Contents

Preface xi
About the Authors xiii

1 Copyright: What, Why, When, Whence?  1
   A tale of two copyrights  1
   What is copyright?  2
      Making copies of the work  2
      Adapting the work  3
      Distributing copies of the work to the public  7
      Performing the work in public  9
      Displaying the work to the public  11
   Why does this book keep saying “could infringe”?  11
   Why copyright?  12
   When does copyright expire?  13
      Pre-1978 works: 95-year term  14
      Post-1977 works: Life + 70, or 95 years, depending on certain factors  17
      Orphan works  18
      Works written but unpublished as of 1978  19
   Whither copyright: Constitutional limits on copyright?  19

2 What Is Copyrighted: A Creative Work of Authorship in Tangible Form  21
   Works of authorship  22
      Literary works  22
      Musical works  22
      Dramatic works  23
      Pantomimes and choreographic works  23
      Pictorial, graphic, and sculptural works  24
      Motion pictures and other audiovisual works  24
      Sound recordings  25
      Architectural works  26
      Other works of authorship  26
Contents

Not a work of authorship 27
Government works are not copyrighted 28
Creativity 31
  Technology and creativity 33
  Adaptations and creativity 34
  The flip side: Copyright protects only creative expression 34
  Creativity in tangible form 36

3 Movie Rights, Book Deals, Recording Contracts, Free Software: Copyright Transactions 39
Who gets the copyright? 39
  One author 40
  Joint authors 41
  Works by employees 42
  Works done on the job? 43
  Employment contracts 43
Copyright transactions 44
  Exclusive versus nonexclusive grants 45
  Music: The mechanical license 46
Open source licensing, a.k.a. free software, and Creative Commons licenses 47

4 Ideas Are Not Copyrighted 51
Copying ideas does not infringe copyright 51
Contracts can protect ideas—a little 57
Functional matter cannot be copyrighted 57
Is software protected by copyright? 60
Design patents 64

5 Formalities: For Want of a ©, the Kingdom Was Lost 67
Copyright notice: That c in a circle 67
Renewal of copyright 69
Restoration of foreign copyrights 71
Registration of copyrights 74
Deposit with registration 75

6 Fair Use: Excelsior! 79
Four-factor test for fair use 79
  The purpose and character of the use 79
  The nature of the copyrighted work 82
  The amount of copyrighted material used 83
  The effect on the potential market for the copyrighted work 84
Problems with the four-factor test 84
7 Copyright Lawsuits 97
   Cease-and-desist letter 97
   No copying \(\rightarrow\) no copyright infringement 98
   Was protected material copied? 101
   How to sue yourself 102
   Remedies 102
   Show me the money: Twice blest 104
8 Patentable Inventions: Products and Processes 111
   What can be patented? 111
   Products 112
      Machines 112
      Articles of manufacture 118
      Composition of matter 124
   Processes 127
      Processes as inventions 127
      Product and process together 129
      Processes as improvements 130
   How long do patents last? 134
   Submarine patents 135
   Patents related to national security 136
9 Nonpatentable: Humans, Nature, Ideas 137
   Patent law: Big tent 137
   No patents "encompassing a human" 140
   Nature: Not patentable 141
      Genes? 145
   Abstract ideas not patentable 147
10 New, Useful, and Nonobvious 151
   Competing inventors: First to file or make public 151
   The old new 152
   New 152
      Public use 153
      Published 156
   Useful 159
   Nonobvious 162
11 Getting a Patent 167
   Patent prosecution 167
   "The name of the game is the claim" 169
   Description of invention (show what you’ve got) 174
   Drawings of the invention 179
12 To Patent or Not to Patent 181
   Why patent? 181
   Beyond business 187
   Why not patent? 189

13 Patent Litigation: The Sport of Kings 193
   Claim interpretation 195
   Validity of the patent 200
   Patent infringement does not require copying 202
   Remedies for infringement: Money and orders to stop 203

14 Trademarks 205
   What is a trademark? 206
   Categories of marks 209
   A trademark must be a source-identifying symbol 212
   Words (existing or made up) as trademarks 212
   Phrases as trademarks 212
   Designs (with or without words) as trademarks 213
   How long does a trademark last? 215

15 Requirements To Be a Mark 223
   Symbols indicating source are protected 224
   Generic terms are not protected 225
   Merely descriptive terms are not protected 226
   Well-known descriptive terms may become trademarks 228
   Distinctive designs may become trademarks 229
   Surnames may become trademarks 229
   Some symbols cannot be trademarks 230
   Symbols confusingly similar to existing trademarks 230
   Symbols for functional matter 233
   Symbols disparaging to people or immoral or scandalous 235
   Symbols that are deceptive 236

16 Choosing, Registering, and Owning a Trademark 237
   Ownership 237
   Choosing a name 239
   Vetting a mark 240
   Trademark search 240
   Evaluating the mark 243
   Benefits of registration 243
   The registration process 244
17 Trademark Infringement: Confusingly Similar? 245
   Commercial use 246
   Confusingly similar possibilities 248
      Similarity of marks 248
      Distinctiveness of the mark 251
      Proximity in marketplace 253
      Buyer's knowledge and attention 256
   Dilution 258
18 Trade Secrets 259
   Formula 261
   Pattern 263
   Compilation 264
   Program 264
   Device 265
   Technique 266
   Process 267
   Other 268
   Not trade secrets 268
   Security measures 270
      Identify trade secrets 271
      Provide nondisclosure agreements 271
      Keep track of copies of trade-secret information 271
      Limit access to trade-secret information 272
      Educate employees about the need for secrecy 273
      Use trade-secret information in separate location (such as a secure area in a factory) 274
      Lock up trade-secret information (physically, in a safe, or logically, in encryption) 274
      Use targeted advertising to check security 275
   Trade secrets last until disclosure 276
   Misappropriation (wrongful access, use, or disclosure) 276
19 Trade Secrets and Employees 281
   Employment contract clauses 284
      Nondisclosure clauses 284
      Noncompete clauses 285
      Invention disclosure and assignment clauses 286
      Document retention clause 286
      Agreement to follow security procedures 287
Trailer clauses 287
Third-party contact clause 288
Nonsolicitation clause 289
Nondisparagement clause 289
Debriefing clause 290
“No cold-calling” agreement 290
Hampers and hammocks 290

20 International Intellectual Property 295
Secrecy 297
National pride 298
Copyright law 302
Patent law 304
Trademark and patent law 310
Geographic appellations 310
Gray market (a.k.a. parallel importation) 311

21 Indigenous Peoples and Intellectual Property 313
No IP for IP? 318
International pacts: IP for IP for IP 319
Cut into public domain? 320
Group rights 320

22 Internet IP: Brave New World 325
Immunity for Internet service providers 330
Copy protection (a.k.a. digital rights management systems, or DRM) 332
Cybersquatting 336

Sources 339
Index 359