

Summary of Contents

VOLUME 1

- 1 The Legal Landscape of Electronic Commercial Law
- 2 Intellectual Property Basics
- 3 Property Rights—Thinking Beyond Intellectual Property
- 4 Laws Validating Electronic Transactions
- 5 Online Contract Formation
- 6 Attribution: Identifying the Parties
- 7 Domain Names and Web Site Jurisdiction Issues
- 8 Terms of Service: Access Contracts, Online Site or Service Agreements, and Application Service Providers
- 9 Linking
- 10 Liability for Informational Content

VOLUME 2

- 11 Consumer Law Issues in E-Commerce
- 12 Online Informational Privacy and Data Protection
- 13 E-Mails and Evidence in E-Commerce Contexts
- 14 Structuring the Analysis of Tax Issues in the E-Commerce Context
- 15 Identity Theft
- 16 Personal Data Security: Issues in Law

Appendixes (*available on the accompanying CD*)

Appendix 1: Electronic Signatures in Global and National Commerce Act

Appendix 2: Computer Fraud and Abuse Act

Appendix 3: Digital Millennium Copyright Act

Appendix 4: The Anticybersquatting Consumer Protection Act

Appendix 5: Uniform Computer Information Transactions Act

Appendix 6: Uniform Electronic Transactions Act

Appendix 7: European Communities Directives

Table of Cases

Index

SUMMARY OF CONTENTS

x

Table of Contents

VOLUME 1

1 The Legal Landscape of Electronic Commercial Law

¶ 1.01	What Is E-Commerce?.....	1-1
¶ 1.02	Economic Transformation and Law	1-3
¶ 1.03	Support Systems or Regulation	1-7
¶ 1.04	Transactional Formats	1-9
¶ 1.05	Trends in New Patterns of Law and Practice.....	1-13
[1]	Pattern 1: Digital Transactional Information as a Valuable Asset	1-13
[2]	Pattern 2: U.S. Law Written in Europe	1-16
[3]	Pattern 3: Federalism Revisited: The Most Regulated World.....	1-18
[4]	Pattern 4: Centralized or Decentralized Commerce.....	1-26
[5]	Pattern 5: Free Information and Content Screening.....	1-29
[6]	Pattern 6: Information Diversity: Finding Sources and Their Quality	1-33
[7]	Pattern 7: Borrowing Others' Resources as a Business Model	1-35
[8]	Pattern 8: Privacy and Security as a Shaping Influence.....	1-37
[9]	Pattern 9: Promulgation of Rules That Are <i>Media</i> Specific.....	1-41
[10]	Pattern 10: Fitting Law to Meet New Harms.....	1-46
¶ 1.06	Conclusion.....	1-49

2 Intellectual Property Basics

¶ 2.01	Introduction	2-1
PART A	GENERAL CHARACTER OF THE ISSUES.....	2-3
¶ 2.02	Nature of Intellectual Property Law	2-3
¶ 2.03	Nature of Property Rights.....	2-3
¶ 2.04	Structure of Intellectual Property Rights Issues.....	2-6
¶ 2.05	Public Domain and Nonproprietary Uses	2-11
PART B	PATENT LAW.....	2-13
¶ 2.06	Patent Law Basics.....	2-13
¶ 2.07	Rights Under a Patent	2-17
¶ 2.08	Patents Give Preclusive, Not Affirmative Rights	2-20

TABLE OF CONTENTS

xii

¶ 2.09	Rights Not Limited to Copying	2-22
¶ 2.09A	Injunctive Relief	2-22
¶ 2.10	Patent Subject Matter and E-Commerce	2-24
[1]	Introduction	2-24
[2]	Software	2-25
[3]	Business Methods	2-28
¶ 2.11	Patent Infringement and Validity Issues	2-33
[1]	Introduction	2-33
[2]	Claim Language and Validity Issues	2-36
[3]	Terms of the Patent Claim and Infringement	2-36
PART C	COPYRIGHT LAW	2-40
¶ 2.12	Copyright Law Basics	2-40
[1]	Introduction	2-40
[2]	Copyright Subject Matter and Registration	2-41
[3]	Exclusive Rights Created	2-47
[4]	Copyrighted Elements	2-52
¶ 2.13	Copyright Infringement Standards	2-54
[1]	Introduction	2-54
[2]	Ownership and Wrongful Act	2-56
[3]	Substantial Similarity and Access	2-57
¶ 2.14	Defenses and Exemptions	2-63
[1]	Introduction	2-63
[2]	Fair Use	2-63
[a]	Commercial or Personal Use	2-66
[b]	Transformative Uses	2-72
[c]	Intermediate Copies	2-76
[d]	Downloading for Personal Use	2-78
[3]	First Sales and Owners of Copies	2-79
[4]	Implied License and Posting on Internet	2-87
[5]	Distance Learning—the TEACH Act	2-90
[6]	Express Licenses	2-94
[7]	Copyright Misuse	2-99
¶ 2.15	Copying Into and Within a Computer or Network	2-102
¶ 2.16	Copying, Display, Distribution, and Making Available Rights on Internet	2-108
[1]	Basic Issues: Impact of Technology on Rights	2-112
[2]	Impact of Particular Technologies: Image and Sound Modifications	2-118
[3]	Impact of Particular Technologies: Linking	2-122
[4]	Impact of Particular Technologies: Pop-Up Ads and Copyright	2-124
[5]	Impact of Particular Technologies: Peer-to-Peer Distribution Systems	2-127

[6] Impact of Particular Technologies: Bootlegging and Copying Live Performances.....	2-131
[7] Impact of Particular Technologies: Artists’ Rights and Theft Prevention Act.....	2-132
[8] Distribution and Making Available Online.....	2-134
¶ 2.17 Indirect Liability: Independent Service Providers and Bulletin Boards.....	2-138
¶ 2.18 Online Databases and Infringement Issues.....	2-151
¶ 2.19 User Interface Issues.....	2-158
PART D TRADEMARK ISSUES.....	2-164
¶ 2.20 Trademark Basics.....	2-164
[1] Introduction.....	2-164
[2] Creation of Rights.....	2-165
[3] Registration of a Mark.....	2-166
[4] Generic and Merely Descriptive Terms and Phrases.....	2-168
[5] Names as Marks.....	2-174
[6] Nature of Rights: Likelihood of Confusion.....	2-177
[a] Use in Commerce as a Mark.....	2-178
[b] Likelihood of Confusion.....	2-184
[c] Fair Use.....	2-188
[d] First Sale.....	2-192
[7] Interface With Copyright Claims.....	2-193
¶ 2.21 Initial-Interest Confusion.....	2-195
¶ 2.22 Similarity and Differences in Products or Services.....	2-200
¶ 2.23 Effect of Disclaimers.....	2-201
¶ 2.24 Nature of Rights: Dilution of Famous Marks.....	2-204
¶ 2.25 Metatags and Links.....	2-208
¶ 2.26 Domain Names.....	2-213
¶ 2.27 Antisites and Trademark.....	2-217
¶ 2.28 Pop-Up Ads, Spyware, and Keyword Sales: Trademark Law.....	2-224
¶ 2.29 “Spyware” or “Malware” Statutes.....	2-233
3 Property Rights—Thinking Beyond Intellectual Property	
¶ 3.01 Introduction.....	3-1
¶ 3.02 The Nature of Property and Rights of Control.....	3-2
PART A RIGHTS ASSOCIATED WITH LOCATION AND CONTROL.....	3-10
¶ 3.03 Protected Locations.....	3-10

TABLE OF CONTENTS

xiv

[1] Online Systems as Assets 3-10

[2] Specific Protections for Certain Data 3-15

¶ 3.04 Trespass to Chattel and Protected Computer Environments 3-16

[1] Authorization and Consent 3-18

[2] Harm to the System as an Element 3-21

¶ 3.05 Unauthorized Access to a Site: Computer Crime Laws 3-27

[1] Introduction 3-27

[2] Computer Fraud and Abuse Act 3-31

[a] Subject Matter Jurisdiction for Civil Relief 3-32

[b] Substantive Violations 3-36

[3] International Cybercrime Convention 3-44

¶ 3.06 Electronic Access and Management Controls: DMCA 3-46

[1] Introduction 3-46

[2] The Anti-Circumvention Provisions 3-53

[a] Direct Circumvention and Trafficking 3-53

[b] Exceptions 3-65

[3] The Copyright Management Information Provision 3-71

[4] Remedies for Violations 3-73

PART B RIGHTS FOCUSED ON THE INFORMATION 3-74

¶ 3.07 Nontraditional Information Rights—Federal Preemption Issues 3-74

¶ 3.07A Super DMCA Laws: Communications Security 3-81

¶ 3.08 Misappropriation and Wrongful Extraction of Commercial Information 3-85

[1] Introduction 3-85

[2] Misappropriation of Facts 3-85

[3] EU Database Directive 3-89

¶ 3.09 Conversion of Information 3-91

¶ 3.09A Unconstitutional Taking of Information 3-99

¶ 3.10 Criminal Law and Theft or Alteration of Information 3-101

¶ 3.10A State Unfair Competition Law: Extending Coverage 3-104

¶ 3.11 Individual’s Right of Publicity 3-107

PART C CONTRACTUAL ISSUES 3-112

¶ 3.12 Contract Terms and Property Issues 3-112

[1] Introduction 3-112

[2] Regulating Access and Creating Property 3-112

[3] Regulating Subsequent Use of Information 3-114

4 Laws Validating Electronic Transactions

¶ 4.01 Introduction 4-1

PART A GENERAL ISSUES 4-1

¶ 4.02 Issues About Validating Electronics in General 4-1

 [1] Introduction 4-1

 [2] Mirror Images and Competing Policies 4-2

 [3] Differences Between Paper and Electronics 4-6

¶ 4.03 Validation Concerns 4-7

 [1] Introduction 4-7

 [2] Contract Formalities 4-8

 [3] Required Notices 4-10

 [4] Required Disclosures 4-12

 [5] Public Filing of Records 4-12

 [6] Admissibility and Reliability of Electronic Records 4-13

 [a] E-Sign, UETA, and UCITA Mandatory Rules 4-14

 [b] Extra Mandatory, Regulatory Rules 4-14

 [c] Business Needs; Sarbanes Oxley 4-15

 [d] Federal Rules of Evidence 4-17

 [e] Federal Rules of Civil Procedure 4-18

 [f] Payment System Rules 4-18

 [g] Data Protection Rules 4-18

 [h] Access Controls 4-19

 [i] Other 4-19

 [7] Electronic Format vs. Content and Other Form 4-20

PART B MODERN LAWS THAT VALIDATE USE OF ELECTRONICS 4-23

¶ 4.04 The Simple Premise Validating Use of Electronics: Equivalence 4-23

¶ 4.05 Laws That Validate Electronics for Specific Contexts 4-26

 [1] Introduction 4-26

 [2] Preexisting Laws and Regulations 4-26

 [3] New Laws Permitting Either Writings or Electronics: UCC
 Article 9 and UCITA 4-30

¶ 4.06 Laws That Validate Electronics Generally 4-33

 [1] Introduction 4-33

 [2] Digital or Secure Signature Laws 4-35

 [3] Electronic Signature or Transaction Laws: The Technology
 Neutrality Approach 4-38

¶ 4.07 Uniform Electronic Transactions Act 4-40

 [1] Scope and Purpose 4-40

 [2] Nondiscrimination as an Unachieved Goal 4-43

 [3] Are Agreements to Use Electronics Effective? 4-44

 [4] Meaning of Agreement to Use Electronics 4-49

 [a] What Facts Are Adequate to Establish “Agreement”? 4-49

 [b] Is the “Agreement” Requirement a Reasonable Precondition
 to the Technology Equivalency Principle? 4-56

 [5] Format of Required Record: Retainability 4-61

 [a] Retainability 4-61

TABLE OF CONTENTS

xvi

[b]	Inhibiting Retention	4-65
[6]	Format of Required Record: Display, Sending, and Other Requirements	4-65
[7]	Procedural Law With Some Substantive Impact	4-67
[8]	Exclusions From Scope	4-68
¶ 4.08	Federal Electronic Signatures In Global and National Commerce Act.....	4-68
[1]	Introduction	4-68
[2]	Basic Principle: Nondiscrimination	4-69
[3]	Preconditions: Generally No Agreement Required.....	4-73
[4]	Requirement of Retainability.....	4-74
[5]	Party Autonomy to Do or Decline to Do Electronics	4-77
[6]	Consumer Disclosure and Assent Rules	4-78
[7]	Exclusion From Scope of E-Sign	4-79
[8]	“Transactions” and E-Sign Scope.....	4-80
[a]	Transactions and Private Conduct.....	4-81
[b]	Transactions With the Government.....	4-82
[c]	Governments as Market Participants.....	4-85
¶ 4.09	Preemption: Effect of E-Sign on State Laws	4-86
[1]	Introduction	4-86
[2]	Scope of Preemption.....	4-88
[3]	Back-In Rule.....	4-91
[a]	Clean Version of UETA.....	4-92
[b]	Consistent Other Laws	4-93
[i]	Technology neutrality	4-94
[ii]	Substantive consistency	4-95
[iii]	Actual statutes.....	4-96
¶ 4.10	Language and Content of Modern Law	4-99
[1]	Introduction	4-99
[2]	Records and Electronic Records.....	4-100
[3]	Signatures and Authentication	4-102
PART C	SELECTED ISSUES REGARDING VALIDATION	4-105
¶ 4.11	Consumer Issues	4-105
[1]	Introduction	4-105
[2]	Scope of the Rules	4-106
[3]	Disclosure and Consent Rules	4-108
¶ 4.12	Preservation of Substantive Laws.....	4-111
¶ 4.13	Electronic Notices	4-115
[1]	Introduction	4-115
[2]	Notices Under E-Sign and UETA: Prior Agreement	4-117
[3]	Notices Under E-Sign and UETA: Content and Method.....	4-118
[4]	Notices Under E-Sign and UETA: When Sent or Received	4-119
[5]	Notices Under E-Sign and UETA: Where Sent or Received	4-123
¶ 4.14	Public Filing	4-124

¶ 4.15	Retention of Records	4-128
	[1] Introduction	4-128
	[2] Mandated Retention of Records	4-129
	[3] Electronic Record Systems Generally—Beyond Retention	4-133
	[4] Retention Under Laws Other Than E-Sign or UETA	4-135
¶ 4.16	Relationship to the Agencies	4-136
	[1] General Rule	4-136
	[2] Federal Agency Regulations	4-141
¶ 4.17	International Law Issues	4-144
	[1] Introduction	4-144
	[2] International Issues and E-Sign	4-144
	[3] UNCITRAL Model Law or Conventions	4-147
	[4] European Union Directives	4-149
¶ 4.18	When Validation Statutes Are Not Necessary or Do Not Apply	4-150
	[1] Laws Requiring Writings or Signatures: Interpretation	4-150
	[2] Nature of a “Writing”	4-151
	[3] Nature of a “Signature”	4-156
	[4] What Is a Signature?	4-161
	[5] A “Process” Might Be a Signature in the United States	4-168
	[6] Intent Is Determinative of Whether There Is a Signature	4-169
PART D	SECTOR-SPECIFIC ELECTRONIC VALIDATION STATUTES.....	4-170
¶ 4.19	Sector-Specific Validation Laws	4-170
	[1] Introduction	4-170
	[2] Check Clearing for the 21st Century Act (C21)	4-170
	[3] Other Methods for Dealing With Checks Electronically, Including E-Check Conversions	4-173
	[4] Payroll Cards	4-177

5 Online Contract Formation

¶ 5.01	Introduction	5-1
¶ 5.02	Sources of Contract Law	5-1
	[1] What Law Governs	5-1
	[2] Current Contract Law Regarding Information and Services	5-3
	[3] Relevance of UCITA	5-8
PART A	CONTRACTUAL ASSENT: TERMS AND AGREEMENTS	5-13
¶ 5.03	Contractual Assent: Terms and Agreements	5-13
	[1] Contract Formation and Objective Manifestations	5-13
	[2] Opportunity to Review Contract Terms	5-26
	[a] Opportunity to Review Terms Before Assent	5-26
	[b] Details of Opportunity to Review Concept	5-31
	[c] Impact of Failure to Read	5-37
	[d] Incorporated Terms and Agreements	5-42

TABLE OF CONTENTS

xviii

[3]	Electronic Agents and Automated Systems	5-45
[4]	Forms of Assent.....	5-50
	[a] Assent by Conduct or Clicking and Other Manifestations of Assent	5-50
	[b] Standard Form Contracts	5-62
	[c] Other Circumstances That May Vitiating Assent.....	5-67
PART B	TERMS THAT MAY REQUIRE MORE ATTENTION.....	5-68
¶ 5.04	Assent to Particular Terms—Disclosure and Format Rules.....	5-68
¶ 5.05	The Requirement of Conspicuous Terms	5-70
	[1] Introduction	5-70
	[2] Terms That Must Be Conspicuous.....	5-71
	[3] What Is Conspicuous Under Commercial Law?.....	5-72
	[4] Conspicuous to an Electronic Agent.....	5-76
	[5] Aspects of the Commercial Law Definition	5-77
¶ 5.06	Consumer Regulations: Clear and Conspicuous Disclosures.....	5-80
	[1] Introduction	5-80
	[2] FTC Dot Com Disclosure Staff Working Paper	5-80
	[3] Privacy Law Definition of “Clear and Conspicuous”	5-82
¶ 5.07	Enforceability of Terms: Contract Law	5-85
	[1] Introduction	5-85
	[2] Unconscionability.....	5-86
	[3] Fundamental Public Policy	5-99
	[4] Good Faith.....	5-101
	[5] Restatement Section 211	5-105

6 Attribution: Identifying the Parties

¶ 6.01	Introduction	6-1
PART A	GENERAL CONSIDERATIONS	6-4.4
¶ 6.02	Attribution Issues in the Legal Context	6-4.4
¶ 6.03	Overview of Attribution Procedures.....	6-6
	[1] Introduction	6-6
	[2] Technology Neutrality.....	6-10
	[3] Verification of Identification	6-11
	[4] Other Obligations	6-12.3
PART B	SELECTED APPROACHES	6-14
¶ 6.04	The Contract Approach	6-14
¶ 6.05	The UCC Article 4A Approach	6-16
¶ 6.06	The Credit Card Approach	6-19
	[1] Introduction	6-19
	[2] Loss Allocated Between Issuer and Merchant.....	6-20

	[3] Merchant and Customer: Unauthorized Use.....	6-23
	[4] Authorized Use.....	6-25
¶ 6.07	The EFTA Approach.....	6-27
	[1] Introduction.....	6-27
	[2] Liability for Unauthorized Transfers.....	6-28
	[3] EFTA Concepts That May Shed Light on Attribution.....	6-29
	[a] Unauthorized Transfers and Authorized Transfers.....	6-29
	[b] Accepted Card or Other Means of Access.....	6-31
	[c] Means of Identification.....	6-31
¶ 6.08	UCITA and UETA Approach.....	6-32
¶ 6.09	The USA PATRIOT Act–Bank Secrecy Act Approach.....	6-36
	[1] Introduction.....	6-36
	[2] Verifying the Identity of Any Person.....	6-40
	[3] Maintaining Records of Information Used to Verify Identity.....	6-42
¶ 6.10	The Digital Signature Laws Approach.....	6-42.1
	[1] What Are Digital Signature Laws?.....	6-42.1
	[2] Are Digital Signature Laws Preempted by E-Sign?.....	6-46
	[3] What Are the Attribution Rules Under Digital Signature Laws?.....	6-47
¶ 6.11	Financial Institutions Examination Council Approach.....	6-52
¶ 6.12	The Government Paperwork Elimination Act and the E-Government Act of 2002 Approaches.....	6-55
¶ 6.13	The Evidentiary Approach.....	6-60
¶ 6.14	The National Automated Clearing House (NACHA) Approach.....	6-62
¶ 6.15	The Children’s Online Privacy Protection Act (COPPA) Approach.....	6-66
¶ 6.15A	The FACT (and FCRA) Approach.....	6-67
¶ 6.15B	The Biometric Approach.....	6-72
¶ 6.15C	Miscellaneous Approaches on Know Your Customer Rules.....	6-73
	[1] Selected State Laws on Know Your Customer.....	6-74
	[2] Selected Federal Laws, Regulations, or Standards.....	6-74
¶ 6.16	Electronic Errors.....	6-74.1
	[1] Introduction.....	6-74.1
	[2] Individuals Interacting With Automated Systems.....	6-74.2
	[3] Agreed Procedures and Error Detection.....	6-79
¶ 6.17	Attributing Changes of Addresses; Inactive Accounts and So On.....	6-81
Exhibit 6.1	FFIEC Guidance on Authentication in an Internet Banking Environment.....	6-83
Exhibit 6.2	OCC Bulletin 2002-2 on ACH Transactions Involving the Internet....	6-97

7 Domain Names and Web Site Jurisdiction Issues

¶ 7.01	Introduction	7-1
PART A DOMAIN NAMES.....		7-2
¶ 7.02	The Fundamental Policy Decision: Names as Identifiers	7-2
¶ 7.03	Nature of a Domain Name.....	7-3
¶ 7.04	Domain Names as Trademarks.....	7-7
¶ 7.05	Domain Names: Infringement and Cybersquatting Issues	7-14
	[1] Introduction	7-14
	[2] Cybersquatting, Trade Names, and Trademark Infringement.....	7-15
	[3] ACPA: General Liability Rule.....	7-17
	[a] Distinctive or Famous Marks	7-18
	[b] Identical or Confusingly Similar	7-20
	[c] Reverse Highjacking	7-22
	[4] ACPA: Bad Faith Intent to Profit	7-23
	[5] ACPA: In Rem Proceedings	7-32
	[6] Cybersquatting and Administrative Dispute Resolution.....	7-37
	[7] International Considerations.....	7-41
	[8] State Laws	7-43
¶ 7.06	Interaction of Infringement, Dilution, and ACPA	7-44
	[1] Overview	7-44
	[2] Trademark Infringement.....	7-45
	[3] Dilution and Domain Names	7-60
¶ 7.07	Domain Names as Seizable Property.....	7-66
¶ 7.08	Considerations in Protecting the Area Around a Domain Name	7-68
PART B JURISDICTION		7-72
¶ 7.09	Web Sites and Jurisdiction Over Lawsuits	7-72
	[1] Introduction	7-72
	[2] General or Specific Jurisdiction.....	7-73
	[a] General Jurisdiction and Pervasive Contacts	7-73
	[b] Specific Jurisdiction and Minimum Contacts.....	7-77
	[3] Purposeful Availment.....	7-79
	[a] Transactional Involvement With a State	7-80
	[b] Targeting and the Effects Test	7-83
	[c] Type of Site: Passive or Interactive.....	7-90

8 Terms of Service: Access Contracts, Online Site or Service Agreements, and Application Service Providers

¶ 8.01	Introduction to Access Contracts.....	8-1
	[1] Nature of an Access Contract	8-1
	[2] General Nature of an Access Provider's Obligation	8-3

TABLE OF CONTENTS

[3] Sites and Public Accommodations	8-7
[4] What Contract Law Applies to Access Contracts?	8-21
PART A TERMS OF SERVICE AND USE AGREEMENTS	8-33
¶ 8.02 Terms—General Issues and Purpose	8-33
[1] Introduction	8-33
[a] Legal Issues Do Exist.....	8-34
[b] Some of the Legal Risks Are Different.....	8-35
[c] Database Issues	8-38
[2] Analyzing Whether Terms Are Advisable or Required.....	8-42
[3] When Terms Are Irrelevant.....	8-45
¶ 8.03 Terms of Service and Use Without Express Contractual Terms.....	8-46
[1] In General.....	8-46
[2] Restrictive Notices as Compared to Contracts.....	8-50
[3] Effect of a Copyright Notice or Management Information.....	8-53
¶ 8.04 Procedures or Notices Associated With DMCA Section 512.....	8-55
[1] Introduction	8-55
[2] Definition of “Online Service Provider”.....	8-64
[3] Conditions for Eligibility.....	8-65
[4] Notice/Takedown/Putback Provisions.....	8-69
[a] Notice/Takedown.....	8-70
[b] Putback	8-76
[c] Misrepresentation.....	8-77
[5] Blocking Access or Removing Allegedly Infringing Material	8-79
[6] Subpoenas to Identify Alleged Infringers.....	8-79
[7] State Laws Tied to DMCA	8-85
¶ 8.04A Subpoenas and First Amendment Issues.....	8-86
¶ 8.05 Procedures Associated With the Communications Decency Act.....	8-89
¶ 8.06 Procedures and Disclosures Associated With Privacy.....	8-93
¶ 8.07 Terms, Disclosures, and Mandates by State Law: The Budding Morass	8-94
[1] Introduction	8-94
[2] Conflicting and Nonuniform Rules.....	8-95
[a] Same Policy, Conflicting Substance	8-96
[b] Conflicting Policies.....	8-99
[3] Difficulties in Discovery of Rules	8-101
[4] The Response: Terms, Risk-Taking, and Lowest Denominators.....	8-103
[5] Interstate Commerce and Other Preemption.....	8-104
[a] Interstate Commerce Preemption.....	8-107
[b] Other Preemption.....	8-112
¶ 8.08 Sector-Specific Regulation: Terms, Disclosure, and Licensed Services.....	8-115
[1] Introduction	8-115
[2] Insurance	8-116
[3] Online Prescriptions and Drugs; Medical Practice Sites.....	8-118
[a] State Laws.....	8-118

TABLE OF CONTENTS

xxii

[b]	Federal Law	8-122
[4]	Automobile Manufacturers and Franchises	8-123
[5]	Remote Sales of Liquor	8-124
[6]	Internet Gambling	8-125
[7]	Social Networking Sites	8-127
[8]	Online Dating Sites	8-128
¶ 8.09	Terms and Procedures Associated With E-Commerce Laws	8-129
[1]	E-Sign, UETA, and UCITA	8-130
[2]	Other Laws Tending to Impact E-Commerce Procedures or Programming	8-130
[a]	“Receipts”	8-131
[b]	Web Site as Triggering Application of a Law	8-134
[c]	Web Site Transmissions	8-134
[d]	Web Site Contact Information	8-135
[e]	Web Site Attribution or Authentication Practices	8-135
¶ 8.10	Express Contractual Terms: Commercial Issues	8-136
[1]	Introduction	8-136
[2]	Terms Triggering Appropriate Substantive Rules	8-137
[3]	Choice of Applicable Law	8-137
[4]	Choice of Forum: Judicial or Arbitral	8-144
[5]	Site Availability and Content	8-153
[6]	Ending the Contract: Termination and Cancellation	8-157
[a]	Termination and Cancellation Compared	8-157
[b]	At-Will Clauses in Access Contracts	8-160
[7]	Amending or Modifying the Terms	8-164
[8]	Warranty Disclaimers	8-178
[9]	Damage Exclusions and Limitations	8-180
[10]	Relationship of the Master Agreement to Specific Uses	8-183
[11]	Misuse of System	8-185
[a]	Bad Acts at the Site or in the System	8-185
[b]	Robotic Access to the Site or System	8-186
[c]	Prohibited Uses: Spam	8-188
[12]	Use of Information Obtained From the System	8-189
[a]	Downloaded Information: The Product	8-189
[b]	Use Limits and Liability of Information Providers	8-192
[13]	Terms Made Advisable by Intellectual Property Issues	8-193
[a]	Site or System License Grant to User	8-193
[b]	User License to the E-Commerce Provider	8-193
[c]	Ownership of Information or Ideas	8-194
[d]	Storage of Data	8-196
[14]	Defining the User	8-198
[15]	Rewriting “Paper” Clauses	8-199
[16]	European Union E-Commerce Directive	8-201
[17]	EU Directive on Data Retention by Publicly Available Electronic Communications Services	8-207
PART B	APPLICATION SERVICE PROVIDERS	8-209

¶ 8.11	What and Why	8-209
¶ 8.12	Applicable Law	8-215
¶ 8.13	A Framework for Approaching ASP Contracts	8-215
	[1] General Issues.....	8-215
	[2] Risk Assessment.....	8-217
	[3] Due Diligence.....	8-217
	[4] Adequate Contract.....	8-218
	[a] Termination.....	8-218
	[b] Data Return.....	8-220
	[5] Ongoing Oversight	8-221
¶ 8.14	Bankruptcy Treatment of the ASP Contract	8-221
Exhibit 8.1:	FFIEC Statement on Risk Management of Outsourced Technology Services.....	8-223
Exhibit 8.2:	OCC Bulletin 2001-47: Third-Party Relationships	8-238
Exhibit 8.3:	Principles for User Generated Content Services	8-253

9 Linking

¶ 9.01	Introduction	9-1
¶ 9.02	Definition of a Link; Linking Relationships.....	9-2
¶ 9.03	Overview of Legal Issues	9-3
PART A	LEGAL ISSUES ASSOCIATED WITH LINKING	9-8
¶ 9.04	Framing the Content of Another Site.....	9-8
	[1] Copyright and Trademark Issues	9-9
	[2] Other Issues	9-13
¶ 9.05	Deep Linking to Another Site: Rights of Access Control.....	9-13
¶ 9.06	Linking and Wrongful Use or Extraction of Data.....	9-17
	[1] Introduction	9-17
	[2] Misappropriation Under U.S. Law	9-18
	[3] European Union Database Directive.....	9-20
¶ 9.07	Copyright Infringement	9-22.2
	[1] Direct Copyright Infringement and Linking	9-22.2
	[2] Indirect Infringement and Linking.....	9-22.5
	[3] DMCA Safe Harbor for Online Service Providers	9-28
¶ 9.08	Trademark and Dilution Issues.....	9-31
¶ 9.09	Public Sites and First Amendment Issues.....	9-37
¶ 9.10	Endorsements	9-38
¶ 9.11	Evidence.....	9-42

TABLE OF CONTENTS

xxiv

PART B	REGULATORY ISSUES.....	9-43
¶ 9.12	National Banks and OCC Guidance	9-43
	[1] Introduction	9-43
	[2] Reputation Risk	9-44
	[3] Transaction Risk	9-45
	[4] Compliance Risk	9-46
	[5] Strategic Risk	9-46
¶ 9.13	Securities and Exchange Commission Approach	9-47
	[1] Introduction	9-47
	[2] Context of the Hyperlink	9-49
	[3] Risk of Confusion	9-49
	[4] Presentation of the Hyperlinked Information.....	9-50
¶ 9.14	Other Agency Guidance	9-51
¶ 9.15	Consumer Rules	9-51
	[1] Introduction	9-51
	[2] FTC Dot Com Disclosure Staff Working Paper	9-51
	[3] Nonbypassable Links.....	9-55
	[4] Privacy and Security.....	9-56
¶ 9.16	Shared Electronic Space	9-58
PART C	LINKING AGREEMENTS.....	9-60
¶ 9.17	The Linking Agreement.....	9-60
	[1] Business Issues.....	9-60
	[2] Types of Links.....	9-60
	[3] Destination Page of Link	9-61
	[4] Location of Link	9-62
	[5] Documentation of the Link’s Specifications	9-62
	[6] Payment Structures.....	9-63
	[7] Service Requirements	9-66
	[8] Tracking and Reporting.....	9-66
	[9] Other Issues.....	9-66.1
	[10] Duration and Cancellation	9-67
¶ 9.18	Applicable Contract Law.....	9-68
Exhibit 9.1:	OCC Bulletin 2001-31 on Weblinking.....	9-69

10 Liability for Informational Content

¶ 10.01	Introduction	10-1
¶ 10.02	Setting the Context	10-1
	[1] Introduction	10-1
	[2] Transactions in Goods	10-1
	[3] Transactions in Information and Services: General Rules	10-3
	[4] Adapting State Regulation to the Internet.....	10-8

[5] Internet as Unique, Public Communication	10-13
PART A LIABILITY RISKS IN INFORMATION CONTRACTS—	
GENERAL THEMES	10-15
¶ 10.03 Contractual Obligations and Limitations	10-15
[1] Introduction	10-15
[2] Nature of a Contract Online.....	10-15
[3] Obligations in Services or Information Contracts.....	10-18
[a] Express Obligations and Warranties	10-19
[b] Implied Warranties and Obligations	10-25
[i] Aesthetics and marketability	10-31
[ii] General audiences and published content	10-31
[iii] Conduits	10-33
[c] Disclaimers and Disavowals of Obligations of Accuracy	10-34
[i] Express obligations	10-34
[ii] Implied obligations and warranties	10-37
PART B TORT LIABILITY RISKS IN DISTRIBUTING	
INFORMATION— IN GENERAL	10-38
¶ 10.04 Tort Liability: In General	10-38
¶ 10.05 Tort Liability: Damage to Another’s Reputation.....	10-40
[1] Defamation Liability	10-40
[a] Nature of Online Defamation.....	10-42
[b] Application of Defamation Rules to Online Environments.....	10-43
[2] False Statements and Mere Opinions.....	10-48
[3] Fault in Making the Statement: Harm to Individuals.....	10-53
[4] Defamation and Harm to Businesses	10-58
[a] Defamation of a Business	10-58
[b] Product Disparagement.....	10-62
[c] Other Harm to a Business	10-67
[i] Tortious interference with performance of contract.....	10-67
[ii] Tortious interference with prospective business	
relationships	10-68
[iii] Civil conspiracy	10-70
[5] Publication of the Defamation: Republishers and Conduits	10-71
[6] Section 230(c) of the Communications Decency Act of 1996.....	10-75
[7] Retraction and Notice Issues Online.....	10-78
[8] Other Privileges or Defenses	10-84
¶ 10.06 Tort Liability: Reliance Damages, Fraud, and Misrepresentation	10-86
[1] Introduction	10-86
[2] Intentional Fraud	10-88
[3] Unintentional Fraud—Duties of Care, Torts of Recklessness, and	
Negligence.....	10-90
¶ 10.07 Tort Liability for Information: Product Liability and Negligence	10-94
[1] Liability for Economic Loss	10-94
[2] Liability for Personal Injury	10-97

TABLE OF CONTENTS

PART C SELECTED ISSUES IN ONLINE LIABILITY RISK FOR INFORMATION PROVIDERS 10-105

¶ 10.08 Direct Information Content Providers 10-105

 [1] Introduction 10-105

 [2] Content Providers: Published Informational Content 10-105

 [3] Content Providers: Narrower Client or User Relationships 10-108

¶ 10.09 Providing Third-Party Content 10-112

 [1] Introduction 10-112

 [2] Intellectual Property Infringement and DMCA Safe Harbors 10-114

 [3] Communications Decency Act Preemption as a General Defense 10-114

 [a] Interactive Computer Service; Providers and Users 10-116

 [i] Interactive computer service 10-116

 [ii] Providers or users 10-119

 [b] Information Provided by Another Information Content Provider 10-122

 [i] Information content provider; “another” information content provider 10-122

 [ii] When is information “provided”? 10-129

 [iii] What qualifies as “information”? 10-131

 [c] Publisher or Speaker 10-132

 [d] Claims Other Than Defamation Covered by the CDA and Exclusions From Coverage 10-138

 [i] Claims based on nonexcluded federal law 10-138

 [ii] Claims based on inconsistent state law 10-139

 [iii] Exclusions 10-147

 [e] Third-Party Information vs. Provider’s Own Information 10-150

 [f] Statutory Extension of CDA Coverage 10-161

 [g] Liability for Editing or Censoring Technology 10-161

 [4] Foreign Laws 10-163

¶ 10.10 International Considerations 10-164

PART D SUBPOENAS AND OTHER LEGAL PROCESS 10-168

¶ 10.11 Subpoenas 10-168

VOLUME 2

11 Consumer Law Issues in E-Commerce

¶ 11.01 Introduction 11-1

PART A DEFINING THE CONCEPT 11-1

¶ 11.02 What Is a Consumer? 11-1

 [1] Introduction 11-1

 [2] Typical Definitions: U.S. Law 11-2

[3] European Definitions.....	11-4
¶ 11.03 Distinguishing Between Consumers and Businesses.....	11-4
¶ 11.04 Application of the Traditional Definition.....	11-9
¶ 11.05 Deviant Definitions and Expanded Concepts.....	11-9
[1] Introduction.....	11-9
[2] Deviant, Expanded Definitions of “Consumer”.....	11-9
[3] Mass-Market Licenses and UCITA.....	11-11
PART B CONSUMER LAWS IN E-COMMERCE.....	11-15
¶ 11.06 Selected Consumer Laws.....	11-15
[1] Introduction.....	11-15
[2] E-Sign Subsection (c).....	11-16
[3] Children’s Online Privacy Protection Act.....	11-17
[4] FTC Cooling-Off Period for Sales Made at Homes or at Certain Other Locations.....	11-18
[5] EU Distance Contracts Directive.....	11-19
[6] FTC Fair Information Practices Principles.....	11-22
[7] FTC Telemarketing Sales Rule.....	11-23
[8] FTC Mail/Telephone Order Rule.....	11-25
[9] FTC Credit Practices Rule.....	11-26
[10] FTC Rule: Preservation of Consumer Claims and Defenses.....	11-26
[11] Fair Credit Reporting Act.....	11-26
[12] Fair Debt Collection Practices Act.....	11-34
[13] FRB Regulation B—Equal Credit.....	11-34
[14] FRB Regulation E—Electronic Fund Transfer.....	11-35
[15] FRB Regulation Z—Truth in Lending.....	11-39
[16] FRB Regulation M—Consumer Leasing.....	11-40
[17] Magnuson-Moss Warranty Act.....	11-40
[18] State Warranty or Disclosure Laws.....	11-43
[19] Usury.....	11-45
[20] Regulating Terms: EU Unfair Terms Directive.....	11-45
[21] Deceptive and Unfair Trade Practices Laws.....	11-46
¶ 11.07 What Consumer Protection Statutes Apply in E-Commerce?.....	11-49
¶ 11.08 FTC Dot Com Disclosures Staff Working Paper on Advertising.....	11-55
¶ 11.09 E-Sign Consumer Consent Rules.....	11-62
[1] Introduction.....	11-62
[2] The Subsection (c) Rule Generally.....	11-63
[3] Elements of the Rule.....	11-66
[a] Consumer.....	11-66
[b] Required Writing.....	11-67
[c] Information.....	11-69
[d] Delivery.....	11-73
[4] The Electronic Handshake Rule.....	11-77
¶ 11.10 Uniform Electronic Transactions Act.....	11-81

[1] Introduction	11-81
[2] Section 8: Consumer and Other Transactions	11-82
[3] Section 10: Mistake Rules	11-85
¶ 11.11 Federal Check Clearing for the 21st Century Act (C21)	11-86

12 Online Informational Privacy and Data Protection

¶ 12.01 Introduction	12-1
¶ 12.02 “Privacy” and “Data Protection”	12-3
[1] “Sensitive” vs. Personally Identifiable Information	12-4
[2] Reasonable Expectation of Privacy vs. Right to Control Data	12-9
[3] Policy Balance and the Other Side of Protection	12-22
[4] Constitutional Dimensions of Privacy Law	12-24
[5] Damages as an Element	12-32
[6] Conflicting Policies and Regulatory Excess	12-44
[7] Perfect Compliance or Reasonable Effort	12-51
[8] Privacy as a Concept in Private Agreements	12-51
¶ 12.03 Privacy Torts	12-52
PART A DATA PROTECTION LAWS	12-61
¶ 12.04 Data Protection Generally	12-61
[1] Introduction	12-61
[2] Personally Identifiable Information	12-63
[a] Multiple Definitions	12-64
[b] Aggregate Information Compared	12-71
[c] Data Matching and Profiles	12-73
[3] U.S. Sector-Specific Approach	12-76
[a] Federal Laws	12-77
[b] State Data Protection Laws	12-87
[i] State law applying to persons generally	12-88
[ii] State and other laws applying to employers	12-90
[4] Data Protection Laws of General Applicability	12-95
[5] Scope of Duty and Right of Action	12-100
[6] Vicarious Liability	12-101
¶ 12.05 Data Protection: Required Consent to Third-Party Use of Data	12-103
[1] Introduction	12-103
[2] Data Protection: Consent in Europe and Canada	12-103
[3] Consent in U.S. Law: Traditional Privacy Law	12-106
[4] Consent in U.S. Data Protection Law: Financial Institutions	12-109
¶ 12.06 Data Protection: Data Quality and Accuracy	12-110
[1] Introduction	12-110
[2] Data Quality in Europe and Canada	12-110
[3] U.S. Fair Credit Reporting Act and Data Quality	12-111
¶ 12.07 Data Protection: Private Party Collection of Data	12-115

TABLE OF CONTENTS

¶ 12.08 Data Protection: EU and the U.S.: Safe Harbor Principles	12-122
¶ 12.09 Data Protection: First Amendment Concerns	12-126
¶ 12.10 Data Protection: Gramm-Leach-Bliley Act	12-128
[1] Introduction	12-128
[2] Meaning of “Financial Institution”	12-130
[3] Obligations Under GLBA	12-139
¶ 12.11 Children’s Online Privacy Protection Act	12-145
PART B SELECTED E-COMMERCE PRIVACY ISSUES	12-151
¶ 12.12 Anonymity and Individual Rights	12-151
¶ 12.13 Cookies and Transactional Information	12-153
¶ 12.14 Social Security Numbers and Similar Data	12-157
[1] Federal Laws	12-157
[2] State Laws	12-162
[3] Competing Common Law Views: SSNs Are Sensitive vs. SSNs Are Sacrosanct	12-168
[4] Other Identifiers	12-178
¶ 12.15 Communications Stored or Intercepted; Pretexting and Sale of Confidential Phone Records Information	12-180
[1] Wiretap Act, Title I of the ECPA	12-182
[2] The Stored Communications Act, Title II of the ECPA	12-191
[a] Third-Party Access	12-194
[i] Authorization by users	12-195
[ii] Authorization by system provider	12-196
[b] Voluntary Disclosure by the Service Operator	12-198
[i] Disclosure of content of the communications	12-198
[ii] Non-content transactional data	12-201
[iii] Type of service operator	12-202
[c] Standards for Compelled Disclosure	12-204
[3] Duty of Certain Service Providers to Assist Law Enforcement	12-206
[a] Wiretap Act	12-206
[b] CALEA	12-208
[c] PROTECT Act of 2008	12-209
[4] CPNI, CPRI, and Other Customer Proprietary Information	12-213
¶ 12.16 Privacy Policies: Content and Risks	12-226
[1] Importance of Policies	12-226
[2] Privacy Policies as Binding Obligations	12-226
[3] Obligation to Adopt a Policy	12-229
[4] Elements of a Policy	12-232
[a] Key Components	12-232
[b] Audience Considerations	12-236
[c] Accessibility of Policy	12-237
[d] Failure to Comply With Policy	12-238
[5] Privacy Policies and Other Liabilities	12-241

TABLE OF CONTENTS

xxx

¶ 12.17	Data Protection and “Right to Know” Law	12-243
[1]	Federal Judicial Records: E-Government Act of 2002	12-249
[2]	Interaction of Privacy Rules With Public Records Rules	12-251
[3]	Interaction of Intellectual Property Rules With Public Records Rules.....	12-260
¶ 12.18	Sharing of Information Among Affiliates for Unsolicited Marketing	12-264
[1]	Federal Fair Credit Reporting Act.....	12-265
[a]	Affiliate.....	12-267
[b]	Consumer.....	12-267
[c]	Eligibility Information	12-268
[d]	Opting Out	12-270
[e]	Duration of Opt-Out.....	12-273
[f]	Solicitation.....	12-273
[i]	What is a “solicitation”?	12-274
[ii]	Making a solicitation.....	12-276
[g]	Exclusions.....	12-276
[h]	Pre-existing Business Relationship.....	12-278
[2]	FTC Telemarketing Rule.....	12-279
[3]	State Law.....	12-280
¶ 12.19	Tracking Technologies	12-282
[1]	“Black Box” or Event Data Recorders.....	12-284
[2]	Radio Frequency Technologies	12-287
[3]	Implanted Devices.....	12-289
¶ 12.20	Genetic or Biometric Information.....	12-290
[1]	Federal Laws and Regulations.....	12-290
[2]	State Laws and Regulations.....	12-298
[3]	Databases With Genetic Information.....	12-300
[a]	Expectations of Privacy	12-300
[b]	Disclosures.....	12-303
[c]	Standards.....	12-303
[d]	Particular Programs.....	12-304
¶ 12.21	Terrorism-Related Laws	12-304
[1]	Illustrative Statutes	12-304
[2]	Communications Assistance for Law Enforcement Act (CALEA)	12-308
[3]	Intersection With Constitutional Issues and Other Rights	12-312
Exhibit 12.1: Safe Harbor Privacy Principles		12-313

13 E-Mails and Evidence in E-Commerce Contexts

¶ 13.01	Introduction	13-1
PART A EMPLOYEE COMPUTER USE ISSUES.....		13-3
¶ 13.02	The Context.....	13-3
¶ 13.03	The Incentive to Establish Policies and Monitor	13-4

[1] Scope of Discussion	13-4
[2] Sexual Harassment and Discrimination	13-5
[3] Copyright Infringement and Defamation	13-8
[4] Trade Secrets and Protection of Other Information	13-9
[5] Workplace Efficiency	13-11
[6] Responding to the Medium: Computer Usage as a Record	13-11
¶ 13.04 Employee Expectations of Privacy	13-14
[1] Fourth Amendment Rights	13-14
[2] Privacy Torts	13-22
¶ 13.05 Federal Statutes	13-24
[1] Introduction	13-24
[2] Electronic Communications Privacy Act of 1986	13-24
[3] Public Forum Issues	13-26
¶ 13.06 E-Mail and Internet Usage Policies	13-30
¶ 13.07 Incoming E-Mails and System Use	13-37
[1] Threats to the System	13-37
[2] Viruses and Other Dangerous or Prohibited Messages	13-38
[3] Trespass Issues and E-Mail Attacks	13-39
[4] Spam and Misleading Advertisements	13-40
[a] General Legal Bases	13-44
[i] Computer Fraud and Abuse Act	13-44
[ii] Telephone Consumer Protection Act of 1991	13-46
[b] Federal CANSPAM Act	13-51
[i] Commercial electronic mail messages	13-54
[ii] Sender	13-60
[iii] Wireless or mobile service commercial mail messages	13-61
[c] International	13-64
[5] Phishing and Other Forms of Account Hijacking	13-66
[6] Constitutional Limits on Regulating Annoying Communications	13-71
[7] Restrictions on Use of E-Mail and Other Information While Driving	13-74
PART B E-MAIL CONTRACT FORMATION AND AMENDMENT	13-75
¶ 13.08 Dealing With Contract Formation and Amendment by E-Mails	13-75
[1] Law of Contract Formation	13-75
[2] When a Signed Writing Is Required, E-Mails Count	13-77
[a] Statutory Requirements	13-77
[b] Federal Electronic Signatures in Global and National Commerce Act	13-80
[c] State Legislation, Including the Uniform Electronic Transactions Act	13-81
[d] The Common Law or Other Law	13-83
[3] What Is a Signature in the E-Mail Context?	13-86
[a] Legal Requirement	13-86
[b] Typing One's Name	13-86
[c] "Letterhead" and Not Typing a Name	13-87
[d] "Reliability"	13-89

TABLE OF CONTENTS

xxxii

[e]	Other Symbols, Including E-Mail Aliases	13-90
[f]	Process as Signature.....	13-91
[g]	Conclusion	13-93
[4]	Admissibility of E-Mails	13-93
[5]	Possible Solutions.....	13-95
[a]	Statutory Protection	13-95
[b]	Previous Contract With Method of Amendment Precluding E-Mails	13-96
[c]	No Previous Contract and Use of Legend Precluding Contract Formation by E-Mail.....	13-98
[i]	Sample disclaimer.....	13-98
[ii]	Other factors	13-99
[iii]	Contract formation rules	13-100
[iv]	Statutory approaches.....	13-100
[6]	Waiver and Obligations of Good Faith.....	13-101
[a]	Waiver of “No Oral Modification” Clauses	13-101
[i]	UCC and UCITA	13-101
[ii]	Common law.....	13-102
[b]	E-Mail Logos and the Common Law	13-103
[c]	Good Faith	13-104
[7]	The Difficult, but Only Solution.....	13-104
PART C	ELECTRONIC EVIDENCE	13-106
¶ 13.09	Introduction to Evidence Issues.....	13-106
¶ 13.10	Electronic Evidence Under Federal Rules of Civil Procedure.....	13-114
[1]	Inclusive Definition	13-114
[2]	Early Discussion Required	13-115
[3]	Format of Production.....	13-118
[4]	Accessibility	13-119
[5]	Routine Information System Management	13-120
[6]	Inadvertent Production, Waiver, and Proposed Federal Rule of Evidence 502.....	13-121
¶ 13.11	Responding to Electronic Discovery Requests	13-122
¶ 13.12	Production of Electronic Evidence	13-127
¶ 13.13	Authentication of Electronic Evidence	13-135
¶ 13.14	Costs.....	13-138
¶ 13.15	International Aspects of Electronic Evidence.....	13-145

14 Structuring the Analysis of Tax Issues in the E-Commerce Context

¶ 14.01	Introduction.....	14-1
PART A	PERSPECTIVES ON TAXATION.....	14-2

¶ 14.02	Complex Economies, Complex Taxes.....	14-2
	[1] Introduction.....	14-2
	[2] Complexity Resulting From Multitude of Taxes.....	14-2
	[3] Complexity Resulting From Multiple Roles Played by Tax Legislation.....	14-3
	[4] Jurisdictional Issues.....	14-3
	[5] Classification Issues.....	14-4
¶ 14.03	Managing Tax Issues in E-Commerce Transactions.....	14-5
	[1] Introduction.....	14-5
	[2] Guidance of Tax Advisors.....	14-5
	[3] Understanding Tax Concepts.....	14-5
	[4] Focus Initially on Business Activity, Not Media.....	14-6
	[5] How Development of Tax Law Lags Behind Technology.....	14-6
	[6] Forcing Square Pegs Into Round Holes.....	14-8
¶ 14.04	E-Commerce Elements in Common Business Transactions.....	14-8
	[1] Introduction.....	14-8
	[2] Transactions Involving Tangible Personal Property.....	14-8
	[a] Advertising.....	14-9
	[b] Order-Processing Functions.....	14-9
	[c] Underlying Sale of Tangible Personal Property.....	14-10
	[d] Other Sales Transaction Elements.....	14-10
	[3] Transactions Involving Intangible Property.....	14-11
	[a] Tax Issues.....	14-11
	[b] Electronic Delivery of Intangible Property.....	14-11
	[4] Tax Implications of Services Characterization.....	14-12
	[a] Tax Implications of Services Generally.....	14-12
	[b] Other Tax Issues of E-Commerce Services.....	14-13
PART B	FREQUENTLY ENCOUNTERED TAXES.....	14-16
¶ 14.05	Income Taxes.....	14-17
	[1] Introduction.....	14-17
	[2] Jurisdictional Constraint on Imposition of Income Taxes.....	14-17
	[3] U.S. Federal Income Tax.....	14-17
	[4] State Income Taxes.....	14-18
	[5] Income Tax Issues for Online Businesses.....	14-19
¶ 14.06	Property Taxes (Ad Valorem Taxes).....	14-20
¶ 14.07	Excise Taxes.....	14-20
¶ 14.08	Sales Tax.....	14-21
	[1] In General.....	14-21
	[2] What Is the Taxable Activity?.....	14-21
	[3] Jurisdictional Issues.....	14-22
	[4] Sales Tax Payment Liability Versus Collection Responsibility.....	14-23
¶ 14.09	Use Tax.....	14-24
	[1] In General.....	14-24
	[2] What Is the Taxable Activity?.....	14-24

TABLE OF CONTENTS

xxxiv

¶ 14.10 Value-Added Tax	14-25
[1] In General	14-25
[2] What Is the Taxable Activity?	14-26
[3] Jurisdictional Issues	14-26
¶ 14.11 Telecommunications Taxes	14-27
PART C APPLICATION OF TAXES TO CERTAIN ONLINE BUSINESS PARTICIPANTS.....	
¶ 14.12 Online Service Providers	14-29
[1] In General	14-29
[2] Property Tax	14-30
[3] Income Tax	14-30
[4] Sales Tax	14-31
[5] Use Tax	14-31
¶ 14.13 Content Providers	14-32
[1] Types of Content Providers	14-32
[2] Property Tax	14-32
[3] Income Tax	14-32
[4] Sales Tax	14-32
[5] VAT Tax	14-33
¶ 14.14 Customers	14-33
[1] In General	14-33
[2] Property Tax	14-33
[3] Income Tax	14-33
[4] Sales Tax	14-34
[5] Use Tax on Customers	14-34
PART D FEDERAL, STATE, AND INTERNATIONAL TRENDS AND ISSUES APPLICABLE TO E-COMMERCE	
¶ 14.15 Federal Taxes in the E-Commerce Context	14-35
[1] E-Commerce Provisions	14-35
[2] The Net Income Concept	14-36
[a] Income Issues	14-36
[b] Deductions and Credits	14-37
[i] Federal tax treatment of expenses	14-37
[ii] Deductions	14-38
[iii] Treatment of capitalized costs	14-38
[3] Software-Related Sourcing Rules	14-40
[a] Source Rules and Section 861	14-41
[b] Overview of the Section 861 Regulations	14-42
[c] Operation of the Regulations Under Section 861	14-43
[i] Has a transfer of copyright rights occurred?	14-43
[ii] Has there been a “sale” or a license?	14-43
[iii] Is the transaction a sale or lease?	14-44
[iv] Is there a transfer of rights or services?	14-44
[v] Is there a transfer of know-how?	14-44

[d]	Application of Section 861 Sourcing Rules	14-44
[e]	Combined Transactions Under Section 861	14-45
¶ 14.16	State and Local Taxes	14-46
[1]	Overview	14-46
[2]	Limitations Imposed by the U.S. Constitution	14-47
[a]	Sales and Use Taxes—Constitutional Limitations	14-48
[i]	Limitations on seller and purchaser liability for sales tax	14-48
[ii]	The nexus concept and sales taxes	14-50
[iii]	Sales tax apportionment	14-54
[iv]	Effect of Equal Protection Clause on sales tax	14-54
[b]	State Income Taxes	14-55
[i]	Income tax in the e-commerce context	14-55
[ii]	Due Process Clause limitations on state income taxes	14-56
[iii]	Equal Protection Clause in the income tax context	14-57
[iv]	Commerce Clause in the income tax context	14-58
[v]	The Compact Clause and income tax	14-62
[c]	Ad Valorem (Property) Taxation	14-62
[i]	Due Process Clause limitations on property tax	14-63
[ii]	Equal Protection Clause limits on property tax	14-63
[iii]	Commerce Clause limits on property tax	14-64
[iv]	Import-Export Clause limits on property tax	14-64
[d]	State Excise and Other Taxes	14-65
[3]	Federal Statutory Limitations on State Taxation	14-65
[a]	Public Law 86-272—Limits on State Income Tax	14-66
[b]	The Internet Tax Freedom Act	14-67
[i]	ITFA prohibition on taxing Internet access	14-68
[ii]	ITFA prohibition on discriminatory taxes	14-69
[iii]	ITFA prohibition on multiple taxation	14-72
[c]	Mobile Telecommunications Sourcing Act	14-75
¶ 14.17	International Taxation of E-Commerce	14-76
[1]	In General	14-76
[2]	Income and Consumption Taxes—The Workhorses of International Taxation	14-78
[a]	Income Tax in the International Context	14-78
[b]	An International Perspective on Income Taxes	14-79
[i]	Residence-based taxation	14-79
[ii]	Source-based taxation	14-79
[c]	E-Commerce Technologies and International Rules	14-81
[3]	The “Permanent Establishment” Concept	14-81
[4]	Character Issues	14-83
[5]	Taxes Based on Consumption	14-84
[6]	International Tax Rules—Sources of Authority	14-85
[a]	Organization for Economic Cooperation and Development	14-85
[b]	World Trade Organization	14-86
[7]	The Ongoing E-Commerce Debate Between the United States and the European Union	14-87

TABLE OF CONTENTS

xxxvi

[a] VAT as Applied in the EU	14-88
[b] E-Commerce Challenges to VAT Rules	14-89
[c] The Impact of Duties in E-Commerce	14-91
PART E MANAGING UNCERTAINTY	14-93
¶ 14.18 Managing E-Commerce Tax Risks for Businesses	14-93
[1] In General	14-93
[2] Managing Risk	14-94
[3] Dealing With Finite Company Resources	14-94
[4] Seeking Predictable Tax Strategies	14-95
[5] Structuring to Isolate Risk	14-96
[6] Technology Solutions	14-96
[7] Exercising Mobility Options	14-96
[8] Contractual Risk Sharing and Risk Shifting	14-96
[9] Pricing to Manage Risk	14-98
[10] Reducing Taxes	14-99
[11] Relationship-Based Techniques	14-99
[12] Treaty-Based Techniques	14-99

15 **Identity Theft**

¶ 15.01 Introduction	15-1
¶ 15.02 What Is Identity Theft?	15-4
[1] Identity Theft of a Business's Identity	15-10
[2] Accepting the Identity of Another	15-10
¶ 15.03 How Does Identity Theft Happen?	15-11
¶ 15.04 Who Is an Identity Thief?	15-15
¶ 15.05 Responses to Identity Theft	15-16
¶ 15.06 What Laws Address Identity Theft?	15-22
[1] Introduction	15-22
[a] Identity Theft vis-à-vis Other Public Policies	15-23
[b] Collision of Identity Theft and Privacy	15-25
[2] Federal Criminal Statutes	15-27
[a] The Identity Theft and Assumption Deterrence Act of 1998	15-27
[b] Other Federal Criminal Statutes	15-28.3
[3] Federal Fair and Accurate Credit Transactions Act of 2003	15-30
[a] Introduction	15-30
[b] Definitions	15-33
[c] Guidelines Regarding Identity Theft for Financial Institutions, Creditors, Debit Card Issuers, and Users of Certain Consumer Reports	15-40
[i] Duties of users of consumer reports regarding address discrepancies	15-40.1

TABLE OF CONTENTS

	[ii]	Duties regarding the detection, prevention, and mitigation of identity theft: identity theft prevention programs	15-40.2
	[iii]	Duties of card issuers regarding changes of address	15-40.8
[d]		Form of Consumer Disclosures Regarding Identity Theft Involving Financial Institutions or Creditors and Certain Transactions With Them	15-40.9
[e]		Obligations of Most Businesses to Supply Information to Victims	15-40.10
	[i]	The businesses that must respond	15-41
	[ii]	The request	15-42
	[iii]	The verification of the request	15-43
	[iv]	The information the business must provide	15-44
	[v]	Parameters for declining to provide information	15-45
	[vi]	To whom the business must provide the information	15-46
	[vii]	Liability and limitations on liability	15-47
[f]		Obligations of Furnishers of Information to a Consumer Reporting Agency	15-47
	[i]	All furnishers	15-47
	[ii]	GLBA financial institution furnishers	15-49
[g]		Obligations of Users of Consumer Reports	15-49
	[i]	Risk-based pricing notice (lack of most favored status)....	15-50
	[ii]	Address discrepancies	15-50
	[iii]	Prescreening	15-51
[h]		Fraud Alerts and Active Duty Alerts in Consumer Reports—Obligations of Users, Creditors, and Others	15-51
	[i]	Obligations of Users of Credit Scores	15-54
	[j]	Blocking of Information Resulting From Identity Theft	15-55
[k]		Affiliate Sharing of Information for Unsolicited Marketing	15-55
[l]		Sale of Identity Theft Debt; Debt Collection	15-56
[m]		Limitations on Provision and Use of Medical Information	15-57
	[i]	Standards for consent	15-57
	[ii]	Restrictions on creditor’s use of medical information	15-57
	[iii]	Persons receiving medical information	15-59
	[iv]	Consumer report definition	15-59
	[v]	Persons furnishing medical information	15-60
[4]		State Statutes; Preemption	15-60
	[a]	Basic Approaches	15-64
	[b]	Statutes Imposing Duties on Third Parties	15-66
	[c]	Statutes Imposing Penalties on the Other Victim, the Person Who Is Duped	15-68
	[d]	Statutes Imposing Identity Theft Conditions to Transactions	15-71
[5]		Common Law Causes of Action	15-72
	[a]	Where New Accounts Are Opened in Victim’s Name	15-76
	[b]	Where Information Is Provided That Might Lead to Identity Theft	15-79
	[c]	Standing	15-82
	¶	15.07 How Can Potential Victims Decrease the Risk of Identity Theft?	15-83

16 Personal Data Security: Issues in Law

¶ 16.01 Introduction	16-1
¶ 16.02 Nature of Security Liability Risk.....	16-2
[1] Three Types of Security Liability Risk.....	16-4
[2] Defining Security: External and Internal	16-5
[3] Perspectives on Security Concerns	16-7
PART A DATA SECURITY AND WRONGDOER'S LIABILITY	16-9
¶ 16.03 Legal Protection of Information and Systems.....	16-9
[1] Criminal Law: Wrongful Access	16-9
[2] Trespass: Wrongful Access	16-11
PART B VOLUNTARY OBLIGATIONS TO THIRD PARTIES	16-12
¶ 16.04 Contractual Obligations of Data Security	16-12
¶ 16.05 Privacy Policies and Security Obligations	16-14
PART C OBLIGATIONS IMPOSED IN LAW	16-18
¶ 16.06 Federal Law and Policy	16-18
[1] Gramm-Leach-Bliley Act	16-19
[a] Safeguards Rule	16-21
[b] Security Breach Notification Guidance.....	16-28
[2] FTC Unfair Practices Regulation Regarding Information Security	16-32
[a] Credit Card Information.....	16-38
[b] Access Controls and Practices	16-39
[c] Authentication or Attribution Practices.....	16-43
[3] Other Federal Security Obligations	16-45
[a] Privacy Act	16-45
[b] Department of Veterans Affairs Information Security Enhancement Act of 2006.....	16-47
[c] Office of Management and Budget	16-47
[i] Reporting incidents involving personally identifiable information.....	16-47
[ii] Safeguarding information requirements and responding to the breach of personally identifiable information.....	16-48
[d] Office of the Director of National Intelligence Guidelines	16-49
[e] National Institute of Standards and Technology	16-50
[f] Telecommunications Carriers, Including Interconnected VOIP	16-51
[g] FERPA (Family Educational Rights and Privacy Act).....	16-52
[i] Data security	16-52
[ii] Access controls	16-54
[iii] Data security breaches	16-55
[h] Other Federal Law or Policies.....	16-57
¶ 16.07 International Law and Policy.....	16-58

¶ 16.08 State Laws	16-60
[1] General Statutes on Security	16-61
[2] Other State Laws on Security	16-69
[3] Security-Breach Notification Laws	16-72
[a] California Statute	16-74
[b] Other State Laws—Diversity and Conflict	16-80
[c] Federal Notice Rules	16-87
[d] State Laws Creating Liability for Security Breaches and State Laws Regarding Payment System Data	16-88
¶ 16.09 Particular Technologies or Devices	16-96
[1] Wireless	16-96
[2] Laptops and Other Portable Devices	16-98
¶ 16.10 Sarbanes-Oxley Issues	16-100
¶ 16.11 Transactional Issues	16-101
[1] Transactional Design	16-101
[2] Transmission Statutes	16-101
[3] Payment System Security Rules	16-102
[a] Credit Cards and Debit Cards	16-103
[b] NACHA Rules	16-106
[4] Transactional Data Types; Methods of Collection; Uses	16-107
[a] Data Type	16-107
[b] Collection Method	16-108
[c] Subsequent Use	16-109
¶ 16.12 Disposal of Data	16-109
PART D OTHER DATA SECURITY	16-116
¶ 16.13 Entity Data	16-116
[1] Nature of Entity Data	16-116
[2] State Laws	16-117
Appendixes (<i>available on the accompanying CD</i>)	
Appendix 1: Electronic Signatures in Global and National Commerce Act	
Appendix 2: Computer Fraud and Abuse Act	
Appendix 3: Digital Millennium Copyright Act	
Appendix 4: The Anticybersquatting Consumer Protection Act	
Appendix 5: Uniform Computer Information Transactions Act	
Appendix 6: Uniform Electronic Transactions Act	
Appendix 7: European Communities Directives	
Table of Cases	Cases-1
Index	I-1

TABLE OF CONTENTS

xi