access Networks

§ 10.01	Regulating Online Content . . . . .	10-3
	[1] Communications Decency Act of 1996 (CDA) . . . . .	10-3
	[a] Background . . . . .	10-3
	[b] Section 230 . . . . .	10-4
	[c] Other Defenses . . . . .	10-14.6
	[i] The Good Faith Defense . . . . .	10-14.7
	[ii] The Access Provider Defense . . . . .	10-14.7
	[iii] The Good Samaritan Defense . . . . .	10-14.8
	[2] Limiting Access to Obscene and Indecent Content . . . . .	10-15
	[3] Transmission of Obscenity Over Bulletin Boards . . . . .	10-16.2
	[4] EU Regulation of Digital Services . . . . .	10-16.2
	[a] The Digital Markets Act . . . . .	10-16.3
	[b] The Digital Services Act . . . . .	10-16.6
§ 10.02	Corporate Internet Access Policies . . . . .	10-16.9
	[1] Initial Procedures . . . . .	10-16.9
	[a] Security . . . . .	10-16.9
	[b] Limited Access . . . . .	10-16.10
	[c] Viruses . . . . .	10-16.10
	[2] E-Mail, Confidentiality, and a Workplace Policy . . . . .	10-16.11
	[a] Generally . . . . .	10-16.11
	[b] Electronic Communication and Privacy Act (ECPA) Concerns . . . . .	10-16.12
	[c] State Law . . . . .	10-16.15
	[d] Attorney-Client Privilege . . . . .	10-16.16
	[e] E-Mail Use Policies . . . . .	10-16.20



**TABLE OF CONTENTS**

xvii

[3]	Offensive and Obscene Communications . . .	10-16.21
[4]	Trade Secrets and Unsolicited Ideas . . . . .	10-16.21
[5]	Online Copyright Infringement . . . . .	10-16.23
[6]	Website Privacy Policies . . . . .	10-16.23
[a]	Generally . . . . .	10-16.23
[b]	FTC Enforcement Actions. . . . .	10-16.26
[7]	Social Media Policies. . . . .	10-16.28
§ 10.02A	The Federal Records Act, Electronic Records and E-Mail . . . . .	10-16.32
§ 10.03	Internet and Wireless Commerce . . . . .	10-17
[1]	Electronic and Digital Signatures . . . . .	10-17
[a]	Enforceability Prior to Federal and State Legislation. . . . .	10-18
[b]	UETA and Other State Electronic Signatures Legislation. . . . .	10-20
[c]	Electronic Signatures in Global and National Commerce Act (E-Sign). . .	10-22
[i]	Purpose and Scope . . . . .	10-22
[ii]	Requirement of Consumer Notice and Consent . . . . .	10-23
[iii]	Reasonably Demonstrating the Consumer’s Ability to Access . . . . .	10-25
[iv]	Effect of E-Sign’s UETA Preemption Provisions on Consent . . . . .	10-26
[v]	Withdrawal of Consent. . . . .	10-27
[vi]	Electronic Agents . . . . .	10-28.2
[vii]	Exemptions from E-Sign . . . . .	10-28.2
[d]	ABA Digital Signature Guidelines . . .	10-28.3
[e]	International Recognition of Electronic Signatures. . . . .	10-28.3
[f]	Security Issues. . . . .	10-28.3
[2]	Export Restrictions on Encryption. . . . .	10-28.5
§ 10.04	Wrongful Conduct on the Internet. . . . .	10-29
[1]	Identity Theft . . . . .	10-29
[2]	Disclosure of Embarrassing or Private Information. . . . .	10-32
[3]	Click Fraud . . . . .	10-36
[4]	Catfishing . . . . .	10-39
[5]	Cyberstalking . . . . .	10-41
[6]	Deepfakes . . . . .	10-44
[7]	Dark Patterns . . . . .	10-45

§ 10.05	Internet Jurisdiction . . . . .	10-46.2
	[1] Online Contract Formation . . . . .	10-46.6
	[2] Websites and Jurisdiction: Is a Website Enough? . . . . .	10-46.11
	[3] Conduct Directed Toward the Jurisdiction. . .	10-46.19
	[4] Jurisdiction Across National Boundaries. . .	10-46.23
§ 10.06	<i>Form: Corporate Internet Use Policy.</i> . . . . .	10-46.29
§ 10.07	<i>Form: Web Linking Referral Fee Agreement.</i> . . .	10-49
§ 10.08	<i>Form: Retail Internet Site Agreement.</i> . . . . .	10-58
§ 10.09	<i>Form: Web Hosting Agreement.</i> . . . . .	10-63
§ 10.10	<i>Form: Search Engine Services Agreement . . . . .</i>	10-77
§ 10.11	<i>Form: Withdrawal of Consent to Electronic Notices and Records.</i> . . . . .	10-88
§ 10.12	<i>Form: Wireless Services Enterprise Agreement.</i> . . . . .	10-91
§ 10.13	<i>Form: Employee Internet Use Policy Statement. . . .</i>	10-123

## CHAPTER 11

### Joint Ventures in Emerging Technologies

§ 11.01	Introduction . . . . .	11-3
§ 11.02	Form of Joint Venture . . . . .	11-4
	[1] Introduction. . . . .	11-4
	[2] Corporation . . . . .	11-4
	[a] Introduction . . . . .	11-4
	[b] Regulatory and Reporting Requirements. . . . .	11-5
	[c] Governing Documents. . . . .	11-5
	[d] Creation . . . . .	11-5
	[e] Taxation . . . . .	11-5
	[f] Management. . . . .	11-5
	[3] Partnership . . . . .	11-6
	[a] Introduction . . . . .	11-6
	[b] Taxation . . . . .	11-6
	[c] Management. . . . .	11-6
	[d] Liability . . . . .	11-6
	[e] Partnership Agreement . . . . .	11-7
	[f] Reporting Obligations . . . . .	11-7
	[g] Formation Costs. . . . .	11-7
	[h] Term of Existence . . . . .	11-7
	[4] Limited Liability Company . . . . .	11-7
	[a] Introduction . . . . .	11-7
	[b] Management. . . . .	11-8
	[c] Operating Agreement. . . . .	11-8

## TABLE OF CONTENTS

xix

	[d] Formation . . . . .	11-8
	[e] Liability . . . . .	11-8
	[f] Fiduciary Duty . . . . .	11-8
	[g] Advantages Over Other Forms . . . . .	11-8
§ 11.03	Contributions . . . . .	11-10
	[1] Introduction . . . . .	11-10
	[2] Form of Contributions . . . . .	11-10
	[3] Intellectual Property . . . . .	11-10
	[4] Contractual Relationships . . . . .	11-11
	[5] Other Assets . . . . .	11-11
§ 11.04	Intellectual Property Licensing . . . . .	11-12
	[1] Introduction . . . . .	11-12
	[2] Technology License . . . . .	11-12
	[a] Definition of Licensed Technology . . . . .	11-12
	[b] Term of Licensed Technology . . . . .	11-12
	[c] Scope of License . . . . .	11-12
	[d] Source Code . . . . .	11-13
	[e] Title to Technology . . . . .	11-13
	[f] Warranties . . . . .	11-13
	[g] Indemnity and Limits on Liability . . . . .	11-14
	[h] Delivery Schedule . . . . .	11-14
	[i] Maintenance . . . . .	11-14
	[3] Content Licensing . . . . .	11-14
	[a] Identification of Licensed Properties . . . . .	11-15
	[b] Grant of Rights . . . . .	11-15
	[c] Reservation of Rights and Exclusivity . . . . .	11-15
	[d] Approvals . . . . .	11-15
	[e] Representations and Warranties . . . . .	11-16
	[f] Disclaimer of Warranties . . . . .	11-16
	[g] Indemnification/Defense Against Third Party Claims . . . . .	11-16
	[h] Limitation of Liability . . . . .	11-17
§ 11.05	Confidentiality . . . . .	11-18
§ 11.06	Management and Employees . . . . .	11-19
	[1] Personnel . . . . .	11-19
	[2] Non-Solicitation of Employees . . . . .	11-19
	[3] Equity Options for Management and Employees . . . . .	11-20
§ 11.07	Financial Provisions . . . . .	11-21
§ 11.08	Services Agreements . . . . .	11-22
§ 11.09	Non-Compete and Exclusivity Issues . . . . .	11-23
	[1] Non-Competition Agreements . . . . .	11-23
	[2] Exclusivity Agreements . . . . .	11-23

§ 11.10	Transfers of Interest . . . . .	11-24
	[1] Introduction. . . . .	11-24
	[2] Restrictions . . . . .	11-24
	[a] Right of First Offer . . . . .	11-24
	[b] Right of First Refusal . . . . .	11-24
	[c] Buy/Sell . . . . .	11-25
§ 11.11	Promotion . . . . .	11-26
§ 11.12	Antitrust Issues . . . . .	11-27
§ 11.13	Termination . . . . .	11-28
§ 11.14	<i>Form: Emerging Technology Joint Venture</i> Checklist . . . . .	11-29
§ 11.15	<i>Form: Memorandum of Understanding for</i> Emerging Technology Joint Venture ABC, INC. . . . .	11-31
§ 11.16	<i>Form: Non-Exclusive Online Affiliate Form</i> . . .	11-58

## CHAPTER 12

### Regulation of Emerging Technology

§ 12.01	Introduction . . . . .	12-2
§ 12.02	Federal Trade Commission. . . . .	12-3
	[1] Introduction. . . . .	12-3
	[2] Antitrust . . . . .	12-3
	[a] Antitrust Laws . . . . .	12-4
	[b] Antitrust Limits on the Licensing of Intellectual Property . . . . .	12-5
	[i] Duty to License to Third Parties . . . . .	12-6
	[ii] Price Restrictions in Licensing Agreements . . . . .	12-7
	[iii] Exclusive Licensing and Exclusive Dealing. . . . .	12-8
	[iv] Cross-Licensing and Pooling Arrangements . . . . .	12-8.1
	[v] Grantbacks. . . . .	12-10
	[vi] Tying . . . . .	12-11
	[vii] Enforcement of Invalid Intellectual Property Rights . . . . .	12-11
	[c] Antitrust Concerns Arising from E-Commerce Collaborations. . . . .	12-13
	[i] Antitrust Issues in Collaborations. . . . .	12-14
	[ii] Collaboration Guidelines . . . . .	12-16.2
	[d] Standard Setting. . . . .	12-16.3
[3]	Protection of Consumers . . . . .	12-17

## TABLE OF CONTENTS

xxi

§ 12.03	International Trade Commission . . . . .	12-21
	[1] Introduction . . . . .	12-21
	[2] Proceedings Under Section 337 . . . . .	12-22
§ 12.04	Department of Commerce . . . . .	12-24
§ 12.05	Federal Communications Commission . . . . .	12-25
	[1] Introduction . . . . .	12-25
	[2] Bureaus and Offices . . . . .	12-26
	[a] Bureaus . . . . .	12-27
	[i] Media . . . . .	12-27
	[ii] Wireless Telecommunications . . . . .	12-27
	[iii] Wireline Competition . . . . .	12-27
	[iv] Enforcement . . . . .	12-27
	[b] Offices . . . . .	12-28
	[i] Engineering and Technology . . . . .	12-28
	[ii] General Counsel . . . . .	12-28
	[iii] Administrative Law Judges . . . . .	12-28
	[iv] Managing Director . . . . .	12-28
	[v] Legislative Affairs . . . . .	12-29
	[3] Regulation of Specific Emerging Technologies . . . . .	12-29
	[a] Television . . . . .	12-29
	[i] Digital Television (DTV) . . . . .	12-29
	[ii] V-Chip . . . . .	12-30
	[b] Voice-Over-Internet Protocol (VoIP) . . . . .	12-31
	[c] E911 . . . . .	12-34
	[d] Spectrum Allocation . . . . .	12-35
	[i] Leasing . . . . .	12-37
	[ii] Cognitive Radio . . . . .	12-37
	[e] Broadband . . . . .	12-38
	[i] BPL . . . . .	12-38
	[ii] Net Neutrality . . . . .	12-40

## Appendices

<b>APPENDIX A:</b> Copyright Materials . . . . .	A-1
<b>APPENDIX B:</b> Trademark Materials . . . . .	B-1
<b>APPENDIX C:</b> Patent Materials . . . . .	C-1
<b>APPENDIX D:</b> Privacy and Publicity Statutes . . . . .	D-1
<b>APPENDIX E:</b> Glossary of Terminology for Emerging Technologies . . . . .	E-1
<b>INDEX</b> . . . . .	I-1