Detailed Table of Contents

Preface ..................................................... vii

Acknowledgments ............................................ ix

Summary Table of Contents..................................... xi

1. Freedom of Speech ......................................... 1
   I. First Amendment Basics. ................................. 2
      A. Content-Based or Content-Neutral. .................. 2
      B. Overbreadth ........................................ 3
      C. Vagueness .......................................... 3
   II. Print Media Versus Broadcast Media ..................... 3
   III. Speech on the Internet Is Entitled to Full First Amendment Protection ..................... 4
      A. The Communications Decency Act ...................... 4
      B. The Child Online Protection Act ..................... 6
      C. The Child Pornography Prevention Act ............... 8
      D. The Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act 8
      E. The Children’s Internet Protection Act .......... 9
      F. Reviewing or Downloading Obscene Material ........ 10
         1. Receipt of Obscene Material ...................... 10
         2. “Knowingly Possessing” Child Pornography .......... 10
      G. Other Federal Efforts to Protect Children Online . 13
   IV. Obscenity and “Community Standards” Online .......... 13
   V. Use of Zoning Law to Restrict Access to Internet Content ...... 16
      A. Dot-Kids Second Level Domain ....................... 17
VI. State Laws Restricting Online Content ........................................... 18
   A. Regulation of Child Pornography ............................................. 18
   B. Preventing Access to Content Harmful to Minors ...................... 21
   C. Other State Restrictions on Online Speech .............................. 30

VII. Liability of Public Libraries for Providing Unrestricted Internet
     Access ......................................................................................... 31
   A. Unwelcome Exposure to Pornography ...................................... 32
   B. Governmental Requests for Library Records ............................... 33

VIII. Discovery of the Identities of Anonymous Internet Users .............. 34

IX. Reporter’s Privilege and Online Speech ......................................... 45

X. Penalties for Posting Personal Information of Others ..................... 46

XI. Criticism of Schools and Teachers ............................................... 48

XII. Online Vote Trading .................................................................. 54

XIII. Advertising for Internet Gambling .............................................. 55

XIV. Internet Search Engines ............................................................. 55

XV. Limits on Email Usage ............................................................... 57

XVI. Blogging ..................................................................................... 58
    A. Blogs Maintained by Soldiers .................................................. 59
    B. Treatment of Blogs Under Federal Election Law .................... 59
    C. International Issues ............................................................... 60

XVII. U.S. First Amendment Protections in the International Context of
      the Internet.................................................................................... 61

Summary of the Law ............................................................................ 66

2. Trademarks .................................................................................... 69

   I. Trademark Basics ........................................................................ 70
      A. Definition of a Trademark ...................................................... 70
      B. Rationale Behind Trademark Protection .................................. 70
      C. Indication of Origin .............................................................. 71
      D. Obtaining Trademark Rights ............................................... 71
         1. Common Law Rights .......................................................... 71
         2. Registered Trademarks ....................................................... 71
         3. Famous Marks .................................................................. 71
      E. Trademark Ownership Actions and Remedies ......................... 71
         1. Infringement ....................................................................... 71
            a. Registered Marks .......................................................... 71
            b. Common Law Marks ...................................................... 72
            c. Establishing Infringement: Likelihood of Confusion ....... 72
         2. Dilution ............................................................................. 72
         3. Difference Between Dilution and Infringement .................. 73
         4. Statutory Remedies ............................................................. 73
            a. Trademark Infringement ................................................ 73
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Detailed Table of Contents</td>
<td>xv</td>
</tr>
<tr>
<td>b. Dilution</td>
<td>73</td>
</tr>
<tr>
<td>II. First Amendment Issues in Trademark Disputes</td>
<td>74</td>
</tr>
<tr>
<td>A. Use of Trademarks as Communicative Speech</td>
<td>74</td>
</tr>
<tr>
<td>1. U.S. Courts of Appeals Split over Gripe Sites</td>
<td>79</td>
</tr>
<tr>
<td>III. Linking and Framing</td>
<td>81</td>
</tr>
<tr>
<td>A. Linking</td>
<td>81</td>
</tr>
<tr>
<td>B. Linking Cases</td>
<td>81</td>
</tr>
<tr>
<td>C. Better Business Bureau Controversy</td>
<td>83</td>
</tr>
<tr>
<td>D. Framing</td>
<td>83</td>
</tr>
<tr>
<td>IV. Metatags and Hidden Code</td>
<td>84</td>
</tr>
<tr>
<td>V. Spam</td>
<td>91</td>
</tr>
<tr>
<td>VI. Contextual Marketing: Paid Search and Targeted Pop-Up Ads</td>
<td>92</td>
</tr>
<tr>
<td>A. Paid Search: Keyword-Triggered Advertising</td>
<td>92</td>
</tr>
<tr>
<td>B. Targeted Pop-Ups</td>
<td>95</td>
</tr>
<tr>
<td>VII. Liability of Internet Service Providers</td>
<td>96</td>
</tr>
<tr>
<td>A. Liability for Third-Party Trademark Infringement</td>
<td>96</td>
</tr>
<tr>
<td>Summary of the Law</td>
<td>97</td>
</tr>
<tr>
<td>3. Domain Names</td>
<td>99</td>
</tr>
<tr>
<td>I. Domain Name Registration</td>
<td>101</td>
</tr>
<tr>
<td>A. Background</td>
<td>101</td>
</tr>
<tr>
<td>1. Disputes with the U.S. Government</td>
<td>101</td>
</tr>
<tr>
<td>2. Disputes with ICANN</td>
<td>103</td>
</tr>
<tr>
<td>B. Top-Level Domain Names</td>
<td>105</td>
</tr>
<tr>
<td>1. Restrictions on Preregistration for Domain Names in New TLDs and Waiting Lists for Expired Domain Names</td>
<td>106</td>
</tr>
<tr>
<td>2. Domain Tasting and Kiting</td>
<td>107</td>
</tr>
<tr>
<td>C. Country Code Top-Level Domain Names</td>
<td>108</td>
</tr>
<tr>
<td>1. The “.eu” Domain</td>
<td>109</td>
</tr>
<tr>
<td>2. The “.us” Domain</td>
<td>109</td>
</tr>
<tr>
<td>D. Top-Level Domain Names and the First Amendment</td>
<td>110</td>
</tr>
<tr>
<td>E. Domain Name Legislation</td>
<td>110</td>
</tr>
<tr>
<td>2. Truth in Domain Names Act (18 U.S.C. § 2252B)</td>
<td>111</td>
</tr>
<tr>
<td>II. Is a Domain Name a Trademark?</td>
<td>111</td>
</tr>
<tr>
<td>A. Applying Trademark Licenses to Domain Names</td>
<td>113</td>
</tr>
<tr>
<td>B. Extra-Statutory Relief in Domain Name Cases</td>
<td>114</td>
</tr>
<tr>
<td>C. Domain Names Used in Competition with Trademark Owner</td>
<td>114</td>
</tr>
</tbody>
</table>
D. Trademark Owners with Competing Claims to a Domain Name ............................................. 117
E. Domain Names as Property ................................................................................................. 120
   1. Liability of Domain Name Registrars for “Coming Soon” Pages ............................................. 122
III. Domain Names Used for Harmful Purposes ................................................................. 123
   A. Domain Name Identical to Another’s Trademark ................................................................. 123
   B. Domain Name Similar, but Not Identical, to Another’s Trademark ......................................... 124
IV. Domain Name Unlawfully Appropriated ............................................................................. 124
V. Cybersquatting and Typosquatting ....................................................................................... 125
   A. Pre-ACPA Cases .................................................................................................................. 125
   B. The Anticybersquatting Consumer Protection Act ............................................................... 126
      1. Enactment of the ACPA .................................................................................................... 126
      2. Remedies ......................................................................................................................... 127
      3. In rem Action ................................................................................................................... 128
   C. Jurisdiction of ACPA ........................................................................................................... 130
   D. Preclusive Effect of UDRP Decisions on Proceedings Under the ACPA ......................... 132
   E. The ACPA Can Apply Retroactively .................................................................................... 134
   F. Liability of Domain Name Registrars Under the ACPA ......................................................... 134
   G. Cybersquatting Cases Under the ACPA ............................................................................. 135
   H. Typosquatting Cases Under the ACPA ............................................................................... 142
   I. Foreign Nationals Under the ACPA ..................................................................................... 145
VI. Domain Name Dispute Resolution—Arbitration ............................................................... 147
   A. Former Policy: The Network Solutions, Inc. Policy ............................................................. 147
   B. The Current Domain Name Dispute Policy: The Uniform Domain Name Dispute Resolution Policy (UDRP) ............................................................................................................. 147
   C. UDRP Decisions ................................................................................................................ 150
      1. Domain Name Is Identical or Confusingly Similar to Trademark in Which Complainant Has Rights ............................................................................................................................... 150
      2. Lack of a Legitimate Right or Interest in the Domain Name ..................................................... 153
      3. The Domain Name Was Registered and Is Being Used in Bad Faith ........................................ 157
         a. Failure to Use a Domain Name ........................................................................................... 158
         b. Offers to Sell a Domain Name ............................................................................................ 159
         c. Efforts to Disrupt Competition .............................................................................................. 160
         d. Efforts to Attract Internet Users and Exploit Consumer Confusion .................................... 162
         e. Lack of Contact Information ............................................................................................... 164
         f. Other Situations ................................................................................................................ 165
VII. UDRP Decisions Involving Domain Names Corresponding to People’s Names .................. 166
VIII. UDRP Decisions Involving Domain Names Corresponding to Geographic Names ........................................ 169
IX. Typosquatting Cases Under the UDRP ........................................ 171
X. Reverse Domain Name Hijacking ........................................ 172
XI. First Amendment Issues in Domain Name Registrations and Use.
A. Parody and Criticism ........................................ 173
  1. Gripe Sites ........................................ 174
  2. Parody Sites ........................................ 179
  3. Gripe Sites and Parody Sites in UDRP Proceedings .......... 180
B. First Amendment Claims Brought Against Domain Name Administrators ........................................ 183
XII. Domain Name Slamming ........................................ 184
Summary of the Law ........................................... 185

4. Copyright ................................................. 187
  I. Copyright Basics ........................................ 189
  A. Protected Works ........................................ 189
  B. Scope of Protection ........................................ 190
  C. Registration ........................................... 191
  D. Available Remedies ........................................ 192
  E. Limits on Protection ........................................ 192
  II. Obtaining and Protecting Rights to Website Content.
  A. Methods of Obtaining Rights ................................ 193
  B. Possession of Print Media Rights Does Not Necessarily Imply Online Rights ........................................ 193
  C. Using Content from Other Websites and the Doctrine of “Fair Use” ........................................ 197
    1. Headline Aggregation Services ................................ 201
    2. Technological Conventions and Alternative License Systems ........................................ 204
  D. Archiving and Caching Websites ................................ 205
  E. Using HTML Source Code or the “Look and Feel” of Other Websites ........................................ 207
  F. Protecting Electronic Databases of Factual Material and Time-Sensitive Information ........................................ 209
  III. Linking and Framing ........................................ 214
    A. Linking ........................................... 214
    B. Framing ........................................... 218
  IV. Liability of Electronic Publishers for Infringing Content Posted by Others ........................................ 219
  V. The Digital Millennium Copyright Act of 1998 (DMCA) ........................................ 223
    A. Safe-Harbor Provisions ........................................ 223
    1. “Pass-Through” Digital Network Communications .......... 226
2. Storing Material for System Caching .......................... 227
3. Information Stored on Systems at the Direction of Users .......................... 228
   a. Requirements for Notification of Infringing Material .......................... 229
   b. Takedown and Counter Notification Requirements .......................... 233
   c. Misrepresentation of Infringement Under the DMCA ........ 234
4. Information Location Tools .................................. 236
5. Issuing Subpoenas to Service Providers .......................... 237

B. Liability for Circumventing Technological Copyright Protection Measures .................................. 239
   1. Circumventing Technological Protection Measures .................. 239
   2. Providing Links to Circumvention Technology ........ 247
C. Liability for Removing Copyright Management Information ........ 248
D. Assessing Damages for Violations of the DMCA .......................... 250
E. Limiting the Scope of the DMCA .................................. 251

VI. Digital Content on the Web .................................. 253
A. Music ............................................. 253
   1. Streaming Music ............................................. 254
      a. Webcasting Royalty Rates for Sound Recordings ........ 255
      b. Cases Involving the Streaming of Digital Audio Files ........ 257
   2. Distribution of Digital Audio Files ............................................. 258
      a. Music Downloading Services ............................................. 260
      b. Cases Involving the Digital Distribution of Audio Files .... 262
B. Video ............................................. 263
   1. Video Distribution Services ............................................. 264
   2. Cases Involving Streaming of Video and Other User Generated Content ............................................. 265
C. File Sharing ............................................. 267
   1. Contributory and Vicarious Liability ............................................. 268
   2. International File-Sharing Disputes ............................................. 276
   3. Industry Action and Internet Service Providers ............................................. 278
      a. International Internet Service Providers ............................................. 280
   4. Industry Action Against Individual Users and Universities ............................................. 281
      a. Actions Against Peer-to-Peer Software Users ............................................. 283
      b. Actions Against University Student Users ............................................. 288
      c. Foreign Actions Against Individual File Sharers ............................................. 289
   5. Government Involvement in Digital File-Sharing and Piracy Issues ............................................. 291
      a. U.S. Efforts ............................................. 291
         i. Family Entertainment and Copyright Act of 2005 ............................................. 293
### Detailed Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>U.S. Federal and State Lawsuits and Criminal Prosecutions</td>
<td>294</td>
</tr>
<tr>
<td>c.</td>
<td>International Efforts</td>
<td>296</td>
</tr>
<tr>
<td>d.</td>
<td>International Prosecutions</td>
<td>298</td>
</tr>
<tr>
<td>6.</td>
<td>Industry Initiatives to Secure Digital Audio Files</td>
<td>299</td>
</tr>
<tr>
<td>D.</td>
<td>Digital Copies of Books</td>
<td>301</td>
</tr>
<tr>
<td>1.</td>
<td>The e-Books Debate</td>
<td>301</td>
</tr>
<tr>
<td>2.</td>
<td>Digitizing Books</td>
<td>303</td>
</tr>
<tr>
<td>a.</td>
<td>Google Book Search and Google Books Library Project</td>
<td>303</td>
</tr>
<tr>
<td>b.</td>
<td>Other Digital Book Projects</td>
<td>304</td>
</tr>
<tr>
<td>3.</td>
<td>Digital Audio Book and e-Book Licensing</td>
<td>305</td>
</tr>
<tr>
<td>E.</td>
<td>Podcasting</td>
<td>306</td>
</tr>
<tr>
<td>F.</td>
<td>Digital Video Recording</td>
<td>307</td>
</tr>
<tr>
<td>VII.</td>
<td>Copyright Law Versus Contract Law</td>
<td>309</td>
</tr>
<tr>
<td>Summary of the Law</td>
<td>313</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Defamation</td>
<td>317</td>
</tr>
<tr>
<td>I.</td>
<td>Libel Basics</td>
<td>318</td>
</tr>
<tr>
<td>A.</td>
<td>The Constitutionalization of Defamation Law</td>
<td>319</td>
</tr>
<tr>
<td>B.</td>
<td>Public Persons</td>
<td>320</td>
</tr>
<tr>
<td>1.</td>
<td>Public Officials</td>
<td>320</td>
</tr>
<tr>
<td>2.</td>
<td>Public Figures</td>
<td>320</td>
</tr>
<tr>
<td>a.</td>
<td>Pervasive Public Figure</td>
<td>320</td>
</tr>
<tr>
<td>b.</td>
<td>Limited-Purpose Public Figure</td>
<td>320</td>
</tr>
<tr>
<td>c.</td>
<td>Involuntary Public Figure</td>
<td>320</td>
</tr>
<tr>
<td>II.</td>
<td>Applying Libel Law to Online Publication</td>
<td>321</td>
</tr>
<tr>
<td>A.</td>
<td>Online Publication</td>
<td>321</td>
</tr>
<tr>
<td>B.</td>
<td>Applying the Public Figure Doctrine to Online Publication</td>
<td>321</td>
</tr>
<tr>
<td>1.</td>
<td>Inviting Attention and Comment</td>
<td>321</td>
</tr>
<tr>
<td>2.</td>
<td>Greater Access to Channels of Effective Communication</td>
<td>322</td>
</tr>
<tr>
<td>3.</td>
<td>Online Notoriety</td>
<td>322</td>
</tr>
<tr>
<td>4.</td>
<td>Public Forum</td>
<td>323</td>
</tr>
<tr>
<td>C.</td>
<td>Online Service Provider Liability</td>
<td>324</td>
</tr>
<tr>
<td>D.</td>
<td>Republication of Defamatory Statements</td>
<td>324</td>
</tr>
<tr>
<td>E.</td>
<td>Discovery of the Identities of Anonymous Defendants</td>
<td>325</td>
</tr>
<tr>
<td>F.</td>
<td>Libel Suits by Anonymous Plaintiffs</td>
<td>325</td>
</tr>
<tr>
<td>G.</td>
<td>Sovereign Immunity as Applied to a Government Website</td>
<td>325</td>
</tr>
<tr>
<td>H.</td>
<td>Motions to Dismiss Under State Anti-SLAPP Laws</td>
<td>326</td>
</tr>
<tr>
<td>I.</td>
<td>Libel Suits Against Bloggers</td>
<td>329</td>
</tr>
<tr>
<td>J.</td>
<td>Lawsuits Complaining of Online Impersonation</td>
<td>330</td>
</tr>
<tr>
<td>III.</td>
<td>Retraction Statutes</td>
<td>332</td>
</tr>
</tbody>
</table>
A. General Background. .................................................. 332
B. Application of Retraction Statutes in the Context of Online Libel ................................................ 332
IV. Responding to Retraction Demands ............................................. 335
   A. Demands for Retraction of Third-Party Content ........... 335
   B. Publishing Retractions Online ................................. 335
      1. Traditional Publication Requirements .................. 335
      2. Online Publication of Corrections and Retractions ..... 335
      3. Correction Demands on Print Publications with Online Counterparts ................................................. 336
      4. Correction Demands Relating to Online Archives ...... 336
V. Online Publication and the “Single Publication Rule” ....... 336
   A. The “Single Publication Rule” ................................. 336
      1. Online Publication and Statutes of Limitations .......... 337
      2. Changes to Articles Published Online .................. 340
   B. Labeling ............................................................. 341
VI. Issues Relating to State Jurisdiction ..................................... 341
VII. Choice of Law .......................................................... 347
   A. Choice of Law in Libel Cases .................................. 347
   B. Basic Choice of Law Principles Applied in Traditional Libel Cases .................................................... 347
   C. Application of Choice of Law Principles in International Libel Cases .................................................... 347
   D. Application of Traditional Choice of Law Principles in the Context of Internet Libel ............................. 348
VIII. International Forum Shopping ............................................. 348
   A. The Global Nature of the Internet ............................. 348
   B. The Appeal of International Forum Shopping ............... 348
      1. Britain ......................................................... 350
      2. Canada ....................................................... 352
      3. Australia .................................................... 355
      4. Germany ..................................................... 356
      5. Other Nations ................................................ 357
   C. Potential Limitations on International Forum Shopping . 359
   D. Recognition and Enforcement of Foreign Judgments .... 359
Summary of the Law .......................................................... 360

6. Data Collection and Privacy .............................................. 363
   I. General .............................................................. 366
   II. Types of Data Collected .......................................... 366
      A. Registration Information ...................................... 366
B. Customer Information ........................................... 367
C. Cookies .......................................................... 367
D. Clickstream Data .................................................. 367
E. Pixel Tags .......................................................... 367
F. Adware and Spyware .............................................. 368

III. Online Privacy: The Regulatory Landscape .............. 369
A. State Regulation .................................................. 369
   1. The California Online Privacy Protection Act ................. 369
   2. Other California Privacy Laws ................................. 370
   3. Other States’ Privacy Laws Governing the Collection and 
      Dissemination of Personal Information ....................... 371
      a. Laws Relating to Privacy Policies and Procedures ..... 371
      b. State Laws Relating to the Sale or Use of Personal 
         Information Obtained Through Websites ............. 372
      c. State Enforcement Actions ................................. 372
B. Proposed Federal Legislation ................................... 373
   1. Federal Agency Data Privacy Protect Act ...................... 374
   2. Personal Data Privacy and Security Act of 2007 ............ 374
C. Federal Laws that Apply to Online Activity or Affect Online 
   Privacy .................................................................. 375
D. The FTC’s Five Core Principles of Privacy Protection .... 375
   1. Surveys ................................................................ 376
   2. Relationship Between Online Privacy Policies and Offline 
      Data Collection Practices .................................... 377
   3. FTC Enforcement ................................................ 377
      a. GeoCities ...................................................... 377
      b. DoubleClick ................................................... 378
      c. Toysmart ....................................................... 378
      d. Microsoft ....................................................... 379
      e. Guess? ......................................................... 379
      f. Tower Records ............................................... 379
      g. Petco .......................................................... 380
      h. Vision I Properties LLC .................................... 380
      i. Intelligent eCommerce ....................................... 381
      j. ChoicePoint ................................................. 381
      k. CardSystems ................................................. 382
E. Other Government Enforcement Proceedings ............... 383
F. The FTC’s Position Regarding the Enactment of New Privacy 
   Laws .................................................................. 383

IV. Protection of Children’s Personal Information ............ 383
A. Children’s Online Privacy Protection Act of 1998 (COPPA) . 384
B. Nonprofits and COPPA .............................................. 385
C. COPPA Safe Harbor ........................................... 385
D. Five-Year Review of FTC COPPA Rules ............... 385
E. The Cost of Compliance ....................................... 386
F. Prosecution Under COPPA ................................. 386
   1. Ohio Art, Lisa Frank Inc., and American Pop Corn
      Company ........................................ 386
   2. Mrs. Fields Cookies and Hershey Foods ................. 387
   3. Amazon.com ........................................ 387
   4. UMG Recordings and Bonzi Software .................... 388
   5. Gateway Learning Corporation .......................... 388
   6. Xanga.com .......................................... 389
G. State COPPA Enforcement ................................. 389
H. Prosecution Beyond COPPA ................................. 389
V. Privacy of Medical Information ......................... 390
   A. HHS HIPAA Final Rule ................................. 390
   B. Case Law ........................................... 391
   C. Federal Legislation .................................... 392
VI. Privacy in the Financial Services Industry .......... 394
   A. Preemption of California Affiliate Financial Privacy
      Legislation .......................................... 397
   B. Enforcement Actions under the Gramm-Leach-Bliley Act .... 397
VII. Data Security and Data Breach Notification Laws .... 399
   A. Data Security Breaches ................................ 400
      1. Discount Shoe Warehouse .......................... 400
      2. MasterCard and CardSystems Solutions .......... 400
      3. Universities ...................................... 401
      4. AOL ............................................. 402
      5. Guidance Software, Inc. .......................... 402
      6. TJX Companies, Inc. .............................. 402
   B. State Laws Relating to the Disclosure of Security Breaches
      Involving Personal Information ......................... 404
   C. Federal Legislation Relating to Disclosure of Security
      Breaches Involving Personal Information ............... 407
      1. Notification of Risk to Personal Data Act .......... 407
      2. Data Accountability & Trust Act ..................... 408
      3. Data Security Act of 2007 .......................... 409
      4. Identity Theft Protection Act ........................ 409
      5. Privacy and Cybercrime Enforcement Act of 2007  .. 410
   D. Data Security Laws and the Federal Government .......... 410
      2. Legislative Response to Federal Security Breaches .... 412
      3. Other Federal Responses ............................ 413
VIII. Identity Theft and “Phishing” .................................. 415
   A. Identity Theft ............................................. 415
      1. Federal Identity Theft Legislation .................. 418
      2. Credit Freezes ........................................ 419
      3. State Enforcement Actions ......................... 420
   B. “Phishing” .................................................. 420
      1. Civil and Criminal Enforcement Against Phishers 421
      2. Federal Legislation ................................. 422
IX. Civil Privacy Suits ........................................... 423
X. Privacy in the Workplace .................................... 431
XI. Constitutionality of Privacy Laws ............................ 435
XII. Industry Self-Regulation ................................... 436
    A. The FTC’s Support for Self-Regulation .............. 436
    B. Other Self-Regulatory Efforts ....................... 436
XIII. Self-Protection ............................................ 439
XIV. Territoriality of Privacy Laws .............................. 441
XV. International Response to Privacy Concerns ............... 441
    A. The 1995 EU Directive ................................. 441
    C. Sanctions .............................................. 443
    D. The 2002 EU Directive ................................ 444
    E. The 2006 EU Directive ................................. 445
    F. Other Developments in the EU ......................... 445
    G. Other International Privacy Laws ..................... 446
       1. Regional Efforts ..................................... 446
       2. Efforts in the United Kingdom ..................... 447
       3. Efforts in Australia ................................ 448
       4. Efforts in Canada ................................... 449
       5. Efforts in China .................................... 452
       6. Efforts in Japan .................................... 452
       7. Efforts in South Africa ............................ 452
       8. Efforts in Thailand .................................. 453
Summary of the Law ............................................. 454

7. Electronic Contracts ......................................... 457
   I. Electronic Contract Basics ............................... 458
      A. Website Disclaimers and User Agreements .......... 458
      B. Electronic Signatures (E-Signatures) ............... 459
   II. Visitor Agreements ..................................... 459
      A. Intellectual Property Statements ................... 459
         1. Use of Publisher’s Content ....................... 459
2. Publisher’s Use of User-Supplied Content 459
3. Restrictions on Framing and Linking 460
B. Disclaimers 460
1. Responsibility Statements 460
2. Liability Statements 460
C. Terms Relating to User-Supplied Content 460
1. User-Supplied Content: Controversial Content 460
2. User-Supplied Content: User Responsibility 461
3. Indemnification 461
D. Other Common Provisions 461
1. Reservation of Rights 461
2. Prohibitions Against Data Scraping and Harvesting of Email Addresses 461
3. Dispute Resolution/Forum Selection 461
4. Privacy Policy 461
5. DMCA Notice 462
III. Enforceability of Electronic Contracts 462
A. “Effective Notice”: Was User Aware of Contract? 462
1. Mailbox Rule 463
2. Cases Confirming Enforceability of Electronic Contracts 464
3. Cases Denying Enforceability of Electronic Contracts 473
B. Enforceability of Particular Provisions: Forum Selection and Arbitration Clauses 476
1. Forum Selection and Arbitration Clauses Found Enforceable 476
2. Arbitration and Forum Selection Clauses Found Unenforceable 485
3. General Enforceability of Electronic Contracts—European and Canadian Developments 490
IV. Electronic and Digital Signatures 492
A. General 492
B. Definitions 492
C. Legislative Efforts 493
1. State Legislation 493
2. Federal Legislation 493
3. International Efforts 494
D. Case Law Developments: E-SIGN and E-Signatures 497
V. The Uniform Computer Information Transactions Act (UCITA) 499
A. General 499
B. Application of UCITA: Examples 500
1. Examples of Contracts Covered by UCITA 500
2. Examples of Contracts Not Covered by UCITA 500
8. Spam, Advertising and Spyware .................................. 505
   I. Unsolicited Commercial Email (“Spam”) ...................... 507
   II. CAN-SPAM Act of 2003 .................................. 507
       A. “Do-Not-Email” List .................................... 510
       B. “Primary Purpose” of Email ............................. 510
       C. Restrictions on Unwanted Wireless Spam .......... 511
       D. Remaining Ambiguities ................................. 512
       E. Effectiveness of the Act ................................ 512
       F. Enforcement of the CAN-SPAM Act .................. 514
           1. FTC and Justice Department Enforcement Actions ... 514
           2. State Enforcement Actions ........................... 520
           3. ISP Enforcement Actions ............................ 521
   III. State Anti-Spam Laws .................................... 525
       A. Prohibition of Fraud .................................... 530
       B. Self-Identifying Disclosures ............................ 530
       C. Labels ................................................... 530
       D. Technical Prohibitions .................................. 531
       E. “Do-Not-Email” Lists .................................... 531
       F. List of State Spam Laws ................................. 532
   IV. Constitutionality of Spam Laws ................................ 535
       A. The Telephone Consumer Protection Act of 1991 .... 535
       B. Constitutional Challenges to Spam Laws .............. 537
   V. Application of State Spam Laws ............................... 542
       A. Government Enforcement of State Spam Laws ....... 542
       B. Private Civil Cases ...................................... 544
   VI. FTC Enforcement Efforts .................................. 553
   VII. Self-Regulation ............................................. 555
   VIII. Blacklists .................................................. 558
   IX. Remedial Measures ........................................... 560
       A. Generally ................................................ 560
       B. Remedial Measures Blocking Legitimate Email ....... 564
   X. International Spam Laws ..................................... 565
       A. The European Union ..................................... 565
           1. Italy ................................................. 566
           2. Denmark ............................................. 566
           3. Sweden .............................................. 566
           4. Britain .............................................. 566
           5. Belgium ............................................. 567
6. Finland ........................................... 567
7. France ........................................... 568
8. Germany ......................................... 568
9. The Netherlands ................................. 568
10. Portugal ......................................... 569

B. Other International Efforts ........................ 569
1. Australia ........................................ 569
2. Canada .......................................... 570
3. South Korea ..................................... 571
4. Japan ............................................ 572
5. Taiwan .......................................... 572
6. China ........................................... 572
7. Mexico ........................................... 572
8. Philippines ...................................... 573
9. Israel ........................................... 573

C. Coordinated International Efforts ................. 573

XI. National “Do Not Call” List ....................... 575

XII. Internet Advertising ............................... 577
A. Policing Fraudulent Advertising .................. 577
B. Contextual Marketing: Paid Search and Targeted Pop-Ups .......................... 579
   1. Paid Search: Keyword-Triggered Advertising .... 579
   2. Targeted Pop-Ups ................................ 596
   3. Click Fraud ...................................... 602

XIII. Advertising for Internet Gambling .............. 604

XIV. The Right of Publicity ............................. 606

XV. “Green Card” Lottery Websites ..................... 610

XVI. Attorney Email and Internet Advertising ........ 611

XVII. Discriminatory Internet Advertising ............. 614

XVIII. Spyware and Adware ............................. 614
   A. Federal Legislative Efforts ....................... 625
   B. State Legislative Efforts ......................... 627
   C. Industry Efforts .................................. 630

Summary of the Law .................................. 632

9. Personal Jurisdiction ............................... 635
   I. Personal Jurisdiction Basics ..................... 637
      A. Specific Jurisdiction ......................... 637
      B. General Jurisdiction ......................... 637
   II. Personal Jurisdiction and the Internet ........ 638
      A. Totality of the Contacts ...................... 639
         1. Cases in Which the Totality of the Contacts Was Found
            Sufficient to Support the Exercise of Specific Jurisdiction 640
Dated: Table of Contents

2. Cases in Which the Totality of the Contacts Was Found Insufficient to Support the Exercise of Specific Jurisdiction 643
3. Cases in Which the Totality of the Contacts Was Found Sufficient to Support the Exercise of General Jurisdiction 644
4. Cases in Which the Totality of the Contacts Was Found Insufficient to Support the Exercise of General Jurisdiction 645
5. Special Cases of Federal Jurisdiction 646

B. Nature of the Website (the Zippo Test) 648
1. Cases in Which the Nature of the Website Supported the Exercise of Specific Jurisdiction 650
2. Cases in Which the Nature of the Website Did Not Support the Exercise of Specific Jurisdiction 656
   a. Operation of Passive Website Did Not Provide Sufficient Basis for Jurisdiction 656
   b. Operation of Interactive Website Did Not Provide Sufficient Basis for Jurisdiction Absent Targeting of Forum Residents 661
3. Cases in Which the Nature of the Website Supported the Exercise of General Jurisdiction 665
   a. Operation of Interactive Website Provided Sufficient Basis for Jurisdiction 665
   b. Interactive Website Contributed to Substantial Relationship with Forum State 666
4. Cases in Which the Nature of the Website Did Not Support the Exercise of General Jurisdiction 669
   a. Passive Website Did Not Target Forum State 669
   b. Interactive Website Did Not Contribute to Substantial Relationship with Forum State 672
5. Cases in Which the Nature of Other Internet Activities Did Not Support Exercise of Personal Jurisdiction 676

C. Effects Test 677
1. Cases in Which the “Effects Test” Was Applied and Assertion of Specific Jurisdiction Was Found to Be Proper 678
   a. Defendant’s Activities Targeted Forum State 678
   b. Defendant’s Activities Caused Injury in Forum State 683
2. Cases in Which the “Effects Test” Was Applied and Assertion of Specific Jurisdiction Was Found Not to Be Proper 684
   a. Defendant’s Activities Did Not Target Forum State 684
   b. Defendant’s Activities Did Not Constitute an Intentional Tort 689
3. Keeton Test 691
   a. Online Publication Sufficiently Substantial Circulation 692
b. Online Publication Not Sufficiently Substantial
   Circulation ........................................ 692

   c. Online Publication Did Not Target Forum State .... 692

III. Lawsuits Brought in Foreign Jurisdictions .......... 693

IV. Limiting Recourse to Foreign Courts ............... 698
   A. Jurisdiction and Service of Process .............. 698
      1. United Kingdom ............................... 698
      2. Canada ........................................ 699
   B. Forum Non Conveniens ............................ 701
      1. United Kingdom ............................... 701
      2. Canada ........................................ 702
   C. International Choice of Law ....................... 703
   D. Recognition and Enforcement of Foreign Judgments .... 703

Summary of the Law ...................................... 706

10. User-Generated Content .................................... 709
   I. Overview of User-generated Content and Online Service Provider
      Liability ........................................... 710
   II. Genesis of Section 230 of the Communications Decency Act .... 712
      A. General Background .............................. 712
      B. Publishers, Distributors, and Common Carriers .... 712
      C. Development of the Law ......................... 713
         1. Liability of Providers and Users of Interactive Computer
            Services Prior to the Enactment of the Communications
            Decency Act of 1996 ............................ 713
         2. Communications Decency Act of 1996 (CDA) ........ 714
            a. Section 230 .................................... 714
            b. Legislative History ............................ 715
   III. Broad Scope of Protection Under Section 230 .......... 715
      A. Congressional Support for Broad Interpretation of Section 230
         Immunity ........................................ 720
      B. “Good Samaritan” Protection Under Section 230 .... 720
   IV. Defining the Limits of Section 230 Immunity .......... 722
      A. Who Qualifies as a Provider of an “Interactive Computer
         Service”? ........................................... 722
         1. Employers as Providers of Interactive Computer Services .. 723
      B. Narrower Readings of Section 230 .................... 723
      C. Statutory Exceptions to Section 230 Immunity .......... 727
         1. “Intellectual Property” Exception to Section 230 .... 727
         2. Federal Criminal Law Exception to Section 230 Immunity .. 730
      D. Common Challenges to Defendant’s Section 230 Immunity . 730
1. Claims that Defendant Is an “Information Content Provider” ........................................ 730
2. Claims that Defendant Is Liable for Distributing Third-Party Content ........................................ 736
3. Other Efforts to Defeat Immunity Under Section 230 ........................................ 743
   E. Liability for Harm Facilitated Through Contacts Established Online ........................................ 745
   F. ISP Liability in the United Kingdom ........................................ 747
V. Procedural Issues ........................................ 748
   A. Section 230 as a Basis for Dismissal Under Rule 12(b)(6) ........................................ 748
   B. Motions for Additional Discovery Under Rule 56(f) ........................................ 750
   C. Interplay of Section 230 and Personal Jurisdiction ........................................ 750
VI. Intellectual Property ........................................ 751
   A. Copyright Liability and the DMCA ........................................ 751
   B. Liability for Third-Party Trademark Infringement ........................................ 752
      1. Contributory Trademark Infringement Online ........................................ 752
      2. Trademark Liability and Section 230 of the Communications Decency Act ........................................ 754
      3. Trademark Liability and the DMCA ........................................ 754
VII. Blogging ........................................ 755
   A. Protection of Bloggers Under Shield Laws ........................................ 755
   B. Press Credentials for Bloggers ........................................ 757
   C. Restrictions on Blogging ........................................ 758
Summary of the Law ........................................ 759

11. Business and Commerce on the Internet ........................................ 761
I. Internet Taxation ........................................ 761
   A. Moratorium on Internet Access Taxation ........................................ 762
   B. Taxation of Internet Telephony ........................................ 763
   C. Assessing Sales Tax on Internet Purchases ........................................ 763
   D. State Efforts to Protect Sales Tax Interests ........................................ 764
      1. Tobacco ........................................ 768
      2. Online Hotel Reservations ........................................ 770
   E. Streamlined Sales Tax and Use Agreement (SSUTA) ........................................ 771
   F. International Taxation Efforts ........................................ 772
II. Sale of Goods Online ........................................ 773
   A. Alcohol ........................................ 773
   B. Tobacco ........................................ 779
   C. Internet Pharmacies ........................................ 782
   D. Other Products ........................................ 785
   E. Online Auctions ........................................ 786
III. Internet Gambling ........................................ 787
A. The Unlawful Internet Gambling Enforcement Act of 2006 787
B. Challenges to the Federal Gambling Ban 789
C. Criminal Actions to Enforce Gambling Ban 790
D. Civil Actions to Enforce Gambling Ban 791
E. Internet Gambling Advertising 793

IV. Insurance 795

Summary of the Law 798

12. Unauthorized Intrusions on Computer Systems 801
   I. The Electronic Communications Privacy Act 801
      A. The Wiretap Act and the Pen Register Act 802
      1. Wiretapping Law and Instant Messaging 809
      B. The Stored Communications Act 811
      1. Unauthorized Access to a Facility 811
      2. Disclosure of the Content of Communications 813
      3. Disclosure of Content and Records of Communications to the Government 817
   II. The Computer Fraud and Abuse Act (CFAA) 820
   III. Application of Common Law Protections to Computer Systems 831
      A. Application of Trespass Law 831
      B. Application of Conversion Law 839

Summary of the Law 842

13. The Converging Voice and Data Networks 843
   I. Classification of Telecommunications Services 843
      A. Cable Modem Service 845
      B. Wireline Broadband Service 845
      C. Other Services 846
      D. Regulation of VoIP 847
   II. Federal Wiretapping Law 848
   III. 911 Emergency Access 848
   IV. “Net Neutrality” 850
   V. State Regulation of VoIP 853

Summary of the Law 856

14. Other Web Issues 857
   I. Discrimination 857
      A. Discrimination Claims Under the Americans with Disabilities Act (ADA) 857
      1. Websites as Places of Public Accommodation 858
      2. Websites of Public Entities 862
      3. State Law ADA Equivalents 863
Detailed Table of Contents

4. Self-Regulation Initiatives ......................... 863
   B. Discrimination on the Basis of Other Personal Characteristics 864
      II. Hyperlink Patent Dispute ................................. 867
Summary of the Law ............................................ 868

Appendix: Cases and Statutes Included on the CD-ROM Accompanying This Volume ................................. 869

Table of Cases ............................................... 877

Index ........................................................ 923

About the Author ............................................. 957