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WORLD INTELLECTUAL  
PROPERTY  
RIGHTS and REMEDIES  
LAWS with COMMENTARY

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## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

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## Introduction

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### A. THE LICENSING TASK

Those who work with intellectual property—lawyers and clients, creative people and business people—find it challenging enough to work within the laws of a single jurisdiction. There are many different types of intellectual property, the legal standards are constantly in flux, the procedures are exacting, the subject matter is intangible, and the factual issues are enormously complicated. These challenges seem simple, however, when compared to acting in the international arena. The globalisation of economies draws practitioners increasingly into issues beyond their shores, where foreign laws prevail.

The task of protecting intellectual property internationally is complex because laws differ so much from country to country. Generalisations are suspect. The same facts can give rise to different results. Experience helps, but it also is unreliable because the laws in most countries are in transition. Thus, it is more important than ever to ask the right questions and to seek adequate tools to address them.

An example drawn from recent experience illustrates the international scale of issues one must address on a routine basis. Company 'A' makes and sells a product in Israel under an established trade mark and seeks to enter the market in the United States, Canada, and European and Asian countries. Company 'B' owns a relevant patent in each of these countries. How does Company 'A' proceed? First, Company 'A' asks whether the product will infringe the claims of the patent under the laws of each jurisdiction. This may require obtaining opinions from lawyers in each country. Second, if the conduct of Company 'A' will infringe the patent of Company 'B' in any of the countries and Company 'A' asks whether a favourable licence can be obtained, relevant licensing laws must be reviewed. Third, Company 'A' evaluates the alternative of attacking the patent, and it commences opposition or court proceedings in countries where the law and facts are favourable. Fourth, Company 'A' determines whether it can expand its trade mark for the product. This involves conducting searches in relevant markets, filing applications, and acquiring trade marks that interfere with exclusivity. In sum, Company 'A' must analyse the laws of perhaps half a dozen countries with respect to patent infringement and validity, licensing, and trade mark law.

As another example, consider two companies that have combined genetic engineering and computer technology in a pioneering invention. They need to consider where to file patents, what they can claim, and what is likely to be enforceable in coming years as laws change. They also need to consider their ownership and licensing strategy, as the consequences of joint ownership and the types of licences that are available may vary from country to country. These concerns are fundamental enough that they should be raised at the beginning of the alliance. Although it may be too early for specific opinions at that time, the parties should have at least a general understanding of the status of protection and trends around the world.

## **B. IMPACT OF GLOBAL COMPETITION**

The principal force that has increased the importance of intellectual property protection is global competition.<sup>1</sup> Those who compete for global markets need to work harder to obtain a competitive advantage in a broader range of activities or they will be put out of business. The rewards for success also are greater than ever. The following are examples of the range of human activities that are affected by global competition and that can be protected using intellectual property:

1. Developing or improving a new product, service, or computer program;
2. Selecting a name or logo for a product, service, or company;
3. Bringing on a key employee or contractor for design, research, or development work;
4. Providing business or technical information to suppliers, investors, or strategic partners;
5. Launching a major sales effort;
6. Preparing new advertising or marketing literature;
7. Maintaining or expanding a customer list;
8. Creating original arts, crafts, or designs;
9. Publishing a home page on the Internet; and
10. Acquiring and developing plant or animal material; and
11. Starting, buying, or selling a business or expanding operations to a new country.

By managing commercial activities well, people can enhance the value of their intellectual property assets (eg, patents, trade marks, trade secrets, copyrights, and special forms of protection such as petty patents and plant breeders' rights). If they manage the task poorly, on the other hand, they will undercut or eliminate intellectual property rights, and may even infringe the rights of others, leading to devastat-

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<sup>1</sup> Doane, 'TRIPS and International Intellectual Property Protection in an Age of Advancing Technology', 9 American U J Int'l L & Policy 465 (1994).

## INTRODUCTION

ing financial and personal impacts. Given the range of activities affected, almost everyone involved in international commerce (including profit-making and not-for-profit organisations) needs to understand the global dimensions of protecting intellectual property.

The international significance of intellectual property does not end with commerce. Politicians and the public have increasingly become involved as intellectual property issues assumed a central role on the stage of international affairs. In particular, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), negotiated in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), brought widespread and heavily negotiated changes to the level of protection for intellectual property around the world.<sup>2</sup> Disputes between countries over intellectual property 'piracy' now command the attention of national leaders. Consequently, a treatise on the subject is valuable for policymakers as well as practitioners.

Such broad public interest subjects intellectual property laws and standards to a variety of forces for change. In addition, new technologies, such as the Internet and genetic engineering push the boundaries of the present legal framework. Technological advances require new interpretations of existing laws, or new laws. Thus, increasingly, our knowledge of intellectual property laws is tested not only across national borders, but across time.

### C. HISTORICAL PERSPECTIVE

The third millennium brings with it a crossroads in terms of international protection of intellectual property. It is impossible to predict exactly what legal reform awaits practitioners, just as one cannot anticipate new technologies. None the less, some lessons may be drawn from a historical perspective.

International protection of intellectual property has grown dramatically from its 19th century philosophical and legal underpinnings. The World Intellectual Property Organisation (WIPO), which administers most treaties relating to intellectual property, had grown to 161 members by 1997.<sup>3</sup> In 1883, 11 states established the Paris Convention. As of 1997, the number of Paris Convention members had grown to 140 countries.<sup>4</sup> The Berne Convention on copyrights, dating to 1886, had 121 member states by 1997. In the quarter century since the Patent Co-operation Treaty was concluded

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<sup>2</sup> Otten and Wager May, 'Nature and Scope of the Agreement: Compliance with TRIPS: The Emerging World View', 29 *Vanderbilt J Transnat'l L* 391 (1996).

<sup>3</sup> The World Intellectual Property Organisation maintains information about other relevant treaties at its Internet home page, <http://www.wipo.org>. See also [http://ra.irv.uit.no/trade\\_law/documents/ip/wipo/art/wipo.htm](http://ra.irv.uit.no/trade_law/documents/ip/wipo/art/wipo.htm).

<sup>4</sup> World Intellectual Property Organisation, <http://www.wipo.org/eng/general/ipip/paris.htm>.

in 1970, 83 states have joined.

The World Trade Organisation (WTO), which administers the far-reaching TRIPS Agreement, has more than 130 members.<sup>5</sup> Regional initiatives, such as the European Patent Convention, also have become important forces in determining intellectual property rights in member states. The growing relevance of international treaties is mirrored in individual intellectual property instruments. According to WIPO, in 1994, approximately 670,000 patents were granted and 4 million were in force worldwide. More than 1 million trade marks were registered or renewed, for a total of more than 8 million in force.<sup>6</sup>

In general, the types of protection available have been strengthened and expanded, as in the United States with micro-organism, plant, animal, and gene patenting, and increased protection for software and computer technology. Provisions that tend to weaken protection, such as compulsory licensing, have been reduced. The level of protection has been made more homogeneous around the world, as with the GATT-TRIPS agreement. There are many who hope for, and expect, greater harmonisation.<sup>7</sup> However, public opinion supporting unique domestic variations, such as the United States' first to invent system, can be intense.

Meanwhile, intellectual property policy has increasingly been linked to other concerns, for example international trade (as in the GATT-TRIPS Agreement), and the environment (as in the Convention on Biological Diversity). This linkage has emphasised some underlying tensions:

1. There are wide disparities between countries in the type and scope of protection available, in particular for computer technology, and for plants, animals, and genetic material;
2. The relevant laws focus on innovations by individuals rather than traditional or collective knowledge; and
3. Few facts are known about the global social and environmental impacts of intellectual property, but many people have strong opinions on the subject.

How are these tensions affecting intellectual property law? Examples from biotechnology and the Internet can help illustrate some trends in the law. By understanding these trends, one can develop better strategies for protecting intellectual property into the

<sup>5</sup> World Intellectual Property Organisation, [http://www.wto.org/wto/memtab2\\_wpf.html](http://www.wto.org/wto/memtab2_wpf.html).

<sup>6</sup> World Intellectual Property Organisation, <http://www.wipo.org/wng/general/ipip/intro.htm> or WIPO International Protection of Industrial Property, Geneva 1996, available at <http://www.unicc.org/wipo/>.

<sup>7</sup> Sabatelli and Rasser, 'Impediments to Global Patent Law Harmonisation,' 22 *N Ky L Rev* 579 (1995); 'A Guide to Patent Law Harmonisation: Towards a More Inventor-Friendly Worldwide Patent System, American Intellectual Property Law Ass'n, 1995, available at <http://www.aipla.org/harmoniz.html>.

## INTRODUCTION

future. Intellectual property protection can affect the direction of technology innovation. Prior to 1980, there was much less protection available for plants and the components of biotechnology. Then, in *Diamond v Chakrabarty*,<sup>8</sup> the United States Supreme Court held that genetically modified bacteria were 'compositions of matter' or 'manufactures' suitable for utility patent protection. This decision led to the issuance of patents on plants and animals, and it is widely viewed as providing a foundation for the biotechnology industry's growth.<sup>9</sup> In *Chakrabarty*, the Supreme Court dodged the argument that patenting recombinant organisms could unleash dangerous environmental and social consequences, observing that genetic research would continue with or without patents on modified bacteria. This point continues to be debated around the world. To what extent does patent protection impact the amount and type of research that is conducted? Is it immoral to turn living organisms or parts of people (genes or cell lines) into intellectual property commodities?<sup>10</sup>

The 1992 Convention on Biological Diversity (CBD) was initially conceived as a way to promote conservation of living organisms. As it entered into force, the Convention on Biological Diversity linked conservation of biological resources in a trio of goals, including development of the resources, and fair sharing of the benefits of that development. The Convention on Biological Diversity for the first time made biological resources subject to sovereign national rights, and required states to support the role of traditional knowledge in maintaining and using such resources. The combination of national rights and traditional knowledge can be seen as the basis for novel quasi-intellectual property rights, several models for which have been proposed.<sup>11</sup>

Politically, the Convention on Biological Diversity can be seen as a bargain whereby resource-rich developing nations agreed to give access to their biological resources, and technology-rich developed nations agreed to give access to resulting technologies.<sup>12</sup> This trade-off initially scared many in the biotechnology industry. Subsequently most of the industrial nations joined the more than 150 member countries who saw the Convention on Biological Diversity as a reasonable way to ensure the continued existence of, and access to the living

<sup>8</sup> *Diamond v Chakrabarty*, 447 US 303 (1980).

<sup>9</sup> Scalise and Nugent, 'International Intellectual Property Protections for Living Matter: Biotechnology, Multinational Conventions and the Exception for Agriculture', 27 *Case W Res J Int'l L* 83, at pp 96-98 (1995).

<sup>10</sup> Kimbrell, *The Human Body Shop* (1995).

<sup>11</sup> Roht-Arriaza, 'Of Seeds and Shamans: the Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities', 17 *Mich J Int'l L* 919 (1996).

<sup>12</sup> Gollin, 'An Intellectual Property Rights Framework for Biodiversity Prospecting', in *Biodiversity Prospecting*, Reid et al, eds, at p 190 (1993, World Resources Institute).

organisms that are critical to continued progress. The ongoing process of implementing the CBD continues to underscore the different levels of intellectual property protection among nations, the difficulty of recognising traditional knowledge, and the lack of comprehensive information we have about the true effects and effectiveness of intellectual property rights.<sup>13</sup>

Technology innovation can rapidly make intellectual property schemes obsolete, particularly in the computer industry.<sup>14</sup> The Internet has led to a flood of information without national boundaries, which is causing some to question whether the fundamental principles of individual authorship and national borders can survive.<sup>15</sup> Libraries are becoming giant globally accessible databases, publications are going on-line, and education and entertainment can be custom-tailored for each computer user. This has led to a struggle over how to apply copyright law or new principles as a basis for controlling access and charging fees.<sup>16</sup>

Trade mark laws are being tested by the Internet, as well. The Internic registry of Internet domain names established a policy to deal with prior trade mark registrations in the context of the international scope of the Internet. The policy precludes the registration of a domain if there is a registered trade mark anywhere in the world, for any good or service, whether or not it is related to the domain name. This policy has already been challenged in the United States as inconsistent with existing laws relating to trade mark infringement and unfair competition. An international Memorandum of Understanding was established to involve the international community, including WIPO, in domain registration and dispute resolution.<sup>17</sup> In sum, political forces and technological change both affect the scope of intellectual property protection available. Intellectual property is important, and it should not be surprising that the relevant laws are constantly in flux.

<sup>13</sup> 'The Impact of Intellectual Property Rights Systems on the Conservation and Sustainable Use of Biological Diversity and on Equitable Sharing of Benefits from its Use', UNEP/CBD/COP3/22 (1996), available at [http://www.iisd.ca/linkages/biodiv/cop3/3\\_22\\_vfinal.htm](http://www.iisd.ca/linkages/biodiv/cop3/3_22_vfinal.htm).

<sup>14</sup> Reichman, 'Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System', 13 *Cardozo Arts & Ent L J* 475 (1993); Sherry, 'Science Based Standards for the Uniform Global Protection of Intellectual Property: The Case of Logic Functions Expressions', 26 *Cal W Int'l L J* 335 (1996).

<sup>15</sup> Aoki, '(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship,' in 'Symposium, Surveying Law and Borders,' 48 *Stanford L Rev* 1293 (1996).

<sup>16</sup> Hamilton, 'Impact of the Trips Agreement on Specific Disciplines: Copyrightable Literary and Artistic Works: The Trips Agreement: Imperialistic, Outdated, and Overprotective', 29 *Vanderbilt J Transnat'l L* 613 (1996).

<sup>17</sup> Internet Domain System, Memorandum of Understanding, Generic Top Level Domains (February 1997), <http://www.iahc.org/gTLD-MoU.html>.

## D. PROTECTING INTELLECTUAL PROPERTY

This discussion leads to the ultimate issue: Why do countries protect intellectual property? What are the advantages and disadvantages of doing so? According to the WIPO view:

Protection of intellectual property is not an end in itself: it is a means to encourage creative activity, industrialisation, investment, and honest trade. All this is designed to contribute more safety and comfort, less poverty and more beauty, in the lives of men.<sup>18</sup>

Does intellectual property help achieve these goals? Anecdotal evidence suggests that intellectual property plays a critical role in the individual decisions people make that lead them to invent or create and then develop or invest in such work. Formal studies of the purposes and effects of intellectual property systems show at least an association between strong intellectual property laws and a high rate of innovation.<sup>19</sup>

However, the existence of a direct causal relationship between strong intellectual property protection and technology progress has not been conclusively demonstrated as a general matter. The situation varies by industry and country.<sup>20</sup> For example, the availability of patent protection is an important factor for investment in chemical and pharmaceutical research and development.<sup>21</sup> On the other hand, other industries are not patent-dependent, and some countries such as Taiwan and South Korea achieved high levels of technology before strengthening their intellectual property laws; thus, one cannot say that intellectual property brought about that progress.

Theorists also have struggled to understand the advantages and disadvantages of intellectual property on purely philosophical grounds.<sup>22</sup> In the absence of good data, many people approach these issues as a matter of economic or political faith, raising the same arguments again and again. Accordingly, it is useful to briefly cata-

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<sup>18</sup> World Intellectual Property Organisation, *International Protection of Industrial Property* (1996), available at <http://www.unicc.org/wipo/>.

<sup>19</sup> Frame, 'National Commitment to Intellectual Property Protection: An Empirical Investigation', 2 *JL & Technology* 209 (1987).

<sup>20</sup> Evenson, 'Survey of Empirical Studies', in *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature*, Siebeck, ed, World Bank Discussion Paper 112, at pp 73-86 (1990).

<sup>21</sup> Evenson, 'Survey of Empirical Studies', in *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature*, Siebeck, ed, World Bank Discussion Paper 112, at pp 73-86 (1990).

<sup>22</sup> Hughes, 'The Philosophy of Intellectual Property', 77 *Geo LJ* 287 (1988).

logue the most common arguments in this debate.<sup>23</sup> These are the arguments most commonly used to support a society's decision to protect a creative endeavour as intellectual property:

1. Incentive—intellectual property provides incentives for people to be creative through the prospect of exclusive rights; society benefits through better, less expensive products and more artistic and cultural diversity.
2. Reward—intellectual property rewards people for their completed creative acts (whatever their motivation was at the outset).
3. Labour—intellectual property helps individuals own the products of their creative 'sweat of the brow'.
4. Morality—intellectual property protects the sense of parenthood artists, inventors, and other creative people often feel toward their work.
5. Public disclosure—sharing of new information can be enhanced by intellectual property instruments such as patent specifications.
6. Technology transfer—intellectual property can be bought, sold, leased, or traded as with tangible property.
7. Technology development—intellectual property is viewed by investors as critical for the investment and capital formation necessary to develop and commercialise a technology.
8. Industrial policy—intellectual property provides tools by which governments can support or discourage research and investment, by establishing, strengthening, weakening, or eliminating intellectual property protection. Also, by strengthening its laws a country may satisfy the demands of a trading partner such as the United States, providing political advantages.

On the other side are several potent counter-arguments militating against strong intellectual property protection. In a nutshell, these arguments hold that intellectual property can have the following negative consequences, which provide a policy basis for restricting or, in the extreme, eliminating types of intellectual property protection.<sup>24</sup> The arguments include:

1. Restricted access to technology—the removal of technology from the public domain is an intrinsic characteristic of intellectual

<sup>23</sup> Prima Braga, 'The Developing Country Case For and Against Intellectual Property Protection', in *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature*, Siebeck, ed, World Bank Discussion Paper 112, at pp 73-86 (1990); Gollin and Laird, 'Global Policies, Local Actions: The Role of National Legislation in Sustainable Biodiversity Prospecting', 2 *Boston University J Science & Tech L* 16 (1996); Scalise and Nugent, 'International Intellectual Property Protections for Living Matter: Biotechnology, Multinational Conventions and the Exception for Agriculture', 27 *Case W Res J Int'l L* 83, at pp 86-87 (1995).

<sup>24</sup> Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated, and Overprotective', in 'Impact of the TRIPS Agreement on Specific Disciplines: Copyrightable Literary and Artistic Works', 29 *Vanderbilt J Transnat'l L* 613 (1996); Kimbrell, *The Human Body Shop* (1995).

## INTRODUCTION

property rights that allows the owner to obtain a competitive advantage, and is critical to serving the public policy goals outlined above;<sup>25</sup> however, the restrictions can be excessive (too long or too broad), and over-protection brings no advantage to society.

2. Increased cost—exclusive rights lead to increased costs to consumers as a necessary means for providing an incentive and reward to the intellectual property owner; as above, the cost can be excessive.
3. Monopolisation—commercial and creative activities tend to become even more centralised in large establishments due to intellectual property rights.
4. Inappropriate incentives—intellectual property systems favour research and investment in protectable innovations. This may undercut the ability to protect and maintain useful traditional knowledge and culturally important folklore.
5. Competition—intellectual property can cause inventors, scientists, and artists to co-operate less and deal more sharply with each other than when their efforts are in the public domain; for example, research results may be concealed until a patent application is filed, or a biological material may be kept secret rather than submitted to a public depository.
6. Expense—intellectual property rights, particularly patents, are expensive and complex to protect and enforce; this is a burden for all, and can put poor and unsophisticated people at a disadvantage.
7. Institutional requirements—intellectual property rights are intangible and require elaborate national legal and regulatory institutions to protect and enforce them; these requirements can divert scarce national funds and expertise from other endeavours.
8. Ethics—intellectual property can conflict with some people's moral views opposing property rights in innovations involving, eg, living organisms and materials obtained from the human body.

In sum, countries have good reasons for protecting intellectual property, but they can create other problems by doing so. It is in each country's interest to adopt and maintain a system of intellectual property protection that maximises the resulting benefits and minimises the negative consequences according to the views of that particular society. Unfortunately, there is insufficient objective information to determine whether a particular country has in fact achieved such a balance.

## E. LOOKING AHEAD

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<sup>25</sup> Reichman, 'Charting the Collapse of the Patent-copyright Dichotomy: Premises for a Restructured International Intellectual Property System', 13 *Cardozo Arts & Ent L J* 475 (1993).

What is likely to happen in the future? Of course, it is impossible to predict with certainty. However, it is possible to outline four outcomes that could occur. The first outcome, the status quo, avoids expanding, modifying, or reducing the scope of protection available. This would lead to a gradual expansion of rights as countries come into compliance with TRIPS over a 10-year period.<sup>26</sup> However, countries could restrict plant and animal patents, and other differences would remain.

The second approach is expansion of protection of all types of intellectual property around the world. This is a foreign policy goal of the United States in implementing TRIPS and in other bilateral and multilateral agreements.<sup>27</sup> Countries would continue to expand the types of exclusive rights available for materials and methods, software, and trade marks, around the world, beyond the levels required under the GATT/TRIPS Agreement. This could be called 'GATT/TRIPS Plus'.

The third option is a roll back or reduction of protection in certain areas. Some groups call for a ban on patenting life forms and genetic material. However, moving in the direction of less protection is far from a radical notion. Indeed, in 1996, the United States Congress amended the United States Code to eliminate enforcement of patents for medical activity. Thus, patents relating to surgery and other medical procedures are unenforceable against medical practitioners unless they also involve use of patented compositions or devices.<sup>28</sup>

Finally, there may be a new approach to finding ways in which intellectual property can promote social goals consistent with the need for free trade and sustainable development.<sup>29</sup> This may involve strengthening protection in some areas, weakening it in others, and adding new types of protection.<sup>30</sup> For example, many proposals have been made regarding extension of intellectual property rights to indigenous people. Under such a new approach, protection would be

<sup>26</sup> Otten and Wager May, 'Nature and Scope of the Agreement: Compliance with TRIPS: the Emerging World View', 29 *Vanderbilt J Transnat'l L* 391 (1996).

<sup>27</sup> World Trade Organisation, Implementation Report: Trade-Related Intellectual Property Rights (March 1996), available at [http://www.ustr.gov/reports/wto/intellectual\\_property.html](http://www.ustr.gov/reports/wto/intellectual_property.html).

<sup>28</sup> 35 United States Code, s 287(c); Yang, 'Patent Policy and Medical Procedure Patents: The Case for Statutory Exclusion from Patentability', 1 *Boston University J Science & Tech L* 5 (1995).

<sup>29</sup> Reichman, 'Legal Hybrids Between the Patent and Copyright Paradigms', in 'Symposium: Toward a Third Intellectual Property Paradigm', 94 *Colum L Rev* 2432 (1994).

<sup>30</sup> Horton, 'Protecting Biodiversity and Cultural Diversity Under Intellectual Property Law: Toward a New International System', 10 *J Envtl L & Litig* 1 (1995).

## INTRODUCTION

more homogeneous in some respects, but it also would reflect variations in cultural attitudes around the world.<sup>31</sup>

## F. CONCLUSION

One can expect that international exchange and transfer of technology and culture will continue to increase. Meanwhile, practitioners will continue to find new ways to use intellectual property rights to secure competitive advantages in a global economy. Strategies for protection are required that will last and be enforceable for decades, despite uncertainty on many issues: whether the coming decades will bring strengthened or weakened protection for particular types of intellectual property; whether the role of international intellectual property organisations such as the WIPO and the WTO will expand or contract in the face of greater sovereignty; whether countries will harmonise their laws or make them more diverse; whether new types of rights, eg, for traditional and widely held knowledge, will be crafted and whether the innovative and creative levels among nations will become closer or diverge. These issues have tremendous significance for practitioners and clients. They also are important for theorists and policymakers concerned with the social and economic aspects of intellectual property protection. In that light, a comprehensive treatise on the state of the law becomes an indispensable tool to help us gain the power of what we know and the wisdom of recognising what we do not know.

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<sup>31</sup> Gana, 'Prospects For Developing Countries Under The TRIPS Agreement', 29 *Vanderbilt J Transnat'l L* 735 (1996).

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# Summary of Contents

## Volume 1

### **PART I. COMMENTARY**

- Chapter 1. Argentina
- Chapter 2. Australia
- Chapter 3. Austria
- Chapter 4. Belgium
- Chapter 5. Bermuda
- Chapter 6. Brazil
- Chapter 7. Canada
- Chapter 8. People's Republic of China
- Chapter 9. Colombia
- Chapter 10. Costa Rica
- Chapter 11. Cyprus
- Chapter 12. Czech Republic
- Chapter 13. Denmark
- Chapter 14. Egypt
- Chapter 15. Estonia
- Chapter 16. Finland
- Chapter 17. France
- Chapter 18. Germany

## Volume 2

### **PART I. COMMENTARY (CONTINUED)**

- Chapter 19. Greece
- Chapter 20. Hong Kong
- Chapter 21. Hungary
- Chapter 22. India
- Chapter 23. Indonesia

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 24. Ireland
- Chapter 25. Israel
- Chapter 26. Italy
- Chapter 27. Japan
- Chapter 28. Lithuania
- Chapter 29. Luxembourg
- Chapter 30. Malaysia
- Chapter 31. Mexico
- Chapter 32. The Netherlands
- Chapter 33. New Zealand
- Chapter 34. Norway
- Chapter 34A. Panama
- Chapter 35. Peru
- Chapter 36. The Philippines
- Chapter 37. Portugal
- Chapter 38. Romania
- Chapter 39. Russian Federation

### **Volume 3**

#### **PART I. COMMENTARY (CONTINUED)**

- Chapter 40. Slovak Republic
- Chapter 41. South Africa
- Chapter 42. Spain
- Chapter 43. Sri Lanka
- Chapter 44. Switzerland
- Chapter 45. Taiwan
- Chapter 46. Thailand
- Chapter 47. Turkey
- Chapter 48. Ukraine
- Chapter 49. United Kingdom
- Chapter 50. United States
- Chapter 51. Vietnam
- Chapter 52. The European Union
- Chapter 53. The Revised Berne Convention for the Protection of

SUMMARY OF CONTENTS

- Literary and Artistic Works
- Chapter 54. The Brussels Satellite Convention
- Chapter 55. European Trade Mark Law
- Chapter 56. Jurisdiction and Dispute Resolution
- Chapter 57. The Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration
- Chapter 58. The Locarno Agreement Establishing an International Classification for Industrial Design
- Appendix 58A. Annex
- Chapter 59. The Madrid Agreement and Protocol
- Chapter 60. The Paris Convention for Protection of Industrial Property
- Chapter 61. The Patent Cooperation Treaty
- Chapter 62. The Patent Law Treaty
- Chapter 63. The Singapore Treaty on Law of Trade Marks
- Chapter 64. The TRIPS Agreement
- Chapter 65. The Universal Copyright Convention
- Appendix 65A. Parties to the Universal Copyright Convention
- Appendix 65B. Parties to the Berne Convention for the Protection of Literary and Artistic Works

**PART II. PRIMARY LAW AND COMMENTARY**

- Chapter 66. Laws of Argentina with Commentary
- Chapter 67. Laws of Australia with Commentary

**Volume 4**

**PART II. PRIMARY LAW AND COMMENTARY  
(CONTINUED)**

- Chapter 68. Laws of Austria with Commentary
- Chapter 69. Laws of Belgium with Commentary
- Chapter 70. Laws of Brazil with Commentary
- Chapter 71. Laws of Canada with Commentary
- Chapter 72. Laws of Colombia with Commentary
- Chapter 73. Laws of Cyprus with Commentary
- Chapter 74. Laws of the Czech Republic with Commentary

WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 75. Laws of Denmark with Commentary
- Chapter 76. Laws of Estonia with Commentary
- Chapter 77. Laws of Finland with Commentary
- Chapter 78. Laws of Hungary with Commentary
- Chapter 79. Laws of Israel with Commentary

## Volume 5

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 80. Laws of Italy with Commentary
- Chapter 81. Laws of Japan with Commentary
- Chapter 82. Laws of Malaysia with Commentary
- Chapter 83. Laws of Mexico with Commentary
- Chapter 84. Laws of New Zealand with Commentary

## Volume 6

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 85. Laws of Norway with Commentary
- Chapter 86. Laws of Peru with Commentary
- Chapter 87. Laws of the Philippines with Commentary
- Chapter 88. Laws of Poland with Commentary
- Chapter 89. Laws of Portugal with Commentary
- Chapter 90. Laws of Singapore with Commentary
- Chapter 91. Laws of South Africa with Commentary
- Chapter 92. Laws of Spain with Commentary
- Chapter 93. Laws of Taiwan with Commentary
- Chapter 94. Laws of Turkey with Commentary
- Chapter 95. Laws of the United States with Commentary

# Table of Contents

## Volume 1

### PART I. COMMENTARY

#### CHAPTER 1. ARGENTINA

##### I. INTRODUCTION

- § 1:1 Domestic legislation
- § 1:2 International agreements
- § 1:3 Structure and administration

##### II. PATENTS

- § 1:4 Nature
- § 1:5 Required information
- § 1:6 Registration procedure
- § 1:7 Beneficiaries of rights—In general
- § 1:8 —Employees
- § 1:9 Extension
- § 1:10 Transfer
- § 1:11 Remedies—Civil proceedings
- § 1:12 —Nullity and cancellation
- § 1:13 —Action to recover ownership
- § 1:14 Priority
- § 1:15 Public intervention
- § 1:16 Infringement actions
- § 1:17 —Civil and criminal actions
- § 1:18 —Injunctions
- § 1:19 —Confiscation

##### III. UTILITY MODELS

- § 1:20 Nature
- § 1:21 Registration procedure

##### IV. TRADE SECRETS

- § 1:22 In general

##### V. COPYRIGHTS

- § 1:23 Nature

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 1:24 Scope of protection
- § 1:25 Registration procedure
- § 1:26 Beneficiaries of rights—In general
- § 1:27 —Duration of rights
- § 1:28 —Transfer of rights
- § 1:29 Attacks on ownership—In general
- § 1:30 —Prior authors
- § 1:31 Public intervention
- § 1:32 Infringement actions—Nature of infringement
- § 1:33 —Criminal penalties
- § 1:34 —Claims for damages
- § 1:35 —Injunctions
- § 1:36 —Confiscation
- § 1:37 —Custom action

### **VI. TRADE AND SERVICE MARKS**

- § 1:38 Nature
- § 1:39 Registration
- § 1:40 Eligible parties
- § 1:41 Duration and renewal
- § 1:42 Transfer
- § 1:43 Cancellation
- § 1:44 Extension
- § 1:45 Attacks on ownership
- § 1:46 Remedies—In general
- § 1:47 —Criminal actions
- § 1:48 —Civil actions
- § 1:49 —Injunctions
- § 1:50 —Customs actions

### **VII. TRADE AND SERVICE NAMES**

- § 1:51 In general

### **VIII. INDUSTRIAL MODELS AND DESIGNS**

- § 1:52 Nature
- § 1:53 Registration
- § 1:54 Beneficiaries of rights
- § 1:55 Duration
- § 1:56 Transfer
- § 1:57 Cancellation
- § 1:58 Attacks on ownership
- § 1:59 Actions against infringement—In general
- § 1:60 —Action for damages
- § 1:61 —Preliminary measures

TABLE OF CONTENTS

**IX. LICENSING AND TRANSFER OF TECHNOLOGY**

- § 1:62 In general
- § 1:63 Registration

**CHAPTER 2. AUSTRALIA**

**I. INTRODUCTION**

- § 2:1 Intellectual property rights recognized

**II. PATENTS**

- § 2:2 In general
- § 2:3 Nature—Creation of rights
- § 2:4 —Beneficiaries of rights
- § 2:5 Term and maintenance—In general
- § 2:6 —Extension of term
- § 2:7 Transfer
- § 2:8 Cancellation
- § 2:9 International aspects
- § 2:10 Attacks on ownership—Prior inventors or users
- § 2:11 Public interest intervention
- § 2:12 Infringement actions—Nature of infringement
- § 2:13 —Action for damages
- § 2:14 —Injunction
- § 2:15 —Confiscation
- § 2:16 —Customs actions

**III. COPYRIGHT**

- § 2:17 Nature—Creation of rights
- § 2:18 —Beneficiaries of rights
- § 2:19 Duration
- § 2:20 Transfer
- § 2:21 International aspects
- § 2:22 Attacks on ownership—Prior authors
- § 2:23 —Public interest intervention
- § 2:24 Infringement actions—Nature of infringement
- § 2:25 —Action for damages
- § 2:26 —Injunction
- § 2:27 —Confiscation
- § 2:28 —Customs action

**IV. TRADE AND SERVICE MARKS**

- § 2:29 Nature—Creation of rights
- § 2:30 —Beneficiaries
- § 2:31 Term and maintenance

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 2:32 Transfer
- § 2:33 Cancellation
- § 2:34 International aspects
- § 2:35 Attacks on ownership—Prior users
- § 2:36 —Public interest
- § 2:37 —Statutory defenses
- § 2:38 Infringement actions—Nature of infringement
- § 2:39 —Action for damages
- § 2:40 —Passing-off
- § 2:41 —Injunction
- § 2:42 —Customs action and confiscation

### V. TRADE AND SERVICE NAMES

- § 2:43 In general

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 2:44 In general

### VII. AESTHETIC DESIGNS AND PATTERNS

- § 2:45 Nature—Creation of rights
- § 2:46 —Beneficiaries of rights
- § 2:47 Term and maintenance
- § 2:48 Transfer
- § 2:49 Cancellation
- § 2:50 Attacks on ownership—Prior users
- § 2:51 —Public interest intervention
- § 2:52 Infringement actions—Nature of infringement
- § 2:53 —Action for damages
- § 2:54 —Injunction
- § 2:55 —Repair defense
- § 2:56 —Confiscation
- § 2:57 —Customs action

### VIII. LICENSING

- § 2:58 In general

## CHAPTER 3. AUSTRIA

### I. INTRODUCTION

- § 3:1 Nature and system of protection
- § 3:2 Civil procedures
- § 3:3 Conflict of laws
- § 3:4 Customs action

## TABLE OF CONTENTS

### II. PATENTS

- § 3:5 Nature—In general
- § 3:6 —Creation of rights
- § 3:7 —Beneficiaries of rights
- § 3:8 —Maintenance
- § 3:9 —Extension
- § 3:10 —Assignment
- § 3:11 —Cancellation
- § 3:12 Attacks on ownership—Prior inventors and users
- § 3:13 —Opposition proceedings
- § 3:14 Infringement actions—Nature of infringement
- § 3:15 —Action for damages
- § 3:16 —Injunction
- § 3:17 —Expropriation

### III. COPYRIGHT

- § 3:18 Nature—In general
- § 3:19 —Creation of rights
- § 3:20 —Beneficiaries of rights
- § 3:21 —Indemnities
- § 3:22 —Moral rights
- § 3:23 —Free use of works
- § 3:24 —Ancillary copyrights
- § 3:25 —Term of protection
- § 3:26 —Assignment
- § 3:27 —International aspects
- § 3:28 Attacks on ownership—Prior authors
- § 3:29 —Public intervention
- § 3:30 Infringement—Nature
- § 3:31 —Action for damages
- § 3:32 —Injunctions
- § 3:33 —Collecting societies

### IV. TRADE AND SERVICE MARKS

- § 3:34 Nature—In general
- § 3:35 —Creation of rights
- § 3:36 —Beneficiaries of rights
- § 3:37 —Maintenance
- § 3:38 —Assignment
- § 3:39 —Cancellation
- § 3:40 —International aspects
- § 3:41 Attacks on ownership—In general
- § 3:42 —Similarity
- § 3:43 —Who may seek cancellation
- § 3:44 —Procedure and fees

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 3:45 —Public intervention
- § 3:46 Infringement actions—Nature of infringement
- § 3:47 —Civil law claims
- § 3:48 —Criminal law claims
- § 3:49 —Injunctions
- § 3:50 —Expropriation

### V. TRADE NAMES AND BUSINESS DESIGNATIONS

- § 3:51 Trade names—In general
- § 3:52 —Partnerships
- § 3:53 —Companies limited by shares
- § 3:54 —Cooperatives
- § 3:55 —Requirements
- § 3:56 —Scope of protection
- § 3:57 —Business designations
- § 3:58 Conflict of laws

### VI. UTILITY MODELS

- § 3:59 Nature—Relevant legislation
- § 3:60 —Creation of rights
- § 3:61 —Beneficiaries
- § 3:62 —Maintenance
- § 3:63 —Extension
- § 3:64 —Assignment
- § 3:65 —Cancellation
- § 3:66 —International aspects
- § 3:67 Attacks on ownership—In general
- § 3:68 —Prior user
- § 3:69 —Public intervention
- § 3:70 Infringement actions—Nature of infringement
- § 3:71 —Potential actions
- § 3:72 —Injunctions

### VII. MODELS

- § 3:73 Nature—In general
- § 3:74 —Creation of rights
- § 3:75 —Beneficiaries of rights
- § 3:76 —Maintenance
- § 3:77 —Extension
- § 3:78 —Assignment
- § 3:79 —Cancellation
- § 3:80 —International aspects
- § 3:81 Attacks on ownership—In general
- § 3:82 —Prior users
- § 3:83 —Public intervention

## TABLE OF CONTENTS

- § 3:84 Infringement actions—In general
- § 3:85 —Nature of infringement
- § 3:86 —Potential actions
- § 3:87 —Injunctions
- § 3:88 —Expropriation
- § 3:89 —Customs action

## VIII. LICENSING

- § 3:90 In general
- § 3:91 Terms
- § 3:92 Scope of rights
- § 3:93 Termination
- § 3:94 Competition rules
- § 3:95 Stamp duties

## CHAPTER 4. BELGIUM

### I. INTRODUCTION

- § 4:1 In general

### II. PATENTS

- § 4:2 Nature—Creation of rights
- § 4:3 —Beneficiaries of rights
- § 4:4 —Maintenance
- § 4:5 —Extension
- § 4:6 —Transfer and licenses
- § 4:7 Cancellation
- § 4:8 International aspects
- § 4:9 Attacks on ownership—Prior inventors or users
- § 4:10 —Public interest
- § 4:11 Infringement actions—In general
- § 4:12 —Nature of infringement
- § 4:13 —Actions for damages
- § 4:14 —Injunctions
- § 4:15 —Additional actions
- § 4:16 —Seizure—Description
- § 4:17 —Criminal offences
- § 4:18 —Customs action

### III. COPYRIGHT AND RELATED RIGHTS

- § 4:19 In general
- § 4:20 Nature—Copyright
- § 4:21 —Related rights
- § 4:22 —Database *sui generis* right

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 4:23 —International aspects
- § 4:24 Attacks on ownership
- § 4:25 Infringement actions—Nature of infringement
- § 4:26 —Exceptions
- § 4:27 —Actions for damages
- § 4:28 —Injunctions
- § 4:29 —Additional actions
- § 4:30 —Seizure—Description
- § 4:31 —Criminal provisions
- § 4:32 —Customs action
- § 4:33 Copyright infringement on communications networks—  
Intermediary liability rules
- § 4:34 Technological protection measures

### IV. TRADE MARKS AND SERVICE MARKS

- § 4:35 In general
- § 4:36 Nature—Creation of rights
- § 4:37 —Beneficiaries of rights
- § 4:38 —Maintenance
- § 4:39 —Transfer and license
- § 4:40 —Cancellation
- § 4:41 —Revocation
- § 4:42 —International aspects
- § 4:43 Attacks on ownership—In general
- § 4:44 —Absolute grounds of invalidity
- § 4:45 —Relative grounds of invalidity
- § 4:46 Infringement actions—Nature of infringement
- § 4:47 —Action for damages
- § 4:48 —Injunction
- § 4:49 —Additional actions
- § 4:50 —Seizure—Description
- § 4:51 —Criminal offences
- § 4:52 —Customs action
- § 4:53 Trade mark infringement on communications networks—  
Intermediary liability rules

### V. TRADE AND SERVICE NAMES

- § 4:54 In general
- § 4:55 Creation of rights
- § 4:56 Trade name infringement
- § 4:57 Action for damages
- § 4:58 Injunctions
- § 4:59 Criminal offences

### VI. DESIGNS AND MODELS

- § 4:60 Nature—In general

## TABLE OF CONTENTS

- § 4:61 —Creation of rights
- § 4:62 —Beneficiaries of rights
- § 4:63 —Maintenance
- § 4:64 —Extension
- § 4:65 —Transfer and licenses
- § 4:66 —Cancellation
- § 4:67 —International aspects
- § 4:68 Attacks on ownership—In general
- § 4:69 —Prior users
- § 4:70 —Public interest
- § 4:71 Infringement actions—In general
- § 4:72 —Nature of infringements
- § 4:73 —Actions for damages
- § 4:74 —Injunction
- § 4:75 —Additional actions
- § 4:76 —Seizure—Description
- § 4:77 Conjunction with copyright law—Creation of rights
- § 4:78 —Beneficiaries of rights
- § 4:79 Design and model infringement on communications networks—  
Intermediary liability rules

## CHAPTER 5. BERMUDA

### I. INTRODUCTION

- § 5:1 In general

### II. PATENTS

- § 5:2 In general
- § 5:3 Nature—Creation of rights
- § 5:4 —Beneficiaries of rights
- § 5:5 —Maintenance
- § 5:6 —Extension: renewal
- § 5:7 —Transfer
- § 5:8 —Cancellation
- § 5:9 —International aspects
- § 5:10 Attacks on ownership—Prior inventors or users
- § 5:11 —Public interest
- § 5:12 Infringement actions—Nature of infringement
- § 5:13 —Action for damages
- § 5:14 —Injunctions
- § 5:15 —Confiscation
- § 5:16 —Customs action

### III. COPYRIGHT

- § 5:17 Nature—In general

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 5:18 —Creation of rights
- § 5:19 —Beneficiaries of rights
- § 5:20 —Duration
- § 5:21 —Transfer
- § 5:22 —International aspects
- § 5:23 —Attacks on ownership
- § 5:24 Infringement actions—Nature of infringement
- § 5:25 —Action for damages
- § 5:26 —Injunctions
- § 5:27 —Confiscation
- § 5:28 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 5:29 Nature—In general
- § 5:30 —Creation of rights
- § 5:31 —Beneficiaries of rights
- § 5:32 —Maintenance
- § 5:33 —Transfer
- § 5:34 —Cancellation
- § 5:35 —International aspects
- § 5:36 Attacks on ownership—In general
- § 5:37 —Prior users
- § 5:38 —Public interest intervention
- § 5:39 Infringement actions—Nature of infringement
- § 5:40 —Action for damages
- § 5:41 —Injunctions
- § 5:42 —Confiscation
- § 5:43 —Customs

### V. INDUSTRIAL DESIGNS

- § 5:44 Nature—In general
- § 5:45 —Creation of rights
- § 5:46 —Beneficiaries of rights
- § 5:47 —Maintenance
- § 5:48 —Extension: renewal
- § 5:49 —Transfer
- § 5:50 —Cancellation
- § 5:51 Attacks on ownership
- § 5:52 Infringement actions—Nature of infringement
- § 5:53 —Action for damages
- § 5:54 —Injunctions
- § 5:55 —Confiscation
- § 5:56 —Customs action

### VI. LICENSING

- § 5:57 In general

TABLE OF CONTENTS

**CHAPTER 6. BRAZIL**

**I. INTRODUCTION**

§ 6:1 In general

**II. PATENTS**

§ 6:2 Nature—Creation of rights

§ 6:3 —Beneficiaries of rights

§ 6:4 —Maintenance

§ 6:5 —Extension

§ 6:6 —Transfer

§ 6:7 —Cancellation

§ 6:8 —International aspects

§ 6:9 Attacks on ownership—Prior inventors or users

§ 6:10 —Public interest intervention

§ 6:11 Infringement actions—Nature of infringement

§ 6:12 —Action for damages

§ 6:13 —Injunctions

§ 6:14 —Confiscation

§ 6:15 —Customs actions

**III. COPYRIGHT**

§ 6:16 Nature—Creation of rights

§ 6:17 —Beneficiaries of rights

§ 6:18 —Duration

§ 6:19 —Transfer

§ 6:20 —International aspects

§ 6:21 Attacks on ownership—Prior authors

§ 6:22 —Public interest intervention

§ 6:23 Infringement actions—Nature of infringement

§ 6:24 —Action for damages

§ 6:25 —Injunctions

§ 6:26 —Confiscation

§ 6:27 —Customs action

**IV. TRADE AND SERVICE MARKS**

§ 6:28 Nature—Creation of rights

§ 6:29 —Beneficiaries of rights

§ 6:30 —Maintenance

§ 6:31 —Transfer

§ 6:32 —Cancellation

§ 6:33 —International aspects

§ 6:34 Attacks on ownership—Prior users

§ 6:35 —Public interest

- § 6:36 Infringement actions—Nature of infringement
- § 6:37 —Action for damages
- § 6:38 —Injunctions
- § 6:39 —Confiscation
- § 6:40 —Customs action

## **V. TRADE AND SERVICE NAMES**

- § 6:41 In general

## **VI. INDUSTRIAL DESIGNS, AESTHETIC DESIGNS, AND PATTERNS**

- § 6:42 Nature—Creation of rights
- § 6:43 —Beneficiaries of rights
- § 6:44 —Maintenance
- § 6:45 —Extension
- § 6:46 —Transfer
- § 6:47 —Cancellation
- § 6:48 —International aspects
- § 6:49 Attacks on ownership—Prior users
- § 6:50 —Public interest
- § 6:51 Infringement action—Nature of infringement
- § 6:52 —Action for damages
- § 6:53 —Injunctions
- § 6:54 —Confiscation
- § 6:55 —Customs action

## **VII. LICENSING**

- § 6:56 Nature

## **CHAPTER 7. CANADA**

### **I. INTRODUCTION**

- § 7:1 In general

### **II. PATENTS**

- § 7:2 Nature—Creation of rights
- § 7:3 —Beneficiaries of rights
- § 7:4 —Maintenance
- § 7:5 —Extension
- § 7:6 —Transfer
- § 7:7 Attacks on ownership—Prior inventors or users
- § 7:8 —Public interest
- § 7:9 Infringement actions—Nature of infringement
- § 7:10 —Action for damages

TABLE OF CONTENTS

- § 7:11 —Injunctions
- § 7:12 —Confiscation

**III. COPYRIGHT**

- § 7:13 In general
- § 7:14 Nature—Creation of rights
- § 7:15 —Beneficiaries of rights
- § 7:16 —Duration
- § 7:17 —Transfer
- § 7:18 —International aspects
- § 7:19 Attacks on ownership—Prior authors
- § 7:20 Infringement actions—Nature of infringement
- § 7:21 —Action for damages
- § 7:22 —Injunctions
- § 7:23 —Confiscation
- § 7:24 —Customs action

**IV. TRADE AND SERVICE MARKS**

- § 7:25 Nature—In general
- § 7:26 —Creation of rights
- § 7:27 —Beneficiaries of rights
- § 7:28 —Maintenance
- § 7:29 —Transfer
- § 7:30 —Cancellation
- § 7:31 —International aspects
- § 7:32 Attacks on ownership—Prior users
- § 7:33 —Public interest
- § 7:34 Infringement actions—In general
- § 7:35 —Nature of infringement
- § 7:36 —Damages
- § 7:37 —Injunctions
- § 7:38 —Confiscation
- § 7:39 —Customs action

**V. TRADE AND SERVICE NAMES**

- § 7:40 In general

**VI. AESTHETIC DESIGNS AND PATTERNS**

- § 7:41 In general

**VII. INDUSTRIAL DESIGNS AND UTILITY MODELS**

- § 7:42 Nature—Creation of rights
- § 7:43 —Beneficiaries of rights
- § 7:44 —Maintenance

- § 7:45 —Extension
- § 7:46 —Transfer
- § 7:47 —Cancellation
- § 7:48 Attacks on ownership—Prior users
- § 7:49 —Public interest
- § 7:50 Infringement actions—Nature of infringement
- § 7:51 —Action for damages
- § 7:52 —Injunctions
- § 7:53 —Confiscation

## VIII. LICENSING

- § 7:54 In general

## CHAPTER 8. PEOPLE'S REPUBLIC OF CHINA

### I. INTRODUCTION

- § 8:1 Legislation
- § 8:2 Treaties
- § 8:3 Registrations

### II. PATENTS

- § 8:4 Nature—In general
- § 8:5 —Creation of rights
- § 8:6 —Beneficiaries of rights
- § 8:7 —Maintenance
- § 8:8 —Expiration and cessation of validity
- § 8:9 —Transfer
- § 8:10 Infringement actions—Nature of infringement
- § 8:11 —Exceptions
- § 8:12 —Administrative procedure
- § 8:13 —Action for damages before the people's tribunal
- § 8:14 —Injunctions and confiscation
- § 8:15 —Customs actions

### III. COPYRIGHT

- § 8:16 Nature—In general
- § 8:17 Creation of rights
- § 8:18 Attacks on ownership
- § 8:19 Beneficiaries of rights—Authors
- § 8:20 —Adaptors, translators, annotators, and arrangers
- § 8:21 —Joint works
- § 8:22 —Compilations
- § 8:23 —Films and works made through methods similar to filming
- § 8:24 —Employees

## TABLE OF CONTENTS

- § 8:25 —Commissioned works
- § 8:26 Duration of protection
- § 8:27 Transfer of rights—In general
- § 8:28 —Licensing
- § 8:29 —Publishing contracts
- § 8:30 —Performances
- § 8:31 —Sound recordings and video recordings
- § 8:32 —Broadcasting by radio or television stations
- § 8:33 International aspects
- § 8:34 Attacks on ownership—Infringement actions
- § 8:35 —Actions for damages

## IV. COMPUTER SOFTWARE

- § 8:36 In general
- § 8:37 Scope of right
- § 8:38 Ownership—In general
- § 8:39 —Duration of software protection
- § 8:40 Transfer
- § 8:41 Infringement

## V. TRADE AND SERVICE MARKS

- § 8:42 Nature
- § 8:43 Creation of rights—Registration procedure
- § 8:44 —Well-known trade marks
- § 8:45 —Opposition procedure
- § 8:46 Beneficiaries of rights
- § 8:47 Maintenance
- § 8:48 Transfer—Assignment
- § 8:49 —License
- § 8:50 Cancellation
- § 8:51 Attacks on ownership—Infringement actions
- § 8:52 —Customs actions

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 8:53 In general

## VII. TRANSFER OF TECHNOLOGY

- § 8:54 In general
- § 8:55 Classification of technology
- § 8:56 Different systems for different technologies—Freely imported or exported technology
- § 8:57 —Restricted technologies
- § 8:58 Legal requirements and liability—In general
- § 8:59 —Penalties related to the import and export of technology
- § 8:60 —Appeal of administrative decisions

## VIII. UNFAIR COMPETITION LAW

- § 8:61 In general
- § 8:62 State monopolies and corruption
- § 8:63 False advertising
- § 8:64 Trade secrets
- § 8:65 Enforcement and jurisdiction—Investigation and enforcement
- § 8:66 —Civil liability
- § 8:67 —Trade marks
- § 8:68 —Trade secrets
- § 8:69 —Appeal

## CHAPTER 9. COLOMBIA

### I. INTRODUCTION

- § 9:1 In general
- § 9:2 Andean group
- § 9:3 International treaties

### II. PATENTS

- § 9:4 Nature—Creation of rights
- § 9:5 —Beneficiaries of rights
- § 9:6 —Maintenance
- § 9:7 —Extension
- § 9:8 —Transfer, license, and claim of ownership
- § 9:9 —Nullity
- § 9:10 —Compulsory license
- § 9:11 Attacks on ownership—Prior inventors or users
- § 9:12 —Infringement actions

### III. COPYRIGHT

- § 9:13 Nature—Creation of rights
- § 9:14 —Beneficiaries
- § 9:15 —Duration
- § 9:16 —Transfer
- § 9:17 International aspects
- § 9:18 Infringement actions—Nature of infringement
- § 9:19 —Civil and criminal actions
- § 9:20 —Injunctions

### IV. TRADE MARKS AND SERVICE MARKS

- § 9:21 Nature—Creation of rights
- § 9:22 Registration process
- § 9:23 Priority
- § 9:24 Conditions—Registrability

## TABLE OF CONTENTS

- § 9:25 —Beneficiaries of rights
- § 9:26 —Renewal and extension
- § 9:27 —Transfers
- § 9:28 —Cancellation
- § 9:29 Attacks on ownership
- § 9:30 Infringement actions—Nature of infringement
- § 9:31 —Protection of rights
- § 9:32 —Injunction
- § 9:33 —Customs
- § 9:34 Trade names

## V. UTILITY MODELS AND INDUSTRIAL DESIGNS

- § 9:35 Utility models—Nature
- § 9:36 —Registration process
- § 9:37 —Priority
- § 9:38 —Conditions
- § 9:39 —Non-registrability
- § 9:40 —Beneficiaries
- § 9:41 —Maintenance
- § 9:42 —Duration
- § 9:43 —Transfer
- § 9:44 —Nullity
- § 9:45 —Attacks on ownership
- § 9:46 —Infringement actions
- § 9:47 —Injunction
- § 9:48 Industrial designs—Nature
- § 9:49 —Priority
- § 9:50 —Conditions
- § 9:51 —Registration process
- § 9:52 —Beneficiaries
- § 9:53 —Duration
- § 9:54 —Transfer
- § 9:55 —Nullity
- § 9:56 —Attacks on ownership

## VI. AESTHETIC DESIGNS AND PATTERNS

- § 9:57 In general

## VII. LICENSES

- § 9:58 In general

## VIII. DOMAIN NAMES

- § 9:59 In general

## IX. LAYOUT DESIGN OF INTEGRATED CIRCUITS

- § 9:60 In general

## CHAPTER 10. COSTA RICA

### I. INTRODUCTION

§ 10:1 In general

### II. PATENTS

§ 10:2 Nature—Creation of rights

§ 10:3 —Registration process

§ 10:4 —Priority

§ 10:5 —Beneficiaries of rights

§ 10:6 —Maintenance

§ 10:7 —Extension

§ 10:8 —Transfer

§ 10:9 —Cancellation

§ 10:10 Attacks on ownership—Prior inventors or users

§ 10:11 —Public interest

§ 10:12 Infringement actions—Nature of infringement

§ 10:13 —Action for damages

§ 10:14 —Injunctions

§ 10:15 —Confiscation

§ 10:16 —Customs actions

### III. COPYRIGHT

§ 10:17 Nature—Creation of rights

§ 10:18 —Beneficiaries of rights

§ 10:19 —Duration

§ 10:20 —Transfer

§ 10:21 —International aspects

§ 10:22 Attacks on ownership

§ 10:23 Infringement actions—Nature of infringement

§ 10:24 —Action for damages

§ 10:25 —Injunctions

§ 10:26 —Confiscation

§ 10:27 —Customs actions

### IV. TRADE MARKS

§ 10:28 Nature—Creation of rights

§ 10:29 —Registration process

§ 10:30 —Priority

§ 10:31 —Beneficiaries of rights

§ 10:32 —Maintenance

§ 10:33 —Transfer

§ 10:34 —Cancellation

§ 10:35 —International aspects

## TABLE OF CONTENTS

- § 10:36 Attacks on ownership—Prior users
- § 10:37 —Public interest
- § 10:38 Infringement actions—Nature of infringement
- § 10:39 —Action for damages
- § 10:40 —Injunctions
- § 10:41 —Confiscation
- § 10:42 —Customs actions

## V. TRADE AND SERVICE NAMES

- § 10:43 In general

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 10:44 In general

## VII. LICENSING

- § 10:45 In general

## CHAPTER 11. CYPRUS

### I. INTRODUCTION

- § 11:1 In general

### II. PATENTS

- § 11:2 Nature
- § 11:3 Creation of rights
- § 11:4 Beneficiaries of rights
- § 11:5 Maintenance
- § 11:6 Extension
- § 11:7 Transfer
- § 11:8 Cancellation
- § 11:9 Prior inventors or users
- § 11:10 Public interest
- § 11:11 Infringement actions—Nature of infringement
- § 11:12 —Action for damages
- § 11:13 —Injunctions

### III. COPYRIGHT

- § 11:14 Nature
- § 11:15 Creation of rights
- § 11:16 Beneficiaries of rights
- § 11:17 Duration
- § 11:18 Transfer
- § 11:19 International aspects

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 11:20 Infringement actions—Nature of infringement
- § 11:21 —Actions for damages
- § 11:22 Injunctions
- § 11:23 —Confiscation
- § 11:24 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 11:25 Nature
- § 11:26 Creation of rights
- § 11:27 Beneficiaries of rights
- § 11:28 Maintenance—In general
- § 11:29 —Use and non-use
- § 11:30 Transfer
- § 11:31 Cancellation
- § 11:32 International aspects
- § 11:33 Infringement actions—Nature of infringement
- § 11:34 —Actions for damages and injunctions
- § 11:35 —Customs action
- § 11:36 Trade names

### V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 11:37 Nature
- § 11:38 Creation of rights
- § 11:39 —Beneficiaries of rights
- § 11:40 Maintenance
- § 11:41 Extension
- § 11:42 Transfer
- § 11:43 International aspects
- § 11:44 Prior users
- § 11:45 Infringement actions

### VI. AESTHETIC DESIGNS AND PATTERNS

- § 11:46 In general

## CHAPTER 12. CZECH REPUBLIC

### I. INTRODUCTION

- § 12:1 In general

### II. PATENTS

- § 12:2 Nature—Creation of rights
- § 12:3 —Beneficiaries of rights
- § 12:4 —Maintenance
- § 12:5 —Extension

## TABLE OF CONTENTS

- § 12:6 —Transfer
- § 12:7 —Cancellation
- § 12:8 International aspects
- § 12:9 Attacks on ownership—Prior inventors or users
- § 12:10 —Public interest
- § 12:11 Infringement actions—Nature of infringement
- § 12:12 —Action for damages
- § 12:13 —Injunction
- § 12:14 —Confiscation
- § 12:15 —Custom actions

### III. COPYRIGHT

- § 12:16 Nature—Creation of rights
- § 12:17 —Beneficiaries of rights
- § 12:18 —Duration
- § 12:19 —Transfer
- § 12:20 International aspects
- § 12:21 Attacks on ownership—Prior authors
- § 12:22 —Public interest
- § 12:23 Infringement actions—Nature of infringement
- § 12:24 —Action for damages
- § 12:25 —Injunction
- § 12:26 —Confiscation
- § 12:27 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 12:28 Nature—Creation of rights
- § 12:29 —Beneficiaries of rights
- § 12:30 —Maintenance
- § 12:31 —Transfer
- § 12:32 —Cancellation
- § 12:33 International aspects
- § 12:34 Attacks on ownership—Prior users
- § 12:35 —Public interest
- § 12:36 Infringement actions—Nature of infringement
- § 12:37 —Action for damages
- § 12:38 —Injunction
- § 12:39 —Confiscation
- § 12:40 —Customs action

### V. TRADE AND SERVICE NAMES

- § 12:41 In general

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 12:42 Nature—Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 12:43 —Beneficiaries of rights
- § 12:44 —Maintenance
- § 12:45 —Extension
- § 12:46 —Transfer
- § 12:47 —Cancellation
- § 12:48 —International aspects
- § 12:49 Attacks on ownership—Prior users
- § 12:50 —Public interest
- § 12:51 Infringement actions—Nature of infringement
- § 12:52 —Action for damages
- § 12:53 —Injunction
- § 12:54 —Confiscation
- § 12:55 —Customs action

### **VII. OTHER INTELLECTUAL PROPERTY PROTECTED BY NATIONAL LEGISLATION**

- § 12:56 Other Intangibles Governed by the Patent Act—Supplementary protection certificates for pharmaceuticals and plant-protection devices
- § 12:57 —Rationalization proposals
- § 12:58 Biotechnological inventions
- § 12:59 Other Intangibles Governed by the Copyright Act—*Sui generis* protection of databases
- § 12:60 —Related rights
- § 12:61 Appellation of origin and geographical appellations
- § 12:62 Protection of plant varieties
- § 12:63 Topographies of semiconductor products
- § 12:64 Trade secrets

### **VIII. LICENSING**

- § 12:65 In general
- § 12:66 Copyright licenses
- § 12:67 Industrial property licenses

## **CHAPTER 13. DENMARK**

### **I. INTRODUCTION**

- § 13:1 In general
- § 13:2 Patent office
- § 13:3 Courts

### **II. PATENTS**

- § 13:4 In general
- § 13:5 Nature

## TABLE OF CONTENTS

- § 13:6 —Creation of rights
- § 13:7 —Beneficiaries of rights
- § 13:8 —Maintenance
- § 13:9 —Extension
- § 13:10 —Transfer
- § 13:11 —Cancellation
- § 13:12 —International aspects
- § 13:13 Attacks on ownership
- § 13:14 —Prior inventors or users
- § 13:15 —Public interest intervention
- § 13:16 Infringement actions—In general
- § 13:17 —Nature of infringement
- § 13:18 —Action for damages
- § 13:19 —Injunction
- § 13:20 —Confiscation

## III. COPYRIGHT

- § 13:21 Copyright Act
- § 13:22 Nature
- § 13:23 —Creation of rights
- § 13:24 —Beneficiaries of rights
- § 13:25 —Duration
- § 13:26 —Transfer
- § 13:27 —Compulsory licenses
- § 13:28 —International aspects
- § 13:29 Attacks on ownership
- § 13:30 —Prior authors
- § 13:31 Infringement actions
- § 13:32 —Nature of infringement
- § 13:33 —Actions for damages
- § 13:34 —Injunctions
- § 13:35 —Confiscation
- § 13:36 —Customs action

## IV. TRADE AND SERVICE MARKS

- § 13:37 In general
- § 13:38 Nature
- § 13:39 —Creation of rights
- § 13:40 —Beneficiaries of rights
- § 13:41 —Maintenance
- § 13:42 —Transfer
- § 13:43 —Cancellation
- § 13:44 —International aspects
- § 13:45 Attacks on ownership
- § 13:46 —Prior users

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 13:47 Infringement actions
- § 13:48 —Nature of infringement
- § 13:49 —Actions for damages
- § 13:50 —Injunctions
- § 13:51 —Confiscation
- § 13:52 —Customs action

### V. TRADE AND SERVICE NAMES

- § 13:53 In general

### VI. UTILITY MODELS

- § 13:54 In general
- § 13:55 Nature—Scope of application
- § 13:56 —Creation of rights
- § 13:57 —Beneficiaries of rights
- § 13:58 —Maintenance
- § 13:59 —Extension
- § 13:60 —Transfer
- § 13:61 —Cancellation
- § 13:62 —International aspects
- § 13:63 Attacks on ownership—Applicable provisions
- § 13:64 —Prior users
- § 13:65 Infringement actions
- § 13:66 —Nature of infringement
- § 13:67 —Actions for damages
- § 13:68 —Injunctions
- § 13:69 —Confiscation

### VII. DESIGNS

- § 13:70 In general
- § 13:71 Nature
- § 13:72 —Creation of rights
- § 13:73 —Beneficiaries of rights
- § 13:74 —Maintenance
- § 13:75 —Extension
- § 13:76 —Transfer
- § 13:77 —Cancellation
- § 13:78 —International aspects
- § 13:79 Attacks on ownership
- § 13:80 Infringement actions
- § 13:81 —Nature of infringement
- § 13:82 —Action for damages
- § 13:83 —Injunctions
- § 13:84 —Confiscation
- § 13:85 —Customs action

## TABLE OF CONTENTS

### VIII. LICENSING

- § 13:86 In general
- § 13:87 Competition law
- § 13:88 Obligations of licensor
- § 13:89 Obligations of licensee
- § 13:90 Term of validity
- § 13:91 Licensing other forms of intellectual property
- § 13:92 In summary

## CHAPTER 14. EGYPT

### I. INTRODUCTION

- § 14:1 Classes of intellectual property
- § 14:2 International conventions
- § 14:3 Intellectual property and the legal system
- § 14:4 Regulatory bodies

### II. PATENTS

- § 14:5 Nature
- § 14:6 Creation of rights
- § 14:7 Registration—The register
- § 14:8 —Process
- § 14:9 —Priority
- § 14:10 —Constitutive or declarative
- § 14:11 Conditions
- § 14:12 Beneficiaries of rights
- § 14:13 —Workers and employees
- § 14:14 —Co-research
- § 14:15 —Maintenance
- § 14:16 —Duration
- § 14:17 —Transfer
- § 14:18 Cancellation
- § 14:19 International applications
- § 14:20 Attacks on ownership—In general
- § 14:21 —Public interest
- § 14:22 —Compulsory licensing
- § 14:23 —Expropriation
- § 14:24 Utility model patents
- § 14:25 Infringement actions—Infringements
- § 14:26 —Provisional measures
- § 14:27 —Civil proceedings
- § 14:28 Dispute settlement
- § 14:29 Transitional arrangements

### III. LAYOUT DESIGNS OF INTEGRATED CIRCUITS

- § 14:30 Nature

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 14:31 Conditions
- § 14:32 Term of protection
- § 14:33 Registration
- § 14:34 Scope of protection
- § 14:35 Compulsory licensing

### IV. UNDISCLOSED INFORMATION

- § 14:36 In general
- § 14:37 Right conferred
- § 14:38 Beneficiaries of rights
- § 14:39 Transfer
- § 14:40 Infringement actions—Nature of infringement
- § 14:41 —Acts not contrary to honest practices
- § 14:42 —Criminal proceeding
- § 14:43 Civil proceedings
- § 14:44 Unfair competition

### V. TRADE MARKS

- § 14:45 Trade marks
- § 14:46 Creation of rights
- § 14:47 —Registration
- § 14:48 —Rights conferred
- § 14:49 —Constitutive or declarative
- § 14:50 —Priority
- § 14:51 —Conditions
- § 14:52 Beneficiaries of rights
- § 14:53 Maintenance
- § 14:54 Transfer—Assignment
- § 14:55 —License
- § 14:56 Trade designations
- § 14:57 Geographical indications
- § 14:58 Cancellation
- § 14:59 International application
- § 14:60 Attacks on ownership
- § 14:61 Infringement actions
- § 14:62 —Nature of infringement
- § 14:63 —Sanctions
- § 14:64 —Conservatory measures
- § 14:65 —Confiscation and destruction

### VI. INDUSTRIAL DESIGNS AND MODELS

- § 14:66 Nature
- § 14:67 Creation of rights—Rights conferred
- § 14:68 —Registration
- § 14:69 —Protection period

## TABLE OF CONTENTS

- § 14:70 Beneficiaries of rights
- § 14:71 Transfer
- § 14:72 Cancellation
- § 14:73 Compulsory licenses
- § 14:74 Infringement actions
- § 14:75 —Nature of infringement
- § 14:76 —Sanctions
- § 14:77 —Conservatory measures

## VII. COPYRIGHT AND RELATED RIGHTS

- § 14:78 Nature
- § 14:79 Creation of rights
- § 14:80 Protected rights
- § 14:81 Conditions
- § 14:82 Rights conferred—Moral rights
- § 14:83 —Economic rights
- § 14:84 Beneficiaries of rights—Authors
- § 14:85 —Collective works
- § 14:86 —Joint works
- § 14:87 —Contributors to audio-visual works
- § 14:88 Duration
- § 14:89 Transfer
- § 14:90 International aspects
- § 14:91 Infringement actions
- § 14:92 —Nature of infringement
- § 14:93 —Conservatory measures

## VIII. PLANT VARIETIES

- § 14:94 Nature
- § 14:95 Creation of rights—Rights conferred
- § 14:96 —Certification
- § 14:97 Conditions
- § 14:98 —Novelty
- § 14:99 —Distinctness
- § 14:100 Beneficiaries
- § 14:101 Period of protection
- § 14:102 Cancellation
- § 14:103 Compulsory licenses
- § 14:104 Infringement actions

## IX. LICENSING

- § 14:105 In general
- § 14:106 Nature
- § 14:107 Structuring
- § 14:108 Protection of interest

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 14:109 Technology transfer—Legislation
- § 14:110 —Scope of application
- § 14:111 —Definition
- § 14:112 —Form and content
- § 14:113 —Restrictive practices
- § 14:114 —Parties—Obligations
- § 14:115 —Liability
- § 14:116 —Termination or modification
- § 14:117 —Law and jurisdiction

## CHAPTER 15. ESTONIA

### I. INTRODUCTION

- § 15:1 In general

### II. PATENTS

- § 15:2 Nature
- § 15:3 —Creation of rights
- § 15:4 —Beneficiaries of rights
- § 15:5 —Maintenance
- § 15:6 —Extension
- § 15:7 —Transfer
- § 15:8 —International aspects
- § 15:9 Attacks on ownership—Right of prior use
- § 15:10 —Exhaustion of rights
- § 15:11 —Public interest
- § 15:12 Infringement actions—Nature of infringement
- § 15:13 —Actions for damages
- § 15:14 —Confiscation
- § 15:15 —Customs actions

### III. COPYRIGHT

- § 15:16 Nature
- § 15:17 —Creation of rights
- § 15:18 —Beneficiaries of rights
- § 15:19 —Duration
- § 15:20 —Transfer
- § 15:21 —International aspects
- § 15:22 Attacks on ownership—Presumption of authorship
- § 15:23 —Joint authorship and co-authorship
- § 15:24 —Public interest
- § 15:25 Infringement actions—Nature of infringement
- § 15:26 —Action for damages
- § 15:27 —Injunctions
- § 15:28 —Confiscation

## TABLE OF CONTENTS

§ 15:29 —Customs action

### **IV. TRADE AND SERVICE MARKS**

- § 15:30 Nature
- § 15:31 —Creation of rights
- § 15:32 —Beneficiaries of rights
- § 15:33 —Maintenance
- § 15:34 —Transfer
- § 15:35 —Cancellation
- § 15:36 —International aspects
- § 15:37 Attacks on ownership—Legislation of exclusive rights
- § 15:38 —Public interest
- § 15:39 Infringement actions—Nature of infringement
- § 15:40 —Action for damages
- § 15:41 —Injunctions
- § 15:42 —Confiscation
- § 15:43 —Customs actions

### **V. TRADE AND SERVICE NAMES**

§ 15:44 In general

### **VI. INDUSTRIAL DESIGNS AND UTILITY MODELS**

- § 15:45 Nature
- § 15:46 —Creation of rights
- § 15:47 —Beneficiaries of rights
- § 15:48 —Maintenance
- § 15:49 —Extension and amendment
- § 15:50 —Transfer
- § 15:51 —Cancellation
- § 15:52 —International aspects
- § 15:53 Attacks on ownership—Prior uses
- § 15:54 —Public interest
- § 15:55 Infringement actions—Nature of infringement
- § 15:56 —Action for damages
- § 15:57 —Injunctions
- § 15:58 —Confiscation
- § 15:59 —Customs action

### **VII. AESTHETIC DESIGNS AND PATTERNS**

§ 15:60 In general

### **VIII. LICENSING**

- § 15:61 In general
- § 15:62 Protection of rights and interests

## CHAPTER 16. FINLAND

### I. INTRODUCTION

§ 16:1 In general

### II. PATENTS

§ 16:2 Nature—Creation of rights

§ 16:3 —Beneficiaries of rights

§ 16:4 —Duration of protection and maintenance

§ 16:5 —Extensions

§ 16:6 —Transferability

§ 16:7 —International aspects

§ 16:8 Attacks on ownership—Prior inventors or users

§ 16:9 —Public interest

§ 16:10 Infringement actions—Nature of infringement

§ 16:11 —Action for damages

§ 16:12 —Injunctions

§ 16:13 —Confiscation

§ 16:14 —Customs action

§ 16:15 Provisional measures to preserve evidence in civil cases

### III. COPYRIGHT

§ 16:16 Current issues

§ 16:17 Nature—Creation of rights

§ 16:18 —Beneficiaries of rights

§ 16:19 —Duration

§ 16:20 —Transfer

§ 16:21 —International aspects

§ 16:22 Attacks on ownership—Prior authors

§ 16:23 —Extended collective licensing

§ 16:24 —Compulsory licensing schemes

§ 16:25 —Private copying levies

§ 16:26 Infringement actions—Nature of infringement

§ 16:27 —Actions for damages

§ 16:28 —Injunctions

§ 16:29 —Confiscation

§ 16:30 —Customs actions

### IV. TRADE MARKS

§ 16:31 Nature—Creation of rights

§ 16:32 —Beneficiaries of rights

§ 16:33 —Maintenance

§ 16:34 —Transfer

§ 16:35 —Cancellation

## TABLE OF CONTENTS

- § 16:36 —International aspects
- § 16:37 Attacks on ownership—Prior users
- § 16:38 —Public interest
- § 16:39 Infringement actions—Nature of infringement
- § 16:40 —Actions for damages
- § 16:41 —Injunctions
- § 16:42 —Seizure
- § 16:43 —Customs action

## V. DESIGNS

- § 16:44 In general
- § 16:45 Nature of design right
- § 16:46 —Creation of rights
- § 16:47 —Beneficiaries of rights
- § 16:48 —Maintenance and extension
- § 16:49 —Transfer
- § 16:50 —Cancellation
- § 16:51 —International aspects
- § 16:52 Attacks on ownership—Prior users
- § 16:53 —Rightful owners
- § 16:54 —Public interest
- § 16:55 Infringement actions
- § 16:56 —Nature of infringement
- § 16:57 —Actions for damages
- § 16:58 —Injunctions
- § 16:59 —Confiscation
- § 16:60 —Customs action

## VI. UTILITY MODELS

- § 16:61 In general
- § 16:62 Nature of utility model right
- § 16:63 —Creation of rights
- § 16:64 —Maintenance and extension
- § 16:65 —International aspects
- § 16:66 Content of right
- § 16:67 Protection in practice

## CHAPTER 17. FRANCE

### I. INTRODUCTION

- § 17:1 Codification of intellectual and industrial property law
- § 17:2 International agreements
- § 17:3 Extension of protection

### II. PATENTS

- § 17:4 Nature

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 17:5 —Creation of rights
- § 17:6 —Beneficiaries of rights
- § 17:7 —Maintenance
- § 17:8 —Extension
- § 17:9 —Transfer of patent rights
- § 17:10 —Cancellation
- § 17:11 Attacks on ownership—Fraudulent acquisition of a patent
- § 17:12 —Prevention of disputes
- § 17:13 —Public interest intervention
- § 17:14 Infringement actions—Nature of infringement
- § 17:15 —Civil action for patent infringement
- § 17:16 —Criminal sanctions
- § 17:17 —Injunctions and attachments
- § 17:18 —Seizure
- § 17:19 —Customs action
- § 17:20 Protection of biotechnological inventions

### III. TECHNOLOGICAL INFORMATION AND KNOW-HOW

- § 17:21 In general
- § 17:22 Trade secrets
- § 17:23 Semiconductors
- § 17:24 Vegetal inventions

### IV. AUTHORS' RIGHTS

- § 17:25 Nature
- § 17:26 —Creation of rights
- § 17:27 —Protection of databases
- § 17:28 —Satellite and cable broadcasting
- § 17:29 —Beneficiaries of rights
- § 17:30 —Duration
- § 17:31 —Transfer
- § 17:32 —International aspects
- § 17:33 Attacks on ownership—Prior authors
- § 17:34 —Public interest
- § 17:35 Infringement actions—Nature of infringement
- § 17:36 —Action for damages
- § 17:37 —Injunctions
- § 17:38 —Confiscation
- § 17:39 —Customs action

### V. PROTECTION OF TRADE AND SERVICE MARKS

- § 17:40 Nature—Definition
- § 17:41 —Creation of rights
- § 17:42 —Beneficiaries of rights

## TABLE OF CONTENTS

- § 17:43 —Maintenance
- § 17:44 —Transfer
- § 17:45 —International aspects
- § 17:46 Attacks on ownership—action by prior user to invalidate subsequently registered mark
- § 17:47 —Action to claim title to mark
- § 17:48 —Public interest intervention
- § 17:49 Infringement actions—Nature of infringement
- § 17:50 Exhaustion of rights
- § 17:51 —Action for damages
- § 17:52 —Provisional remedies and injunctions
- § 17:53 —Confiscation
- § 17:54 —Customs action

## VI. TRADE AND SERVICE NAMES AND SIGNS

- § 17:55 In general

## VII. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 17:56 Nature—Scope of protection
- § 17:57 —Creation of rights
- § 17:58 —Procedure
- § 17:59 —Beneficiaries of rights
- § 17:60 —Maintenance
- § 17:61 —Extension
- § 17:62 —Transfer
- § 17:63 —International aspects
- § 17:64 Attacks on ownership
- § 17:65 Infringement actions—Nature of infringement
- § 17:66 —Action for damages
- § 17:67 —Provisional remedies and injunctions
- § 17:68 —Confiscation
- § 17:69 —Final measures of relief
- § 17:70 —Customs action

## VIII. LICENSING

- § 17:71 In general
- § 17:72 Patents—Object
- § 17:73 —Compensation
- § 17:74 —Improvements
- § 17:75 —Licensor's warranties
- § 17:76 —Licensee's duties
- § 17:77 —Duration and termination
- § 17:78 —Know-how
- § 17:79 Registered trade marks—Object
- § 17:80 —Warranties

- § 17:81 —Duration and termination
- § 17:82 General aspects—Contractual disputes
- § 17:83 —Bankruptcy

## CHAPTER 18. GERMANY

### I. INTRODUCTION

- § 18:1 Sources of law
- § 18:2 International agreements
- § 18:3 Impact of German unification
- § 18:4 Legal practice

### II. PATENTS

- § 18:5 In general
- § 18:6 Nature—Creation of rights
- § 18:7 —Beneficiaries of rights
- § 18:8 —Maintenance
- § 18:9 —Term
- § 18:10 —Transfer and license
- § 18:11 —Cancellation
- § 18:12 Attacks on ownership—Prior inventors or users
- § 18:13 —Public interest intervention
- § 18:14 —Extension
- § 18:15 Infringement actions
- § 18:16 —Nature of infringement
- § 18:17 —Action for damages
- § 18:18 —Injunctions
- § 18:19 —Seizure
- § 18:20 —Customs action

### III. COPYRIGHT

- § 18:21 In general
- § 18:22 Nature
- § 18:23 —Creation of rights
- § 18:24 —Beneficiaries of rights
- § 18:25 —Duration
- § 18:26 —Transfer
- § 18:27 —International aspects
- § 18:28 Attacks on ownership
- § 18:29 —Prior authors
- § 18:30 —Public interest intervention
- § 18:31 —Extension
- § 18:32 —Infringement actions
- § 18:33 —Nature of infringement
- § 18:34 —Action for damages

## TABLE OF CONTENTS

- § 18:35 —Injunctions
- § 18:36 —Seizure
- § 18:37 —Customs action

## IV. TRADE AND SERVICE MARKS

- § 18:38 In general
- § 18:39 Nature—Definition and scope
- § 18:40 —Creation of rights
- § 18:41 —Beneficiaries of rights
- § 18:42 —Maintenance
- § 18:43 —Transfer
- § 18:44 —Cancellation
- § 18:45 —International aspects
- § 18:46 Attacks on ownership
- § 18:47 —Prior users
- § 18:48 —Public interest intervention
- § 18:49 —Extension
- § 18:50 Infringement actions
- § 18:51 —Nature of infringement
- § 18:52 —Action for damages
- § 18:53 —Injunctions
- § 18:54 —Seizure
- § 18:55 —Customs action

## V. TRADE AND SERVICE NAMES

- § 18:56 In general
- § 18:57 Creation of rights
- § 18:58 Attacks on ownership and infringement actions
- § 18:59 Extension

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 18:60 In general
- § 18:61 Nature
- § 18:62 —Creation of rights
- § 18:63 —Beneficiaries of rights
- § 18:64 —Maintenance
- § 18:65 —Duration
- § 18:66 —Transfer
- § 18:67 —Cancellation
- § 18:68 —International aspects
- § 18:69 Attacks on ownership
- § 18:70 —Prior users
- § 18:71 —Public intervention
- § 18:72 —Extension
- § 18:73 Infringement actions

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 18:74 —Nature of infringement
- § 18:75 —action for damages, information, destruction, and seizure
- § 18:76 —Injunctions
- § 18:77 —Customs action

### VII. AESTHETIC DESIGNS AND PATTERNS

- § 18:78 Nature
- § 18:79 —Creation of rights
- § 18:80 —Beneficiaries of rights
- § 18:81 —Maintenance
- § 18:82 —Duration
- § 18:83 —Transfer and licenses
- § 18:84 —Cancellation
- § 18:85 —International aspects
- § 18:86 Attacks on ownership
- § 18:87 —Prior users
- § 18:88 —Public interest intervention
- § 18:89 Infringement actions
- § 18:90 —Nature of infringement
- § 18:91 —action for damages
- § 18:92 —Injunctions
- § 18:93 —Seizure
- § 18:94 —Customs action

### VIII. LICENSING

- § 18:95 In general

### IX. UNFAIR COMPETITION

- § 18:96 In general

## Volume 2

### CHAPTER 19. GREECE

#### I. INTRODUCTION

- § 19:1 In general

#### II. PATENTS

- § 19:2 In general
- § 19:3 Nature
- § 19:4 —Creation of rights
- § 19:5 —Beneficiaries of rights
- § 19:6 —Maintenance

## TABLE OF CONTENTS

- § 19:7 —Extension
- § 19:8 —Transfer
- § 19:9 —Cancellation
- § 19:10 Attacks on ownership
- § 19:11 Infringement actions
- § 19:12 —Action for damages
- § 19:13 —Injunctions
- § 19:14 —Confiscation
- § 19:15 —Other means of protection
- § 19:16 —Customs action

## III. COPYRIGHT

- § 19:17 In general
- § 19:18 Elements of work
- § 19:19 —Databases
- § 19:20 —Computer programs
- § 19:21 —Collective works
- § 19:22 —Employee works
- § 19:23 —Anonymous or pseudonymous works
- § 19:24 Related rights
- § 19:25 —Performers
- § 19:26 —Phonogram producers
- § 19:27 —Radio and television organizations
- § 19:28 —Publishers
- § 19:29 Duration—Authors
- § 19:30 —Joint authorship
- § 19:31 —Anonymous or pseudonymous works
- § 19:32 —Audiovisual works
- § 19:33 —Databases
- § 19:34 —Performers
- § 19:35 —Phonogram producers
- § 19:36 —Producers of sound and visual recordings
- § 19:37 —Broadcasting organizations
- § 19:38 —Unpublished works
- § 19:39 Transfer of rights
- § 19:40 —Contracts of transfer
- § 19:41 —Fees
- § 19:42 —Collecting societies
- § 19:43 International aspects
- § 19:44 Infringement
- § 19:45 —Remedies
- § 19:46 —Injunctions

## IV. TRADE AND SERVICE MARKS

- § 19:47 Nature

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 19:48 —Creation of rights
- § 19:49 —Beneficiaries of rights
- § 19:50 —Maintenance
- § 19:51 —Transfer
- § 19:52 —Cancellation
- § 19:53 —International aspects
- § 19:54 Attacks on ownership
- § 19:55 Infringement actions
- § 19:56 —Petition for de-registration
- § 19:57 —Actions before civil courts
- § 19:58 —Injunctions
- § 19:59 —Confiscation
- § 19:60 —Customs action

### V. TRADE AND SERVICE NAMES

- § 19:61 In general

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 19:62 Nature
- § 19:63 —Creation of rights
- § 19:64 —Beneficiaries of rights
- § 19:65 —Maintenance
- § 19:66 —Extension
- § 19:67 —Transfer
- § 19:68 —Cancellation
- § 19:69 —International aspects
- § 19:70 Attacks on ownership
- § 19:71 Infringement actions
- § 19:72 Import restrictions

### VII. AESTHETIC DESIGNS AND PATTERNS

- § 19:73 In general

### VIII. LICENSING

- § 19:74 In general

## CHAPTER 20. HONG KONG

### I. INTRODUCTION

- § 20:1 In general

### II. PATENTS

- § 20:2 In general

## TABLE OF CONTENTS

- § 20:3 Nature—Standard patent
- § 20:4 —Short-term patent
- § 20:5 —Duration
- § 20:6 —Renewal
- § 20:7 —Transfer
- § 20:8 Attacks on ownership—Validity and revocation
- § 20:9 —Defenses
- § 20:10 Infringement actions—Infringing acts
- § 20:11 —High Court infringement actions
- § 20:12 —Injunctions
- § 20:13 —Order for delivery up or destruction
- § 20:14 —Costs

## III. COPYRIGHT

- § 20:15 In general
- § 20:16 Copyright (amendment) ordinance 2004
- § 20:17 Copyright (amendment) ordinance 2007 and copyright (amendment) ordinance 2009
- § 20:18 Parallel imports
- § 20:19 Nature—Subsistence of copyright
- § 20:20 —Types of work protected
- § 20:21 —Authorship
- § 20:22 —Duration
- § 20:23 Moral rights—Ordinance
- § 20:24 —Paternity right
- § 20:25 —Integrity right
- § 20:26 —False attribution of work
- § 20:27 Infringement actions—Types of infringement
- § 20:28 —Civil and criminal proceedings
- § 20:29 —Border control

## IV. TRADE MARKS

- § 20:30 In general
- § 20:31 Nature—Registrability and application
- § 20:32 —Procedure for application
- § 20:33 —Opposition
- § 20:34 —Beneficiaries of rights
- § 20:35 —Terms and maintenance
- § 20:36 —Transfer
- § 20:37 —Registrable transactions
- § 20:38 —Cancellation
- § 20:39 —Declaration of invalidity of registration of trade mark
- § 20:40 —Transitional arrangements
- § 20:41 Prior rights
- § 20:42 Infringement actions
- § 20:43 —Penalties for infringement

§ 20:44 —Border control

## V. DESIGNS

- § 20:45 In general
- § 20:46 Nature—Definition and registrability
- § 20:47 —Applications and documents
- § 20:48 —Term
- § 20:49 Attacks on ownership
- § 20:50 Infringement actions

## VI. LICENSING

- § 20:51 In general
- § 20:52 Compulsory licensing

## VII. OTHER FORMS OF PROTECTION

- § 20:53 Passing-off
- § 20:54 False or misleading representation as to seller's connection with another person
- § 20:55 Confidential information
- § 20:56 Integrated circuits
- § 20:57 Plant variety
- § 20:58 Prevention of copyright piracy

## CHAPTER 21. HUNGARY

### I. INTRODUCTION

- § 21:1 In general
- § 21:2 Source and scope of protection
- § 21:3 Institutions

### II. COPYRIGHT AND RELATED RIGHTS

- § 21:4 Copyright—Nature
- § 21:5 —Subsidiary rights and copyright
- § 21:6 —Works excluded from copyright
- § 21:7 Creation of rights
- § 21:8 —Beneficiaries of rights
- § 21:9 —Term of protection
- § 21:10 —Assignment
- § 21:11 —International aspects
- § 21:12 —Limitations to copyright
- § 21:13 Infringement actions
- § 21:14 —Nature of infringement
- § 21:15 —Actions for damages
- § 21:16 —Injunctions

## TABLE OF CONTENTS

- § 21:17 —Confiscation
- § 21:18 —Customs action
- § 21:19 Rights adjoined to copyright (Related rights)
- § 21:20 —Performers
- § 21:21 —Producers of films and sound recordings
- § 21:22 —Radio and television organizations

### III. LICENSING

- § 21:23 Copyright—Nature of licensing
- § 21:24 —Common rules
- § 21:25 —Contracts
- § 21:26 —Broadcasting
- § 21:27 —Producers of motion picture works
- § 21:28 —Protection of authors of databases
- § 21:29 —Software program protection
- § 21:30 —Works ordered for advertising
- § 21:31 —Designs
- § 21:32 Industrial property rights

### IV. PATENTS

- § 21:33 In general
- § 21:34 Creation of rights
- § 21:35 Beneficiaries of rights
- § 21:36 —Inventors
- § 21:37 —Employees
- § 21:38 —Partners
- § 21:39 Maintenance
- § 21:40 Extension
- § 21:41 Transfer
- § 21:42 Exhaustion of patent protection
- § 21:43 Cancellation
- § 21:44 International aspects
- § 21:45 Prior users
- § 21:46 Public intervention
- § 21:47 —Compulsory license due to failure to utilize invention
- § 21:48 —Compulsory license due to pending patents
- § 21:49 —Common provisions
- § 21:50 Infringement actions—Nature of infringement
- § 21:51 —action for damages
- § 21:52 —Injunction
- § 21:53 —Confiscation
- § 21:54 —Customs action
- § 21:55 —Alteration of decisions of hungarian patent office by court

### V. TRADE MARKS

- § 21:56 Nature

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 21:57 —International trade marks
- § 21:58 —Community trade marks
- § 21:59 Creation of rights—Registration criteria
- § 21:60 Maintenance
- § 21:61 —Multiple beneficiaries
- § 21:62 —Collective marks
- § 21:63 —Certifying marks
- § 21:64 Licensing agreements
- § 21:65 Cancellation
- § 21:66 International aspects
- § 21:67 Infringement actions—Nature of infringement
- § 21:68 —Action for damages
- § 21:69 —Injunction
- § 21:70 —Confiscation
- § 21:71 Protection of geographical marks of goods
- § 21:72 Community and international protection
- § 21:73 —International registration of designations of origin

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 21:74 Nature
- § 21:75 Creation of rights—Utility models
- § 21:76 —Industrial designs
- § 21:77 Beneficiaries of rights—Utility models
- § 21:78 —Industrial designs
- § 21:79 Maintenance—Utility models
- § 21:80 —Industrial designs
- § 21:81 Extension—Utility models
- § 21:82 —Industrial designs
- § 21:83 Assignment—Utility models
- § 21:84 —Industrial designs
- § 21:85 Cancellation—Utility models
- § 21:86 —Industrial designs
- § 21:87 Amendment and division
- § 21:88 Limitations on ownership—Prior users
- § 21:89 —Public interest intervention
- § 21:90 —Infringement actions
- § 21:91 —Action for damages
- § 21:92 —Procedural rules

## CHAPTER 22. INDIA

### I. INTRODUCTION

- § 22:1 In general

### II. PATENTS

- § 22:2 Nature

## TABLE OF CONTENTS

- § 22:3 —Not “inventions”
- § 22:4 Creation of rights—Definition of a patent
- § 22:5 —Rights to citizens
- § 22:6 —Varieties of patents
- § 22:7 Maintenance—Eligibility
- § 22:8 —Subject matter
- § 22:9 —Duration
- § 22:10 —Procedure
- § 22:11 Attacks on ownership
- § 22:12 Infringement actions
- § 22:13 Assignment, stamp duty, and registration—Assignment
- § 22:14 —Stamp duty
- § 22:15 —Registration
- § 22:16 Developments
- § 22:17 —Patents (Amendment) Act 2002

## III. COPYRIGHT

- § 22:18 Nature
- § 22:19 Creation of rights—Categories
- § 22:20 —Term of copyright
- § 22:21 —Ownership of copyright
- § 22:22 —Registration
- § 22:23 —Rights of the author
- § 22:24 —Rights of the owner
- § 22:25 —Stamp duty
- § 22:26 —Registration
- § 22:27 Transfer—Assignment
- § 22:28 —Transmission
- § 22:29 —Relinquishment
- § 22:30 —License

## IV. TRADE MARKS

- § 22:31 Governing laws
- § 22:32 Trade mark
- § 22:33 Registration—Joint registration
- § 22:34 —Associated trade mark
- § 22:35 —Collective marks
- § 22:36 —Certification trade marks
- § 22:37 —Application for registration
- § 22:38 —What marks may be registered?
- § 22:39 —Duration
- § 22:40 —Service marks
- § 22:41 —Multiclass applications
- § 22:42 Protection of trade marks
- § 22:43 Assignment of trade marks

§ 22:44 Stamp duty and registration

## V. INDUSTRIAL DESIGNS

- § 22:45 Nature
- § 22:46 Industrial designs—Definition
- § 22:47 —Design as property
- § 22:48 —Registration of designs
- § 22:49 Procedure for registration—Application
- § 22:50 Transfer—Assignment
- § 22:51 —Stamp duty
- § 22:52 Registration

## VI. GEOGRAPHICAL INDICATIONS

- § 22:53 Nature
- § 22:54 Grant of a geographical indication registration—Application for registration
- § 22:55 —Rights conferred by registration
- § 22:56 —Maintenance
- § 22:57 —Infringement

## VII. LICENSING

- § 22:58 General
- § 22:59 Compulsory licenses
- § 22:60 Patents licensing—Nature
- § 22:61 —License agreement
- § 22:62 Trade marks licensing—Nature
- § 22:63 —Characteristics of a license
- § 22:64 —Types of trade mark licensing
- § 22:65 —Registration of a trade mark license
- § 22:66 —Application for registration of a trade mark license

## CHAPTER 23. INDONESIA

### I. INTRODUCTION

§ 23:1 In general

### II. PATENTS

- § 23:2 Nature of a patent
- § 23:3 Simple patents
- § 23:4 Unpatentable inventions
- § 23:5 Registration
- § 23:6 —Administrative stage
- § 23:7 —First publication
- § 23:8 —Substantive examination

## TABLE OF CONTENTS

- § 23:9 —Priority right
- § 23:10 —Beneficiaries of the right
- § 23:11 Maintenance of a patent—Exploitation of a granted patent
- § 23:12 —Maintenance fee
- § 23:13 —Period of a granted patent
- § 23:14 Transfer of a patent right
- § 23:15 License
- § 23:16 —Compulsory license
- § 23:17 Draft government regulation on compulsory licenses for patents
- § 23:18 Regulation number 27 of 2004 on the procedure of patent implementation by the government
- § 23:19 Cancellation of a patent right
- § 23:20 —Cancellation by a third party
- § 23:21 —Effects of cancellation of a patent right
- § 23:22 Challenge to ownership
- § 23:23 Prior inventors or users
- § 23:24 Public interest
- § 23:25 Infringement action
- § 23:26 —Civil action
- § 23:27 —Criminal action
- § 23:28 —Dispute resolution
- § 23:29 —Action for damages
- § 23:30 —Injunction
- § 23:31 —Temporary restraining order
- § 23:32 —Confiscation
- § 23:33 —Presidential regulation number 37 of 2010
- § 23:34 —Transitional conditions

## III. COPYRIGHT

- § 23:35 Nature of copyright
- § 23:36 Creation of rights
- § 23:37 Voluntary registration system
- § 23:38 Registration procedure
- § 23:39 Registration process
- § 23:40 Moral rights
- § 23:41 Priority right
- § 23:42 Beneficiaries of rights
- § 23:43 Duration
- § 23:44 Transfer of right
- § 23:45 License
- § 23:46 —Compulsory licensing
- § 23:47 Nature of protection
- § 23:48 International aspects
- § 23:49 Challenge to ownership—Prior authors
- § 23:50 —Public interest
- § 23:51 Infringement action—Nature of infringement

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 23:52 —Injunctions
- § 23:53 —Temporary restraining order
- § 23:54 —Civil action
- § 23:55 —Criminal action
- § 23:56 Government regulation

### IV. TRADE AND SERVICE MARKS

- § 23:57 Nature
- § 23:58 Creation of rights
- § 23:59 Registration procedure
- § 23:60 Registration process
- § 23:61 —Approval for registration
- § 23:62 —Disapproval for registration or rejection
- § 23:63 —Procedure at the mark appeal commission
- § 23:64 —Process for renewal
- § 23:65 Government regulation number 7 of 2005
- § 23:66 Presidential regulation number 20 of 2005
- § 23:67 Unregistrable marks
- § 23:68 Marking
- § 23:69 Priority right mark registrations
- § 23:70 Beneficiaries of rights
- § 23:71 Maintenance of the right to a mark
- § 23:72 Requirement for use of a mark
- § 23:73 Transfer of right to a mark
- § 23:74 Licensing
- § 23:75 Canceling and invalidating a mark—Cancellation
- § 23:76 —Invalidation
- § 23:77 International aspects
- § 23:78 Challenges to ownership—Prior users
- § 23:79 —Public interest intervention
- § 23:80 Infringement actions—Nature of infringement
- § 23:81 —Civil action
- § 23:82 —Criminal action
- § 23:83 —Alternative dispute resolution
- § 23:84 —Action for damages
- § 23:85 —Injunctions
- § 23:86 —Temporary court order
- § 23:87 —Confiscation
- § 23:88 Customs action

### V. COLLECTIVE MARKS

- § 23:89 In general

### VI. GEOGRAPHICAL INDICATIONS

- § 23:90 Nature

## TABLE OF CONTENTS

- § 23:91 Government regulation number 51/2007 on geographical indications
- § 23:92 —Inability to register a geographical indication
- § 23:93 —Period of validity
- § 23:94 —Requirements for and process of filing
- § 23:95 —Announcement in the geographical indication journal
- § 23:96 —Rejection and rebuttal
- § 23:97 —Use and supervision of geographical indication
- § 23:98 —Foreign geographical indications
- § 23:99 —Amendments and withdrawal of a geographical indication
- § 23:100 —Amendments in the book of specification
- § 23:101 —Geographical indication appeal
- § 23:102 —Violation and claim
- § 23:103 —Prior user

## VII. TRADE SECRETS

- § 23:104 Nature of trade secrets
- § 23:105 Creation of rights
- § 23:106 Licensing
- § 23:107 Assignment
- § 23:108 Dispute resolution
- § 23:109 Criminal action

## VIII. INDUSTRIAL DESIGNS

- § 23:110 Nature of industrial designs
- § 23:111 Creation of rights
- § 23:112 Registration
- § 23:113 Registration process
- § 23:114 Licensing
- § 23:115 Assignment
- § 23:116 Cancellation of a registered industrial design
- § 23:117 Dispute resolution
- § 23:118 Injunction
- § 23:119 Criminal action

## IX. LAYOUT OF INTEGRATED CIRCUITS

- § 23:120 Nature
- § 23:121 Creation of right
- § 23:122 Registration
- § 23:123 Licensing
- § 23:124 Assignment
- § 23:125 Cancellation of a registered layout design of an integrated circuit
- § 23:126 Dispute resolution
- § 23:127 Injunction
- § 23:128 Criminal action

## CHAPTER 24. IRELAND

### I. INTRODUCTION

- § 24:1 Types of rights
- § 24:2 The controller
- § 24:3 Volume of registrations of intellectual property rights
- § 24:4 Trade mark agents
- § 24:5 Patent agents

### II. PATENTS

- § 24:6 Nature—Applicable laws
- § 24:7 —Types of patents
- § 24:8 —Patentable rights
- § 24:9 —Term
- § 24:10 Creation of rights—Application process
- § 24:11 —Priority
- § 24:12 —Searches and search reports
- § 24:13 —Withdrawal of application
- § 24:14 —Grant of patent
- § 24:15 —Short-term patent
- § 24:16 Beneficiaries of rights—Inventors
- § 24:17 —Financiers and co-researchers
- § 24:18 Maintenance—Renewal fees
- § 24:19 —Restoration
- § 24:20 —Exploitation
- § 24:21 —Extension
- § 24:22 Transfer—Disposal of interests in patents
- § 24:23 —Licenses as of right
- § 24:24 —Compulsory licenses as of right
- § 24:25 —Competition aspects
- § 24:26 Cancellation—Voluntary cancellation
- § 24:27 —Revocation
- § 24:28 —Removal by controller
- § 24:29 Attacks on ownership—Determination of entitlement
- § 24:30 —Revocation of a patent
- § 24:31 —Short-term patents
- § 24:32 —Prior inventors or users
- § 24:33 —Public interest
- § 24:34 Infringement actions—Proceedings
- § 24:35 —Nature of infringement
- § 24:36 —Declarations
- § 24:37 —Threat of proceedings
- § 24:38 —Relief available
- § 24:39 —Action for damages
- § 24:40 —Injunctions

## TABLE OF CONTENTS

- § 24:41 —Confiscation
- § 24:42 —Customs action

### III. COPYRIGHT

- § 24:43 Nature—Governing law
- § 24:44 —What is copyright?
- § 24:45 Qualification requirements
- § 24:46 —Copyright in works
- § 24:47 —Moral rights
- § 24:48 —Computer programs
- § 24:49 —Literary works
- § 24:50 —Dramatic works
- § 24:51 —Artistic works
- § 24:52 —Musical works
- § 24:53 —Original databases
- § 24:54 —Database right
- § 24:55 —Artists—Resale rights
- § 24:56 Creation of rights
- § 24:57 —Owner of copyright
- § 24:58 —Duration
- § 24:59 —Transfer
- § 24:60 Attacks on ownership—Negative right
- § 24:61 —Acts not constituting infringement
- § 24:62 —Prior author
- § 24:63 —Public interest
- § 24:64 Infringement—Procedure
- § 24:65 —Nature of infringement
- § 24:66 —Action for damages
- § 24:67 —Injunctions
- § 24:68 —Confiscation
- § 24:69 —Customs action
- § 24:70 —Proof of copyright

### IV. TRADE MARKS

- § 24:71 Governing laws
- § 24:72 Trade mark
- § 24:73 —Defined
- § 24:74 —Registration
- § 24:75 Creation of rights—Non-registered trade marks
- § 24:76 —Registered trade marks
- § 24:77 Registration—Application
- § 24:78 —Priority
- § 24:79 —Advertisement and opposition
- § 24:80 —Completion of registration
- § 24:81 —Duration

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 24:82 —Assignment and license
- § 24:83 —Surrender, revocation, and rectification
- § 24:84 —International aspects
- § 24:85 Infringement action
- § 24:86 —Infringement of registered mark
- § 24:87 —Permissible use
- § 24:88 —Passing off
- § 24:89 —Representation that trade mark is registered
- § 24:90 —Action for damages
- § 24:91 —Injunctions
- § 24:92 —Other remedies
- § 24:93 —Customs action

### V. TRADE AND SERVICE NAMES

- § 24:94 Business names
- § 24:95 Company names
- § 24:96 Service marks

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 24:97 Nature—Applicable laws
- § 24:98 —What is a design?
- § 24:99 —Creation of right
- § 24:100 —Beneficiaries of rights
- § 24:101 —Maintenance
- § 24:102 —Extension
- § 24:103 —Transfer
- § 24:104 —Cancellation
- § 24:105 —International aspects
- § 24:106 Attacks on ownership
- § 24:107 —Prior users
- § 24:108 —Public interest
- § 24:109 Infringement actions
- § 24:110 —Nature of infringement
- § 24:111 —Action for damages
- § 24:112 —Injunctions
- § 24:113 —Confiscation
- § 24:114 —Customs action

### VII. DEVELOPMENTS

- § 24:115 In general

### VIII. AESTHETIC DESIGNS AND PATENTS

- § 24:116 In general

### IX. LICENSING

- § 24:117 In general

## TABLE OF CONTENTS

- § 24:118 Franchising
- § 24:119 —Typical provisions in franchise agreements
- § 24:120 Distribution arrangements
- § 24:121 —Typical provisions in distribution agreements
- § 24:122 Patents
- § 24:123 Parent subsidiary
- § 24:124 Formalities
- § 24:125 Patent license
- § 24:126 Competition

## CHAPTER 25. ISRAEL

### I. INTRODUCTION

- § 25:1 In general

### II. COPYRIGHT

- § 25:2 In general
- § 25:3 Nature
- § 25:4 —Ownership
- § 25:5 —Duration
- § 25:6 —Transfer
- § 25:7 —International aspects
- § 25:8 Attacks on ownership
- § 25:9 —Infringement actions
- § 25:10 —Damages
- § 25:11 —Injunction
- § 25:12 —Confiscation
- § 25:13 —Customs action

### III. PATENTS

- § 25:14 In general
- § 25:15 Nature
- § 25:16 —Ownership
- § 25:17 —Maintenance and extensions
- § 25:18 —Transfer
- § 25:19 —Cancellation
- § 25:20 —International aspects
- § 25:21 Attack on ownership
- § 25:22 —Government intervention
- § 25:23 —Patent infringement
- § 25:24 —Confiscation and destruction
- § 25:25 —Customs actions

### IV. TRADE MARKS AND SERVICE MARKS

- § 25:26 In general

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 25:27 Nature
- § 25:28 Registration procedure
- § 25:29 —Immediate examination
- § 25:30 —Publication
- § 25:31 —Opposition
- § 25:32 —Appeal
- § 25:33 —Grounds for refusal of applications
- § 25:34 —Disclaimers
- § 25:35 —Parallel applications
- § 25:36 —Priority
- § 25:37 —Beneficiaries of rights
- § 25:38 —Maintenance
- § 25:39 —Transfer
- § 25:40 —Cancellation
- § 25:41 —International aspects
- § 25:42 Attack on ownership
- § 25:43 —Public interest
- § 25:44 —Infringement actions

### V. DESIGNS AND MODELS

- § 25:45 Nature
- § 25:46 —Priority
- § 25:47 —Beneficiaries of rights
- § 25:48 —Maintenance
- § 25:49 —Transfer
- § 25:50 —Cancellation
- § 25:51 —International aspects
- § 25:52 Attacks on ownership
- § 25:53 —Public interest
- § 25:54 Infringement actions
- § 25:55 —Action for damages
- § 25:56 —Confiscation and destruction

## CHAPTER 26. ITALY

### I. INTRODUCTION

- § 26:1 Sources of law
- § 26:2 Revision of laws

### II. PATENTS

- § 26:3 Fundamental laws
- § 26:4 Nature
- § 26:5 —Creation of rights, registration, and priority
- § 26:6 —Beneficiaries of rights
- § 26:7 —Maintenance

## TABLE OF CONTENTS

- § 26:8 —Extension
- § 26:9 —Transfer
- § 26:10 —Cancellation and expiration
- § 26:11 —International aspects
- § 26:12 Attacks on ownership—Inventor's rights
- § 26:13 —Public interest intervention
- § 26:14 Infringement actions—Nature of infringement
- § 26:15 —Action for damages
- § 26:16 Injunction
- § 26:17 —Confiscation
- § 26:18 —Customs action
- § 26:19 —Criminal sanctions

### III. COPYRIGHT

- § 26:20 Sources of law
- § 26:21 Nature—Types of rights
- § 26:22 —Creation of rights
- § 26:23 —Beneficiaries of rights
- § 26:24 —Duration
- § 26:25 —Transfer
- § 26:26 —International aspects
- § 26:27 Attacks on ownership—Prior authors
- § 26:28 —Public intervention
- § 26:29 —Infringement actions

### IV. TRADE AND SERVICE MARKS

- § 26:30 Fundamental laws
- § 26:31 Nature—Definition
- § 26:32 —Scope of protection
- § 26:33 —Creation of rights
- § 26:34 —Beneficiaries of rights
- § 26:35 —Maintenance
- § 26:36 —Transfer and licenses
- § 26:37 —Cancellation
- § 26:38 —International aspects
- § 26:39 Attacks on ownership—Prior users
- § 26:40 —Public intervention
- § 26:41 Infringement actions—Nature
- § 26:42 —Action for damages
- § 26:43 —Injunction
- § 26:44 —Confiscation
- § 26:45 —Criminal and administrative sanctions

### V. TRADE AND SERVICE NAMES

- § 26:46 In general

## **VI. DESIGNS AND MODELS**

- § 26:47 International agreements and legislation
- § 26:48 Territory
- § 26:49 Registrability requirements
- § 26:50 Registrable designs and models
- § 26:51 Priority
- § 26:52 Applicant
- § 26:53 Documents with filing
- § 26:54 Professional agents
- § 26:55 Where to file
- § 26:56 Novelty and disclosure
- § 26:57 Multiple designs

## **VII. ACCESSIBILITY TO THIRD PARTIES**

- § 26:58 In general
- § 26:59 Rights conferred by application
- § 26:60 Examination
- § 26:61 Opposition and amendment
- § 26:62 Grant
- § 26:63 Duration
- § 26:64 Maintenance fees
- § 26:65 Copyright protection

## **VIII. UTILITY MODELS**

- § 26:66 In general

## **IX. LICENSING AND ASSIGNMENT**

- § 26:67 In general

## **CHAPTER 27. JAPAN**

### **I. INTRODUCTION**

- § 27:1 History
- § 27:2 Civil law system
- § 27:3 Intellectual property system
- § 27:4 Regulatory bodies
- § 27:5 International harmonization

### **II. PATENTS**

- § 27:6 Nature—Creation of rights
- § 27:7 —Beneficiaries of rights
- § 27:8 Maintenance—Term of protection and extension
- § 27:9 —Transfer

## TABLE OF CONTENTS

- § 27:10 —Cancellation
- § 27:11 —International aspects
- § 27:12 Attacks on ownership—Prior inventors or users
- § 27:13 —Public interest intervention
- § 27:14 Infringement actions—Nature of infringement
- § 27:15 —Damages
- § 27:16 —Injunctions
- § 27:17 —Confiscation, destruction, or disposition of infringing items
- § 27:18 —Customs action

### III. COPYRIGHT

- § 27:19 Nature—Creation of rights
- § 27:20 —Beneficiaries
- § 27:21 —Term of protection
- § 27:22 —Transfer
- § 27:23 —International aspects
- § 27:24 Attacks on ownership—Prior authors
- § 27:25 —Public interest
- § 27:26 Infringement actions—Nature of infringement
- § 27:27 —Damages
- § 27:28 —Injunctions
- § 27:29 —Confiscation, destruction, or disposition of infringing items
- § 27:30 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 27:31 Nature—Creation of rights
- § 27:32 —Beneficiaries of rights
- § 27:33 —Term of protection, renewal, and maintenance
- § 27:34 —Transfer
- § 27:35 —Cancellation
- § 27:36 —International aspects
- § 27:37 Attacks on ownership—Prior users
- § 27:38 —Public interest
- § 27:39 Infringement actions—Nature of infringement
- § 27:40 —Damages
- § 27:41 —Injunctions
- § 27:42 —Confiscation, destruction, or disposition of infringing items
- § 27:43 —Customs action

### V. TRADE AND SERVICE NAMES

- § 27:44 In general

### VI. UTILITY MODELS

- § 27:45 Nature

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 27:46 —Requirements
- § 27:47 —Examination procedure
- § 27:48 —Term of protection
- § 27:49 —Transformation to patent
- § 27:50 Attacks on ownership
- § 27:51 Infringement actions

### VII. AESTHETIC DESIGNS AND PATTERNS

- § 27:52 Nature—Creation of rights
- § 27:53 —Beneficiaries of rights
- § 27:54 —Term of protection and extension
- § 27:55 —Maintenance
- § 27:56 —Transfer
- § 27:57 —Transfer of design right
- § 27:58 —Cancellation
- § 27:59 —International aspects
- § 27:60 Attacks on ownership—Prior creators or users
- § 27:61 —Public interest
- § 27:62 Infringement actions—Nature of infringement
- § 27:63 —Damages
- § 27:64 —Injunctions
- § 27:65 —Confiscation, destruction, or disposition of infringing items
- § 27:66 —Customs action

### VIII. LICENSING

- § 27:67 Nature of licenses
- § 27:68 Protection of interest
- § 27:69 Practical aspects

## CHAPTER 28. LITHUANIA

### I. INTRODUCTION

- § 28:1 In general

### II. PATENTS

- § 28:2 Nature—Creation of rights
- § 28:3 —Beneficiaries of rights
- § 28:4 —Maintenance
- § 28:5 —Validity period
- § 28:6 —Transfer
- § 28:7 —Cancellation
- § 28:8 —International aspects
- § 28:9 Attacks on ownerships—Prior inventors or users
- § 28:10 —Public interest

## TABLE OF CONTENTS

- § 28:11 Infringement actions—Nature of infringement
- § 28:12 —Action for damages
- § 28:13 —Injunctions
- § 28:14 —Confiscation
- § 28:15 —Customs actions

### III. COPYRIGHT

- § 28:16 Nature—Creation of rights
- § 28:17 —Beneficiaries of rights
- § 28:18 —Duration
- § 28:19 —Transfer
- § 28:20 —International aspects
- § 28:21 Attacks on ownership—Prior authors
- § 28:22 —Public interest
- § 28:23 Infringement actions—Nature of infringement
- § 28:24 —Action for damages
- § 28:25 —Injunctions
- § 28:26 —Confiscation
- § 28:27 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 28:28 Nature—Creation of rights
- § 28:29 —Beneficiaries of rights
- § 28:30 —Maintenance
- § 28:31 —Transfer
- § 28:32 —Cancellation
- § 28:33 —International aspects
- § 28:34 Attacks on ownership—Prior users
- § 28:35 —Public interest
- § 28:36 Infringement actions—Nature of infringement
- § 28:37 —Actions for damages
- § 28:38 —Injunctions
- § 28:39 —Confiscation
- § 28:40 —Customs action

### V. TRADE AND SERVICE NAMES

- § 28:41 In general

### VI. INDUSTRIAL DESIGNS

- § 28:42 Nature—Creation of rights
- § 28:43 —Beneficiaries of rights
- § 28:44 —Maintenance
- § 28:45 —Extension
- § 28:46 —Transfer

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 28:47 —Cancellation
- § 28:48 —International aspects
- § 28:49 Attacks on ownership
- § 28:50 —Prior users
- § 28:51 —Public interest
- § 28:52 Infringement actions—Nature of infringement
- § 28:53 —Action for damages
- § 28:54 —Injunctions
- § 28:55 —Confiscation
- § 28:56 —Customs action

### **VII. AESTHETIC DESIGNS AND PATTERNS**

- § 28:57 In general

### **VIII. TOPOGRAPHIES OF SEMICONDUCTOR PRODUCTS**

- § 28:58 In general
- § 28:59 Protected rights
- § 28:60 Validity period
- § 28:61 Remedies

### **IX. PLANT VARIETIES**

- § 28:62 In general
- § 28:63 Novelty
- § 28:64 Distinctiveness
- § 28:65 Uniformity
- § 28:66 Stability
- § 28:67 Requirements for denomination
- § 28:68 Application
- § 28:69 Validity period
- § 28:70 Protected rights of the breeder
- § 28:71 Remedies

### **X. COMMERCIAL SECRETS**

- § 28:72 In general
- § 28:73 Infringement actions

### **XI. LICENSING**

- § 28:74 In general

## **CHAPTER 29. LUXEMBOURG**

### **I. INTRODUCTION**

- § 29:1 In general

TABLE OF CONTENTS

**II. PATENTS**

- § 29:2 In general
- § 29:3 Procedure
- § 29:4 Types of licenses
- § 29:5 Infringement

**III. COPYRIGHT**

- § 29:6 In general
- § 29:7 Exceptions to protection
- § 29:8 Type of rights
- § 29:9 —Moral rights
- § 29:10 —Financial rights
- § 29:11 Registration
- § 29:12 Multiple creators
- § 29:13 Duration
- § 29:14 Transfer
- § 29:15 International aspects
- § 29:16 Attacks on ownership
- § 29:17 Infringement

**IV. TRADE AND SERVICE MARKS**

- § 29:18 In general
- § 29:19 Unfair competition law
- § 29:20 Infringing goods

**V. TRADE AND SERVICE NAMES**

- § 29:21 In general

**VI. INDUSTRIAL DESIGNS AND UTILITY MODELS**

- § 29:22 In general

**CHAPTER 30. MALAYSIA**

**I. INTRODUCTION**

- § 30:1 In general
- § 30:2 Malaysia's cyberlaws
- § 30:3 Intellectual Property Corporation of Malaysia Act 2002
- § 30:4 Intellectual Property Court

**II. PATENTS**

- § 30:5 Nature
- § 30:6 Registration process
- § 30:7 —Substantive examination or modified substantive examination

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 30:8 —Declaration of priority
- § 30:9 —Prior disclosure
- § 30:10 —Exceptions to prior disclosure
- § 30:11 —Prior manufacture or use
- § 30:12 Rights to a patent
- § 30:13 —Inventions made by employee or commissioned works
- § 30:14 Exploitation of patent
- § 30:15 Limitation of rights
- § 30:16 —Duration and extension of patent
- § 30:17 —Lapsed patents and reinstatement
- § 30:18 —Transfer: assignment and license
- § 30:19 —Compulsory licenses
- § 30:20 —Patent infringement and compulsory license
- § 30:21 Surrender of patent
- § 30:22 Invalidation of patent
- § 30:23 Infringement action
- § 30:24 —Right to institute proceedings
- § 30:25 —Burden of proof
- § 30:26 —Defenses against patent infringement actions
- § 30:27 —Remedies for patent infringement
- § 30:28 Patents (Amendment) Act 2003 and 2006
- § 30:29 Association of South-East Asia Nations Patent Examination Cooperation

### III. COPYRIGHT

- § 30:30 Nature—Creation of rights
- § 30:31 —Beneficiaries of rights
- § 30:32 —General scope
- § 30:33 —Duration of copyright
- § 30:34 —Transfer
- § 30:35 —International aspects
- § 30:36 —Reference of copyright licenses to copyright tribunal
- § 30:37 Attacks on ownership—Prior authors
- § 30:38 —Public interest
- § 30:39 Infringement actions—Nature of infringement
- § 30:40 —Action for damages
- § 30:41 —Injunctions
- § 30:42 —Customs actions
- § 30:43 Copyright offenses—Nature of offense
- § 30:44 Copyright and the Intellectual Property Corporation of Malaysia

### IV. TRADE AND SERVICE MARKS

- § 30:45 Nature—Creation of rights
- § 30:46 —Beneficiaries of rights
- § 30:47 —Dealings
- § 30:48 —Cancellation

## TABLE OF CONTENTS

- § 30:49 Attacks on ownership—Prior users
- § 30:50 —Public interest intervention
- § 30:51 Infringement actions—Nature of infringement
- § 30:52 —Action for damages
- § 30:53 —Injunctions
- § 30:54 —Confiscation
- § 30:55 —Customs action
- § 30:56 Border controls
- § 30:57 Geographical Indications Act 2000
- § 30:58 —Registration
- § 30:59 —Renewal of registration
- § 30:60 —Rights of registrant
- § 30:61 Geographical indications and the Intellectual Property Corporation of Malaysia

## V. TRADE AND SERVICE NAMES

- § 30:62 In general

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 30:63 In general
- § 30:64 Registration process
- § 30:65 Maintenance
- § 30:66 Restoration
- § 30:67 Transfers
- § 30:68 Cancellation
- § 30:69 International aspects
- § 30:70 Attacks on ownership
- § 30:71 Licensing
- § 30:72 Infringement actions

## VII. AESTHETIC DESIGNS AND PATTERNS

- § 30:73 In general

## VIII. LICENSING

- § 30:74 Nature of licensing
- § 30:75 Structure of licensing transactions
- § 30:76 —Protection of the intellectual property right
- § 30:77 —Identification of potential licensee and negotiation process
- § 30:78 —The license or contractual process
- § 30:79 —Industrial Coordination Act
- § 30:80 —Distribution licenses
- § 30:81 Common examples of licensing routes
- § 30:82 —Joint venture
- § 30:83 —Contract manufacture
- § 30:84 —Distribution

## **IX. FRANCHISING**

- § 30:85 In general
- § 30:86 Nature
- § 30:87 Regulation of Franchises under the Franchise Act
- § 30:88 Registration under the Franchise Act
- § 30:89 Regulation of the franchise agreement
- § 30:90 Maintenance
- § 30:91 —Cancellation
- § 30:92 —Enforcement and offenses

## **X. LAYOUT DESIGNS OF INTEGRATED CIRCUITS ACT 2000**

- § 30:93 In general
- § 30:94 Duration
- § 30:95 Rights of the right holder
- § 30:96 Infringement
- § 30:97 Remedies for infringement
- § 30:98 Transfers and licenses

## **XI. OPTICAL DISCS ACT 2000**

- § 30:99 In general

## **XII. PROTECTION OF NEW PLANT VARIETIES ACT 2004**

- § 30:100 In general
- § 30:101 Requirements for registration
- § 30:102 Scope of breeder's right and infringement actions
- § 30:103 Duration
- § 30:104 Invalidation and revocation of breeder's right
- § 30:105 Assignment or transmission of breeder's right

## **XIII. DOMAIN NAMES**

- § 30:106 In general
- § 30:107 Registration
- § 30:108 Infringement of trade or service marks
- § 30:109 Bad faith
- § 30:110 Dispute resolution
- § 30:111 Remedies

## **XIV. PROTECTION OF PERSONAL DATA**

- § 30:112 In general
- § 30:113 Application and scope
- § 30:114 Specific exemptions

## TABLE OF CONTENTS

- § 30:115 Rights
- § 30:116 Personal data protection principles
- § 30:117 Other offences—Transfer of personal data out of Malaysia
- § 30:118 —Unlawful collection of personal data
- § 30:119 Registration
- § 30:120 Enforcement and data protection commissioner

## CHAPTER 31. MEXICO

### I. INTRODUCTION

- § 31:1 In general

### II. PATENTS

- § 31:2 Nature—Creation of rights
- § 31:3 —Procedure
- § 31:4 —Beneficiaries of rights
- § 31:5 —Maintenance
- § 31:6 —Extension
- § 31:7 —Transfer
- § 31:8 —Cancellation
- § 31:9 Attacks on ownership
- § 31:10 —Prior inventors or users
- § 31:11 —Public interest
- § 31:12 Infringement actions—Nature of infringement
- § 31:13 —Action for damages
- § 31:14 —Injunctions
- § 31:15 —Confiscation
- § 31:16 —Customs actions

### III. COPYRIGHT

- § 31:17 Nature—Creation of rights
- § 31:18 —Beneficiaries of rights
- § 31:19 —Duration
- § 31:20 —Transfer
- § 31:21 —International aspects
- § 31:22 Attacks on ownership—Prior authors
- § 31:23 —Public interest
- § 31:24 Infringement actions—Nature
- § 31:25 —Action for damages
- § 31:26 —Injunction
- § 31:27 —Confiscation
- § 31:28 —Customs action

### IV. TRADE MARKS AND SERVICE MARKS

- § 31:29 Nature—Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 31:30 —Beneficiaries of rights
- § 31:31 —Maintenance
- § 31:32 —Transfer
- § 31:33 —Cancellation
- § 31:34 —International aspects
- § 31:35 Attacks on ownership—Prior users
- § 31:36 —Public interest
- § 31:37 Infringement actions—Nature of infringement
- § 31:38 —Action for damages
- § 31:39 —Injunctions
- § 31:40 —Confiscation
- § 31:41 —Customs action

### V. TRADE AND SERVICE NAMES

- § 31:42 Nature—Creation of rights
- § 31:43 —Beneficiaries of rights
- § 31:44 —Maintenance
- § 31:45 —Extension
- § 31:46 —Transfer
- § 31:47 —Cancellation
- § 31:48 —International aspects
- § 31:49 Attacks on ownership—Prior users
- § 31:50 —Public interest
- § 31:51 Infringement actions—Nature of infringement
- § 31:52 —Action for damages
- § 31:53 —Injunctions
- § 31:54 —Confiscation
- § 31:55 —Customs action

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 31:56 Nature—Creation of rights
- § 31:57 —Beneficiaries of rights
- § 31:58 —Maintenance
- § 31:59 —Extension
- § 31:60 —Transfer
- § 31:61 —Cancellation
- § 31:62 —International aspects
- § 31:63 Attacks on ownership
- § 31:64 —Prior users
- § 31:65 —Public interest
- § 31:66 Infringement actions—Nature of infringement
- § 31:67 —Action for damages
- § 31:68 —Injunctions
- § 31:69 —Confiscation
- § 31:70 —Customs action

TABLE OF CONTENTS

**VII. AESTHETIC DESIGNS AND PATTERNS**

§ 31:71 In general

**VIII. LICENSING**

§ 31:72 In general

**CHAPTER 32. THE NETHERLANDS**

**I. INTRODUCTION**

§ 32:1 In general

**II. PATENTS**

- § 32:2 Nature—Creation of rights
- § 32:3 —Beneficiaries of rights
- § 32:4 —Maintenance
- § 32:5 —Extension
- § 32:6 —Transfer
- § 32:7 —Cancellation
- § 32:8 Attacks on ownership—Prior inventors or users
- § 32:9 —Public interest
- § 32:10 Infringement actions—Nature of infringement
- § 32:11 —Action for damages
- § 32:12 —Injunction
- § 32:13 —Confiscation
- § 32:14 —Custom actions

**III. COPYRIGHT**

- § 32:15 Nature—Creation of rights
- § 32:16 —Beneficiaries of rights
- § 32:17 —Duration
- § 32:18 —Transfer
- § 32:19 —International aspects
- § 32:20 Attacks on ownership—Prior authors
- § 32:21 —Public interest
- § 32:22 Infringement actions—Nature of infringement
- § 32:23 —Action for damages
- § 32:24 —Injunction
- § 32:25 —Confiscation
- § 32:26 —Customs action

**IV. TRADE AND SERVICE MARKS**

- § 32:27 Nature
- § 32:28 —Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 32:29 —Beneficiaries of rights
- § 32:30 —Maintenance
- § 32:31 —Transfer
- § 32:32 —Cancellation
- § 32:33 —International aspects
- § 32:34 Attacks on ownership—Prior users
- § 32:35 —Public interest
- § 32:36 Infringement actions—Nature of infringement
- § 32:37 —Action for damages
- § 32:38 —Injunction
- § 32:39 —Confiscation
- § 32:40 —Customs action

### V. TRADE NAMES

- § 32:41 Nature
- § 32:42 —Creation of rights
- § 32:43 —Beneficiaries of rights
- § 32:44 —Maintenance
- § 32:45 —Transfer
- § 32:46 —Cancellation
- § 32:47 —International aspects
- § 32:48 Attacks on ownership—Prior users
- § 32:49 —Public interest
- § 32:50 Infringement actions—Nature of infringement
- § 32:51 —Action for damages
- § 32:52 —Injunction
- § 32:53 —Confiscation
- § 32:54 —Customs

### VI. INDUSTRIAL DESIGN AND UTILITY MODELS, AESTHETIC DESIGNS AND PATTERNS

- § 32:55 Nature
- § 32:56 —Creation of rights
- § 32:57 —Beneficiaries
- § 32:58 —Maintenance
- § 32:59 —Extension and renewal
- § 32:60 —Transfer
- § 32:61 —Cancellation
- § 32:62 —International aspects
- § 32:63 Attacks on ownership—Prior users
- § 32:64 —Public interest
- § 32:65 Infringement actions—Nature of infringement
- § 32:66 —Action for damages
- § 32:67 —Injunction
- § 32:68 —Confiscation

TABLE OF CONTENTS

§ 32:69 —Customs action

**VII. LICENSING**

§ 32:70 In general

**CHAPTER 33. NEW ZEALAND**

**I. INTRODUCTION**

§ 33:1 Protected classes of rights

§ 33:2 System of laws

§ 33:3 Enforcement of rights

**II. PATENTS**

§ 33:4 Nature—Creation of rights

§ 33:5 —Beneficiaries of rights

§ 33:6 —Maintenance

§ 33:7 —Extension

§ 33:8 —Transfer

§ 33:9 —Cancellation

§ 33:10 —International aspects

§ 33:11 Attacks on ownership—Prior users

§ 33:12 —Public interest

§ 33:13 Infringement actions—Nature of infringement

§ 33:14 —Action for damages

§ 33:15 —Injunction

§ 33:16 —Confiscation

§ 33:17 —Customs action

§ 33:18 International aspects

**III. COPYRIGHT**

§ 33:19 Nature—Creation of rights

§ 33:20 —Beneficiaries of rights

§ 33:21 —Moral rights

§ 33:22 —Rental rights

§ 33:23 —Duration

§ 33:24 —Transfer

§ 33:25 —International aspects

§ 33:26 Attacks on ownership—Public interest

§ 33:27 Infringement actions—Nature

§ 33:28 —Permissible acts

§ 33:29 —Action for damages

§ 33:30 —Injunction

§ 33:31 —Confiscation

§ 33:32 —Customs action

#### **IV. TRADE MARKS**

- § 33:33 Nature
- § 33:34 Creation of rights
- § 33:35 —Registration process
- § 33:36 —Registrability of trade marks
- § 33:37 Beneficiaries of rights
- § 33:38 Maintenance
- § 33:39 Transfer
- § 33:40 —Assignment
- § 33:41 —License
- § 33:42 Cancellation
- § 33:43 International aspects
- § 33:44 Attacks on ownership—Prior users
- § 33:45 —Public interest
- § 33:46 Infringement actions—Nature
- § 33:47 —Action for damages
- § 33:48 —Injunction
- § 33:49 —Confiscation
- § 33:50 —Customs action

#### **V. TRADE AND SERVICE NAMES**

- § 33:51 In general

#### **VI. INDUSTRIAL DESIGNS AND UTILITY MODELS**

- § 33:52 Copyright protection
- § 33:53 Layout designs and integrated circuits

#### **VII. AESTHETIC DESIGNS AND PATTERNS**

- § 33:54 Nature
- § 33:55 Creation of rights
- § 33:56 Beneficiaries of rights
- § 33:57 Maintenance
- § 33:58 Transfer
- § 33:59 Cancellation
- § 33:60 International aspects
- § 33:61 Attacks on ownership—Prior users
- § 33:62 —Public interest
- § 33:63 Infringement action—Nature
- § 33:64 —Action for damages
- § 33:65 —Injunction
- § 33:66 —Confiscation
- § 33:67 —Customs action

#### **VIII. LICENSING**

- § 33:68 In general

TABLE OF CONTENTS

§ 33:69 Franchising

**CHAPTER 34. NORWAY**

**I. INTRODUCTION**

§ 34:1 In general

**II. PATENTS**

- § 34:2 Nature—Creation of rights
- § 34:3 —Beneficiaries of rights
- § 34:4 —Maintenance
- § 34:5 —Duration
- § 34:6 —Transfer of patent rights
- § 34:7 —Cancellation
- § 34:8 —Invalidity
- § 34:9 Attacks on ownership—Prior inventors or users
- § 34:10 —Public interest intervention
- § 34:11 Infringement actions—Nature of infringement
- § 34:12 —Action for damages
- § 34:13 —Injunction
- § 34:14 —Confiscation
- § 34:15 —Customs action

**III. COPYRIGHT**

- § 34:16 Nature—Creation of rights
- § 34:17 —Beneficiaries of rights
- § 34:18 —Duration
- § 34:19 —Transfer of rights
- § 34:20 —International aspects
- § 34:21 Copyright disputes
- § 34:22 Infringement cases
- § 34:23 —Infringing acts
- § 34:24 —Action for damages
- § 34:25 —Interim measures
- § 34:26 —Confiscation
- § 34:27 —Customs action

**IV. TRADE AND SERVICE MARKS**

- § 34:28 Nature
- § 34:29 —Creation of right and registration process
- § 34:30 —Beneficiaries of rights
- § 34:31 —Maintenance
- § 34:32 —Transfer
- § 34:33 —Cancellation

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 34:34 —International aspects
- § 34:35 Attacks on ownership
- § 34:36 Infringement actions
- § 34:37 —Nature of infringement
- § 34:38 —Action for damages
- § 34:39 —Injunction
- § 34:40 —Confiscation
- § 34:41 —Customs action
- § 34:42 Common marks

### V. ENTERPRISE NAMES (TRADE NAMES)

- § 34:43 In general
- § 34:44 Object
- § 34:45 Requirement of distinctiveness
- § 34:46 Registration
- § 34:47 Duration and expiry
- § 34:48 Assignment of enterprise name
- § 34:49 Actions
- § 34:50 International aspects

### VI. DESIGNS

- § 34:51 In general
- § 34:52 Nature
- § 34:53 —Creation of rights
- § 34:54 —Beneficiaries of rights
- § 34:55 —Maintenance
- § 34:56 —Extension
- § 34:57 —Transfers
- § 34:58 —Cancellation
- § 34:59 —International aspects
- § 34:60 Attacks on ownership—No prior user rights
- § 34:61 —No compulsory license
- § 34:62 —Title to design disputed
- § 34:63 Infringement actions—Nature of infringement
- § 34:64 —Action for damages
- § 34:65 —Injunction
- § 34:66 —Confiscation
- § 34:67 —Customs action

### VII. AESTHETIC DESIGNS AND PATTERNS

- § 34:68 In general
- § 34:69 Nature—Creation of rights
- § 34:70 —Beneficiaries of rights
- § 34:71 —Maintenance
- § 34:72 —Extension

## TABLE OF CONTENTS

§ 34:73 —Transfer of rights

### VIII. LICENSING

- § 34:74 Nature
- § 34:75 Assignments and licenses
- § 34:76 Statutory rules on the interpretation of agreements
- § 34:77 Constraints of freedom of contract—Good business practices
- § 34:78 —Price controls
- § 34:79 —Competition rules
- § 34:80 Drafting issues—Key issues often neglected
- § 34:81 —Arbitration
- § 34:82 Formal requirements

## CHAPTER 34A. PANAMA

### I. INTRODUCTION

- § 34A:1 In general
- § 34A:2 Intellectual property legal system
- § 34A:3 —Regulatory bodies
- § 34A:4 —Extent of exploitation
- § 34A:5 — —Volume of inbound and outbound intellectual property

### II. PATENTS

- § 34A:6 Nature—Creation of rights
- § 34A:7 — —Priority
- § 34A:8 —Beneficiaries of rights
- § 34A:9 — —Co-inventors
- § 34A:10 — —Financiers
- § 34A:11 — —Employees
- § 34A:12 —Maintenance
- § 34A:13 —Extension
- § 34A:14 —Transfer
- § 34A:15 —Cancellation
- § 34A:16 Attacks on ownership
- § 34A:17 —Prior inventors or users
- § 34A:18 —Public interest
- § 34A:19 Infringement actions
- § 34A:20 —Nature of infringement
- § 34A:21 —Action for damages
- § 34A:22 —Injunction
- § 34A:23 —Confiscation
- § 34A:24 —Customs actions

### III. COPYRIGHT

- § 34A:25 Nature—Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 34A:26 —Beneficiaries of rights
- § 34A:27 —Duration
- § 34A:28 —Transfer
- § 34A:29 —International aspects
- § 34A:30 Attacks on ownership
- § 34A:31 —Prior authors
- § 34A:32 —Public interest
- § 34A:33 Infringement actions
- § 34A:34 —Nature of infringement
- § 34A:35 —Action for damages
- § 34A:36 —Injunction
- § 34A:37 —Confiscation
- § 34A:38 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 34A:39 Nature—Creation of rights
- § 34A:40 —Beneficiaries of rights
- § 34A:41 —Maintenance
- § 34A:42 —Transfer—Assignment
- § 34A:43 — —License
- § 34A:44 —Cancellation
- § 34A:45 —International aspects
- § 34A:46 Attacks on ownership
- § 34A:47 —Prior users
- § 34A:48 —Public interest
- § 34A:49 Infringement actions
- § 34A:50 —Nature of infringement
- § 34A:51 —Action for damages
- § 34A:52 —Injunction
- § 34A:53 —Confiscation
- § 34A:54 —Customs action

### V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 34A:55 Nature—Creation of rights
- § 34A:56 —Beneficiaries of rights
- § 34A:57 —Maintenance
- § 34A:58 —Extension
- § 34A:59 —Transfer
- § 34A:60 —Cancellation
- § 34A:61 Attacks on ownership
- § 34A:62 —Prior inventors or users
- § 34A:63 —Public interest
- § 34A:64 Infringement actions
- § 34A:65 —Nature of infringement
- § 34A:66 —Action for damages

## TABLE OF CONTENTS

- § 34A:67 —Injunction
- § 34A:68 —Confiscation
- § 34A:69 —Customs actions

## VI. LICENSING

- § 34A:70 Nature
- § 34A:71 Patents, industrial designs, and utility models
- § 34A:72 Trade marks
- § 34A:73 Copyright

## CHAPTER 35. PERU

### I. INTRODUCTION

- § 35:1 In general
- § 35:2 Classes of intellectual property
- § 35:3 Legal system
- § 35:4 —Courts of first instance
- § 35:5 —Court of second instance
- § 35:6 —Appeal courts
- § 35:7 Regulatory rules
- § 35:8 Volume of registrations
- § 35:9 Time limit

### II. PATENTS

- § 35:10 Creation of rights—Registration procedure
- § 35:11 —Type of registration
- § 35:12 —Priority
- § 35:13 —Requirements
- § 35:14 Beneficiaries of rights
- § 35:15 Maintenance; requirements for exploitation
- § 35:16 Extension
- § 35:17 Transfer
- § 35:18 Cancellation
- § 35:19 International aspects—Treatment of foreigners
- § 35:20 —Conventions
- § 35:21 Attacks on ownership
- § 35:22 Public interest
- § 35:23 Infringement actions
- § 35:24 Action for damages
- § 35:25 Injunction
- § 35:26 Confiscation
- § 35:27 Customs action

### III. COPYRIGHT

- § 35:28 Creation of rights—Type of registration

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 35:29 —Protection requirements
- § 35:30 —Moral rights
- § 35:31 Beneficiaries of rights—Author
- § 35:32 —Co-authors
- § 35:33 —Anonymous work or work under pseudonym
- § 35:34 —Collective work
- § 35:35 —Employment relationship or by assignment
- § 35:36 Duration
- § 35:37 Transfer
- § 35:38 —License
- § 35:39 International aspects—Treatment of foreigners
- § 35:40 —Conventions
- § 35:41 Attacks on ownership—Prior authors
- § 35:42 —Public interest intervention
- § 35:43 Infringement actions
- § 35:44 Action for damages
- § 35:45 Injunction
- § 35:46 Confiscation
- § 35:47 Customs action

### IV. TRADE AND SERVICE MARKS

- § 35:48 Creation of rights—Registration procedure
- § 35:49 —Type of registration
- § 35:50 —Priority
- § 35:51 —Requirements
- § 35:52 Beneficiaries of rights
- § 35:53 Maintenance
- § 35:54 Transfer—Transfers and licenses
- § 35:55 —Guarantee and attachment
- § 35:56 Cancellation
- § 35:57 International aspects—Treatment of foreigners
- § 35:58 —Conventions
- § 35:59 Attacks on ownership—Prior users
- § 35:60 —Public interest intervention
- § 35:61 Infringement actions
- § 35:62 Action for damages
- § 35:63 Injunction
- § 35:64 Confiscation
- § 35:65 Customs action

### V. TRADE AND SERVICE NAMES

- § 35:66 In general
- § 35:67 Creation of rights—Type of registration
- § 35:68 —Protection
- § 35:69 —Duration

## TABLE OF CONTENTS

- § 35:70 —Requirements for exploitation
- § 35:71 —Transfer

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 35:72 Creation of rights—Registration procedure
- § 35:73 —Type of registration
- § 35:74 —Priority
- § 35:75 —Requirements
- § 35:76 Beneficiaries of rights
- § 35:77 Extension
- § 35:78 —Transfer
- § 35:79 —Cancellation
- § 35:80 International aspects—Treatment of foreigners
- § 35:81 —Conventions
- § 35:82 Attacks on ownership—Prior users
- § 35:83 —Public interest regulation
- § 35:84 Infringement actions
- § 35:85 Actions for damages, injunction, and confiscation and customs actions

## VII. LICENSING

- § 35:86 Copyrights
- § 35:87 Patents
- § 35:88 —Mandatory licenses
- § 35:89 Trade marks

## CHAPTER 36. THE PHILIPPINES

### I. INTRODUCTION

- § 36:1 In general

### II. PATENTS

- § 36:2 Nature—Creation of rights
- § 36:3 —Beneficiaries of rights
- § 36:4 —Maintenance
- § 36:5 —Extension
- § 36:6 —Transfer
- § 36:7 —Cancellation
- § 36:8 Attacks on ownership—Prior inventors or users
- § 36:9 —Public interest (Government) intervention
- § 36:10 Infringement actions—Nature of infringement
- § 36:11 —Action for damages
- § 36:12 —Injunctions
- § 36:13 —Confiscation

### III. COPYRIGHT

- § 36:14 Nature—Creation of rights
- § 36:15 —Beneficiaries of rights
- § 36:16 —Duration
- § 36:17 —Transfer
- § 36:18 Attacks on ownership
- § 36:19 Infringement—Nature of infringement
- § 36:20 —Action for damages
- § 36:21 —Injunctions
- § 36:22 —Confiscation
- § 36:23 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 36:24 Nature—Creation of rights
- § 36:25 —Beneficiaries of rights
- § 36:26 —Maintenance
- § 36:27 —Transfer
- § 36:28 —Cancellation
- § 36:29 Attacks on ownership—Prior users
- § 36:30 —Public interest (Government) intervention
- § 36:31 Infringement actions—Nature of infringement
- § 36:32 —Actions for damages
- § 36:33 —Unfair competition
- § 36:34 —Injunctions
- § 36:35 —Confiscation
- § 36:36 —Customs action

### V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 36:37 Nature—Creation of rights
- § 36:38 —Beneficiaries of rights
- § 36:39 —Maintenance
- § 36:40 —Extension
- § 36:41 —Transfer
- § 36:42 —Cancellation
- § 36:43 Attacks on ownership—Prior inventors or users
- § 36:44 —Public interest (Government) intervention
- § 36:45 Infringement actions—Nature of infringement
- § 36:46 —Action for damages
- § 36:47 —Injunctions
- § 36:48 —Confiscation

### VI. LICENSING

- § 36:49 Voluntary licensing
- § 36:50 Compulsory licensing

TABLE OF CONTENTS

**CHAPTER 37. PORTUGAL**

**I. INTRODUCTION**

§ 37:1 In general

**II. PATENTS**

- § 37:2 Creation of rights
- § 37:3 Protection for new plant varieties
- § 37:4 Utility models
- § 37:5 Application procedure
- § 37:6 Provisional applications
- § 37:7 Parties
- § 37:8 Nature of protection
- § 37:9 Assignment and license
- § 37:10 Duration
- § 37:11 Public interest
- § 37:12 Attacks on ownership
- § 37:13 Civil, criminal, and administrative remedies

**III. COPYRIGHT**

- § 37:14 Relevant law
- § 37:15 Nature
- § 37:16 Ownership
- § 37:17 Duration
- § 37:18 Assignment and license
- § 37:19 Public interest
- § 37:20 Civil, criminal, and administrative remedies

**IV. TRADE AND SERVICE MARKS**

- § 37:21 Nature of trade and service marks
- § 37:22 Creation of rights
- § 37:23 Application procedure
- § 37:24 Beneficiaries of rights
- § 37:25 Duration and maintenance
- § 37:26 Transfer and license
- § 37:27 Cancellation
- § 37:28 International aspects—International conventions
- § 37:29 —Community law
- § 37:30 —Macao
- § 37:31 —Other former Portuguese territories
- § 37:32 Attacks on ownership—Prior rights
- § 37:33 —Unfair competition
- § 37:34 —Public interest
- § 37:35 Civil, criminal, and administrative remedies

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 37:36 —Opposition
- § 37:37 —Appeal
- § 37:38 —Civil action
- § 37:39 —Criminal action
- § 37:40 —Customs action

### V. DESIGNS OR MODELS

- § 37:41 In general
- § 37:42 Registration procedure
- § 37:43 Nature of protection and duration
- § 37:44 Civil, criminal, and administrative remedies

### VI. LOGOS

- § 37:45 In general
- § 37:46 Registration procedure
- § 37:47 Duration
- § 37:48 Assignment and cancellation
- § 37:49 Civil, criminal, and administrative remedies

### VII. COMPUTER PROGRAMS AND DATABASES

- § 37:50 Nature of protection
- § 37:51 Exceptions
- § 37:52 Beneficiaries of rights
- § 37:53 Duration
- § 37:54 Assignment and license
- § 37:55 Civil and criminal remedies

### VIII. TOPOGRAPHIES OF SEMI-CONDUCTOR PRODUCTS

- § 37:56 Creation of rights
- § 37:57 —Application procedure
- § 37:58 —Parties
- § 37:59 Nature of protection
- § 37:60 Assignment and license
- § 37:61 Duration
- § 37:62 Attacks on ownership
- § 37:63 Civil, criminal, and administrative procedures

### IX. LICENSING

- § 37:64 In general

## CHAPTER 38. ROMANIA

### I. INTRODUCTION

- § 38:1 In general

TABLE OF CONTENTS

**II. PATENTS**

- § 38:2 Nature
- § 38:3 Creation of rights
- § 38:4 Beneficiaries of rights
- § 38:5 Maintenance
- § 38:6 Extension
- § 38:7 Transfer
- § 38:8 International aspects
- § 38:9 Attacks on ownership—Prior inventors or users
- § 38:10 —Public interest
- § 38:11 Infringement actions—Nature of infringement
- § 38:12 —Action for damages
- § 38:13 —Confiscation
- § 38:14 —Customs actions

**III. COPYRIGHTS**

- § 38:15 Nature
- § 38:16 Creation of rights
- § 38:17 Beneficiaries of rights
- § 38:18 Duration
- § 38:19 Transfer
- § 38:20 International aspects
- § 38:21 Attacks on ownership
- § 38:22 —Prior authors
- § 38:23 —Public interest
- § 38:24 Infringement actions—Nature of infringement
- § 38:25 —Action for damages
- § 38:26 —Confiscation
- § 38:27 —Customs action

**IV. TRADE AND SERVICE MARKS**

- § 38:28 Nature
- § 38:29 Creation of rights
- § 38:30 Beneficiaries of rights
- § 38:31 Maintenance
- § 38:32 Transfer
- § 38:33 Cancellation
- § 38:34 International aspects
- § 38:35 Attacks on ownership—Prior users
- § 38:36 —Public interest
- § 38:37 Infringement actions—Nature of infringement
- § 38:38 —Action for damages
- § 38:39 —Confiscation
- § 38:40 —Customs action

## V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 38:41 Nature
- § 38:42 Creation of rights
- § 38:43 Beneficiaries of rights
- § 38:44 Maintenance
- § 38:45 Extension
- § 38:46 Transfer
- § 38:47 Cancellation
- § 38:48 International aspects
- § 38:49 Attacks on copyright—Prior users
- § 38:50 Infringement actions—Action for damages
- § 38:51 —Confiscation
- § 38:52 —Custom actions

## VI. LICENSING

- § 38:53 In general

## CHAPTER 39. RUSSIAN FEDERATION

### I. INTRODUCTION

- § 39:1 In general
- § 39:2 National legislation
- § 39:3 International treaties
- § 39:4 Government agencies
- § 39:5 Volume of intellectual property

### II. PATENTS OF INVENTIONS, UTILITY MODEL PATENTS, AND PATENTS OF INDUSTRIAL DESIGNS

- § 39:6 In general
- § 39:7 Nature—Creation of rights
- § 39:8 —Beneficiaries of rights
- § 39:9 —Maintenance
- § 39:10 —Extension
- § 39:11 —Transfer
- § 39:12 —Cancellation
- § 39:13 Attacks on ownership—Prior use
- § 39:14 —Public interest
- § 39:15 Infringement actions—Nature of infringement
- § 39:16 —Remedies
- § 39:17 —Action for damage
- § 39:18 —Injunctions
- § 39:19 —Confiscation
- § 39:20 —Customs actions

TABLE OF CONTENTS

**III. COPYRIGHT AND RELATED (NEIGHBORING) RIGHTS**

- § 39:21 In general
- § 39:22 Nature—Creation of rights
- § 39:23 —Beneficiaries of rights
- § 39:24 —Duration
- § 39:25 —Transfer
- § 39:26 —International aspects
- § 39:27 Attacks on ownership—Prior authors
- § 39:28 —Public interest
- § 39:29 Infringement actions
- § 39:30 —Nature of infringement
- § 39:31 —Action for damages
- § 39:32 —Injunctions
- § 39:33 —Confiscation
- § 39:34 —Customs action

**IV. TRADE MARKS AND SERVICE MARKS**

- § 39:35 In general
- § 39:36 Nature
- § 39:37 —Emergence of rights
- § 39:38 —Beneficiaries of rights
- § 39:39 —Maintenance
- § 39:40 —Transfer
- § 39:41 —Cancellation
- § 39:42 —International aspects
- § 39:43 Infringement actions
- § 39:44 —Nature of infringement
- § 39:45 —Action for damages
- § 39:46 —Injunctions
- § 39:47 —Confiscation
- § 39:48 —Customs action

**V. FIRM NAMES**

- § 39:49 Nature
- § 39:50 Usage and disposal

**VI. COMMERCIAL DESIGNATIONS (TRADE NAMES)**

- § 39:51 Nature
- § 39:52 Usage and disposal
- § 39:53 Collision of rights

**VII. AESTHETIC DESIGNS AND PATTERNS**

- § 39:54 In general

## VIII. LICENSING

- § 39:55 Nature
- § 39:56 Proper use
- § 39:57 Protection of interest

## Volume 3

## CHAPTER 40. SLOVAK REPUBLIC

### I. INTRODUCTION

- § 40:1 Copyright and related rights
- § 40:2 Industrial property rights
- § 40:3 Rights of cultivators
- § 40:4 Exploitation of intellectual property rights—Personal property rights
- § 40:5 —Property rights related to personal property rights
- § 40:6 Creation of intellectual property rights—Intellectual property rights without formal requirements for creation
- § 40:7 —Intellectual property rights with formal requirements for creation
- § 40:8 —Formal requirements
- § 40:9 Regulatory bodies
- § 40:10 International agreements

### II. PATENTS

- § 40:11 Nature—Creation of rights
- § 40:12 —Beneficiaries of rights
- § 40:13 —Maintenance
- § 40:14 —Extension
- § 40:15 —Transfer
- § 40:16 —Cancellation
- § 40:17 Attacks on ownership—Prior inventors or users
- § 40:18 —Public interest
- § 40:19 Infringement actions—Nature of infringement
- § 40:20 —Action for damages
- § 40:21 —Injunctions
- § 40:22 —Confiscation
- § 40:23 —Customs actions

### III. COPYRIGHT

- § 40:24 Nature—Creation of rights
- § 40:25 Beneficiaries of rights
- § 40:26 —Duration

## TABLE OF CONTENTS

- § 40:27 —Transfer
- § 40:28 Attacks on ownership—Prior authors
- § 40:29 —Public interest
- § 40:30 Infringement actions—Nature of infringement
- § 40:31 —Action for damages
- § 40:32 —Injunctions
- § 40:33 —Confiscation
- § 40:34 —Customs action

## IV. TRADE MARK

- § 40:35 Definition
- § 40:36 Procedure
- § 40:37 Registration
- § 40:38 Term of protection
- § 40:39 Rights of trade mark owners—Right to use trade mark
- § 40:40 —Right to grant license
- § 40:41 —Right to transfer trade mark
- § 40:42 —Right to lien on trade mark
- § 40:43 Obligations of trade mark user
- § 40:44 Protection of rights of trade mark owners
- § 40:45 Limitations on trade marks
- § 40:46 Termination of trade marks

## V. BUSINESS NAMES

- § 40:47 Nature
- § 40:48 Creation of business name
- § 40:49 Establishment of business name
- § 40:50 Duration of business name
- § 40:51 Transfer of business name
- § 40:52 Removal or discharge of business name
- § 40:53 Protection of business
- § 40:54 Foreign business names

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 40:55 Nature—Creation of rights
- § 40:56 —Beneficiaries of rights
- § 40:57 —Maintenance
- § 40:58 —Extension
- § 40:59 —Transfer
- § 40:60 —Cancellation
- § 40:61 —International aspects
- § 40:62 Attacks on ownership—Prior inventors or users
- § 40:63 —Public interest
- § 40:64 Infringement actions—Nature of infringement
- § 40:65 —Action for damages

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 40:66 —Injunctions
- § 40:67 —Confiscation
- § 40:68 —Customs actions

### VII. LICENSING

- § 40:69 In general
- § 40:70 Licensing of copyrights
- § 40:71 —Manner of use of work
- § 40:72 —Extent of license
- § 40:73 —Remuneration
- § 40:74 —Exclusive and non-exclusive licenses
- § 40:75 —Disposition
- § 40:76 —Publication of works
- § 40:77 —General licensing contracts
- § 40:78 —Collective licensing contracts
- § 40:79 Industrial property rights and rights of cultivators
- § 40:80 —Entry of license into register
- § 40:81 —Exclusive and non-exclusive licenses
- § 40:82 —Disposition
- § 40:83 —Maintenance
- § 40:84 —Documentation and information
- § 40:85 —Interests of licensee
- § 40:86 —Repudiation

## CHAPTER 41. SOUTH AFRICA

### I. INTRODUCTION

- § 41:1 In general
- § 41:2 International agreements
- § 41:3 Scope of activity
- § 41:4 —Patent applications

### II. PATENTS

- § 41:5 Nature
- § 41:6 —Creation of rights
- § 41:7 —Beneficiaries of rights
- § 41:8 —Maintenance
- § 41:9 —Extension
- § 41:10 —Transfers
- § 41:11 —Cancellation
- § 41:12 Attacks on ownership
- § 41:13 —Prior inventors or users
- § 41:14 —Public interest
- § 41:15 Infringement actions
- § 41:16 —Action for damages

## TABLE OF CONTENTS

- § 41:17 —Confiscation
- § 41:18 —Customs action

### III. COPYRIGHT

- § 41:19 Nature
- § 41:20 —Creation of rights
- § 41:21 —Beneficiaries of rights
- § 41:22 —Duration
- § 41:23 —Transfer
- § 41:24 —International aspects
- § 41:25 —Attacks on ownership
- § 41:26 Infringement actions
- § 41:27 —Nature of infringement
- § 41:28 —Action for damages
- § 41:29 —Injunctions
- § 41:30 —Confiscation
- § 41:31 —Customs action

### IV. TRADE MARKS AND SERVICE MARKS

- § 41:32 Nature
- § 41:33 —Creation of rights
- § 41:34 —Procedure for registration
- § 41:35 —Examination
- § 41:36 —Beneficiaries of rights
- § 41:37 —Maintenance
- § 41:38 —Assignment and licensing
- § 41:39 —Cancellation
- § 41:40 —International aspects
- § 41:41 Attacks on ownership
- § 41:42 —Prior users
- § 41:43 —Government intervention
- § 41:44 —Infringement
- § 41:45 —Action for damages
- § 41:46 —Injunctions
- § 41:47 —Confiscation
- § 41:48 —Police action

### V. TRADE AND SERVICE NAMES

- § 41:49 In general
- § 41:50 Limits of protection

### VI. UTILITY MODELS —FUNCTIONAL DESIGN

- § 41:51 Nature
- § 41:52 —Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 41:53 —Beneficiaries of rights
- § 41:54 —Maintenance
- § 41:55 —Extension
- § 41:56 —Transfer
- § 41:57 —Cancellation
- § 41:58 —International aspects
- § 41:59 Attacks on ownership—Prior users
- § 41:60 —Public interest
- § 41:61 —Certificate of validity
- § 41:62 Infringement actions
- § 41:63 —Nature of infringement
- § 41:64 —Actions for damages
- § 41:65 —Injunctions
- § 41:66 —Confiscation
- § 41:67 —Customs action
- § 41:68 —Proceedings for declaration of non-infringement
- § 41:69 —Threats of infringement

### VII. AESTHETIC DESIGNS

- § 41:70 Nature
- § 41:71 —Creation of rights
- § 41:72 —Beneficiaries of rights
- § 41:73 —Maintenance
- § 41:74 —Extension
- § 41:75 —Transfer
- § 41:76 —Cancellation
- § 41:77 —International aspects
- § 41:78 Attacks on ownership
- § 41:79 —Public interest
- § 41:80 Infringement actions
- § 41:81 —Nature of infringement
- § 41:82 —Actions for damages
- § 41:83 —Injunctions
- § 41:84 —Confiscation
- § 41:85 —Customs action
- § 41:86 —Proceedings for declaration of non-infringement
- § 41:87 —Threats of infringement

### VIII. COUNTERFEIT GOODS

- § 41:88 In general

## CHAPTER 42. SPAIN

### I. INTRODUCTION

- § 42:1 Types of intellectual property

## TABLE OF CONTENTS

- § 42:2 New technical solutions
- § 42:3 —Formal creations of industrial application
- § 42:4 —Distinctive emblems or signs used in business
- § 42:5 Remedies
- § 42:6 International agreements
- § 42:7 Volume of intellectual property transactions

## II. PATENTS

- § 42:8 In general
- § 42:9 Nature—Creation of rights
- § 42:10 —Beneficiaries of rights
- § 42:11 —Maintenance
- § 42:12 —Extension and renewal
- § 42:13 —Transfer
- § 42:14 —Cancellation
- § 42:15 —International aspects
- § 42:16 Attacks on ownership—Prior inventors or users
- § 42:17 —Public intervention
- § 42:18 Infringement actions—Proceedings
- § 42:19 —Remedies

## III. COPYRIGHT

- § 42:20 Nature—Creation of rights
- § 42:21 —Content of rights
- § 42:22 —Beneficiaries of rights
- § 42:23 —Duration
- § 42:24 —Transfer
- § 42:25 —International aspects
- § 42:26 Attacks on ownership
- § 42:27 Infringement actions—Nature of the infringement
- § 42:28 —Actions for damages
- § 42:29 —Injunctions
- § 42:30 —Confiscation
- § 42:31 Customs actions
- § 42:32 —Private and domestic uses
- § 42:33 —Reproductions, distributions, and public communications
- § 42:34 —Transformation

## IV. TRADE AND SERVICE MARKS

- § 42:35 In general
- § 42:36 Nature—Creation of rights
- § 42:37 —Beneficiaries of rights
- § 42:38 —Maintenance
- § 42:39 —Transfer
- § 42:40 —Cancellation

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 42:41 —International aspects
- § 42:42 Attacks on ownership
- § 42:43 Infringement actions—Remedies

### V. TRADE AND SERVICE NAMES

- § 42:44 In general

### VI. UTILITY MODELS

- § 42:45 Nature
- § 42:46 Creation of rights
- § 42:47 Beneficiaries
- § 42:48 Maintenance
- § 42:49 Extension
- § 42:50 Regulation

### VII. INDUSTRIAL DESIGNS

- § 42:51 Nature
- § 42:52 Creation of rights

### VIII. LICENSING

- § 42:53 In general

## CHAPTER 43. SRI LANKA

### I. INTRODUCTION

- § 43:1 In general

### II. PATENTS

- § 43:2 Nature—Creation of rights
- § 43:3 —Beneficiaries of rights
- § 43:4 —Maintenance
- § 43:5 —Extension
- § 43:6 —Transfer
- § 43:7 —Cancellation
- § 43:8 Attacks on ownership—Prior inventors or users
- § 43:9 —Public interest
- § 43:10 Infringement actions—Nature of infringement
- § 43:11 —Action for damages
- § 43:12 —Injunctions
- § 43:13 —Confiscation
- § 43:14 —Customs actions

### III. COPYRIGHT

- § 43:15 Nature—Creation of rights

## TABLE OF CONTENTS

- § 43:16 —Beneficiaries of rights
- § 43:17 —Duration
- § 43:18 —Transfer
- § 43:19 —International aspects
- § 43:20 Attacks on ownership—Prior authors
- § 43:21 —Public interest
- § 43:22 Infringement actions—Nature of infringement
- § 43:23 —Action for damages
- § 43:24 —Injunctions
- § 43:25 —Confiscation
- § 43:26 —Customs action

## IV. TRADE MARKS

- § 43:27 Nature—Creation of rights
- § 43:28 —Beneficiaries of rights
- § 43:29 —Maintenance—
- § 43:30 —Transfer
- § 43:31 —Cancellation
- § 43:32 —International aspects
- § 43:33 Attacks on ownership—Prior users
- § 43:34 —Public interest
- § 43:35 Infringement actions—Nature of infringement
- § 43:36 —Action for damages
- § 43:37 —Injunctions
- § 43:38 —Confiscation
- § 43:39 —Customs action
- § 43:40 Trade and service names
- § 43:41 Trade and service names

## V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 43:42 Nature—Creation of rights
- § 43:43 —Beneficiaries of rights
- § 43:44 —Maintenance
- § 43:45 —Extension
- § 43:46 —Transfer
- § 43:47 —Cancellation
- § 43:48 Attacks on ownership—Prior users
- § 43:49 —Public interest
- § 43:50 Infringement actions—Nature of infringement
- § 43:51 —Action for damages
- § 43:52 —Injunctions
- § 43:53 —Confiscation
- § 43:54 —Customs action

## VI. AESTHETIC DESIGNS AND PATTERNS

- § 43:55 In general

## VII. LICENSING

§ 43:56 In general

## CHAPTER 44. SWITZERLAND

### I. INTRODUCTION

§ 44:1 In general

§ 44:2 Classes of intellectual property

§ 44:3 Exhaustion of distribution right of intellectual property

§ 44:4 Freedom of imitation and unfair competition

### II. PATENTS

§ 44:5 Practical relevance of swiss patent law

§ 44:6 Nature—Creation of rights

§ 44:7 —Beneficiaries of rights

§ 44:8 —Maintenance

§ 44:9 —Extension

§ 44:10 —Transfer

§ 44:11 —Cancellation

§ 44:12 —International aspects

§ 44:13 Attacks on ownership—Prior inventors or users

§ 44:14 —Public interest

§ 44:15 Infringement actions—Nature of infringement

§ 44:16 —Civil remedies

§ 44:17 —Penal remedies

### III. COPYRIGHT

§ 44:18 Nature—Creation of rights

§ 44:19 —Beneficiaries of rights

§ 44:20 —Duration

§ 44:21 —Transfer

§ 44:22 —International aspects

§ 44:23 —Revision of 1992

§ 44:24 Attacks on ownership—Prior authors

§ 44:25 —Public interest

§ 44:26 Infringement actions—Nature of infringement

§ 44:27 —Remedies

§ 44:28 —Customs actions

### IV. TRADE AND SERVICE MARKS

§ 44:29 Nature

§ 44:30 —Creation of rights

§ 44:31 —Beneficiaries of rights

§ 44:32 —Maintenance

## TABLE OF CONTENTS

- § 44:33 —Extension
- § 44:34 —Transfer
- § 44:35 —Cancellation
- § 44:36 —Indications of origin
- § 44:37 —International aspects
- § 44:38 Attacks on ownership—Prior users
- § 44:39 —Public interest
- § 44:40 Infringement actions—Nature of infringement
- § 44:41 —Remedies
- § 44:42 —Customs action

## V. INDUSTRIAL DESIGNS

- § 44:43 Nature—Creation of rights
- § 44:44 —Beneficiaries of rights
- § 44:45 —Term of protection
- § 44:46 —Maintenance
- § 44:47 —Transfer
- § 44:48 —Design protection and copyright law
- § 44:49 Attacks on ownership; infringement actions
- § 44:50 —Customs actions

## VI. TRADE AND SERVICE NAMES

- § 44:51 Nature—Creation of rights
- § 44:52 —Beneficiaries
- § 44:53 —Maintenance
- § 44:54 —Transfer
- § 44:55 —Cancellation
- § 44:56 —International aspects
- § 44:57 Attacks on ownership—Prior users
- § 44:58 —Public interest
- § 44:59 Infringement actions—Nature of infringement
- § 44:60 —Remedies

## CHAPTER 45. TAIWAN

### I. INTRODUCTION

- § 45:1 In general

### II. PATENTS

- § 45:2 Nature
- § 45:3 —Creation of rights
- § 45:4 —Beneficiaries of rights
- § 45:5 —Maintenance
- § 45:6 —Extension

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 45:7 —Transfer
- § 45:8 —Invalidation
- § 45:9 Attacks on ownership
- § 45:10 Infringement actions
- § 45:11 —Nature of infringement
- § 45:12 —Actions for damages
- § 45:13 —Injunctions
- § 45:14 —Confiscation
- § 45:15 —Customs actions

### III. COPYRIGHT

- § 45:16 Nature
- § 45:17 —Creation of rights
- § 45:18 —Beneficiaries of rights
- § 45:19 —Duration
- § 45:20 —Transfer
- § 45:21 —International aspects
- § 45:22 Attacks on ownership
- § 45:23 Infringement actions
- § 45:24 —Nature of infringement
- § 45:25 —Action for damages
- § 45:26 —Injunctions
- § 45:27 —Confiscation
- § 45:28 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 45:29 In general
- § 45:30 Nature
- § 45:31 —Creation of rights
- § 45:32 —Beneficiaries of rights
- § 45:33 —Maintenance
- § 45:34 —Transfer
- § 45:35 —Cancellation
- § 45:36 —International aspects
- § 45:37 Attacks on ownership—Prior users
- § 45:38 —Government intervention
- § 45:39 Infringement actions
- § 45:40 —Nature of infringement
- § 45:41 —Action for damages
- § 45:42 —Injunctions
- § 45:43 —Confiscation
- § 45:44 —Customs action

### V. UTILITY MODELS

- § 45:45 Nature

## TABLE OF CONTENTS

- § 45:46 —Creation of rights
- § 45:47 —Beneficiaries of rights
- § 45:48 —Maintenance
- § 45:49 —Extension
- § 45:50 —Transfer
- § 45:51 —Invalidation
- § 45:52 —Termination of rights
- § 45:53 —International aspects
- § 45:54 Attacks on ownership
- § 45:55 —Prior inventors or users
- § 45:56 Infringement actions
- § 45:57 —Nature of infringement
- § 45:58 —Actions for damages
- § 45:59 —Injunctions
- § 45:60 —Confiscation
- § 45:61 —Customs actions

## VI. DESIGNS

- § 45:62 Nature
- § 45:63 —Creation of rights
- § 45:64 —Beneficiaries of rights
- § 45:65 —Maintenance
- § 45:66 —Extension
- § 45:67 —Transfer
- § 45:68 —Invalidation
- § 45:69 —Termination of rights
- § 45:70 —International aspects
- § 45:71 Attacks on ownership
- § 45:72 —Prior inventors or users
- § 45:73 Infringement actions
- § 45:74 —Nature of infringement
- § 45:75 —Actions for damages
- § 45:76 —Injunctions
- § 45:77 —Confiscation
- § 45:78 —Customs actions

## CHAPTER 46. THAILAND

### I. INTRODUCTION

- § 46:1 In general

### II. PATENTS

- § 46:2 Nature—Creation of rights
- § 46:3 —Invention by employees
- § 46:4 —Maintenance

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 46:5 —Extension
- § 46:6 —Transfer
- § 46:7 —Cancellation
- § 46:8 Attacks on ownership—Prior use
- § 46:9 —Public interest
- § 46:10 Infringement—Nature of infringement
- § 46:11 —Compensation
- § 46:12 —Injunctions
- § 46:13 —Confiscation
- § 46:14 —Customs actions

### III. COPYRIGHT

- § 46:15 Nature—Creation of rights
- § 46:16 —Creation by employees
- § 46:17 —Duration
- § 46:18 —Transfer
- § 46:19 Attacks on ownership—Prior authors
- § 46:20 —Public interest
- § 46:21 Infringement—Nature of infringement
- § 46:22 —Compensation
- § 46:23 —Injunctions
- § 46:24 —Confiscation
- § 46:25 —Customs

### IV. TRADE AND SERVICE MARKS

- § 46:26 Nature—Creation of rights
- § 46:27 —Co-existence
- § 46:28 —Maintenance
- § 46:29 —Transfer
- § 46:30 —Cancellation
- § 46:31 Attacks on ownership—Prior use
- § 46:32 Infringement—Nature of infringement
- § 46:33 —Compensation
- § 46:34 —Injunctions
- § 46:35 —Confiscation
- § 46:36 —Customs actions

### V. TRADE AND SERVICE NAMES

- § 46:37 In general

### VI. INDUSTRIAL DESIGNS

- § 46:38 Nature—Creation of rights
- § 46:39 —Invention by employees
- § 46:40 —Maintenance

## TABLE OF CONTENTS

- § 46:41 —Extension
- § 46:42 —Transfer
- § 46:43 —Cancellation
- § 46:44 —Prior use
- § 46:45 Infringement—Nature of infringement
- § 46:46 —Compensation
- § 46:47 —Injunctions
- § 46:48 —Confiscation
- § 46:49 —Customs actions

## VII. TRADE SECRETS

- § 46:50 Nature
- § 46:51 Infringement—Nature of infringement
- § 46:52 —Compensation
- § 46:53 —Injunctions

## VIII. GEOGRAPHIC INDICATIONS

- § 46:54 Creation of right
- § 46:55 —Maintenance
- § 46:56 —Use and suspension of geographic indication
- § 46:57 —Cancellation
- § 46:58 Infringement—Nature of infringement
- § 46:59 —Compensation
- § 46:60 —Injunctions

## CHAPTER 47. TURKEY

### I. INTRODUCTION

- § 47:1 In general

### II. PATENTS

- § 47:2 Nature
- § 47:3 —Creation of rights
- § 47:4 —Beneficiaries of rights
- § 47:5 —Maintenance
- § 47:6 —Extension
- § 47:7 —Transfer
- § 47:8 —Cancellation
- § 47:9 Attacks on ownership—Prior inventors or users
- § 47:10 —Public interest (Government) intervention
- § 47:11 Infringement actions—Nature of infringement
- § 47:12 —Action for damages
- § 47:13 —Injunctions
- § 47:14 —Confiscation

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

§ 47:15 —Customs action

### III. COPYRIGHT

- § 47:16 Nature
- § 47:17 —Creation of rights
- § 47:18 —Beneficiaries of rights
- § 47:19 —Duration
- § 47:20 —Transfer
- § 47:21 Attacks on ownership—Prior authors
- § 47:22 —Public interest (Government) intervention
- § 47:23 Infringement actions—Nature of infringement
- § 47:24 —Action for damages
- § 47:25 —Injunctions
- § 47:26 —Confiscation
- § 47:27 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 47:28 Nature
- § 47:29 —Creation of rights
- § 47:30 —Beneficiaries of rights
- § 47:31 —Maintenance
- § 47:32 —Transfer
- § 47:33 —Cancellation
- § 47:34 Attacks on ownership—Prior users
- § 47:35 —Public interest (Government) intervention
- § 47:36 Infringement actions—Nature of infringement
- § 47:37 —Action for damages
- § 47:38 —Injunctions
- § 47:39 —Confiscation
- § 47:40 —Customs action

### V. TRADE AND SERVICE NAMES

- § 47:41 In general

### VI. INDUSTRIAL DESIGNS

- § 47:42 In general
- § 47:43 Nature
- § 47:44 —Creation of rights
- § 47:45 —Beneficiaries of rights
- § 47:46 —Maintenance
- § 47:47 —Extension
- § 47:48 —Transfer
- § 47:49 —Cancellation
- § 47:50 Attacks on ownership—Prior users

## TABLE OF CONTENTS

- § 47:51 —Public interest (Government) intervention
- § 47:52 Infringement actions—Nature of infringement
- § 47:53 —Injunctions
- § 47:54 —Confiscation
- § 47:55 —Customs action

## VII. UTILITY MODELS

- § 47:56 In general

## VIII. AESTHETIC DESIGNS AND PATTERNS

- § 47:57 In general

## CHAPTER 48. UKRAINE

### I. INTRODUCTION

- § 48:1 Legislation
- § 48:2 Treaties
- § 48:3 Registrations

### II. INVENTIONS AND UTILITY MODELS

- § 48:4 Nature
- § 48:5 Public interest
- § 48:6 Creation of rights
- § 48:7 Priority right
- § 48:8 Duration and maintenance
- § 48:9 Rights holders
- § 48:10 Transfer of rights
- § 48:11 Licensing
- § 48:12 International aspects
- § 48:13 Infringement
- § 48:14 Action for damages

### III. COPYRIGHT AND NEIGHBORING RIGHTS

- § 48:15 Nature
- § 48:16 Creation of rights
- § 48:17 Moral and property rights
- § 48:18 Initial holder and beneficiaries
- § 48:19 Co-authorship
- § 48:20 Rights of translator and author of other derivative works
- § 48:21 Rights of producer
- § 48:22 Rights of employer
- § 48:23 Duration of copyright and neighboring rights
- § 48:24 Transfer of rights
- § 48:25 Licensing

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 48:26 International aspects
- § 48:27 Infringement
- § 48:28 Actions for damages

### **IV. TRADE MARKS AND SERVICE MARKS**

- § 48:29 Nature
- § 48:30 Confirmation of trade mark right
- § 48:31 Priority right
- § 48:32 Co-ownership
- § 48:33 Transfer of rights and licensing
- § 48:34 Duration and maintenance
- § 48:35 International aspects
- § 48:36 Infringement

### **V. INDUSTRIAL DESIGNS**

- § 48:37 Nature
- § 48:38 Creation of rights
- § 48:39 Priority right
- § 48:40 Duration
- § 48:41 Initial holder
- § 48:42 Rights of employer
- § 48:43 Transfer of rights and licensing
- § 48:44 International aspects
- § 48:45 Infringement

### **VI. DOMAIN NAMES**

- § 48:46 Nature
- § 48:47 Confirmation of rights
- § 48:48 Duration and maintenance
- § 48:49 International aspects
- § 48:50 Infringement

### **VII. PLANT VARIETIES**

- § 48:51 Nature
- § 48:52 Creation of rights
- § 48:53 Priority right
- § 48:54 Duration and maintenance
- § 48:55 Rights holders
- § 48:56 Transfer of rights and licensing
- § 48:57 International aspects
- § 48:58 Infringement
- § 48:59 Action for damages

### **VIII. TRADE OR FIRM NAMES**

- § 48:60 Nature

## TABLE OF CONTENTS

- § 48:61 Property rights to trade names
- § 48:62 Infringement

## IX. GEOGRAPHICAL INDICATIONS

- § 48:63 Nature
- § 48:64 Creation of rights
- § 48:65 International aspects
- § 48:66 Infringement

## CHAPTER 49. UNITED KINGDOM

### I. INTRODUCTION

- § 49:1 Intellectual property rights system
- § 49:2 Intellectual property profession

### II. PATENTS

- § 49:3 Nature
- § 49:4 —Creation of rights
- § 49:5 —Beneficiaries of rights
- § 49:6 —Maintenance
- § 49:7 —Extension
- § 49:8 —Transfer
- § 49:9 —Cancellation
- § 49:10 Attacks on ownership—Prior inventors or users
- § 49:11 —Public interest
- § 49:12 Infringement—Nature of infringement
- § 49:13 —Action for damages
- § 49:14 —Injunction
- § 49:15 —Confiscation
- § 49:16 —Customs action

### III. COPYRIGHT

- § 49:17 Nature
- § 49:18 —Creation of rights
- § 49:19 —Beneficiaries of rights
- § 49:20 —Duration
- § 49:21 —Transfer
- § 49:22 —International aspects
- § 49:23 Attacks on ownership—Prior authors
- § 49:24 —Public interest
- § 49:25 Infringement actions—Nature of infringement
- § 49:26 —Action for damages
- § 49:27 —Injunction
- § 49:28 —Confiscation

§ 49:29 —Customs action

#### **IV. TRADE MARKS**

- § 49:30 Nature
- § 49:31 —Creation of rights
- § 49:32 —Beneficiaries of rights
- § 49:33 —Maintenance
- § 49:34 —Transfer
- § 49:35 —Cancellation
- § 49:36 —International aspects
- § 49:37 Attacks on ownership—Prior use
- § 49:38 —Public interest
- § 49:39 Infringement actions—Nature of infringement
- § 49:40 —Action for damages
- § 49:41 —Injunction
- § 49:42 —Confiscation
- § 49:43 —Customs action

#### **V. INDUSTRIAL DESIGNS AND UTILITY MODELS**

- § 49:44 Nature
- § 49:45 —Applicable laws
- § 49:46 —Design defined
- § 49:47 —Creation of rights
- § 49:48 —Beneficiaries of rights
- § 49:49 —Maintenance, extension and renewal
- § 49:50 —Transfer
- § 49:51 —Cancellation
- § 49:52 —International aspects
- § 49:53 Attacks on ownership—Prior use
- § 49:54 —Public interest
- § 49:55 Infringement actions—Nature of infringement
- § 49:56 —Action for damages
- § 49:57 —Injunction
- § 49:58 —Confiscation
- § 49:59 —Customs action

#### **VI. AESTHETIC DESIGNS AND PATTERNS**

- § 49:60 In general
- § 49:61 United Kingdom registered designs
- § 49:62 Copyright

#### **VII. LICENSING**

- § 49:63 Nature
- § 49:64 —Geography

## TABLE OF CONTENTS

- § 49:65 Core considerations—Type of intellectual property right licensed
- § 49:66 —Territorial scope
- § 49:67 —Term of license
- § 49:68 —Exclusivity
- § 49:69 —Sub-licenses
- § 49:70 —Payment
- § 49:71 —Ownership of intellectual property rights
- § 49:72 —Maintenance of rights
- § 49:73 —Defense and enforcement
- § 49:74 Other considerations—Recordal of registrable transactions
- § 49:75 —Consequences of recordal
- § 49:76 —Competition law

## CHAPTER 50. UNITED STATES

### I. INTRODUCTION

- § 50:1 In general

### II. UTILITY PATENTS

- § 50:2 Nature
- § 50:3 —Application procedure
- § 50:4 —Inventorship and ownership
- § 50:5 —Term
- § 50:6 —Transfer of ownership
- § 50:7 —Post-issuance correction and disclaimer
- § 50:8 —International aspects
- § 50:9 Attacks on validity—Re-examination
- § 50:10 —Prior inventorship
- § 50:11 —Invalidity and unenforceability
- § 50:12 —Public interest and government intervention
- § 50:13 Infringement actions—Nature of infringement
- § 50:14 —Action for damages
- § 50:15 —Injunctive relief
- § 50:16 —Import restrictions

### III. COPYRIGHT

- § 50:17 Nature
- § 50:18 —Creation of rights
- § 50:19 —Beneficiaries of rights
- § 50:20 —Duration
- § 50:21 —Transfer
- § 50:22 —International aspects
- § 50:23 Attacks on ownership—Original work
- § 50:24 —Public interest and government intervention
- § 50:25 Infringement actions—Nature of infringement

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 50:26 —Fair use
- § 50:27 —Action for damages
- § 50:28 —Injunctions
- § 50:29 —Confiscation
- § 50:30 —Customs action
- § 50:31 Special considerations for computer software
- § 50:32 Copyright protection and management systems

### IV. TRADE MARKS AND SERVICE MARKS

- § 50:33 Nature
- § 50:34 —Registration of marks
- § 50:35 —Beneficiaries of rights
- § 50:36 —Maintenance of federal registration
- § 50:37 —Transfer
- § 50:38 —Cancellation of federal registration
- § 50:39 —International aspects
- § 50:40 Attacks on ownership—Prior users
- § 50:41 —Fraud on the trade mark office
- § 50:42 —Public interest and government intervention
- § 50:43 Infringement actions—Nature of infringement
- § 50:44 —Action for damages
- § 50:45 —Injunctions
- § 50:46 —Confiscation
- § 50:47 Other trade mark actions—Dilution
- § 50:48 —Cybersquatting
- § 50:49 —Unfair competition
- § 50:50 —Customs action
- § 50:51 Trade and service names

### V. DESIGN PATENTS

- § 50:52 Nature
- § 50:53 —Application procedure
- § 50:54 —Term
- § 50:55 Infringement actions—Nature of infringement
- § 50:56 —Action for damages

### VI. TRADE SECRETS

- § 50:57 Nature
- § 50:58 —Creation of rights
- § 50:59 —Beneficiaries of rights
- § 50:60 —Protection
- § 50:61 —Transfer
- § 50:62 —Loss of rights
- § 50:63 —International aspects
- § 50:64 Attacks on ownership—Subsequent discovery

## TABLE OF CONTENTS

- § 50:65 —Public interest and government intervention
- § 50:66 Misappropriation actions—Nature of misappropriation
- § 50:67 —Action for damages
- § 50:68 —Injunctions
- § 50:69 —Confiscation
- § 50:70 —Customs action

## VII. LICENSING

- § 50:71 Nature
- § 50:72 Factors encouraging licensing
- § 50:73 Role of licensing in overall strategy
- § 50:74 Structuring licensing transactions
- § 50:75 —Preliminary provisions
- § 50:76 —Grant of rights
- § 50:77 —Licensee obligations regarding licensor copyrights and trade marks
- § 50:78 —Delivery
- § 50:79 Acceptance of licensed material by licensee
- § 50:80 —Payment for licensed material
- § 50:81 —Term of licensed rights
- § 50:82 —Termination of licensed rights
- § 50:83 —Other matters specific to transaction
- § 50:84 —Warranties (Licensor promises as to ownership and performance)
- § 50:85 —Limitation of liability for breach of agreement
- § 50:86 —Confidentiality
- § 50:87 —Indemnity for third-party claims
- § 50:88 —Government approvals and other requirements
- § 50:89 —Dispute resolution
- § 50:90 —Miscellaneous

## CHAPTER 51. VIETNAM

### I. INTRODUCTION

- § 51:1 In general

### II. AUTHORS' RIGHTS AND RELATED RIGHTS

- § 51:2 In general
- § 51:3 Conditions of protection of authors—Copyright
- § 51:4 —Related rights
- § 51:5 Contents, limitation, and term of protection of authors—Authors' rights
- § 51:6 —Related rights
- § 51:7 Ownership of copyright and related rights—Copyright
- § 51:8 —Related rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 51:9 Assignment and transfer of right of use of author's rights and related rights
- § 51:10 Registration certification of copyrights and related rights
- § 51:11 —Copyright registration certificates and related rights
- § 51:12 Representative, consultancy, and service for copyright and related rights

### III. INDUSTRIAL PROPERTY

- § 51:13 In general
- § 51:14 Categories of industrial property—Patent inventions and utility solution patents
- § 51:15 —Industrial designs
- § 51:16 —Layout designs
- § 51:17 —Trade marks
- § 51:18 —Trade names
- § 51:19 — —Registration of trade names
- § 51:20 —Geographical indications
- § 51:21 —Business secrets
- § 51:22 Owners of industrial property rights
- § 51:23 Creation of rights in industrial property
- § 51:24 Rights of beneficiaries
- § 51:25 Maintenance and renewal of protection titles
- § 51:26 Extension
- § 51:27 Transfer and licensing
- § 51:28 Invalidation
- § 51:29 Limits on the right of ownership—Prior use
- § 51:30 —Government intervention in the public interest
- § 51:31 —Dependent patent
- § 51:32 —General provisions relating to compulsory licensing

### IV. RIGHTS OVER NEW PLANT VARIETIES

- § 51:33 In general
- § 51:34 Establishment
- § 51:35 Content of the right
- § 51:36 Limitations on the right
- § 51:37 Transfer of the right

### V. INFRINGEMENT ACTIONS

- § 51:38 In general
- § 51:39 Assessment procedures and intellectual property examinations
- § 51:40 Intellectual property agents
- § 51:41 —Civil remedies
- § 51:42 —Administrative and criminal remedies
- § 51:43 —Customs authority and border control measures
- § 51:44 —Inspection

TABLE OF CONTENTS

§ 51:45 —Suspension measures

**CHAPTER 52. THE EUROPEAN UNION**

**I. INTRODUCTION**

§ 52:1 In general

**II. PATENTS**

§ 52:2 Nature

§ 52:3 Attacks on ownership

§ 52:4 Infringement actions

**III. COPYRIGHT**

§ 52:5 Nature

§ 52:6 Attacks on ownership

§ 52:7 Infringement actions

**IV. TRADE AND SERVICE MARKS**

§ 52:8 Nature

§ 52:9 Attacks on ownership

§ 52:10 Infringement actions

**V. INDUSTRIAL DESIGN AND UTILITY MODELS**

§ 52:11 Nature

§ 52:12 Attacks on ownership

§ 52:13 Infringement actions

**VI. AESTHETIC DESIGNS AND PATTERNS**

§ 52:14 Nature

§ 52:15 Attacks on ownership

§ 52:16 Infringement actions

**CHAPTER 53. THE REVISED BERNE  
CONVENTION FOR THE PROTECTION OF  
LITERARY AND ARTISTIC WORKS**

**I. INTRODUCTION**

§ 53:1 In general

**II. ORIGIN OF REVISED BERNE CONVENTION**

§ 53:2 History

§ 53:3 Status

### **III. ADDITIONAL INTERNATIONAL TREATIES**

- § 53:4 Universal Copyright Convention
- § 53:5 Agreement on Trade-Related Aspects of Intellectual Property Rights—Revised Berne Convention
- § 53:6 —Berne plus
- § 53:7 World Intellectual Property Organization Copyright Treaty

### **IV. STRUCTURE OF REVISED BERNE CONVENTION**

- § 53:8 In general
- § 53:9 Application of Revised Berne Convention—Works
- § 53:10 —Level of creativity
- § 53:11 —Special rules for certain works
- § 53:12 —Personal application

### **V. BASIC PRINCIPLES OF REVISED BERNE CONVENTION**

- § 53:13 National treatment and minimum rights
- § 53:14 No formalities
- § 53:15 Independence from protection in country of origin
- § 53:16 Proof of authorship

### **VI. CONCLUSION**

- § 53:17 In general

## **CHAPTER 54. THE BRUSSELS SATELLITE CONVENTION**

### **I. INTRODUCTION**

- § 54:1 In general

### **II. CONTENT**

- § 54:2 Scope of protection
- § 54:3 Exceptions from protection
- § 54:4 Relation to copyright and domestic legal regulations on abuse of monopoly

### **III. CONCLUSION**

- § 54:5 In general

## **CHAPTER 55. EUROPEAN TRADE MARK LAW**

### **I. INTRODUCTION**

- § 55:1 In general

TABLE OF CONTENTS

- § 55:2 National trade mark protection
- § 55:3 Madrid Agreement

**II. COMMUNITY TRADE MARK AND HARMONIZATION**

- § 55:4 In general
- § 55:5 Harmonization Directive

**III. COMMUNITY TRADE MARK**

- § 55:6 Nature
- § 55:7 Scope
- § 55:8 Applications
- § 55:9 Oppositions
- § 55:10 Conversion procedure
- § 55:11 Priority
- § 55:12 Seniority
- § 55:13 Infringement actions
- § 55:14 Remedies
- § 55:15 Renewal

**IV. MADRID PROTOCOL**

- § 55:16 In general
- § 55:17 Applications
- § 55:18 Assignment of international trade marks

**V. NATIONAL RIGHTS AND THE COMMUNITY TRADE MARK**

- § 55:19 In general

**VI. PIRACY AND COUNTERFEITING**

- § 55:20 In general

**VII. ENLARGEMENT**

- § 55:21 Accession of new member states
- § 55:22 Accession of Bulgaria and Romania

**CHAPTER 56. JURISDICTION AND DISPUTE RESOLUTION**

**I. INTRODUCTION**

- § 56:1 In general

## **II. ACTIONABILITY OF FOREIGN INTELLECTUAL PROPERTY RIGHTS IN ENGLISH COURTS**

- § 56:2 In general
- § 56:3 The Judgments Regulation
- § 56:4 —General rule: Defendant to be sued in his home state
- § 56:5 —Exceptions to the general rule

## **III. THE INTERNET**

- § 56:6 In general

## **IV. ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION**

- § 56:7 In general
- § 56:8 Arbitration
- § 56:9 Alternative dispute resolution
- § 56:10 Litigation
- § 56:11 World Intellectual Property Organization Arbitration and Mediation Center
- § 56:12 Advantages of World Intellectual Property Organization dispute resolution procedures

## **CHAPTER 57. THE LISBON AGREEMENT FOR THE PROTECTION OF APPELLATIONS OF ORIGIN AND THEIR INTERNATIONAL REGISTRATION**

### **I. INTRODUCTION**

- § 57:1 In general
- § 57:2 Purpose of the Lisbon Agreement
- § 57:3 Member states

### **II. INTERNATIONAL REGISTRATION PROCEDURE**

- § 57:4 In general
- § 57:5 Mandatory content of application
- § 57:6 Examination by international bureau

### **III. REQUIREMENTS FOR PROTECTION**

- § 57:7 In general
- § 57:8 Recognition, protection, and reputation in country of origin
- § 57:9 —Recognition
- § 57:10 —Protection and reparation
- § 57:11 Grant of protection

## TABLE OF CONTENTS

- § 57:12 —Scope of protection
- § 57:13 Refusal of protection
- § 57:14 —Remedies against refusals
- § 57:15 Tolerated use for prior users
- § 57:16 Remedies against violations

## IV. CHANGES AFFECTING INTERNATIONAL REGISTRATION

- § 57:17 Modifications
- § 57:18 Renunciation of protection
- § 57:19 Cancellation of international registration
- § 57:20 Invalidation
- § 57:21 Corrections

## CHAPTER 58. THE LOCARNO AGREEMENT ESTABLISHING AN INTERNATIONAL CLASSIFICATION FOR INDUSTRIAL DESIGN

### I. INTRODUCTION

- § 58:1 In general
- § 58:2 Purpose of Locarno Classification
- § 58:3 Revisions and editions of Classification
- § 58:4 Member states
- § 58:5 Structure of Locarno Classification
- § 58:6 Use and scope of Locarno Classification

### II. CLASSIFICATION SYSTEM

- § 58:7 In general
- § 58:8 Classes and subclasses
- § 58:9 —Alphabetical list
- § 58:10 —Class list
- § 58:11 —Finding appropriate class
- § 58:12 —Search methods
- § 58:13 —Double-check test
- § 58:14 —Classification in infringement cases

Appendix 58A. Annex

## CHAPTER 59. THE MADRID AGREEMENT AND PROTOCOL

### I. INTRODUCTION

- § 59:1 In general

### II. INTERNATIONAL REGISTRATION PROCEDURE

- § 59:2 In general

- § 59:3 Application form
- § 59:4 Determining applicable system
- § 59:5 Entitlement to file
- § 59:6 —Designating the European Union
- § 59:7 Eligibility criteria
- § 59:8 Basic mark
- § 59:9 Specification
- § 59:10 Languages
- § 59:11 Representation
- § 59:12 Fees
- § 59:13 Transmission of application to the international bureau
- § 59:14 —Examination by the international bureau
- § 59:15 —Examination by the national offices
- § 59:16 Duration and renewal
- § 59:17 Maintenance of international registration
- § 59:18 Dependency period

### **III. CENTRAL ATTACK AND TRANSFORMATION**

- § 59:19 In general

### **IV. SUBSEQUENT DESIGNATION**

- § 59:20 In general

### **V. ASSIGNMENT**

- § 59:21 In general

## **CHAPTER 60. THE PARIS CONVENTION FOR PROTECTION OF INDUSTRIAL PROPERTY**

### **I. INTRODUCTION**

- § 60:1 In general
- § 60:2 History of the Paris Convention

### **II. SUBSTANTIVE PROVISIONS**

- § 60:3 In general
- § 60:4 National treatment
- § 60:5 Right of priority

### **III. COMMON RULES FOR PATENTS**

- § 60:6 In general
- § 60:7 Principle of independence of patents
- § 60:8 Right of inventor to be mentioned
- § 60:9 Patentability not effected by restrictions on product

## TABLE OF CONTENTS

- § 60:10 Importation of patented products or products made from patented processes
- § 60:11 Failure to work and compulsory licenses
- § 60:12 Grace period for maintenance fees
- § 60:13 Patents in international traffic
- § 60:14 Inventions shown and marks exhibited at international exhibitions

## IV. COMMON RULES CONCERNING TRADE MARKS

- § 60:15 In general
- § 60:16 Cancellation for non-use
- § 60:17 Use in form different from form registered
- § 60:18 Concurrent use
- § 60:19 Grace period for renewal fees
- § 60:20 Independence of trade marks
- § 60:21 Protection of trade marks registered in country of origin
- § 60:22 Protection for unregistered well-known marks
- § 60:23 State emblems, official hallmarks, and emblems of international organizations
- § 60:24 Assignment of trade marks
- § 60:25 Service marks
- § 60:26 Registration of marks in name of agent
- § 60:27 Nature of goods not obstacle to registration
- § 60:28 Collective marks
- § 60:29 Industrial designs
- § 60:30 Trade names
- § 60:31 Indications of source and appellations of origin

## V. COMMON RULES CONCERNING UNFAIR COMPETITION

- § 60:32 In general
- § 60:33 Unfair competition
- § 60:34 Article 10 *bis*

## VI. GENERAL AND ADMINISTRATIVE PROVISIONS

- § 60:35 In general

## CHAPTER 61. THE PATENT COOPERATION TREATY

### I. INTRODUCTION

- § 61:1 In general
- § 61:2 History

### II. BASIC FEATURES OF THE TREATY

- § 61:3 Not a world patent

- § 61:4 Procedure
- § 61:5 —Filing
- § 61:6 —Search, written opinion, and publication
- § 61:7 —Demand
- § 61:8 —National and regional phase filings

### **III. STRATEGIC USE OF PATENT COOPERATION TREATY APPLICATIONS**

- § 61:9 In general

### **IV. UNITED STATES PATENT COOPERATION TREATY APPLICATION STRATEGY**

- § 61:10 Choosing receiving office and international searching authority
- § 61:11 Restoration of right of priority
- § 61:12 Filing and unity of invention
- § 61:13 Doctrine of equivalents and prosecution history estoppel
- § 61:14 Obtaining prior art date based on filing of patent cooperation treaty application
- § 61:15 Taking advantage of grace periods based on filing of patent cooperation treaty application

### **V. MOVING TOWARD PATENT COOPERATION TREATY-BASED WORLD PATENT?**

- § 61:16 In general

### **VI. CONCLUSION**

- § 61:17 In general

## **CHAPTER 62. THE PATENT LAW TREATY**

### **I. INTRODUCTION**

- § 62:1 In general

### **II. RELATION TO PATENT COOPERATION TREATY**

- § 62:2 In general

### **III. APPLICATION OF PATENT LAW TREATY**

- § 62:3 In general

### **IV. MAIN PROVISIONS OF PATENT LAW TREATY**

- § 62:4 Filing date requirements
- § 62:5 Application formalities

## TABLE OF CONTENTS

- § 62:6 Mandatory representation
- § 62:7 Communications
- § 62:8 Validity and revocation of patents
- § 62:9 Relief with respect to time limits and reinstatement of rights
- § 62:10 Correction or addition of priority claim
- § 62:11 Restoration of priority right

## V. SUBSTANTIVE PATENT LAW TREATY

- § 62:12 In general

## VI. CONCLUSION

- § 62:13 In general

## CHAPTER 63. THE SINGAPORE TREATY ON LAW OF TRADE MARKS

- § 63:1 Introduction
- § 63:2 Marks to which Treaty applies
- § 63:3 Electronic communications: Article 8 and Rule 6
- § 63:4 Relief measures in cases of failure to comply with time limits
- § 63:5 Trade mark license requirements
- § 63:6 Establishment of an assembly
- § 63:7 Resolution by diplomatic conference supplementary to Singapore Treaty
- § 63:8 Effective date of treaty and contracting parties

## CHAPTER 64. THE TRIPS AGREEMENT

### I. INTRODUCTION

- § 64:1 In general

### II. RELATIONSHIP WITH EXISTING CONVENTIONS

- § 64:2 In general

### III. GENERAL PRINCIPLES

- § 64:3 Aim and scope
- § 64:4 Concept of national treatment
- § 64:5 Most-favored-nation principle

### IV. SUBSTANTIVE PROVISIONS

- § 64:6 Existing conventions as basis for protection
- § 64:7 Copyright and related rights
- § 64:8 Trade marks
- § 64:9 Geographical indications

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 64:10 Industrial designs
- § 64:11 Patents
- § 64:12 Integrated circuits
- § 64:13 Trade secrets and know-how
- § 64:14 Control of anti-competitive practices

### V. ENFORCEMENT AND ADMINISTRATIVE ISSUES

- § 64:15 Enforcement
- § 64:16 Dispute prevention and settlement
- § 64:17 Transition arrangements
- § 64:18 Review of TRIPS agreement

## CHAPTER 65. THE UNIVERSAL COPYRIGHT CONVENTION

- § 65:1 Introduction
- § 65:2 Background
- § 65:3 Current application
- § 65:4 Overview of provisions
- § 65:5 Main provisions—General scope of protection
- § 65:6 —National treatment
- § 65:7 —Maximum permissible formalities
- § 65:8 —Duration of copyright
- § 65:9 —Translation rights
- § 65:10 —Right to produce instructional materials

Appendix 65A. Parties to the Universal Copyright Convention

Appendix 65B. Parties to the Berne Convention for the Protection of Literary and Artistic Works

## PART II. PRIMARY LAW AND COMMENTARY

### CHAPTER 66. LAWS OF ARGENTINA WITH COMMENTARY

#### I. INTRODUCTION

- § 66:1 In general
- § 66:2 Patents
- § 66:3 Utility models
- § 66:4 Trade secrets
- § 66:5 Copyrights
- § 66:6 Trade and service marks
- § 66:7 Industrial models and designs
- § 66:8 Licensing and transfer of technology

TABLE OF CONTENTS

**II. STATUTORY TEXT**

- § 66:9 Patent and Utility Models Law Number 24.482, amended by Law Number 24.572
- § 66:10 Confidentiality Act
- § 66:11 Copyright Act
- § 66:12 Trade Mark Act

**CHAPTER 67. LAWS OF AUSTRALIA WITH COMMENTARY**

**I. INTRODUCTION**

- § 67:1 In general

**II. COPYRIGHT**

- § 67:2 In general
- § 67:3 Computer programs
- § 67:4 Lists and databases
- § 67:5 Bundles of copyright
- § 67:6 Display of copyright notice
- § 67:7 Display of copyright notice—Infringement of copyright and fair dealing
- § 67:8 Reproduction
- § 67:9 Copyright in utilitarian works
- § 67:10 Secondary infringement
- § 67:11 Ownership of copyright
- § 67:12 Assignments and licenses
- § 67:13 Rights and duties of the Crown
- § 67:14 International aspects of copyright
- § 67:15 Moral rights
- § 67:16 —Recent and proposed amendments
- § 67:17 Performers' protection
- § 67:18 Proposals for amendment
- § 67:19 Case law—Green v. Broadcasting Corporation of New Zealand
- § 67:20 —De Garis and Another v. Neville Jeffress Pidler Pty. Ltd

**III. COPYRIGHT AMENDMENT (DIGITAL AGENDA) ACT 2000**

- § 67:21 In general
- § 67:22 Elements of the amendment
- § 67:23 Exceptions
- § 67:24 Enforcement measures

**IV. CIRCUIT LAYOUTS**

- § 67:25 In general

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 67:26 Duration of protection
- § 67:27 Evidentiary labels
- § 67:28 Infringement of eligible layouts
- § 67:29 Reverse engineering
- § 67:30 Innocent infringement
- § 67:31 Ownership and licenses
- § 67:32 Rights of the commonwealth
- § 67:33 International aspects
- § 67:34 Case law—Nintendo v. Centronics

### V. DESIGNS

- § 67:35 In general
- § 67:36 Obtaining registration
- § 67:37 Duration of rights
- § 67:38 Ownership, assignments, and other dealings
- § 67:39 Infringement
- § 67:40 Rights of the Crown
- § 67:41 International aspects
- § 67:42 Proposals for reform
- § 67:43 Case law—Dart Industries Inc. and Another v. Decor Corporation Pty. Limited

### VI. PATENTS

- § 67:44 In general
- § 67:45 Obtaining a patent
- § 67:46 Patentee's rights
- § 67:47 Marking requirements
- § 67:48 Standard patent extensions only for pharmaceutical substances or human therapeutic use
- § 67:49 Computer software
- § 67:50 Microorganisms
- § 67:51 Infringement
- § 67:52 Assignments and licenses
- § 67:53 Statutory controls on patent assignments and licenses patent abuse
- § 67:54 Rights of the Commonwealth
- § 67:55 International aspects
- § 67:56 Case law—Makita (Australia) Pty. Ltd. v. Black & Decker (Australasia) Pty. Ltd
- § 67:57 —BristolMyers Squibb Co. v. F.H. Faulding & Co. Ltd
- § 67:58 —Van der Lely v. Bamfords
- § 67:59 —Windsurfing International Inc. v. Petit
- § 67:60 Patents Amendment (Innovation Patents) Bill 2000

### VII. PLANT BREEDER'S RIGHTS ACT 1994

- § 67:61 In general

## TABLE OF CONTENTS

- § 67:62 Purposes of the scheme
- § 67:63 Application process
- § 67:64 Eligibility
- § 67:65 Benefits of plant breeder's rights
- § 67:66 Costs of plant breeder's rights
- § 67:67 Trade practices and plant breeder's rights interaction
- § 67:68 Summary

## VIII. CONFIDENTIAL INFORMATION, TRADE SECRETS, AND KNOW-HOW

- § 67:69 In general
- § 67:70 Information is not property
- § 67:71 When are ideas not protected?
- § 67:72 Confidential information and franchising
- § 67:73 Reverse engineering
- § 67:74 When is the duty of confidentiality no longer binding?
- § 67:75 Employees and contractors
- § 67:76 Case law—Wheatley v. Bell
- § 67:77 —Cope Allman (Marrickville) Pty. Limited v. Farrow and Others
- § 67:78 —Secton Pty. Ltd. (T/AS BWN. Industries) v. Delawood Pty. Ltd

## IX. REGISTERED TRADE MARKS

- § 67:79 In general
- § 67:80 What is a sign?
- § 67:81 Descriptiveness
- § 67:82 Distinctiveness
- § 67:83 Originality and deceptiveness
- § 67:84 Special types of registrations
- § 67:85 How does a trade mark get registered?
- § 67:86 Removal
- § 67:87 Marking
- § 67:88 Licensing and other dealings with registered trade marks
- § 67:89 Trade marks and franchising
- § 67:90 Infringement
- § 67:91 Comparative advertising
- § 67:92 International aspects

## X. TRADE PRACTICES LAW

- § 67:93 In general
- § 67:94 Sponsorship, rights of personality, cartoon characters, and merchandising
- § 67:95 Comparative advertising
- § 67:96 Origin labeling
- § 67:97 International reputation
- § 67:98 Geographical indications

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 67:99 Unconscionability and franchising
- § 67:100 Case law—Pacific Dunlop Ltd. v. Hogan

### **XI. COMMON LAW REMEDIES**

- § 67:101 In general
- § 67:102 Passing off
- § 67:103 Business and product names
- § 67:104 Appearance of things
- § 67:105 Rights of personality
- § 67:106 Licensing and common law trade marks
- § 67:107 Injurious and malicious falsehood
- § 67:108 Case law—Reddaway v. Banham
- § 67:109 —A. G. Spalding & Bros v. A. W. Gammage Ltd
- § 67:110 —Reckitt & Colman Products Ltd. v. Borden Inc

### **XII. STATUTORY TEXT**

- § 67:111 Trade Marks Act 1995
- § 67:112 Copyright Act 1968
- § 67:113 Patents Act 1990
- § 67:114 Designs Act 1906

## **Volume 4**

### **CHAPTER 68. LAWS OF AUSTRIA WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 68:1 In general
- § 68:2 Competition law
- § 68:3 Trade Mark Act
- § 68:4 Registered design protection
- § 68:5 Patent law
- § 68:6 Industrial designs protection
- § 68:7 Semiconductor chip design protection
- § 68:8 Copyright law
- § 68:9 Domain names

#### **II. STATUTORY TEXT**

- § 68:10 Act Against Unfair Competition
- § 68:11 Trade Mark Act
- § 68:12 Registered Design Act
- § 68:13 Patent Act
- § 68:14 Industrial Design Act

TABLE OF CONTENTS

- § 68:15 Semiconductor Chip Act
- § 68:16 Copyright Act

**CHAPTER 69. LAWS OF BELGIUM WITH COMMENTARY**

**I. INTRODUCTION**

- § 69:1 In general
- § 69:2 Copyright
- § 69:3 Trade marks
- § 69:4 Designs and models
- § 69:5 Patents
- § 69:6 Breeders' certificates
- § 69:7 Databases
- § 69:8 Chips
- § 69:9 Software
- § 69:10 Domain names

**II. STATUTORY TEXT**

- § 69:11 Copyright Act of 30 June 1994
- § 69:12 The Benelux Treaty on Intellectual Property of 25 February 2005
- § 69:13 Patent Act of 28 March 1984

**CHAPTER 70. LAWS OF BRAZIL WITH COMMENTARY**

**I. INTRODUCTION**

- § 70:1 In general
- § 70:2 Industrial property law
- § 70:3 —Patent law
- § 70:4 —Trade Mark Law
- § 70:5 —Other dispositions of the industrial property law
- § 70:6 —Copyright law

**II. STATUTORY TEXT**

- § 70:7 Industrial Property Law, Law number 9.279 of 14 May 1996
- § 70:8 Copyright Law, Law Number 9.610 of 19 February 1998

**CHAPTER 71. LAWS OF CANADA WITH COMMENTARY**

**I. INTRODUCTION**

- § 71:1 In general

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 71:2 Statutes
- § 71:3 —Competition Act
- § 71:4 Patent Act
- § 71:5 Trade Marks Act
- § 71:6 —Official marks and geographic indications
- § 71:7 —Licensing and assignment
- § 71:8 —Remedies available to trade mark owners
- § 71:9 —Public regulation relevant to trade mark owners
- § 71:10 Industrial Design Act
- § 71:11 —Nature of protection and originality
- § 71:12 —Application and registration process
- § 71:13 —Interaction with other forms of intellectual property
- § 71:14 —Rights and infringement
- § 71:15 Plant Breeders' Rights Act
- § 71:16 Integrated Circuit Topography Act
- § 71:17 Copyright Act

### II. STATUTORY TEXT

- § 71:18 Patent Act
- § 71:19 Copyright Act
- § 71:20 Trade Marks Act
- § 71:21 Act Respecting Industrial Designs
- § 71:22 Plant Breeders' Rights Act
- § 71:23 Integrated Circuit Topography Act

## CHAPTER 72. LAWS OF COLOMBIA WITH COMMENTARY

### I. INTRODUCTION

- § 72:1 In general

### II. STATUTORY TEXT

- § 72:2 Common Regime on Industrial Property
- § 72:3 Decision Number 351 of 1993 on the Common Regime on Copyright
- § 72:4 Law Number 23 of 1982 on Copyright

## CHAPTER 73. LAWS OF CYPRUS WITH COMMENTARY

### I. INTRODUCTION

- § 73:1 In general
- § 73:2 Domestic law
- § 73:3 International agreements

TABLE OF CONTENTS

§ 73:4 Patents

**II. STATUTORY TEXT**

§ 73:5 Patents Law

§ 73:6 Trade Marks Law

§ 73:7 Copyright Law

**CHAPTER 74. LAWS OF THE CZECH  
REPUBLIC WITH COMMENTARY**

**I. INTRODUCTION**

§ 74:1 System of intellectual property law

§ 74:2 —Registered and unregistered

§ 74:3 —Creative and non-creative

§ 74:4 —Individual and non-individual

**II. SOURCES OF LAW**

§ 74:5 National legislation

§ 74:6 International treaties

§ 74:7 European law

**III. PATENTS**

§ 74:8 In general

§ 74:9 Patentability

§ 74:10 Patent rights

§ 74:11 Period of protection

§ 74:12 Patent office prosecution

§ 74:13 Patent cooperation treaty patents

§ 74:14 Infringement of rights

§ 74:15 Cancellation proceedings

§ 74:16 Appeals of decisions of the industrial property office

**IV. UTILITY MODELS**

§ 74:17 In general

**V. INDUSTRIAL DESIGNS**

§ 74:18 In general

**VI. TRADE MARKS**

§ 74:19 In general

§ 74:20 Concept of trade mark

§ 74:21 Registration proceedings

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 74:22 Rights in the trade mark
- § 74:23 Cancellation

### **VII. COPYRIGHT**

- § 74:24 In general

### **VIII. UNFAIR COMPETITION**

- § 74:25 In general

### **IX. OTHER BRANCHES OF LAW AND PRIVATE INTERNATIONAL LAW**

- § 74:26 In general

### **X. PROCEDURAL ASPECTS**

- § 74:27 In general

### **XI. STATUTORY TEXT**

- § 74:28 Law on Trade Marks
- § 74:29 Act Concerning Literary, Scientific, and Artistic Work (Copyright Act)
- § 74:30 Law on Inventions, Industrial Designs, and Rationalization Proposals, Law Number 527 of 27 November 1990

## **CHAPTER 75. LAWS OF DENMARK WITH COMMENTARY**

- § 75:1 Consolidated Trade Marks Act, Act Number 90, 28-01-2009
- § 75:2 Consolidated Act on Copyright, Act Number 587, 20-06-2008

## **CHAPTER 76. LAWS OF ESTONIA WITH COMMENTARY**

### **I. INTRODUCTION**

- § 76:1 In general
- § 76:2 Note on commentary

### **II. STATUTORY TEXT**

- § 76:3 Copyright Act of 11 November 1992
- § 76:4 Trade Marks Act of 22 May 2002
- § 76:5 Patents Act of 16 March 1994
- § 76:6 Utility Models Act of 16 March 1994
- § 76:7 Industrial Design Protection Act of 18 November 1997
- § 76:8 Protection of Layout Designs of Integrated Circuits Act of 25 November 1998

TABLE OF CONTENTS

- § 76:9 Principles of Legal Regulation of Industrial Property Act of 28  
January 2003  
§ 76:10 Geographical Indication Protection Act of 15 December 1999

**CHAPTER 77. LAWS OF FINLAND WITH  
COMMENTARY**

**I. INTRODUCTION**

- § 77:1 In general  
§ 77:2 Scope of Finnish intellectual property legislation  
§ 77:3 Enforcement of rights—Forum  
§ 77:4 —Remedies  
§ 77:5 —Evidence  
§ 77:6 Administrative and self-regulative bodies—National Board of  
Patents and Registration  
§ 77:7 —Customs authorities  
§ 77:8 —Copyright Council  
§ 77:9 —Board on Business Practice

**II. STATUTORY TEXT**

- § 77:10 Patents Act 1967  
§ 77:11 Trade Marks Act 1967

**CHAPTER 78. LAWS OF HUNGARY WITH  
COMMENTARY**

**I. INTRODUCTION**

- § 78:1 In general

**II. PATENTS**

- § 78:2 In general  
§ 78:3 Patentable subject matter  
§ 78:4 Entitlement to patent  
§ 78:5 —Service inventions  
§ 78:6 —Employee inventions  
§ 78:7 Duration of protection and rights conferred  
§ 78:8 Patent Cooperation Treaty; National phase  
§ 78:9 European patents  
§ 78:10 Competent authorities

**III. UTILITY MODELS**

- § 78:11 In general  
§ 78:12 Conditions of grant

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 78:13 Entitlement to utility model protection
- § 78:14 Duration of protection and rights conferred
- § 78:15 Competent authorities

### IV. INDUSTRIAL DESIGNS

- § 78:16 In general
- § 78:17 Conditions of grant
- § 78:18 Entitlement to design protection
- § 78:19 Duration of protection and rights conferred
- § 78:20 Competent authorities

### V. TRADE MARKS AND GEOGRAPHICAL INDICATIONS

- § 78:21 Act XI of 1997
- § 78:22 Competition Act

### VI. COPYRIGHT

- § 78:23 Act LXXVI of 1999

### VII. INTERNATIONAL TREATIES PERTAINING TO INTELLECTUAL PROPERTY

- § 78:24 In general

### VIII. STATUTORY TEXT

- § 78:25 Law XXXIII of 1995 on the Protection of Inventions by Patents
- § 78:26 Law Number LXXVI of 1999 on Copyright

## CHAPTER 79. LAWS OF ISRAEL WITH COMMENTARY

### I. INTRODUCTION

- § 79:1 In general

### II. PATENTS

- § 79:2 In general
- § 79:3 Amendments to the Patent Law
- § 79:4 Proposed 2010 Amendments to the patent Law
- § 79:5 Pharmacists' Ordinance
- § 79:6 Plant breeders' rights
- § 79:7 Protection of integrated circuits

### III. COPYRIGHT LAW

- § 79:8 In general

TABLE OF CONTENTS

- § 79:9 Rights
- § 79:10 Permitted use of copyrighted material
- § 79:11 —Procedure
- § 79:12 —Enforcement

**IV. TRADE MARKS**

- § 79:13 In general
- § 79:14 Registration of foreign trade marks
- § 79:15 Madrid Protocol
- § 79:16 Merchandise Marks Ordinance 1929
- § 79:17 Protection of Appellations of Origin and Geographical Names Law 1965

**V. PASSING OFF AND OTHER COMMERCIAL TORTS**

- § 79:18 The tort of passing off
- § 79:19 Theft of commercial secrets

**VI. DEFENSE EXPORT CONTROL LAW, 2007**

- § 79:20 In general

**VII. RESTRICTIVE TRADE PRACTICES LAW 1988**

- § 79:21 In general

**VIII. INFRINGEMENT BY ANONYMOUS INTERNET TORTFEASORS**

- § 79:22 In general

**IX. PARALLEL IMPORTS**

- § 79:23 In general

**X. INDUSTRIAL DESIGNS**

- § 79:24 In general

**XI. EXTRATERRITORIAL APPLICATION OF ISRAEL INTELLECTUAL PROPERTY LAW**

- § 79:25 In general

**XII. COPYRIGHT LAW 2007**

- § 79:26 In general

**XIII. STATUTORY TEXT**

- § 79:27 Copyright Law of 2007

- § 79:28 Performers and Broadcasters Law 1984
- § 79:29 Trade Marks Ordinance (New Version) 1972
- § 79:30 Customs Ordinance
- § 79:31 Merchandise Marks Ordinance
- § 79:32 Protection of Appellations of Origin and Geographical Names Law 1965
- § 79:33 Commercial Wrongs Law 1999
- § 79:34 Patents Law 1967
- § 79:35 Integrated Circuits (Protection) Law, 1999
- § 79:36 Patents and Designs Ordinance, 1924

## Volume 5

### CHAPTER 80. LAWS OF ITALY WITH COMMENTARY

#### I. PROTECTION OF COPYRIGHT AND OTHER RELATED RIGHTS

- § 80:1 In general
- § 80:2 Works qualifying for protection
- § 80:3 Economic rights
- § 80:4 Duration

#### II. OWNERSHIP OF COPYRIGHT

- § 80:5 In general
- § 80:6 Moral rights
- § 80:7 Neighbouring rights
- § 80:8 Registration
- § 80:9 Cases of infringement
- § 80:10 Enforcement of rights
- § 80:11 Assignment and licensing of copyright
- § 80:12 International protection of copyright

#### III. STATUTORY TEXT

- § 80:13 Protection of Copyright and Other Rights, Act Number 633 of 22 April 1941

### CHAPTER 81. LAWS OF JAPAN WITH COMMENTARY

#### I. INTRODUCTION

- § 81:1 In general
- § 81:2 Background

TABLE OF CONTENTS

§ 81:3 International conventions

**II. STATUTORY TEXT**

§ 81:4 Patent Act

§ 81:5 Copyright Act

**CHAPTER 82. LAWS OF MALAYSIA WITH COMMENTARY**

**I. INTRODUCTION**

§ 82:1 In general

§ 82:2 Trade Marks Act of 1976

§ 82:3 Patents Act of 1983

§ 82:4 Copyright Act of 1987

§ 82:5 Industrial Designs Act of 1996

§ 82:6 Layout-Design of Integrated Circuits Act of 2000

**II. STATUTORY TEXT**

§ 82:7 Copyright Act 1987 (Act Number 332)

§ 82:8 Patents Act 1983 (Act Number 291 as amended)

§ 82:9 Trade Marks Act 1976 (Act Number 175)

**CHAPTER 83. LAWS OF MEXICO WITH COMMENTARY**

**I. INTRODUCTION**

§ 83:1 In general—Patents

§ 83:2 —Trade marks

§ 83:3 —Administrative proceeding

§ 83:4 —Modifications with regard to defense and protection of industrial property rights

§ 83:5 —Sanctions

§ 83:6 Increase in powers of the mexican institute of industrial property

§ 83:7 Harmonization with international treaties

**II. STATUTORY TEXT**

§ 83:8 Industrial Property Law

§ 83:9 Federal Copyright Law

**CHAPTER 84. LAWS OF NEW ZEALAND WITH COMMENTARY**

**I. INTRODUCTION**

§ 84:1 In general

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 84:2 Intellectual property office
- § 84:3 Unregistered rights and common law rights
- § 84:4 Peculiarities in New Zealand legislation

### II. MAJOR LEGISLATION

- § 84:5 Patents Act of 1953
- § 84:6 Trade Marks Act of 2002
- § 84:7 Designs Act of 1953
- § 84:8 Copyright Act of 1994
- § 84:9 Layout Designs Act of 1994
- § 84:10 Plant Variety Rights Act of 1987

### III. STATUTORY TEXT

- § 84:11 Patents Act (Consolidated) 1953-2002
- § 84:12 Layout Designs Act (Consolidated) 1994-1999
- § 84:13 Designs Act (Consolidated) 1953-2010
- § 84:14 Plant Variety Rights Act (Consolidated) 1987-1999
- § 84:15 Flags, Emblems, and Names Protection Act (Consolidated) 1981-2010
- § 84:16 Fair Trading Act (Consolidated) 1986-2008
- § 84:17 Commerce Act (Consolidated) 1986-2008
- § 84:18 Copyright Act (Consolidated) 1994-2011
- § 84:19 Trade Marks Act (Consolidated) 2002-2011
- § 84:20 Geographical Indications (Wine and Spirits) Registration Act
- § 84:21 Major Events Management Act 2007

## Volume 6

### CHAPTER 85. LAWS OF NORWAY WITH COMMENTARY

#### I. TRADE MARKS

- § 85:1 In general
- § 85:2 Filing of application and examination

#### II. INDUSTRIAL DESIGNS

- § 85:3 In general
- § 85:4 Filing of application and examination, and registration

#### III. PATENTS

- § 85:5 In general
- § 85:6 Filing of application and examination
- § 85:7 Scope of protection, duration of patent, and infringement

## TABLE OF CONTENTS

§ 85:8 License and compulsory license

### IV. STATUTORY TEXT

§ 85:9 Trade Marks Act

§ 85:10 Designs Act

§ 85:11 Patents Act

## CHAPTER 86. LAWS OF PERU WITH COMMENTARY

### I. COPYRIGHT LAW

§ 86:1 In general

§ 86:2 Scope of protection

§ 86:3 Rights conferred to the author

§ 86:4 —Moral rights

§ 86:5 —Property rights

§ 86:6 Categories of protectable works of authorship

§ 86:7 —Literary works

§ 86:8 —Artistic works

§ 86:9 —Scientific works

§ 86:10 —Computer programs

§ 86:11 Duration of copyright protection

§ 86:12 Remedies

### II. PATENT LAW

§ 86:13 In general

§ 86:14 Subject matter and conditions for protection

§ 86:15 Duration of rights

§ 86:16 Scope of protection

§ 86:17 Infringement

§ 86:18 Exhaustion of rights

§ 86:19 Defenses

§ 86:20 Opposition

§ 86:21 Remedies

### III. TRADE MARK LAW

§ 86:22 In general

§ 86:23 Subject matter and registrability

§ 86:24 Obtaining protection

§ 86:25 Duration

§ 86:26 Scope of protection

§ 86:27 Exhaustion of rights

§ 86:28 Infringement

§ 86:29 Opposition and revindication

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 86:30 Remedies
- § 86:31 Cancellation, nullification and lapse
- § 86:32 Assignment and license

### IV. OTHER LAWS

- § 86:33 Geographical indications
- § 86:34 Industrial designs
- § 86:35 Utility models
- § 86:36 Lay-out designs of integrated Circuits
- § 86:37 Industrial and trade secrets

### V. STATUTORY TEXT

- § 86:38 Copyright law
- § 86:39 Patent law
- § 86:40 Trade Mark Law

## CHAPTER 87. LAWS OF THE PHILIPPINES WITH COMMENTARY

- § 87:1 Introduction
- § 87:2 Intellectual property code (Republic Act number 8293)

## CHAPTER 88. LAWS OF POLAND WITH COMMENTARY

### I. INTRODUCTION

- § 88:1 In general
- § 88:2 International treaties

### II. COPYRIGHT ACT

- § 88:3 In general

### III. INDUSTRIAL PROPERTY

- § 88:4 In general
- § 88:5 Invention
- § 88:6 Patent
- § 88:7 —Unauthorized use and patent infringement
- § 88:8 —Criminal penalties
- § 88:9 —Patent annulment and patent lapse
- § 88:10 Utility models
- § 88:11 Trade marks
- § 88:12 Industrial designs
- § 88:13 Topography of integrated Circuits
- § 88:14 Priority

TABLE OF CONTENTS

**IV. STATUTORY TEXT**

- § 88:15 Act of 4 February 1994 on Copyright and Neighboring Rights
- § 88:16 Act of 30 June 2000 on Industrial Property Law

**CHAPTER 89. LAWS OF PORTUGAL WITH COMMENTARY**

**I. INTRODUCTION**

- § 89:1 In general

**II. INDUSTRIAL PROPERTY**

- § 89:2 In general
- § 89:3 Patents
- § 89:4 Utility models
- § 89:5 Industrial designs and models
- § 89:6 Trade marks
- § 89:7 Awards
- § 89:8 Names and insignia of establishments
- § 89:9 Logos
- § 89:10 Appellations of origin and geographical indications
- § 89:11 Unfair competition

**III. COPYRIGHT**

- § 89:12 In general

**IV. INFRINGEMENT AND LITIGATION**

- § 89:13 Opposition within the National Institute of Industrial Property
- § 89:14 Litigation in the commercial court
- § 89:15 Litigation in the criminal courts
- § 89:16 Litigation in the civil courts and criminal courts (Copyright)

**V. STATUTORY TEXT**

- § 89:17 Copyright and Neighboring Rights Code
- § 89:18 Industrial Property Code

**CHAPTER 90. LAWS OF SINGAPORE WITH COMMENTARY**

**I. INTRODUCTION**

- § 90:1 In general
- § 90:2 Background
- § 90:3 International conventions

## II. LAW OF COPYRIGHT

- § 90:4 Legislation
- § 90:5 Subject matter and conditions for copyright protection
- § 90:6 Obtaining protection: “connecting factors”
- § 90:7 Duration
- § 90:8 Ownership
- § 90:9 Scope of protection
- § 90:10 Infringement
- § 90:11 Exhaustion of rights
- § 90:12 Selected defences
- § 90:13 Remedies
- § 90:14 Protection of performers

## III. LAW OF PATENTS

- § 90:15 Legislation
- § 90:16 Subject matter and conditions for protection
- § 90:17 Obtaining protection
- § 90:18 Duration
- § 90:19 Ownership
- § 90:20 Scope of protection
- § 90:21 Infringement
- § 90:22 Exhaustion of rights
- § 90:23 Selected defences
- § 90:24 Opposition and revocation
- § 90:25 Remedies

## IV. LAW OF TRADE MARKS

- § 90:26 Legislation
- § 90:27 Subject matter and registrability
- § 90:28 Absolute grounds
- § 90:29 Relative grounds
- § 90:30 Obtaining protection
- § 90:31 Duration
- § 90:32 Ownership
- § 90:33 Scope of protection
- § 90:34 Infringement
- § 90:35 Exhaustion of rights
- § 90:36 Selected defences
- § 90:37 Opposition and revocation
- § 90:38 Remedies
- § 90:39 Protection of well-known trade marks

## V. OTHER LAWS

- § 90:40 Geographical indications

## TABLE OF CONTENTS

- § 90:41 Law of “Unregistered Trade Marks” and passing off
- § 90:42 Registered designs
- § 90:43 Layout designs of integrated Circuits
- § 90:44 Law of confidentiality

## VI. STATUTORY TEXT

- § 90:45 Copyright Act
- § 90:46 Patents Act
- § 90:47 Trade Marks Act 1998

## CHAPTER 91. LAWS OF SOUTH AFRICA WITH COMMENTARY

### I. INTRODUCTION

- § 91:1 Applicable law
- § 91:2 Legislation

### II. STATUTORY TEXT

- § 91:3 Patents Act, Act Number 57 of 1978, as amended
- § 91:4 Designs Act, Act Number 195 of 1993, as amended
- § 91:5 Copyright Act, Act Number 95 of 1978
- § 91:6 Counterfeit Goods Act, Act Number 37 of 1997
- § 91:7 Trade Marks Act, Act number 194 of 1993

## CHAPTER 92. LAWS OF SPAIN WITH COMMENTARY

### I. INTRODUCTION

- § 92:1 In general
- § 92:2 Copyright and other neighboring rights
- § 92:3 Trade and service marks
- § 92:4 Trade and service names
- § 92:5 Industrial designs and utility models
- § 92:6 Aesthetic designs and patterns
- § 92:7 Patents
- § 92:8 —International conventions

### II. STATUTORY TEXT

- § 92:9 Royal Legislative Decree Number 1/1996 of 12 April 1996, as modified by Law Number 5/1998 of 6 March 1998, implementing European Community Directive Number 96/9/ec of 11 March 1996

## **CHAPTER 93. LAWS OF TAIWAN WITH COMMENTARY**

### **I. INTRODUCTION**

§ 93:1 In general

### **II. FORMS OF INTELLECTUAL PROPERTY PROTECTION**

§ 93:2 Patents

§ 93:3 Trade marks

§ 93:4 Copyright

§ 93:5 —Moral and economic rights

§ 93:6 —Electronic rights management information and technology protection measures

§ 93:7 Trade secrets

§ 93:8 Integrated circuit layouts (Mask works)

§ 93:9 Fair trade law

§ 93:10 —Regulation on monopolies, mergers, and concerted actions

§ 93:11 —Regulation on unfair competition

§ 93:12 —Remedies

### **III. STATUTORY TEXT**

§ 93:13 Patent law

§ 93:14 Trade Mark Law

§ 93:15 Copyright law

## **CHAPTER 94. LAWS OF TURKEY WITH COMMENTARY**

### **I. COPYRIGHT**

§ 94:1 In general

§ 94:2 Requirements for protection

§ 94:3 Authorship and ownership of copyright

§ 94:4 Rights of owner

§ 94:5 Term of protection

§ 94:6 Infringement of rights

### **II. INDUSTRIAL RIGHTS**

§ 94:7 In general

### **III. TRADE MARKS**

§ 94:8 Definition and scope

## TABLE OF CONTENTS

- § 94:9 Types and classification
- § 94:10 Persons entitled to protection
- § 94:11 Use and term of protection
- § 94:12 Infringement of rights

## IV. PATENTS AND UTILITY MODELS

- § 94:13 Definition and scope
- § 94:14 System of granting a patent
- § 94:15 Persons entitled to protection
- § 94:16 Use and term of protection
- § 94:17 Infringement of rights

## V. INDUSTRIAL DESIGNS

- § 94:18 Definition and scope
- § 94:19 Procedures for granting right
- § 94:20 Persons entitled to protection
- § 94:21 Duration of design right
- § 94:22 Infringements of rights

## VI. STATUTORY TEXT

- § 94:23 Law on Intellectual and Artistic Works
- § 94:24 Decree-Law Number 556 Pertaining to the Protection of Trade Marks
- § 94:25 Decree-Law Number 551 Pertaining to the Protection of Patent Rights
- § 94:26 Decree-Law Number 554 Pertaining to the Protection of Industrial Designs

## CHAPTER 95. LAWS OF THE UNITED STATES WITH COMMENTARY

### I. INTRODUCTION

- § 95:1 In general
- § 95:2 Background
- § 95:3 International conventions

### II. COPYRIGHT

- § 95:4 Legislation
- § 95:5 Subject matter and conditions for copyright protection
- § 95:6 Obtaining protection
- § 95:7 Duration
- § 95:8 Ownership
- § 95:9 Scope of protection
- § 95:10 Infringement

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 95:11 Selected defenses
- § 95:12 Remedies

### III. PATENT LAW

- § 95:13 Legislation
- § 95:14 Subject matter and conditions for protection
- § 95:15 Obtaining protection
- § 95:16 Duration
- § 95:17 Ownership
- § 95:18 Scope of protection
- § 95:19 Infringement
- § 95:20 Selected defenses
- § 95:21 Remedies

### IV. TRADE MARKS

- § 95:22 Legislation
- § 95:23 Subject matter and registrability
- § 95:24 Obtaining protection
- § 95:25 Duration
- § 95:26 Ownership
- § 95:27 Scope of protection
- § 95:28 Infringement
- § 95:29 Selected defenses
- § 95:30 Opposition and cancellation
- § 95:31 Remedies
- § 95:32 Protection of well-known trade marks

### V. STATUTORY TEXT

- § 95:33 Copyright Act
- § 95:34 Patent Act
- § 95:35 Trade Mark Act

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WORLD INTELLECTUAL  
PROPERTY  
RIGHTS and REMEDIES  
LAWS with COMMENTARY

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Volume 2

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# Summary of Contents

## Volume 1

### PART I. COMMENTARY

- Chapter 1. Argentina
- Chapter 2. Australia
- Chapter 3. Austria
- Chapter 4. Belgium
- Chapter 5. Bermuda
- Chapter 6. Brazil
- Chapter 7. Canada
- Chapter 8. People's Republic of China
- Chapter 9. Colombia
- Chapter 10. Costa Rica
- Chapter 11. Cyprus
- Chapter 12. Czech Republic
- Chapter 13. Denmark
- Chapter 14. Egypt
- Chapter 15. Estonia
- Chapter 16. Finland
- Chapter 17. France
- Chapter 18. Germany

## Volume 2

### PART I. COMMENTARY (CONTINUED)

- Chapter 19. Greece
- Chapter 20. Hong Kong
- Chapter 21. Hungary
- Chapter 22. India
- Chapter 23. Indonesia

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 24. Ireland
- Chapter 25. Israel
- Chapter 26. Italy
- Chapter 27. Japan
- Chapter 28. Lithuania
- Chapter 29. Luxembourg
- Chapter 30. Malaysia
- Chapter 31. Mexico
- Chapter 32. The Netherlands
- Chapter 33. New Zealand
- Chapter 34. Norway
- Chapter 34A. Panama
- Chapter 35. Peru
- Chapter 36. The Philippines
- Chapter 37. Portugal
- Chapter 38. Romania
- Chapter 39. Russian Federation

### **Volume 3**

#### **PART I. COMMENTARY (CONTINUED)**

- Chapter 40. Slovak Republic
- Chapter 41. South Africa
- Chapter 42. Spain
- Chapter 43. Sri Lanka
- Chapter 44. Switzerland
- Chapter 45. Taiwan
- Chapter 46. Thailand
- Chapter 47. Turkey
- Chapter 48. Ukraine
- Chapter 49. United Kingdom
- Chapter 50. United States
- Chapter 51. Vietnam
- Chapter 52. The European Union
- Chapter 53. The Revised Berne Convention for the Protection of

## SUMMARY OF CONTENTS

- Literary and Artistic Works
- Chapter 54. The Brussels Satellite Convention
- Chapter 55. European Trade Mark Law
- Chapter 56. Jurisdiction and Dispute Resolution
- Chapter 57. The Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration
- Chapter 58. The Locarno Agreement Establishing an International Classification for Industrial Design
- Appendix 58A. Annex
- Chapter 59. The Madrid Agreement and Protocol
- Chapter 60. The Paris Convention for Protection of Industrial Property
- Chapter 61. The Patent Cooperation Treaty
- Chapter 62. The Patent Law Treaty
- Chapter 63. The Singapore Treaty on Law of Trade Marks
- Chapter 64. The TRIPS Agreement
- Chapter 65. The Universal Copyright Convention
- Appendix 65A. Parties to the Universal Copyright Convention
- Appendix 65B. Parties to the Berne Convention for the Protection of Literary and Artistic Works

## **PART II. PRIMARY LAW AND COMMENTARY**

- Chapter 66. Laws of Argentina with Commentary
- Chapter 67. Laws of Australia with Commentary

## **Volume 4**

## **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 68. Laws of Austria with Commentary
- Chapter 69. Laws of Belgium with Commentary
- Chapter 70. Laws of Brazil with Commentary
- Chapter 71. Laws of Canada with Commentary
- Chapter 72. Laws of Colombia with Commentary
- Chapter 73. Laws of Cyprus with Commentary
- Chapter 74. Laws of the Czech Republic with Commentary

WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 75. Laws of Denmark with Commentary
- Chapter 76. Laws of Estonia with Commentary
- Chapter 77. Laws of Finland with Commentary
- Chapter 78. Laws of Hungary with Commentary
- Chapter 79. Laws of Israel with Commentary

## Volume 5

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 80. Laws of Italy with Commentary
- Chapter 81. Laws of Japan with Commentary
- Chapter 82. Laws of Malaysia with Commentary
- Chapter 83. Laws of Mexico with Commentary
- Chapter 84. Laws of New Zealand with Commentary

## Volume 6

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 85. Laws of Norway with Commentary
- Chapter 86. Laws of Peru with Commentary
- Chapter 87. Laws of the Philippines with Commentary
- Chapter 88. Laws of Poland with Commentary
- Chapter 89. Laws of Portugal with Commentary
- Chapter 90. Laws of Singapore with Commentary
- Chapter 91. Laws of South Africa with Commentary
- Chapter 92. Laws of Spain with Commentary
- Chapter 93. Laws of Taiwan with Commentary
- Chapter 94. Laws of Turkey with Commentary
- Chapter 95. Laws of the United States with Commentary

# Table of Contents

## PART I. COMMENTARY (CONTINUED)

### CHAPTER 19. GREECE

#### I. INTRODUCTION

§ 19:1 In general

#### II. PATENTS

§ 19:2 In general

§ 19:3 Nature

§ 19:4 —Creation of rights

§ 19:5 —Beneficiaries of rights

§ 19:6 —Maintenance

§ 19:7 —Extension

§ 19:8 —Transfer

§ 19:9 —Cancellation

§ 19:10 Attacks on ownership

§ 19:11 Infringement actions

§ 19:12 —Action for damages

§ 19:13 —Injunctions

§ 19:14 —Confiscation

§ 19:15 —Other means of protection

§ 19:16 —Customs action

#### III. COPYRIGHT

§ 19:17 In general

§ 19:18 Elements of work

§ 19:19 —Databases

§ 19:20 —Computer programs

§ 19:21 —Collective works

§ 19:22 —Employee works

§ 19:23 —Anonymous or pseudonymous works

§ 19:24 Related rights

§ 19:25 —Performers

§ 19:26 —Phonogram producers

§ 19:27 —Radio and television organizations

§ 19:28 —Publishers

§ 19:29 Duration—Authors

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 19:30 —Joint authorship
- § 19:31 —Anonymous or pseudonymous works
- § 19:32 —Audiovisual works
- § 19:33 —Databases
- § 19:34 —Performers
- § 19:35 —Phonogram producers
- § 19:36 —Producers of sound and visual recordings
- § 19:37 —Broadcasting organizations
- § 19:38 —Unpublished works
- § 19:39 Transfer of rights
- § 19:40 —Contracts of transfer
- § 19:41 —Fees
- § 19:42 —Collecting societies
- § 19:43 International aspects
- § 19:44 Infringement
- § 19:45 —Remedies
- § 19:46 —Injunctions

### IV. TRADE AND SERVICE MARKS

- § 19:47 Nature
- § 19:48 —Creation of rights
- § 19:49 —Beneficiaries of rights
- § 19:50 —Maintenance
- § 19:51 —Transfer
- § 19:52 —Cancellation
- § 19:53 —International aspects
- § 19:54 Attacks on ownership
- § 19:55 Infringement actions
- § 19:56 —Petition for de-registration
- § 19:57 —Actions before civil courts
- § 19:58 —Injunctions
- § 19:59 —Confiscation
- § 19:60 —Customs action

### V. TRADE AND SERVICE NAMES

- § 19:61 In general

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 19:62 Nature
- § 19:63 —Creation of rights
- § 19:64 —Beneficiaries of rights
- § 19:65 —Maintenance
- § 19:66 —Extension
- § 19:67 —Transfer
- § 19:68 —Cancellation

## TABLE OF CONTENTS

- § 19:69 —International aspects
- § 19:70 Attacks on ownership
- § 19:71 Infringement actions
- § 19:72 Import restrictions

## VII. AESTHETIC DESIGNS AND PATTERNS

- § 19:73 In general

## VIII. LICENSING

- § 19:74 In general

## CHAPTER 20. HONG KONG

### I. INTRODUCTION

- § 20:1 In general

### II. PATENTS

- § 20:2 In general
- § 20:3 Nature—Standard patent
- § 20:4 —Short-term patent
- § 20:5 —Duration
- § 20:6 —Renewal
- § 20:7 —Transfer
- § 20:8 Attacks on ownership—Validity and revocation
- § 20:9 —Defenses
- § 20:10 Infringement actions—Infringing acts
- § 20:11 —High Court infringement actions
- § 20:12 —Injunctions
- § 20:13 —Order for delivery up or destruction
- § 20:14 —Costs

### III. COPYRIGHT

- § 20:15 In general
- § 20:16 Copyright (amendment) ordinance 2004
- § 20:17 Copyright (amendment) ordinance 2007 and copyright (amendment) ordinance 2009
- § 20:18 Parallel imports
- § 20:19 Nature—Subsistence of copyright
- § 20:20 —Types of work protected
- § 20:21 —Authorship
- § 20:22 —Duration
- § 20:23 Moral rights—Ordinance
- § 20:24 —Paternity right
- § 20:25 —Integrity right

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 20:26 —False attribution of work
- § 20:27 Infringement actions—Types of infringement
- § 20:28 —Civil and criminal proceedings
- § 20:29 —Border control

### IV. TRADE MARKS

- § 20:30 In general
- § 20:31 Nature—Registrability and application
- § 20:32 —Procedure for application
- § 20:33 —Opposition
- § 20:34 —Beneficiaries of rights
- § 20:35 —Terms and maintenance
- § 20:36 —Transfer
- § 20:37 —Registrable transactions
- § 20:38 —Cancellation
- § 20:39 —Declaration of invalidity of registration of trade mark
- § 20:40 —Transitional arrangements
- § 20:41 Prior rights
- § 20:42 Infringement actions
- § 20:43 —Penalties for infringement
- § 20:44 —Border control

### V. DESIGNS

- § 20:45 In general
- § 20:46 Nature—Definition and registrability
- § 20:47 —Applications and documents
- § 20:48 —Term
- § 20:49 Attacks on ownership
- § 20:50 Infringement actions

### VI. LICENSING

- § 20:51 In general
- § 20:52 Compulsory licensing

### VII. OTHER FORMS OF PROTECTION

- § 20:53 Passing-off
- § 20:54 False or misleading representation as to seller's connection with another person
- § 20:55 Confidential information
- § 20:56 Integrated circuits
- § 20:57 Plant variety
- § 20:58 Prevention of copyright piracy

TABLE OF CONTENTS

**CHAPTER 21. HUNGARY**

**I. INTRODUCTION**

- § 21:1 In general
- § 21:2 Source and scope of protection
- § 21:3 Institutions

**II. COPYRIGHT AND RELATED RIGHTS**

- § 21:4 Copyright—Nature
- § 21:5 —Subsidiary rights and copyright
- § 21:6 —Works excluded from copyright
- § 21:7 Creation of rights
- § 21:8 —Beneficiaries of rights
- § 21:9 —Term of protection
- § 21:10 —Assignment
- § 21:11 —International aspects
- § 21:12 —Limitations to copyright
- § 21:13 Infringement actions
- § 21:14 —Nature of infringement
- § 21:15 —Actions for damages
- § 21:16 —Injunctions
- § 21:17 —Confiscation
- § 21:18 —Customs action
- § 21:19 Rights adjoined to copyright (Related rights)
- § 21:20 —Performers
- § 21:21 —Producers of films and sound recordings
- § 21:22 —Radio and television organizations

**III. LICENSING**

- § 21:23 Copyright—Nature of licensing
- § 21:24 —Common rules
- § 21:25 —Contracts
- § 21:26 —Broadcasting
- § 21:27 —Producers of motion picture works
- § 21:28 —Protection of authors of databases
- § 21:29 —Software program protection
- § 21:30 —Works ordered for advertising
- § 21:31 —Designs
- § 21:32 Industrial property rights

**IV. PATENTS**

- § 21:33 In general
- § 21:34 Creation of rights
- § 21:35 Beneficiaries of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 21:36 —Inventors
- § 21:37 —Employees
- § 21:38 —Partners
- § 21:39 Maintenance
- § 21:40 Extension
- § 21:41 Transfer
- § 21:42 Exhaustion of patent protection
- § 21:43 Cancellation
- § 21:44 International aspects
- § 21:45 Prior users
- § 21:46 Public intervention
- § 21:47 —Compulsory license due to failure to utilize invention
- § 21:48 —Compulsory license due to pending patents
- § 21:49 —Common provisions
- § 21:50 Infringement actions—Nature of infringement
- § 21:51 —action for damages
- § 21:52 —Injunction
- § 21:53 —Confiscation
- § 21:54 —Customs action
- § 21:55 —Alteration of decisions of hungarian patent office by court

## V. TRADE MARKS

- § 21:56 Nature
- § 21:57 —International trade marks
- § 21:58 —Community trade marks
- § 21:59 Creation of rights—Registration criteria
- § 21:60 Maintenance
- § 21:61 —Multiple beneficiaries
- § 21:62 —Collective marks
- § 21:63 —Certifying marks
- § 21:64 Licensing agreements
- § 21:65 Cancellation
- § 21:66 International aspects
- § 21:67 Infringement actions—Nature of infringement
- § 21:68 —Action for damages
- § 21:69 —Injunction
- § 21:70 —Confiscation
- § 21:71 Protection of geographical marks of goods
- § 21:72 Community and international protection
- § 21:73 —International registration of designations of origin

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 21:74 Nature
- § 21:75 Creation of rights—Utility models
- § 21:76 —Industrial designs

## TABLE OF CONTENTS

- § 21:77 Beneficiaries of rights—Utility models
- § 21:78 —Industrial designs
- § 21:79 Maintenance—Utility models
- § 21:80 —Industrial designs
- § 21:81 Extension—Utility models
- § 21:82 —Industrial designs
- § 21:83 Assignment—Utility models
- § 21:84 —Industrial designs
- § 21:85 Cancellation—Utility models
- § 21:86 —Industrial designs
- § 21:87 Amendment and division
- § 21:88 Limitations on ownership—Prior users
- § 21:89 —Public interest intervention
- § 21:90 —Infringement actions
- § 21:91 —Action for damages
- § 21:92 —Procedural rules

## CHAPTER 22. INDIA

### I. INTRODUCTION

- § 22:1 In general

### II. PATENTS

- § 22:2 Nature
- § 22:3 —Not “inventions”
- § 22:4 Creation of rights—Definition of a patent
- § 22:5 —Rights to citizens
- § 22:6 —Varieties of patents
- § 22:7 Maintenance—Eligibility
- § 22:8 —Subject matter
- § 22:9 —Duration
- § 22:10 —Procedure
- § 22:11 Attacks on ownership
- § 22:12 Infringement actions
- § 22:13 Assignment, stamp duty, and registration—Assignment
- § 22:14 —Stamp duty
- § 22:15 —Registration
- § 22:16 Developments
- § 22:17 —Patents (Amendment) Act 2002

### III. COPYRIGHT

- § 22:18 Nature
- § 22:19 Creation of rights—Categories
- § 22:20 —Term of copyright
- § 22:21 —Ownership of copyright

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 22:22 —Registration
- § 22:23 —Rights of the author
- § 22:24 —Rights of the owner
- § 22:25 —Stamp duty
- § 22:26 —Registration
- § 22:27 Transfer—Assignment
- § 22:28 —Transmission
- § 22:29 —Relinquishment
- § 22:30 —License

### IV. TRADE MARKS

- § 22:31 Governing laws
- § 22:32 Trade mark
- § 22:33 Registration—Joint registration
- § 22:34 —Associated trade mark
- § 22:35 —Collective marks
- § 22:36 —Certification trade marks
- § 22:37 —Application for registration
- § 22:38 —What marks may be registered?
- § 22:39 —Duration
- § 22:40 —Service marks
- § 22:41 —Multiclass applications
- § 22:42 Protection of trade marks
- § 22:43 Assignment of trade marks
- § 22:44 Stamp duty and registration

### V. INDUSTRIAL DESIGNS

- § 22:45 Nature
- § 22:46 Industrial designs—Definition
- § 22:47 —Design as property
- § 22:48 —Registration of designs
- § 22:49 Procedure for registration—Application
- § 22:50 Transfer—Assignment
- § 22:51 —Stamp duty
- § 22:52 Registration

### VI. GEOGRAPHICAL INDICATIONS

- § 22:53 Nature
- § 22:54 Grant of a geographical indication registration—Application for registration
- § 22:55 —Rights conferred by registration
- § 22:56 —Maintenance
- § 22:57 —Infringement

### VII. LICENSING

- § 22:58 General

## TABLE OF CONTENTS

- § 22:59 Compulsory licenses
- § 22:60 Patents licensing—Nature
- § 22:61 —License agreement
- § 22:62 Trade marks licensing—Nature
- § 22:63 —Characteristics of a license
- § 22:64 —Types of trade mark licensing
- § 22:65 —Registration of a trade mark license
- § 22:66 —Application for registration of a trade mark license

## CHAPTER 23. INDONESIA

### I. INTRODUCTION

- § 23:1 In general

### II. PATENTS

- § 23:2 Nature of a patent
- § 23:3 Simple patents
- § 23:4 Unpatentable inventions
- § 23:5 Registration
- § 23:6 —Administrative stage
- § 23:7 —First publication
- § 23:8 —Substantive examination
- § 23:9 —Priority right
- § 23:10 —Beneficiaries of the right
- § 23:11 Maintenance of a patent—Exploitation of a granted patent
- § 23:12 —Maintenance fee
- § 23:13 —Period of a granted patent
- § 23:14 Transfer of a patent right
- § 23:15 License
- § 23:16 —Compulsory license
- § 23:17 Draft government regulation on compulsory licenses for patents
- § 23:18 Regulation number 27 of 2004 on the procedure of patent implementation by the government
- § 23:19 Cancellation of a patent right
- § 23:20 —Cancellation by a third party
- § 23:21 —Effects of cancellation of a patent right
- § 23:22 Challenge to ownership
- § 23:23 Prior inventors or users
- § 23:24 Public interest
- § 23:25 Infringement action
- § 23:26 —Civil action
- § 23:27 —Criminal action
- § 23:28 —Dispute resolution
- § 23:29 —Action for damages
- § 23:30 —Injunction

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 23:31 —Temporary restraining order
- § 23:32 —Confiscation
- § 23:33 —Presidential regulation number 37 of 2010
- § 23:34 —Transitional conditions

### III. COPYRIGHT

- § 23:35 Nature of copyright
- § 23:36 Creation of rights
- § 23:37 Voluntary registration system
- § 23:38 Registration procedure
- § 23:39 Registration process
- § 23:40 Moral rights
- § 23:41 Priority right
- § 23:42 Beneficiaries of rights
- § 23:43 Duration
- § 23:44 Transfer of right
- § 23:45 License
- § 23:46 —Compulsory licensing
- § 23:47 Nature of protection
- § 23:48 International aspects
- § 23:49 Challenge to ownership—Prior authors
- § 23:50 —Public interest
- § 23:51 Infringement action—Nature of infringement
- § 23:52 —Injunctions
- § 23:53 —Temporary restraining order
- § 23:54 —Civil action
- § 23:55 —Criminal action
- § 23:56 Government regulation

### IV. TRADE AND SERVICE MARKS

- § 23:57 Nature
- § 23:58 Creation of rights
- § 23:59 Registration procedure
- § 23:60 Registration process
- § 23:61 —Approval for registration
- § 23:62 —Disapproval for registration or rejection
- § 23:63 —Procedure at the mark appeal commission
- § 23:64 —Process for renewal
- § 23:65 Government regulation number 7 of 2005
- § 23:66 Presidential regulation number 20 of 2005
- § 23:67 Unregistrable marks
- § 23:68 Marking
- § 23:69 Priority right mark registrations
- § 23:70 Beneficiaries of rights
- § 23:71 Maintenance of the right to a mark

## TABLE OF CONTENTS

- § 23:72 Requirement for use of a mark
- § 23:73 Transfer of right to a mark
- § 23:74 Licensing
- § 23:75 Canceling and invalidating a mark—Cancellation
- § 23:76 —Invalidation
- § 23:77 International aspects
- § 23:78 Challenges to ownership—Prior users
- § 23:79 —Public interest intervention
- § 23:80 Infringement actions—Nature of infringement
- § 23:81 —Civil action
- § 23:82 —Criminal action
- § 23:83 —Alternative dispute resolution
- § 23:84 —Action for damages
- § 23:85 —Injunctions
- § 23:86 —Temporary court order
- § 23:87 —Confiscation
- § 23:88 Customs action

## V. COLLECTIVE MARKS

- § 23:89 In general

## VI. GEOGRAPHICAL INDICATIONS

- § 23:90 Nature
- § 23:91 Government regulation number 51/2007 on geographical indications
- § 23:92 —Inability to register a geographical indication
- § 23:93 —Period of validity
- § 23:94 —Requirements for and process of filing
- § 23:95 —Announcement in the geographical indication journal
- § 23:96 —Rejection and rebuttal
- § 23:97 —Use and supervision of geographical indication
- § 23:98 —Foreign geographical indications
- § 23:99 —Amendments and withdrawal of a geographical indication
- § 23:100 —Amendments in the book of specification
- § 23:101 —Geographical indication appeal
- § 23:102 —Violation and claim
- § 23:103 —Prior user

## VII. TRADE SECRETS

- § 23:104 Nature of trade secrets
- § 23:105 Creation of rights
- § 23:106 Licensing
- § 23:107 Assignment
- § 23:108 Dispute resolution
- § 23:109 Criminal action

## VIII. INDUSTRIAL DESIGNS

- § 23:110 Nature of industrial designs
- § 23:111 Creation of rights
- § 23:112 Registration
- § 23:113 Registration process
- § 23:114 Licensing
- § 23:115 Assignment
- § 23:116 Cancellation of a registered industrial design
- § 23:117 Dispute resolution
- § 23:118 Injunction
- § 23:119 Criminal action

## IX. LAYOUT OF INTEGRATED CIRCUITS

- § 23:120 Nature
- § 23:121 Creation of right
- § 23:122 Registration
- § 23:123 Licensing
- § 23:124 Assignment
- § 23:125 Cancellation of a registered layout design of an integrated circuit
- § 23:126 Dispute resolution
- § 23:127 Injunction
- § 23:128 Criminal action

## CHAPTER 24. IRELAND

### I. INTRODUCTION

- § 24:1 Types of rights
- § 24:2 The controller
- § 24:3 Volume of registrations of intellectual property rights
- § 24:4 Trade mark agents
- § 24:5 Patent agents

### II. PATENTS

- § 24:6 Nature—Applicable laws
- § 24:7 —Types of patents
- § 24:8 —Patentable rights
- § 24:9 —Term
- § 24:10 Creation of rights—Application process
- § 24:11 —Priority
- § 24:12 —Searches and search reports
- § 24:13 —Withdrawal of application
- § 24:14 —Grant of patent
- § 24:15 —Short-term patent
- § 24:16 Beneficiaries of rights—Inventors

## TABLE OF CONTENTS

- § 24:17 —Financiers and co-researchers
- § 24:18 Maintenance—Renewal fees
- § 24:19 —Restoration
- § 24:20 —Exploitation
- § 24:21 —Extension
- § 24:22 Transfer—Disposals of interests in patents
- § 24:23 —Licenses as of right
- § 24:24 —Compulsory licenses as of right
- § 24:25 —Competition aspects
- § 24:26 Cancellation—Voluntary cancellation
- § 24:27 —Revocation
- § 24:28 —Removal by controller
- § 24:29 Attacks on ownership—Determination of entitlement
- § 24:30 —Revocation of a patent
- § 24:31 —Short-term patents
- § 24:32 —Prior inventors or users
- § 24:33 —Public interest
- § 24:34 Infringement actions—Proceedings
- § 24:35 —Nature of infringement
- § 24:36 —Declarations
- § 24:37 —Threat of proceedings
- § 24:38 —Relief available
- § 24:39 —Action for damages
- § 24:40 —Injunctions
- § 24:41 —Confiscation
- § 24:42 —Customs action

## III. COPYRIGHT

- § 24:43 Nature—Governing law
- § 24:44 —What is copyright?
- § 24:45 Qualification requirements
- § 24:46 —Copyright in works
- § 24:47 —Moral rights
- § 24:48 —Computer programs
- § 24:49 —Literary works
- § 24:50 —Dramatic works
- § 24:51 —Artistic works
- § 24:52 —Musical works
- § 24:53 —Original databases
- § 24:54 —Database right
- § 24:55 —Artists—Resale rights
- § 24:56 Creation of rights
- § 24:57 —Owner of copyright
- § 24:58 —Duration
- § 24:59 —Transfer
- § 24:60 Attacks on ownership—Negative right

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 24:61 —Acts not constituting infringement
- § 24:62 —Prior author
- § 24:63 —Public interest
- § 24:64 Infringement—Procedure
- § 24:65 —Nature of infringement
- § 24:66 —Action for damages
- § 24:67 —Injunctions
- § 24:68 —Confiscation
- § 24:69 —Customs action
- § 24:70 —Proof of copyright

### IV. TRADE MARKS

- § 24:71 Governing laws
- § 24:72 Trade mark
- § 24:73 —Defined
- § 24:74 —Registration
- § 24:75 Creation of rights—Non-registered trade marks
- § 24:76 —Registered trade marks
- § 24:77 Registration—Application
- § 24:78 —Priority
- § 24:79 —Advertisement and opposition
- § 24:80 —Completion of registration
- § 24:81 —Duration
- § 24:82 —Assignment and license
- § 24:83 —Surrender, revocation, and rectification
- § 24:84 —International aspects
- § 24:85 Infringement action
- § 24:86 —Infringement of registered mark
- § 24:87 —Permissible use
- § 24:88 —Passing off
- § 24:89 —Representation that trade mark is registered
- § 24:90 —Action for damages
- § 24:91 —Injunctions
- § 24:92 —Other remedies
- § 24:93 —Customs action

### V. TRADE AND SERVICE NAMES

- § 24:94 Business names
- § 24:95 Company names
- § 24:96 Service marks

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 24:97 Nature—Applicable laws
- § 24:98 —What is a design?
- § 24:99 —Creation of right

## TABLE OF CONTENTS

- § 24:100 —Beneficiaries of rights
- § 24:101 —Maintenance
- § 24:102 —Extension
- § 24:103 —Transfer
- § 24:104 —Cancellation
- § 24:105 —International aspects
- § 24:106 Attacks on ownership
- § 24:107 —Prior users
- § 24:108 —Public interest
- § 24:109 Infringement actions
- § 24:110 —Nature of infringement
- § 24:111 —Action for damages
- § 24:112 —Injunctions
- § 24:113 —Confiscation
- § 24:114 —Customs action

## VII. DEVELOPMENTS

- § 24:115 In general

## VIII. AESTHETIC DESIGNS AND PATENTS

- § 24:116 In general

## IX. LICENSING

- § 24:117 In general
- § 24:118 Franchising
- § 24:119 —Typical provisions in franchise agreements
- § 24:120 Distribution arrangements
- § 24:121 —Typical provisions in distribution agreements
- § 24:122 Patents
- § 24:123 Parent subsidiary
- § 24:124 Formalities
- § 24:125 Patent license
- § 24:126 Competition

## CHAPTER 25. ISRAEL

### I. INTRODUCTION

- § 25:1 In general

### II. COPYRIGHT

- § 25:2 In general
- § 25:3 Nature
- § 25:4 —Ownership
- § 25:5 —Duration

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 25:6 —Transfer
- § 25:7 —International aspects
- § 25:8 Attacks on ownership
- § 25:9 —Infringement actions
- § 25:10 —Damages
- § 25:11 —Injunction
- § 25:12 —Confiscation
- § 25:13 —Customs action

### III. PATENTS

- § 25:14 In general
- § 25:15 Nature
- § 25:16 —Ownership
- § 25:17 —Maintenance and extensions
- § 25:18 —Transfer
- § 25:19 —Cancellation
- § 25:20 —International aspects
- § 25:21 Attack on ownership
- § 25:22 —Government intervention
- § 25:23 —Patent infringement
- § 25:24 —Confiscation and destruction
- § 25:25 —Customs actions

### IV. TRADE MARKS AND SERVICE MARKS

- § 25:26 In general
- § 25:27 Nature
- § 25:28 Registration procedure
- § 25:29 —Immediate examination
- § 25:30 —Publication
- § 25:31 —Opposition
- § 25:32 —Appeal
- § 25:33 —Grounds for refusal of applications
- § 25:34 —Disclaimers
- § 25:35 —Parallel applications
- § 25:36 —Priority
- § 25:37 —Beneficiaries of rights
- § 25:38 —Maintenance
- § 25:39 —Transfer
- § 25:40 —Cancellation
- § 25:41 —International aspects
- § 25:42 Attack on ownership
- § 25:43 —Public interest
- § 25:44 —Infringement actions

### V. DESIGNS AND MODELS

- § 25:45 Nature

## TABLE OF CONTENTS

- § 25:46 —Priority
- § 25:47 —Beneficiaries of rights
- § 25:48 —Maintenance
- § 25:49 —Transfer
- § 25:50 —Cancellation
- § 25:51 —International aspects
- § 25:52 Attacks on ownership
- § 25:53 —Public interest
- § 25:54 Infringement actions
- § 25:55 —Action for damages
- § 25:56 —Confiscation and destruction

## CHAPTER 26. ITALY

### I. INTRODUCTION

- § 26:1 Sources of law
- § 26:2 Revision of laws

### II. PATENTS

- § 26:3 Fundamental laws
- § 26:4 Nature
- § 26:5 —Creation of rights, registration, and priority
- § 26:6 —Beneficiaries of rights
- § 26:7 —Maintenance
- § 26:8 —Extension
- § 26:9 —Transfer
- § 26:10 —Cancellation and expiration
- § 26:11 —International aspects
- § 26:12 Attacks on ownership—Inventor's rights
- § 26:13 —Public interest intervention
- § 26:14 Infringement actions—Nature of infringement
- § 26:15 —Action for damages
- § 26:16 Injunction
- § 26:17 —Confiscation
- § 26:18 —Customs action
- § 26:19 —Criminal sanctions

### III. COPYRIGHT

- § 26:20 Sources of law
- § 26:21 Nature—Types of rights
- § 26:22 —Creation of rights
- § 26:23 —Beneficiaries of rights
- § 26:24 —Duration
- § 26:25 —Transfer
- § 26:26 —International aspects

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 26:27 Attacks on ownership—Prior authors
- § 26:28 —Public intervention
- § 26:29 —Infringement actions

### **IV. TRADE AND SERVICE MARKS**

- § 26:30 Fundamental laws
- § 26:31 Nature—Definition
- § 26:32 —Scope of protection
- § 26:33 —Creation of rights
- § 26:34 —Beneficiaries of rights
- § 26:35 —Maintenance
- § 26:36 —Transfer and licenses
- § 26:37 —Cancellation
- § 26:38 —International aspects
- § 26:39 Attacks on ownership—Prior users
- § 26:40 —Public intervention
- § 26:41 Infringement actions—Nature
- § 26:42 —Action for damages
- § 26:43 —Injunction
- § 26:44 —Confiscation
- § 26:45 —Criminal and administrative sanctions

### **V. TRADE AND SERVICE NAMES**

- § 26:46 In general

### **VI. DESIGNS AND MODELS**

- § 26:47 International agreements and legislation
- § 26:48 Territory
- § 26:49 Registrability requirements
- § 26:50 Registrable designs and models
- § 26:51 Priority
- § 26:52 Applicant
- § 26:53 Documents with filing
- § 26:54 Professional agents
- § 26:55 Where to file
- § 26:56 Novelty and disclosure
- § 26:57 Multiple designs

### **VII. ACCESSIBILITY TO THIRD PARTIES**

- § 26:58 In general
- § 26:59 Rights conferred by application
- § 26:60 Examination
- § 26:61 Opposition and amendment
- § 26:62 Grant

## TABLE OF CONTENTS

- § 26:63 Duration
- § 26:64 Maintenance fees
- § 26:65 Copyright protection

## VIII. UTILITY MODELS

- § 26:66 In general

## IX. LICENSING AND ASSIGNMENT

- § 26:67 In general

## CHAPTER 27. JAPAN

### I. INTRODUCTION

- § 27:1 History
- § 27:2 Civil law system
- § 27:3 Intellectual property system
- § 27:4 Regulatory bodies
- § 27:5 International harmonization

### II. PATENTS

- § 27:6 Nature—Creation of rights
- § 27:7 —Beneficiaries of rights
- § 27:8 Maintenance—Term of protection and extension
- § 27:9 —Transfer
- § 27:10 —Cancellation
- § 27:11 —International aspects
- § 27:12 Attacks on ownership—Prior inventors or users
- § 27:13 —Public interest intervention
- § 27:14 Infringement actions—Nature of infringement
- § 27:15 —Damages
- § 27:16 —Injunctions
- § 27:17 —Confiscation, destruction, or disposition of infringing items
- § 27:18 —Customs action

### III. COPYRIGHT

- § 27:19 Nature—Creation of rights
- § 27:20 —Beneficiaries
- § 27:21 —Term of protection
- § 27:22 —Transfer
- § 27:23 —International aspects
- § 27:24 Attacks on ownership—Prior authors
- § 27:25 —Public interest
- § 27:26 Infringement actions—Nature of infringement
- § 27:27 —Damages

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 27:28 —Injunctions
- § 27:29 —Confiscation, destruction, or disposition of infringing items
- § 27:30 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 27:31 Nature—Creation of rights
- § 27:32 —Beneficiaries of rights
- § 27:33 —Term of protection, renewal, and maintenance
- § 27:34 —Transfer
- § 27:35 —Cancellation
- § 27:36 —International aspects
- § 27:37 Attacks on ownership—Prior users
- § 27:38 —Public interest
- § 27:39 Infringement actions—Nature of infringement
- § 27:40 —Damages
- § 27:41 —Injunctions
- § 27:42 —Confiscation, destruction, or disposition of infringing items
- § 27:43 —Customs action

### V. TRADE AND SERVICE NAMES

- § 27:44 In general

### VI. UTILITY MODELS

- § 27:45 Nature
- § 27:46 —Requirements
- § 27:47 —Examination procedure
- § 27:48 —Term of protection
- § 27:49 —Transformation to patent
- § 27:50 Attacks on ownership
- § 27:51 Infringement actions

### VII. AESTHETIC DESIGNS AND PATTERNS

- § 27:52 Nature—Creation of rights
- § 27:53 —Beneficiaries of rights
- § 27:54 —Term of protection and extension
- § 27:55 —Maintenance
- § 27:56 —Transfer
- § 27:57 —Transfer of design right
- § 27:58 —Cancellation
- § 27:59 —International aspects
- § 27:60 Attacks on ownership—Prior creators or users
- § 27:61 —Public interest
- § 27:62 Infringement actions—Nature of infringement
- § 27:63 —Damages

## TABLE OF CONTENTS

- § 27:64 —Injunctions
- § 27:65 —Confiscation, destruction, or disposition of infringing items
- § 27:66 —Customs action

## VIII. LICENSING

- § 27:67 Nature of licenses
- § 27:68 Protection of interest
- § 27:69 Practical aspects

## CHAPTER 28. LITHUANIA

### I. INTRODUCTION

- § 28:1 In general

### II. PATENTS

- § 28:2 Nature—Creation of rights
- § 28:3 —Beneficiaries of rights
- § 28:4 —Maintenance
- § 28:5 —Validity period
- § 28:6 —Transfer
- § 28:7 —Cancellation
- § 28:8 —International aspects
- § 28:9 Attacks on ownerships—Prior inventors or users
- § 28:10 —Public interest
- § 28:11 Infringement actions—Nature of infringement
- § 28:12 —Action for damages
- § 28:13 —Injunctions
- § 28:14 —Confiscation
- § 28:15 —Customs actions

### III. COPYRIGHT

- § 28:16 Nature—Creation of rights
- § 28:17 —Beneficiaries of rights
- § 28:18 —Duration
- § 28:19 —Transfer
- § 28:20 —International aspects
- § 28:21 Attacks on ownership—Prior authors
- § 28:22 —Public interest
- § 28:23 Infringement actions—Nature of infringement
- § 28:24 —Action for damages
- § 28:25 —Injunctions
- § 28:26 —Confiscation
- § 28:27 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 28:28 Nature—Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 28:29 —Beneficiaries of rights
- § 28:30 —Maintenance
- § 28:31 —Transfer
- § 28:32 —Cancellation
- § 28:33 —International aspects
- § 28:34 Attacks on ownership—Prior users
- § 28:35 —Public interest
- § 28:36 Infringement actions—Nature of infringement
- § 28:37 —Actions for damages
- § 28:38 —Injunctions
- § 28:39 —Confiscation
- § 28:40 —Customs action

### **V. TRADE AND SERVICE NAMES**

- § 28:41 In general

### **VI. INDUSTRIAL DESIGNS**

- § 28:42 Nature—Creation of rights
- § 28:43 —Beneficiaries of rights
- § 28:44 —Maintenance
- § 28:45 —Extension
- § 28:46 —Transfer
- § 28:47 —Cancellation
- § 28:48 —International aspects
- § 28:49 Attacks on ownership
- § 28:50 —Prior users
- § 28:51 —Public interest
- § 28:52 Infringement actions—Nature of infringement
- § 28:53 —Action for damages
- § 28:54 —Injunctions
- § 28:55 —Confiscation
- § 28:56 —Customs action

### **VII. AESTHETIC DESIGNS AND PATTERNS**

- § 28:57 In general

### **VIII. TOPOGRAPHIES OF SEMICONDUCTOR PRODUCTS**

- § 28:58 In general
- § 28:59 Protected rights
- § 28:60 Validity period
- § 28:61 Remedies

### **IX. PLANT VARIETIES**

- § 28:62 In general

## TABLE OF CONTENTS

- § 28:63 Novelty
- § 28:64 Distinctiveness
- § 28:65 Uniformity
- § 28:66 Stability
- § 28:67 Requirements for denomination
- § 28:68 Application
- § 28:69 Validity period
- § 28:70 Protected rights of the breeder
- § 28:71 Remedies

## X. COMMERCIAL SECRETS

- § 28:72 In general
- § 28:73 Infringement actions

## XI. LICENSING

- § 28:74 In general

## CHAPTER 29. LUXEMBOURG

### I. INTRODUCTION

- § 29:1 In general

### II. PATENTS

- § 29:2 In general
- § 29:3 Procedure
- § 29:4 Types of licenses
- § 29:5 Infringement

### III. COPYRIGHT

- § 29:6 In general
- § 29:7 Exceptions to protection
- § 29:8 Type of rights
- § 29:9 —Moral rights
- § 29:10 —Financial rights
- § 29:11 Registration
- § 29:12 Multiple creators
- § 29:13 Duration
- § 29:14 Transfer
- § 29:15 International aspects
- § 29:16 Attacks on ownership
- § 29:17 Infringement

### IV. TRADE AND SERVICE MARKS

- § 29:18 In general

- § 29:19 Unfair competition law
- § 29:20 Infringing goods

## V. TRADE AND SERVICE NAMES

- § 29:21 In general

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 29:22 In general

## CHAPTER 30. MALAYSIA

### I. INTRODUCTION

- § 30:1 In general
- § 30:2 Malaysia's cyberlaws
- § 30:3 Intellectual Property Corporation of Malaysia Act 2002
- § 30:4 Intellectual Property Court

### II. PATENTS

- § 30:5 Nature
- § 30:6 Registration process
- § 30:7 —Substantive examination or modified substantive examination
- § 30:8 —Declaration of priority
- § 30:9 —Prior disclosure
- § 30:10 —Exceptions to prior disclosure
- § 30:11 —Prior manufacture or use
- § 30:12 Rights to a patent
- § 30:13 —Inventions made by employee or commissioned works
- § 30:14 Exploitation of patent
- § 30:15 Limitation of rights
- § 30:16 —Duration and extension of patent
- § 30:17 —Lapsed patents and reinstatement
- § 30:18 —Transfer: assignment and license
- § 30:19 —Compulsory licenses
- § 30:20 —Patent infringement and compulsory license
- § 30:21 Surrender of patent
- § 30:22 Invalidation of patent
- § 30:23 Infringement action
- § 30:24 —Right to institute proceedings
- § 30:25 —Burden of proof
- § 30:26 —Defenses against patent infringement actions
- § 30:27 —Remedies for patent infringement
- § 30:28 Patents (Amendment) Act 2003 and 2006
- § 30:29 Association of South-East Asia Nations Patent Examination Cooperation

## TABLE OF CONTENTS

### III. COPYRIGHT

- § 30:30 Nature—Creation of rights
- § 30:31 —Beneficiaries of rights
- § 30:32 —General scope
- § 30:33 —Duration of copyright
- § 30:34 —Transfer
- § 30:35 —International aspects
- § 30:36 —Reference of copyright licenses to copyright tribunal
- § 30:37 Attacks on ownership—Prior authors
- § 30:38 —Public interest
- § 30:39 Infringement actions—Nature of infringement
- § 30:40 —Action for damages
- § 30:41 —Injunctions
- § 30:42 —Customs actions
- § 30:43 Copyright offenses—Nature of offense
- § 30:44 Copyright and the Intellectual Property Corporation of Malaysia

### IV. TRADE AND SERVICE MARKS

- § 30:45 Nature—Creation of rights
- § 30:46 —Beneficiaries of rights
- § 30:47 —Dealings
- § 30:48 —Cancellation
- § 30:49 Attacks on ownership—Prior users
- § 30:50 —Public interest intervention
- § 30:51 Infringement actions—Nature of infringement
- § 30:52 —Action for damages
- § 30:53 —Injunctions
- § 30:54 —Confiscation
- § 30:55 —Customs action
- § 30:56 Border controls
- § 30:57 Geographical Indications Act 2000
- § 30:58 —Registration
- § 30:59 —Renewal of registration
- § 30:60 —Rights of registrant
- § 30:61 Geographical indications and the Intellectual Property Corporation of Malaysia

### V. TRADE AND SERVICE NAMES

- § 30:62 In general

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 30:63 In general
- § 30:64 Registration process
- § 30:65 Maintenance

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 30:66 Restoration
- § 30:67 Transfers
- § 30:68 Cancellation
- § 30:69 International aspects
- § 30:70 Attacks on ownership
- § 30:71 Licensing
- § 30:72 Infringement actions

### **VII. AESTHETIC DESIGNS AND PATTERNS**

- § 30:73 In general

### **VIII. LICENSING**

- § 30:74 Nature of licensing
- § 30:75 Structure of licensing transactions
- § 30:76 —Protection of the intellectual property right
- § 30:77 —Identification of potential licensee and negotiation process
- § 30:78 —The license or contractual process
- § 30:79 —Industrial Coordination Act
- § 30:80 —Distribution licenses
- § 30:81 Common examples of licensing routes
- § 30:82 —Joint venture
- § 30:83 —Contract manufacture
- § 30:84 —Distribution

### **IX. FRANCHISING**

- § 30:85 In general
- § 30:86 Nature
- § 30:87 Regulation of Franchises under the Franchise Act
- § 30:88 Registration under the Franchise Act
- § 30:89 Regulation of the franchise agreement
- § 30:90 Maintenance
- § 30:91 —Cancellation
- § 30:92 —Enforcement and offenses

### **X. LAYOUT DESIGNS OF INTEGRATED CIRCUITS ACT 2000**

- § 30:93 In general
- § 30:94 Duration
- § 30:95 Rights of the right holder
- § 30:96 Infringement
- § 30:97 Remedies for infringement
- § 30:98 Transfers and licenses

### **XI. OPTICAL DISCS ACT 2000**

- § 30:99 In general

TABLE OF CONTENTS

**XII. PROTECTION OF NEW PLANT VARIETIES ACT  
2004**

- § 30:100 In general
- § 30:101 Requirements for registration
- § 30:102 Scope of breeder's right and infringement actions
- § 30:103 Duration
- § 30:104 Invalidation and revocation of breeder's right
- § 30:105 Assignment or transmission of breeder's right

**XIII. DOMAIN NAMES**

- § 30:106 In general
- § 30:107 Registration
- § 30:108 Infringement of trade or service marks
- § 30:109 Bad faith
- § 30:110 Dispute resolution
- § 30:111 Remedies

**XIV. PROTECTION OF PERSONAL DATA**

- § 30:112 In general
- § 30:113 Application and scope
- § 30:114 Specific exemptions
- § 30:115 Rights
- § 30:116 Personal data protection principles
- § 30:117 Other offences—Transfer of personal data out of Malaysia
- § 30:118 —Unlawful collection of personal data
- § 30:119 Registration
- § 30:120 Enforcement and data protection commissioner

**CHAPTER 31. MEXICO**

**I. INTRODUCTION**

- § 31:1 In general

**II. PATENTS**

- § 31:2 Nature—Creation of rights
- § 31:3 —Procedure
- § 31:4 —Beneficiaries of rights
- § 31:5 —Maintenance
- § 31:6 —Extension
- § 31:7 —Transfer
- § 31:8 —Cancellation
- § 31:9 Attacks on ownership
- § 31:10 —Prior inventors or users
- § 31:11 —Public interest

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 31:12 Infringement actions—Nature of infringement
- § 31:13 —Action for damages
- § 31:14 —Injunctions
- § 31:15 —Confiscation
- § 31:16 —Customs actions

### III. COPYRIGHT

- § 31:17 Nature—Creation of rights
- § 31:18 —Beneficiaries of rights
- § 31:19 —Duration
- § 31:20 —Transfer
- § 31:21 —International aspects
- § 31:22 Attacks on ownership—Prior authors
- § 31:23 —Public interest
- § 31:24 Infringement actions—Nature
- § 31:25 —Action for damages
- § 31:26 —Injunction
- § 31:27 —Confiscation
- § 31:28 —Customs action

### IV. TRADE MARKS AND SERVICE MARKS

- § 31:29 Nature—Creation of rights
- § 31:30 —Beneficiaries of rights
- § 31:31 —Maintenance
- § 31:32 —Transfer
- § 31:33 —Cancellation
- § 31:34 —International aspects
- § 31:35 Attacks on ownership—Prior users
- § 31:36 —Public interest
- § 31:37 Infringement actions—Nature of infringement
- § 31:38 —Action for damages
- § 31:39 —Injunctions
- § 31:40 —Confiscation
- § 31:41 —Customs action

### V. TRADE AND SERVICE NAMES

- § 31:42 Nature—Creation of rights
- § 31:43 —Beneficiaries of rights
- § 31:44 —Maintenance
- § 31:45 —Extension
- § 31:46 —Transfer
- § 31:47 —Cancellation
- § 31:48 —International aspects
- § 31:49 Attacks on ownership—Prior users
- § 31:50 —Public interest

## TABLE OF CONTENTS

- § 31:51 Infringement actions—Nature of infringement
- § 31:52 —Action for damages
- § 31:53 —Injunctions
- § 31:54 —Confiscation
- § 31:55 —Customs action

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 31:56 Nature—Creation of rights
- § 31:57 —Beneficiaries of rights
- § 31:58 —Maintenance
- § 31:59 —Extension
- § 31:60 —Transfer
- § 31:61 —Cancellation
- § 31:62 —International aspects
- § 31:63 Attacks on ownership
- § 31:64 —Prior users
- § 31:65 —Public interest
- § 31:66 Infringement actions—Nature of infringement
- § 31:67 —Action for damages
- § 31:68 —Injunctions
- § 31:69 —Confiscation
- § 31:70 —Customs action

## VII. AESTHETIC DESIGNS AND PATTERNS

- § 31:71 In general

## VIII. LICENSING

- § 31:72 In general

## CHAPTER 32. THE NETHERLANDS

### I. INTRODUCTION

- § 32:1 In general

### II. PATENTS

- § 32:2 Nature—Creation of rights
- § 32:3 —Beneficiaries of rights
- § 32:4 —Maintenance
- § 32:5 —Extension
- § 32:6 —Transfer
- § 32:7 —Cancellation
- § 32:8 Attacks on ownership—Prior inventors or users
- § 32:9 —Public interest
- § 32:10 Infringement actions—Nature of infringement

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 32:11 —Action for damages
- § 32:12 —Injunction
- § 32:13 —Confiscation
- § 32:14 —Custom actions

### III. COPYRIGHT

- § 32:15 Nature—Creation of rights
- § 32:16 —Beneficiaries of rights
- § 32:17 —Duration
- § 32:18 —Transfer
- § 32:19 —International aspects
- § 32:20 Attacks on ownership—Prior authors
- § 32:21 —Public interest
- § 32:22 Infringement actions—Nature of infringement
- § 32:23 —Action for damages
- § 32:24 —Injunction
- § 32:25 —Confiscation
- § 32:26 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 32:27 Nature
- § 32:28 —Creation of rights
- § 32:29 —Beneficiaries of rights
- § 32:30 —Maintenance
- § 32:31 —Transfer
- § 32:32 —Cancellation
- § 32:33 —International aspects
- § 32:34 Attacks on ownership—Prior users
- § 32:35 —Public interest
- § 32:36 Infringement actions—Nature of infringement
- § 32:37 —Action for damages
- § 32:38 —Injunction
- § 32:39 —Confiscation
- § 32:40 —Customs action

### V. TRADE NAMES

- § 32:41 Nature
- § 32:42 —Creation of rights
- § 32:43 —Beneficiaries of rights
- § 32:44 —Maintenance
- § 32:45 —Transfer
- § 32:46 —Cancellation
- § 32:47 —International aspects
- § 32:48 Attacks on ownership—Prior users
- § 32:49 —Public interest

## TABLE OF CONTENTS

- § 32:50 Infringement actions—Nature of infringement
- § 32:51 —Action for damages
- § 32:52 —Injunction
- § 32:53 —Confiscation
- § 32:54 —Customs

## VI. INDUSTRIAL DESIGN AND UTILITY MODELS, AESTHETIC DESIGNS AND PATTERNS

- § 32:55 Nature
- § 32:56 —Creation of rights
- § 32:57 —Beneficiaries
- § 32:58 —Maintenance
- § 32:59 —Extension and renewal
- § 32:60 —Transfer
- § 32:61 —Cancellation
- § 32:62 —International aspects
- § 32:63 Attacks on ownership—Prior users
- § 32:64 —Public interest
- § 32:65 Infringement actions—Nature of infringement
- § 32:66 —Action for damages
- § 32:67 —Injunction
- § 32:68 —Confiscation
- § 32:69 —Customs action

## VII. LICENSING

- § 32:70 In general

## CHAPTER 33. NEW ZEALAND

### I. INTRODUCTION

- § 33:1 Protected classes of rights
- § 33:2 System of laws
- § 33:3 Enforcement of rights

### II. PATENTS

- § 33:4 Nature—Creation of rights
- § 33:5 —Beneficiaries of rights
- § 33:6 —Maintenance
- § 33:7 —Extension
- § 33:8 —Transfer
- § 33:9 —Cancellation
- § 33:10 —International aspects
- § 33:11 Attacks on ownership—Prior users
- § 33:12 —Public interest

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 33:13 Infringement actions—Nature of infringement
- § 33:14 —Action for damages
- § 33:15 —Injunction
- § 33:16 —Confiscation
- § 33:17 —Customs action
- § 33:18 International aspects

### III. COPYRIGHT

- § 33:19 Nature—Creation of rights
- § 33:20 —Beneficiaries of rights
- § 33:21 —Moral rights
- § 33:22 —Rental rights
- § 33:23 —Duration
- § 33:24 —Transfer
- § 33:25 —International aspects
- § 33:26 Attacks on ownership—Public interest
- § 33:27 Infringement actions—Nature
- § 33:28 —Permissible acts
- § 33:29 —Action for damages
- § 33:30 —Injunction
- § 33:31 —Confiscation
- § 33:32 —Customs action

### IV. TRADE MARKS

- § 33:33 Nature
- § 33:34 Creation of rights
- § 33:35 —Registration process
- § 33:36 —Registrability of trade marks
- § 33:37 Beneficiaries of rights
- § 33:38 Maintenance
- § 33:39 Transfer
- § 33:40 —Assignment
- § 33:41 —License
- § 33:42 Cancellation
- § 33:43 International aspects
- § 33:44 Attacks on ownership—Prior users
- § 33:45 —Public interest
- § 33:46 Infringement actions—Nature
- § 33:47 —Action for damages
- § 33:48 —Injunction
- § 33:49 —Confiscation
- § 33:50 —Customs action

### V. TRADE AND SERVICE NAMES

- § 33:51 In general

TABLE OF CONTENTS

**VI. INDUSTRIAL DESIGNS AND UTILITY MODELS**

- § 33:52 Copyright protection
- § 33:53 Layout designs and integrated circuits

**VII. AESTHETIC DESIGNS AND PATTERNS**

- § 33:54 Nature
- § 33:55 Creation of rights
- § 33:56 Beneficiaries of rights
- § 33:57 Maintenance
- § 33:58 Transfer
- § 33:59 Cancellation
- § 33:60 International aspects
- § 33:61 Attacks on ownership—Prior users
- § 33:62 —Public interest
- § 33:63 Infringement action—Nature
- § 33:64 —Action for damages
- § 33:65 —Injunction
- § 33:66 —Confiscation
- § 33:67 —Customs action

**VIII. LICENSING**

- § 33:68 In general
- § 33:69 Franchising

**CHAPTER 34. NORWAY**

**I. INTRODUCTION**

- § 34:1 In general

**II. PATENTS**

- § 34:2 Nature—Creation of rights
- § 34:3 —Beneficiaries of rights
- § 34:4 —Maintenance
- § 34:5 —Duration
- § 34:6 —Transfer of patent rights
- § 34:7 —Cancellation
- § 34:8 —Invalidity
- § 34:9 Attacks on ownership—Prior inventors or users
- § 34:10 —Public interest intervention
- § 34:11 Infringement actions—Nature of infringement
- § 34:12 —Action for damages
- § 34:13 —Injunction
- § 34:14 —Confiscation
- § 34:15 —Customs action

### III. COPYRIGHT

- § 34:16 Nature—Creation of rights
- § 34:17 —Beneficiaries of rights
- § 34:18 —Duration
- § 34:19 —Transfer of rights
- § 34:20 —International aspects
- § 34:21 Copyright disputes
- § 34:22 Infringement cases
- § 34:23 —Infringing acts
- § 34:24 —Action for damages
- § 34:25 —Interim measures
- § 34:26 —Confiscation
- § 34:27 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 34:28 Nature
- § 34:29 —Creation of right and registration process
- § 34:30 —Beneficiaries of rights
- § 34:31 —Maintenance
- § 34:32 —Transfer
- § 34:33 —Cancellation
- § 34:34 —International aspects
- § 34:35 Attacks on ownership
- § 34:36 Infringement actions
- § 34:37 —Nature of infringement
- § 34:38 —Action for damages
- § 34:39 —Injunction
- § 34:40 —Confiscation
- § 34:41 —Customs action
- § 34:42 Common marks

### V. ENTERPRISE NAMES (TRADE NAMES)

- § 34:43 In general
- § 34:44 Object
- § 34:45 Requirement of distinctiveness
- § 34:46 Registration
- § 34:47 Duration and expiry
- § 34:48 Assignment of enterprise name
- § 34:49 Actions
- § 34:50 International aspects

### VI. DESIGNS

- § 34:51 In general
- § 34:52 Nature

## TABLE OF CONTENTS

- § 34:53 —Creation of rights
- § 34:54 —Beneficiaries of rights
- § 34:55 —Maintenance
- § 34:56 —Extension
- § 34:57 —Transfers
- § 34:58 —Cancellation
- § 34:59 —International aspects
- § 34:60 Attacks on ownership—No prior user rights
- § 34:61 —No compulsory license
- § 34:62 —Title to design disputed
- § 34:63 Infringement actions—Nature of infringement
- § 34:64 —Action for damages
- § 34:65 —Injunction
- § 34:66 —Confiscation
- § 34:67 —Customs action

## VII. AESTHETIC DESIGNS AND PATTERNS

- § 34:68 In general
- § 34:69 Nature—Creation of rights
- § 34:70 —Beneficiaries of rights
- § 34:71 —Maintenance
- § 34:72 —Extension
- § 34:73 —Transfer of rights

## VIII. LICENSING

- § 34:74 Nature
- § 34:75 Assignments and licenses
- § 34:76 Statutory rules on the interpretation of agreements
- § 34:77 Constraints of freedom of contract—Good business practices
- § 34:78 —Price controls
- § 34:79 —Competition rules
- § 34:80 Drafting issues—Key issues often neglected
- § 34:81 —Arbitration
- § 34:82 Formal requirements

## CHAPTER 34A. PANAMA

### I. INTRODUCTION

- § 34A:1 In general
- § 34A:2 Intellectual property legal system
- § 34A:3 —Regulatory bodies
- § 34A:4 —Extent of exploitation
- § 34A:5 — —Volume of inbound and outbound intellectual property

### II. PATENTS

- § 34A:6 Nature—Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 34A:7 — — Priority
- § 34A:8 — Beneficiaries of rights
- § 34A:9 — — Co-inventors
- § 34A:10 — — Financiers
- § 34A:11 — — Employees
- § 34A:12 — Maintenance
- § 34A:13 — Extension
- § 34A:14 — Transfer
- § 34A:15 — Cancellation
- § 34A:16 Attacks on ownership
- § 34A:17 — Prior inventors or users
- § 34A:18 — Public interest
- § 34A:19 Infringement actions
- § 34A:20 — Nature of infringement
- § 34A:21 — Action for damages
- § 34A:22 — Injunction
- § 34A:23 — Confiscation
- § 34A:24 — Customs actions

### III. COPYRIGHT

- § 34A:25 Nature—Creation of rights
- § 34A:26 — Beneficiaries of rights
- § 34A:27 — Duration
- § 34A:28 — Transfer
- § 34A:29 — International aspects
- § 34A:30 Attacks on ownership
- § 34A:31 — Prior authors
- § 34A:32 — Public interest
- § 34A:33 Infringement actions
- § 34A:34 — Nature of infringement
- § 34A:35 — Action for damages
- § 34A:36 — Injunction
- § 34A:37 — Confiscation
- § 34A:38 — Customs action

### IV. TRADE AND SERVICE MARKS

- § 34A:39 Nature—Creation of rights
- § 34A:40 — Beneficiaries of rights
- § 34A:41 — Maintenance
- § 34A:42 — Transfer—Assignment
- § 34A:43 — — License
- § 34A:44 — Cancellation
- § 34A:45 — International aspects
- § 34A:46 Attacks on ownership
- § 34A:47 — Prior users

## TABLE OF CONTENTS

- § 34A:48 —Public interest
- § 34A:49 Infringement actions
- § 34A:50 —Nature of infringement
- § 34A:51 —Action for damages
- § 34A:52 —Injunction
- § 34A:53 —Confiscation
- § 34A:54 —Customs action

## V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 34A:55 Nature—Creation of rights
- § 34A:56 —Beneficiaries of rights
- § 34A:57 —Maintenance
- § 34A:58 —Extension
- § 34A:59 —Transfer
- § 34A:60 —Cancellation
- § 34A:61 Attacks on ownership
- § 34A:62 —Prior inventors or users
- § 34A:63 —Public interest
- § 34A:64 Infringement actions
- § 34A:65 —Nature of infringement
- § 34A:66 —Action for damages
- § 34A:67 —Injunction
- § 34A:68 —Confiscation
- § 34A:69 —Customs actions

## VI. LICENSING

- § 34A:70 Nature
- § 34A:71 Patents, industrial designs, and utility models
- § 34A:72 Trade marks
- § 34A:73 Copyright

## CHAPTER 35. PERU

### I. INTRODUCTION

- § 35:1 In general
- § 35:2 Classes of intellectual property
- § 35:3 Legal system
- § 35:4 —Courts of first instance
- § 35:5 —Court of second instance
- § 35:6 —Appeal courts
- § 35:7 Regulatory rules
- § 35:8 Volume of registrations
- § 35:9 Time limit

### II. PATENTS

- § 35:10 Creation of rights—Registration procedure

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 35:11 —Type of registration
- § 35:12 —Priority
- § 35:13 —Requirements
- § 35:14 Beneficiaries of rights
- § 35:15 Maintenance; requirements for exploitation
- § 35:16 Extension
- § 35:17 Transfer
- § 35:18 Cancellation
- § 35:19 International aspects—Treatment of foreigners
- § 35:20 —Conventions
- § 35:21 Attacks on ownership
- § 35:22 Public interest
- § 35:23 Infringement actions
- § 35:24 Action for damages
- § 35:25 Injunction
- § 35:26 Confiscation
- § 35:27 Customs action

### III. COPYRIGHT

- § 35:28 Creation of rights—Type of registration
- § 35:29 —Protection requirements
- § 35:30 —Moral rights
- § 35:31 Beneficiaries of rights—Authors
- § 35:32 —Co-authors
- § 35:33 —Anonymous work or work under pseudonym
- § 35:34 —Collective work
- § 35:35 —Employment relationship or by assignment
- § 35:36 Duration
- § 35:37 Transfer
- § 35:38 —License
- § 35:39 International aspects—Treatment of foreigners
- § 35:40 —Conventions
- § 35:41 Attacks on ownership—Prior authors
- § 35:42 —Public interest intervention
- § 35:43 Infringement actions
- § 35:44 Action for damages
- § 35:45 Injunction
- § 35:46 Confiscation
- § 35:47 Customs action

### IV. TRADE AND SERVICE MARKS

- § 35:48 Creation of rights—Registration procedure
- § 35:49 —Type of registration
- § 35:50 —Priority
- § 35:51 —Requirements

## TABLE OF CONTENTS

- § 35:52 Beneficiaries of rights
- § 35:53 Maintenance
- § 35:54 Transfer—Transfers and licenses
- § 35:55 —Guarantee and attachment
- § 35:56 Cancellation
- § 35:57 International aspects—Treatment of foreigners
- § 35:58 —Conventions
- § 35:59 Attacks on ownership—Prior users
- § 35:60 —Public interest intervention
- § 35:61 Infringement actions
- § 35:62 Action for damages
- § 35:63 Injunction
- § 35:64 Confiscation
- § 35:65 Customs action

## V. TRADE AND SERVICE NAMES

- § 35:66 In general
- § 35:67 Creation of rights—Type of registration
- § 35:68 —Protection
- § 35:69 —Duration
- § 35:70 —Requirements for exploitation
- § 35:71 —Transfer

## VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 35:72 Creation of rights—Registration procedure
- § 35:73 —Type of registration
- § 35:74 —Priority
- § 35:75 —Requirements
- § 35:76 Beneficiaries of rights
- § 35:77 Extension
- § 35:78 —Transfer
- § 35:79 —Cancellation
- § 35:80 International aspects—Treatment of foreigners
- § 35:81 —Conventions
- § 35:82 Attacks on ownership—Prior users
- § 35:83 —Public interest regulation
- § 35:84 Infringement actions
- § 35:85 Actions for damages, injunction, and confiscation and customs actions

## VII. LICENSING

- § 35:86 Copyrights
- § 35:87 Patents
- § 35:88 —Mandatory licenses
- § 35:89 Trade marks

## CHAPTER 36. THE PHILIPPINES

### I. INTRODUCTION

§ 36:1 In general

### II. PATENTS

§ 36:2 Nature—Creation of rights

§ 36:3 —Beneficiaries of rights

§ 36:4 —Maintenance

§ 36:5 —Extension

§ 36:6 —Transfer

§ 36:7 —Cancellation

§ 36:8 Attacks on ownership—Prior inventors or users

§ 36:9 —Public interest (Government) intervention

§ 36:10 Infringement actions—Nature of infringement

§ 36:11 —Action for damages

§ 36:12 —Injunctions

§ 36:13 —Confiscation

### III. COPYRIGHT

§ 36:14 Nature—Creation of rights

§ 36:15 —Beneficiaries of rights

§ 36:16 —Duration

§ 36:17 —Transfer

§ 36:18 Attacks on ownership

§ 36:19 Infringement—Nature of infringement

§ 36:20 —Action for damages

§ 36:21 —Injunctions

§ 36:22 —Confiscation

§ 36:23 —Customs action

### IV. TRADE AND SERVICE MARKS

§ 36:24 Nature—Creation of rights

§ 36:25 —Beneficiaries of rights

§ 36:26 —Maintenance

§ 36:27 —Transfer

§ 36:28 —Cancellation

§ 36:29 Attacks on ownership—Prior users

§ 36:30 —Public interest (Government) intervention

§ 36:31 Infringement actions—Nature of infringement

§ 36:32 —Actions for damages

§ 36:33 —Unfair competition

§ 36:34 —Injunctions

§ 36:35 —Confiscation

## TABLE OF CONTENTS

§ 36:36 —Customs action

### V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 36:37 Nature—Creation of rights
- § 36:38 —Beneficiaries of rights
- § 36:39 —Maintenance
- § 36:40 —Extension
- § 36:41 —Transfer
- § 36:42 —Cancellation
- § 36:43 Attacks on ownership—Prior inventors or users
- § 36:44 —Public interest (Government) intervention
- § 36:45 Infringement actions—Nature of infringement
- § 36:46 —Action for damages
- § 36:47 —Injunctions
- § 36:48 —Confiscation

### VI. LICENSING

- § 36:49 Voluntary licensing
- § 36:50 Compulsory licensing

## CHAPTER 37. PORTUGAL

### I. INTRODUCTION

§ 37:1 In general

### II. PATENTS

- § 37:2 Creation of rights
- § 37:3 Protection for new plant varieties
- § 37:4 Utility models
- § 37:5 Application procedure
- § 37:6 Provisional applications
- § 37:7 Parties
- § 37:8 Nature of protection
- § 37:9 Assignment and license
- § 37:10 Duration
- § 37:11 Public interest
- § 37:12 Attacks on ownership
- § 37:13 Civil, criminal, and administrative remedies

### III. COPYRIGHT

- § 37:14 Relevant law
- § 37:15 Nature
- § 37:16 Ownership
- § 37:17 Duration

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 37:18 Assignment and license
- § 37:19 Public interest
- § 37:20 Civil, criminal, and administrative remedies

### IV. TRADE AND SERVICE MARKS

- § 37:21 Nature of trade and service marks
- § 37:22 Creation of rights
- § 37:23 Application procedure
- § 37:24 Beneficiaries of rights
- § 37:25 Duration and maintenance
- § 37:26 Transfer and license
- § 37:27 Cancellation
- § 37:28 International aspects—International conventions
- § 37:29 —Community law
- § 37:30 —Macao
- § 37:31 —Other former Portuguese territories
- § 37:32 Attacks on ownership—Prior rights
- § 37:33 —Unfair competition
- § 37:34 —Public interest
- § 37:35 Civil, criminal, and administrative remedies
- § 37:36 —Opposition
- § 37:37 —Appeal
- § 37:38 —Civil action
- § 37:39 —Criminal action
- § 37:40 —Customs action

### V. DESIGNS OR MODELS

- § 37:41 In general
- § 37:42 Registration procedure
- § 37:43 Nature of protection and duration
- § 37:44 Civil, criminal, and administrative remedies

### VI. LOGOS

- § 37:45 In general
- § 37:46 Registration procedure
- § 37:47 Duration
- § 37:48 Assignment and cancellation
- § 37:49 Civil, criminal, and administrative remedies

### VII. COMPUTER PROGRAMS AND DATABASES

- § 37:50 Nature of protection
- § 37:51 Exceptions
- § 37:52 Beneficiaries of rights
- § 37:53 Duration

## TABLE OF CONTENTS

- § 37:54 Assignment and license
- § 37:55 Civil and criminal remedies

## VIII. TOPOGRAPHIES OF SEMI-CONDUCTOR PRODUCTS

- § 37:56 Creation of rights
- § 37:57 —Application procedure
- § 37:58 —Parties
- § 37:59 Nature of protection
- § 37:60 Assignment and license
- § 37:61 Duration
- § 37:62 Attacks on ownership
- § 37:63 Civil, criminal, and administrative procedures

## IX. LICENSING

- § 37:64 In general

## CHAPTER 38. ROMANIA

### I. INTRODUCTION

- § 38:1 In general

### II. PATENTS

- § 38:2 Nature
- § 38:3 Creation of rights
- § 38:4 Beneficiaries of rights
- § 38:5 Maintenance
- § 38:6 Extension
- § 38:7 Transfer
- § 38:8 International aspects
- § 38:9 Attacks on ownership—Prior inventors or users
- § 38:10 —Public interest
- § 38:11 Infringement actions—Nature of infringement
- § 38:12 —Action for damages
- § 38:13 —Confiscation
- § 38:14 —Customs actions

### III. COPYRIGHTS

- § 38:15 Nature
- § 38:16 Creation of rights
- § 38:17 Beneficiaries of rights
- § 38:18 Duration
- § 38:19 Transfer
- § 38:20 International aspects

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 38:21 Attacks on ownership
- § 38:22 —Prior authors
- § 38:23 —Public interest
- § 38:24 Infringement actions—Nature of infringement
- § 38:25 —Action for damages
- § 38:26 —Confiscation
- § 38:27 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 38:28 Nature
- § 38:29 Creation of rights
- § 38:30 Beneficiaries of rights
- § 38:31 Maintenance
- § 38:32 Transfer
- § 38:33 Cancellation
- § 38:34 International aspects
- § 38:35 Attacks on ownership—Prior users
- § 38:36 —Public interest
- § 38:37 Infringement actions—Nature of infringement
- § 38:38 —Action for damages
- § 38:39 —Confiscation
- § 38:40 —Customs action

### V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 38:41 Nature
- § 38:42 Creation of rights
- § 38:43 Beneficiaries of rights
- § 38:44 Maintenance
- § 38:45 Extension
- § 38:46 Transfer
- § 38:47 Cancellation
- § 38:48 International aspects
- § 38:49 Attacks on copyright—Prior users
- § 38:50 Infringement actions—Action for damages
- § 38:51 —Confiscation
- § 38:52 —Custom actions

### VI. LICENSING

- § 38:53 In general

## CHAPTER 39. RUSSIAN FEDERATION

### I. INTRODUCTION

- § 39:1 In general

## TABLE OF CONTENTS

- § 39:2 National legislation
- § 39:3 International treaties
- § 39:4 Government agencies
- § 39:5 Volume of intellectual property

## II. PATENTS OF INVENTIONS, UTILITY MODEL PATENTS, AND PATENTS OF INDUSTRIAL DESIGNS

- § 39:6 In general
- § 39:7 Nature—Creation of rights
- § 39:8 —Beneficiaries of rights
- § 39:9 —Maintenance
- § 39:10 —Extension
- § 39:11 —Transfer
- § 39:12 —Cancellation
- § 39:13 Attacks on ownership—Prior use
- § 39:14 —Public interest
- § 39:15 Infringement actions—Nature of infringement
- § 39:16 —Remedies
- § 39:17 —Action for damage
- § 39:18 —Injunctions
- § 39:19 —Confiscation
- § 39:20 —Customs actions

## III. COPYRIGHT AND RELATED (NEIGHBORING) RIGHTS

- § 39:21 In general
- § 39:22 Nature—Creation of rights
- § 39:23 —Beneficiaries of rights
- § 39:24 —Duration
- § 39:25 —Transfer
- § 39:26 —International aspects
- § 39:27 Attacks on ownership—Prior authors
- § 39:28 —Public interest
- § 39:29 Infringement actions
- § 39:30 —Nature of infringement
- § 39:31 —Action for damages
- § 39:32 —Injunctions
- § 39:33 —Confiscation
- § 39:34 —Customs action

## IV. TRADE MARKS AND SERVICE MARKS

- § 39:35 In general
- § 39:36 Nature
- § 39:37 —Emergence of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 39:38 —Beneficiaries of rights
- § 39:39 —Maintenance
- § 39:40 —Transfer
- § 39:41 —Cancellation
- § 39:42 —International aspects
- § 39:43 Infringement actions
- § 39:44 —Nature of infringement
- § 39:45 —Action for damages
- § 39:46 —Injunctions
- § 39:47 —Confiscation
- § 39:48 —Customs action

### **V. FIRM NAMES**

- § 39:49 Nature
- § 39:50 Usage and disposal

### **VI. COMMERCIAL DESIGNATIONS (TRADE NAMES)**

- § 39:51 Nature
- § 39:52 Usage and disposal
- § 39:53 Collision of rights

### **VII. AESTHETIC DESIGNS AND PATTERNS**

- § 39:54 In general

### **VIII. LICENSING**

- § 39:55 Nature
- § 39:56 Proper use
- § 39:57 Protection of interest

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WORLD INTELLECTUAL  
PROPERTY  
RIGHTS and REMEDIES  
LAWS with COMMENTARY

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# Summary of Contents

## Volume 1

### **PART I. COMMENTARY**

- Chapter 1. Argentina
- Chapter 2. Australia
- Chapter 3. Austria
- Chapter 4. Belgium
- Chapter 5. Bermuda
- Chapter 6. Brazil
- Chapter 7. Canada
- Chapter 8. People's Republic of China
- Chapter 9. Colombia
- Chapter 10. Costa Rica
- Chapter 11. Cyprus
- Chapter 12. Czech Republic
- Chapter 13. Denmark
- Chapter 14. Egypt
- Chapter 15. Estonia
- Chapter 16. Finland
- Chapter 17. France
- Chapter 18. Germany

## Volume 2

### **PART I. COMMENTARY (CONTINUED)**

- Chapter 19. Greece
- Chapter 20. Hong Kong
- Chapter 21. Hungary
- Chapter 22. India
- Chapter 23. Indonesia

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 24. Ireland
- Chapter 25. Israel
- Chapter 26. Italy
- Chapter 27. Japan
- Chapter 28. Lithuania
- Chapter 29. Luxembourg
- Chapter 30. Malaysia
- Chapter 31. Mexico
- Chapter 32. The Netherlands
- Chapter 33. New Zealand
- Chapter 34. Norway
- Chapter 34A. Panama
- Chapter 35. Peru
- Chapter 36. The Philippines
- Chapter 37. Portugal
- Chapter 38. Romania
- Chapter 39. Russian Federation

### **Volume 3**

#### **PART I. COMMENTARY (CONTINUED)**

- Chapter 40. Slovak Republic
- Chapter 41. South Africa
- Chapter 42. Spain
- Chapter 43. Sri Lanka
- Chapter 44. Switzerland
- Chapter 45. Taiwan
- Chapter 46. Thailand
- Chapter 47. Turkey
- Chapter 48. Ukraine
- Chapter 49. United Kingdom
- Chapter 50. United States
- Chapter 51. Vietnam
- Chapter 52. The European Union
- Chapter 53. The Revised Berne Convention for the Protection of

## SUMMARY OF CONTENTS

- Literary and Artistic Works
- Chapter 54. The Brussels Satellite Convention
- Chapter 55. European Trade Mark Law
- Chapter 56. Jurisdiction and Dispute Resolution
- Chapter 57. The Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration
- Chapter 58. The Locarno Agreement Establishing an International Classification for Industrial Design
- Appendix 58A. Annex
- Chapter 59. The Madrid Agreement and Protocol
- Chapter 60. The Paris Convention for Protection of Industrial Property
- Chapter 61. The Patent Cooperation Treaty
- Chapter 62. The Patent Law Treaty
- Chapter 63. The Singapore Treaty on Law of Trade Marks
- Chapter 64. The TRIPS Agreement
- Chapter 65. The Universal Copyright Convention
- Appendix 65A. Parties to the Universal Copyright Convention
- Appendix 65B. Parties to the Berne Convention for the Protection of Literary and Artistic Works

## **PART II. PRIMARY LAW AND COMMENTARY**

- Chapter 66. Laws of Argentina with Commentary
- Chapter 67. Laws of Australia with Commentary

## **Volume 4**

## **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 68. Laws of Austria with Commentary
- Chapter 69. Laws of Belgium with Commentary
- Chapter 70. Laws of Brazil with Commentary
- Chapter 71. Laws of Canada with Commentary
- Chapter 72. Laws of Colombia with Commentary
- Chapter 73. Laws of Cyprus with Commentary
- Chapter 74. Laws of the Czech Republic with Commentary

WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 75. Laws of Denmark with Commentary
- Chapter 76. Laws of Estonia with Commentary
- Chapter 77. Laws of Finland with Commentary
- Chapter 78. Laws of Hungary with Commentary
- Chapter 79. Laws of Israel with Commentary

## Volume 5

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 80. Laws of Italy with Commentary
- Chapter 81. Laws of Japan with Commentary
- Chapter 82. Laws of Malaysia with Commentary
- Chapter 83. Laws of Mexico with Commentary
- Chapter 84. Laws of New Zealand with Commentary

## Volume 6

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 85. Laws of Norway with Commentary
- Chapter 86. Laws of Peru with Commentary
- Chapter 87. Laws of the Philippines with Commentary
- Chapter 88. Laws of Poland with Commentary
- Chapter 89. Laws of Portugal with Commentary
- Chapter 90. Laws of Singapore with Commentary
- Chapter 91. Laws of South Africa with Commentary
- Chapter 92. Laws of Spain with Commentary
- Chapter 93. Laws of Taiwan with Commentary
- Chapter 94. Laws of Turkey with Commentary
- Chapter 95. Laws of the United States with Commentary

# Table of Contents

## **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

### **CHAPTER 68. LAWS OF AUSTRIA WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 68:1 In general
- § 68:2 Competition law
- § 68:3 Trade Mark Act
- § 68:4 Registered design protection
- § 68:5 Patent law
- § 68:6 Industrial designs protection
- § 68:7 Semiconductor chip design protection
- § 68:8 Copyright law
- § 68:9 Domain names

#### **II. STATUTORY TEXT**

- § 68:10 Act Against Unfair Competition
- § 68:11 Trade Mark Act
- § 68:12 Registered Design Act
- § 68:13 Patent Act
- § 68:14 Industrial Design Act
- § 68:15 Semiconductor Chip Act
- § 68:16 Copyright Act

### **CHAPTER 69. LAWS OF BELGIUM WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 69:1 In general
- § 69:2 Copyright
- § 69:3 Trade marks
- § 69:4 Designs and models
- § 69:5 Patents
- § 69:6 Breeders' certificates
- § 69:7 Databases

- § 69:8 Chips
- § 69:9 Software
- § 69:10 Domain names

## II. STATUTORY TEXT

- § 69:11 Copyright Act of 30 June 1994
- § 69:12 The Benelux Treaty on Intellectual Property of 25 February 2005
- § 69:13 Patent Act of 28 March 1984

## CHAPTER 70. LAWS OF BRAZIL WITH COMMENTARY

### I. INTRODUCTION

- § 70:1 In general
- § 70:2 Industrial property law
- § 70:3 —Patent law
- § 70:4 —Trade Mark Law
- § 70:5 —Other dispositions of the industrial property law
- § 70:6 —Copyright law

### II. STATUTORY TEXT

- § 70:7 Industrial Property Law, Law number 9.279 of 14 May 1996
- § 70:8 Copyright Law, Law Number 9.610 of 19 February 1998

## CHAPTER 71. LAWS OF CANADA WITH COMMENTARY

### I. INTRODUCTION

- § 71:1 In general
- § 71:2 Statutes
- § 71:3 —Competition Act
- § 71:4 Patent Act
- § 71:5 Trade Marks Act
- § 71:6 —Official marks and geographic indications
- § 71:7 —Licensing and assignment
- § 71:8 —Remedies available to trade mark owners
- § 71:9 —Public regulation relevant to trade mark owners
- § 71:10 Industrial Design Act
- § 71:11 —Nature of protection and originality
- § 71:12 —Application and registration process
- § 71:13 —Interaction with other forms of intellectual property
- § 71:14 —Rights and infringement
- § 71:15 Plant Breeders' Rights Act

## TABLE OF CONTENTS

- § 71:16 Integrated Circuit Topography Act
- § 71:17 Copyright Act

### II. STATUTORY TEXT

- § 71:18 Patent Act
- § 71:19 Copyright Act
- § 71:20 Trade Marks Act
- § 71:21 Act Respecting Industrial Designs
- § 71:22 Plant Breeders' Rights Act
- § 71:23 Integrated Circuit Topography Act

## CHAPTER 72. LAWS OF COLOMBIA WITH COMMENTARY

### I. INTRODUCTION

- § 72:1 In general

### II. STATUTORY TEXT

- § 72:2 Common Regime on Industrial Property
- § 72:3 Decision Number 351 of 1993 on the Common Regime on Copyright
- § 72:4 Law Number 23 of 1982 on Copyright

## CHAPTER 73. LAWS OF CYPRUS WITH COMMENTARY

### I. INTRODUCTION

- § 73:1 In general
- § 73:2 Domestic law
- § 73:3 International agreements
- § 73:4 Patents

### II. STATUTORY TEXT

- § 73:5 Patents Law
- § 73:6 Trade Marks Law
- § 73:7 Copyright Law

## CHAPTER 74. LAWS OF THE CZECH REPUBLIC WITH COMMENTARY

### I. INTRODUCTION

- § 74:1 System of intellectual property law
- § 74:2 —Registered and unregistered

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 74:3 —Creative and non-creative
- § 74:4 —Individual and non-individual

### **II. SOURCES OF LAW**

- § 74:5 National legislation
- § 74:6 International treaties
- § 74:7 European law

### **III. PATENTS**

- § 74:8 In general
- § 74:9 Patentability
- § 74:10 Patent rights
- § 74:11 Period of protection
- § 74:12 Patent office prosecution
- § 74:13 Patent cooperation treaty patents
- § 74:14 Infringement of rights
- § 74:15 Cancellation proceedings
- § 74:16 Appeals of decisions of the industrial property office

### **IV. UTILITY MODELS**

- § 74:17 In general

### **V. INDUSTRIAL DESIGNS**

- § 74:18 In general

### **VI. TRADE MARKS**

- § 74:19 In general
- § 74:20 Concept of trade mark
- § 74:21 Registration proceedings
- § 74:22 Rights in the trade mark
- § 74:23 Cancellation

### **VII. COPYRIGHT**

- § 74:24 In general

### **VIII. UNFAIR COMPETITION**

- § 74:25 In general

### **IX. OTHER BRANCHES OF LAW AND PRIVATE INTERNATIONAL LAW**

- § 74:26 In general

### **X. PROCEDURAL ASPECTS**

- § 74:27 In general

## TABLE OF CONTENTS

### **XI. STATUTORY TEXT**

- § 74:28 Law on Trade Marks
- § 74:29 Act Concerning Literary, Scientific, and Artistic Work (Copyright Act)
- § 74:30 Law on Inventions, Industrial Designs, and Rationalization Proposals, Law Number 527 of 27 November 1990

### **CHAPTER 75. LAWS OF DENMARK WITH COMMENTARY**

- § 75:1 Consolidated Trade Marks Act, Act Number 90, 28-01-2009
- § 75:2 Consolidated Act on Copyright, Act Number 587, 20-06-2008

### **CHAPTER 76. LAWS OF ESTONIA WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 76:1 In general
- § 76:2 Note on commentary

#### **II. STATUTORY TEXT**

- § 76:3 Copyright Act of 11 November 1992
- § 76:4 Trade Marks Act of 22 May 2002
- § 76:5 Patents Act of 16 March 1994
- § 76:6 Utility Models Act of 16 March 1994
- § 76:7 Industrial Design Protection Act of 18 November 1997
- § 76:8 Protection of Layout Designs of Integrated Circuits Act of 25 November 1998
- § 76:9 Principles of Legal Regulation of Industrial Property Act of 28 January 2003
- § 76:10 Geographical Indication Protection Act of 15 December 1999

### **CHAPTER 77. LAWS OF FINLAND WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 77:1 In general
- § 77:2 Scope of Finnish intellectual property legislation
- § 77:3 Enforcement of rights—Forum
- § 77:4 —Remedies
- § 77:5 —Evidence
- § 77:6 Administrative and self-regulative bodies—National Board of Patents and Registration
- § 77:7 —Customs authorities

- § 77:8 —Copyright Council
- § 77:9 —Board on Business Practice

## II. STATUTORY TEXT

- § 77:10 Patents Act 1967
- § 77:11 Trade Marks Act 1967

# CHAPTER 78. LAWS OF HUNGARY WITH COMMENTARY

## I. INTRODUCTION

- § 78:1 In general

## II. PATENTS

- § 78:2 In general
- § 78:3 Patentable subject matter
- § 78:4 Entitlement to patent
- § 78:5 —Service inventions
- § 78:6 —Employee inventions
- § 78:7 Duration of protection and rights conferred
- § 78:8 Patent Cooperation Treaty; National phase
- § 78:9 European patents
- § 78:10 Competent authorities

## III. UTILITY MODELS

- § 78:11 In general
- § 78:12 Conditions of grant
- § 78:13 Entitlement to utility model protection
- § 78:14 Duration of protection and rights conferred
- § 78:15 Competent authorities

## IV. INDUSTRIAL DESIGNS

- § 78:16 In general
- § 78:17 Conditions of grant
- § 78:18 Entitlement to design protection
- § 78:19 Duration of protection and rights conferred
- § 78:20 Competent authorities

## V. TRADE MARKS AND GEOGRAPHICAL INDICATIONS

- § 78:21 Act XI of 1997
- § 78:22 Competition Act

## VI. COPYRIGHT

- § 78:23 Act LXXVI of 1999

TABLE OF CONTENTS

**VII. INTERNATIONAL TREATIES PERTAINING TO INTELLECTUAL PROPERTY**

§ 78:24 In general

**VIII. STATUTORY TEXT**

§ 78:25 Law XXXIII of 1995 on the Protection of Inventions by Patents

§ 78:26 Law Number LXXVI of 1999 on Copyright

**CHAPTER 79. LAWS OF ISRAEL WITH COMMENTARY**

**I. INTRODUCTION**

§ 79:1 In general

**II. PATENTS**

§ 79:2 In general

§ 79:3 Amendments to the Patent Law

§ 79:4 Proposed 2010 Amendments to the patent Law

§ 79:5 Pharmacists' Ordinance

§ 79:6 Plant breeders' rights

§ 79:7 Protection of integrated circuits

**III. COPYRIGHT LAW**

§ 79:8 In general

§ 79:9 Rights

§ 79:10 Permitted use of copyrighted material

§ 79:11 —Procedure

§ 79:12 —Enforcement

**IV. TRADE MARKS**

§ 79:13 In general

§ 79:14 Registration of foreign trade marks

§ 79:15 Madrid Protocol

§ 79:16 Merchandise Marks Ordinance 1929

§ 79:17 Protection of Appellations of Origin and Geographical Names Law 1965

**V. PASSING OFF AND OTHER COMMERCIAL TORTS**

§ 79:18 The tort of passing off

§ 79:19 Theft of commercial secrets

**VI. DEFENSE EXPORT CONTROL LAW, 2007**

§ 79:20 In general

**VII. RESTRICTIVE TRADE PRACTICES LAW 1988**

§ 79:21 In general

**VIII. INFRINGEMENT BY ANONYMOUS INTERNET TORTFEASORS**

§ 79:22 In general

**IX. PARALLEL IMPORTS**

§ 79:23 In general

**X. INDUSTRIAL DESIGNS**

§ 79:24 In general

**XI. EXTRATERRITORIAL APPLICATION OF ISRAEL INTELLECTUAL PROPERTY LAW**

§ 79:25 In general

**XII. COPYRIGHT LAW 2007**

§ 79:26 In general

**XIII. STATUTORY TEXT**

§ 79:27 Copyright Law of 2007

§ 79:28 Performers and Broadcasters Law 1984

§ 79:29 Trade Marks Ordinance (New Version) 1972

§ 79:30 Customs Ordinance

§ 79:31 Merchandise Marks Ordinance

§ 79:32 Protection of Appellations of Origin and Geographical Names Law 1965

§ 79:33 Commercial Wrongs Law 1999

§ 79:34 Patents Law 1967

§ 79:35 Integrated Circuits (Protection) Law, 1999

§ 79:36 Patents and Designs Ordinance, 1924

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WORLD INTELLECTUAL  
PROPERTY  
RIGHTS and REMEDIES  
LAWS with COMMENTARY

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# Summary of Contents

## Volume 1

### PART I. COMMENTARY

- Chapter 1. Argentina
- Chapter 2. Australia
- Chapter 3. Austria
- Chapter 4. Belgium
- Chapter 5. Bermuda
- Chapter 6. Brazil
- Chapter 7. Canada
- Chapter 8. People's Republic of China
- Chapter 9. Colombia
- Chapter 10. Costa Rica
- Chapter 11. Cyprus
- Chapter 12. Czech Republic
- Chapter 13. Denmark
- Chapter 14. Egypt
- Chapter 15. Estonia
- Chapter 16. Finland
- Chapter 17. France
- Chapter 18. Germany

## Volume 2

### PART I. COMMENTARY (CONTINUED)

- Chapter 19. Greece
- Chapter 20. Hong Kong
- Chapter 21. Hungary
- Chapter 22. India
- Chapter 23. Indonesia

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 24. Ireland
- Chapter 25. Israel
- Chapter 26. Italy
- Chapter 27. Japan
- Chapter 28. Lithuania
- Chapter 29. Luxembourg
- Chapter 30. Malaysia
- Chapter 31. Mexico
- Chapter 32. The Netherlands
- Chapter 33. New Zealand
- Chapter 34. Norway
- Chapter 34A. Panama
- Chapter 35. Peru
- Chapter 36. The Philippines
- Chapter 37. Portugal
- Chapter 38. Romania
- Chapter 39. Russian Federation

### **Volume 3**

#### **PART I. COMMENTARY (CONTINUED)**

- Chapter 40. Slovak Republic
- Chapter 41. South Africa
- Chapter 42. Spain
- Chapter 43. Sri Lanka
- Chapter 44. Switzerland
- Chapter 45. Taiwan
- Chapter 46. Thailand
- Chapter 47. Turkey
- Chapter 48. Ukraine
- Chapter 49. United Kingdom
- Chapter 50. United States
- Chapter 51. Vietnam
- Chapter 52. The European Union
- Chapter 53. The Revised Berne Convention for the Protection of

## SUMMARY OF CONTENTS

- Literary and Artistic Works
- Chapter 54. The Brussels Satellite Convention
- Chapter 55. European Trade Mark Law
- Chapter 56. Jurisdiction and Dispute Resolution
- Chapter 57. The Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration
- Chapter 58. The Locarno Agreement Establishing an International Classification for Industrial Design
- Appendix 58A. Annex
- Chapter 59. The Madrid Agreement and Protocol
- Chapter 60. The Paris Convention for Protection of Industrial Property
- Chapter 61. The Patent Cooperation Treaty
- Chapter 62. The Patent Law Treaty
- Chapter 63. The Singapore Treaty on Law of Trade Marks
- Chapter 64. The TRIPS Agreement
- Chapter 65. The Universal Copyright Convention
- Appendix 65A. Parties to the Universal Copyright Convention
- Appendix 65B. Parties to the Berne Convention for the Protection of Literary and Artistic Works

## **PART II. PRIMARY LAW AND COMMENTARY**

- Chapter 66. Laws of Argentina with Commentary
- Chapter 67. Laws of Australia with Commentary

## **Volume 4**

## **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 68. Laws of Austria with Commentary
- Chapter 69. Laws of Belgium with Commentary
- Chapter 70. Laws of Brazil with Commentary
- Chapter 71. Laws of Canada with Commentary
- Chapter 72. Laws of Colombia with Commentary
- Chapter 73. Laws of Cyprus with Commentary
- Chapter 74. Laws of the Czech Republic with Commentary

WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 75. Laws of Denmark with Commentary
- Chapter 76. Laws of Estonia with Commentary
- Chapter 77. Laws of Finland with Commentary
- Chapter 78. Laws of Hungary with Commentary
- Chapter 79. Laws of Israel with Commentary

## Volume 5

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 80. Laws of Italy with Commentary
- Chapter 81. Laws of Japan with Commentary
- Chapter 82. Laws of Malaysia with Commentary
- Chapter 83. Laws of Mexico with Commentary
- Chapter 84. Laws of New Zealand with Commentary

## Volume 6

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 85. Laws of Norway with Commentary
- Chapter 86. Laws of Peru with Commentary
- Chapter 87. Laws of the Philippines with Commentary
- Chapter 88. Laws of Poland with Commentary
- Chapter 89. Laws of Portugal with Commentary
- Chapter 90. Laws of Singapore with Commentary
- Chapter 91. Laws of South Africa with Commentary
- Chapter 92. Laws of Spain with Commentary
- Chapter 93. Laws of Taiwan with Commentary
- Chapter 94. Laws of Turkey with Commentary
- Chapter 95. Laws of the United States with Commentary

# Table of Contents

## PART I. COMMENTARY (CONTINUED)

### CHAPTER 40. SLOVAK REPUBLIC

#### I. INTRODUCTION

- § 40:1 Copyright and related rights
- § 40:2 Industrial property rights
- § 40:3 Rights of cultivators
- § 40:4 Exploitation of intellectual property rights—Personal property rights
- § 40:5 —Property rights related to personal property rights
- § 40:6 Creation of intellectual property rights—Intellectual property rights without formal requirements for creation
- § 40:7 —Intellectual property rights with formal requirements for creation
- § 40:8 —Formal requirements
- § 40:9 Regulatory bodies
- § 40:10 International agreements

#### II. PATENTS

- § 40:11 Nature—Creation of rights
- § 40:12 —Beneficiaries of rights
- § 40:13 —Maintenance
- § 40:14 —Extension
- § 40:15 —Transfer
- § 40:16 —Cancellation
- § 40:17 Attacks on ownership—Prior inventors or users
- § 40:18 —Public interest
- § 40:19 Infringement actions—Nature of infringement
- § 40:20 —Action for damages
- § 40:21 —Injunctions
- § 40:22 —Confiscation
- § 40:23 —Customs actions

#### III. COPYRIGHT

- § 40:24 Nature—Creation of rights
- § 40:25 Beneficiaries of rights
- § 40:26 —Duration

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 40:27 —Transfer
- § 40:28 Attacks on ownership—Prior authors
- § 40:29 —Public interest
- § 40:30 Infringement actions—Nature of infringement
- § 40:31 —Action for damages
- § 40:32 —Injunctions
- § 40:33 —Confiscation
- § 40:34 —Customs action

### IV. TRADE MARK

- § 40:35 Definition
- § 40:36 Procedure
- § 40:37 Registration
- § 40:38 Term of protection
- § 40:39 Rights of trade mark owners—Right to use trade mark
- § 40:40 —Right to grant license
- § 40:41 —Right to transfer trade mark
- § 40:42 —Right to lien on trade mark
- § 40:43 Obligations of trade mark user
- § 40:44 Protection of rights of trade mark owners
- § 40:45 Limitations on trade marks
- § 40:46 Termination of trade marks

### V. BUSINESS NAMES

- § 40:47 Nature
- § 40:48 Creation of business name
- § 40:49 Establishment of business name
- § 40:50 Duration of business name
- § 40:51 Transfer of business name
- § 40:52 Removal or discharge of business name
- § 40:53 Protection of business
- § 40:54 Foreign business names

### VI. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 40:55 Nature—Creation of rights
- § 40:56 —Beneficiaries of rights
- § 40:57 —Maintenance
- § 40:58 —Extension
- § 40:59 —Transfer
- § 40:60 —Cancellation
- § 40:61 —International aspects
- § 40:62 Attacks on ownership—Prior inventors or users
- § 40:63 —Public interest
- § 40:64 Infringement actions—Nature of infringement
- § 40:65 —Action for damages

## TABLE OF CONTENTS

- § 40:66 —Injunctions
- § 40:67 —Confiscation
- § 40:68 —Customs actions

## VII. LICENSING

- § 40:69 In general
- § 40:70 Licensing of copyrights
- § 40:71 —Manner of use of work
- § 40:72 —Extent of license
- § 40:73 —Remuneration
- § 40:74 —Exclusive and non-exclusive licenses
- § 40:75 —Disposition
- § 40:76 —Publication of works
- § 40:77 —General licensing contracts
- § 40:78 —Collective licensing contracts
- § 40:79 Industrial property rights and rights of cultivators
- § 40:80 —Entry of license into register
- § 40:81 —Exclusive and non-exclusive licenses
- § 40:82 —Disposition
- § 40:83 —Maintenance
- § 40:84 —Documentation and information
- § 40:85 —Interests of licensee
- § 40:86 —Repudiation

## CHAPTER 41. SOUTH AFRICA

### I. INTRODUCTION

- § 41:1 In general
- § 41:2 International agreements
- § 41:3 Scope of activity
- § 41:4 —Patent applications

### II. PATENTS

- § 41:5 Nature
- § 41:6 —Creation of rights
- § 41:7 —Beneficiaries of rights
- § 41:8 —Maintenance
- § 41:9 —Extension
- § 41:10 —Transfers
- § 41:11 —Cancellation
- § 41:12 Attacks on ownership
- § 41:13 —Prior inventors or users
- § 41:14 —Public interest
- § 41:15 Infringement actions
- § 41:16 —Action for damages

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 41:17 —Confiscation
- § 41:18 —Customs action

### III. COPYRIGHT

- § 41:19 Nature
- § 41:20 —Creation of rights
- § 41:21 —Beneficiaries of rights
- § 41:22 —Duration
- § 41:23 —Transfer
- § 41:24 —International aspects
- § 41:25 —Attacks on ownership
- § 41:26 Infringement actions
- § 41:27 —Nature of infringement
- § 41:28 —Action for damages
- § 41:29 —Injunctions
- § 41:30 —Confiscation
- § 41:31 —Customs action

### IV. TRADE MARKS AND SERVICE MARKS

- § 41:32 Nature
- § 41:33 —Creation of rights
- § 41:34 —Procedure for registration
- § 41:35 —Examination
- § 41:36 —Beneficiaries of rights
- § 41:37 —Maintenance
- § 41:38 —Assignment and licensing
- § 41:39 —Cancellation
- § 41:40 —International aspects
- § 41:41 Attacks on ownership
- § 41:42 —Prior users
- § 41:43 —Government intervention
- § 41:44 —Infringement
- § 41:45 —Action for damages
- § 41:46 —Injunctions
- § 41:47 —Confiscation
- § 41:48 —Police action

### V. TRADE AND SERVICE NAMES

- § 41:49 In general
- § 41:50 Limits of protection

### VI. UTILITY MODELS —FUNCTIONAL DESIGN

- § 41:51 Nature
- § 41:52 —Creation of rights

## TABLE OF CONTENTS

- § 41:53 —Beneficiaries of rights
- § 41:54 —Maintenance
- § 41:55 —Extension
- § 41:56 —Transfer
- § 41:57 —Cancellation
- § 41:58 —International aspects
- § 41:59 Attacks on ownership—Prior users
- § 41:60 —Public interest
- § 41:61 —Certificate of validity
- § 41:62 Infringement actions
- § 41:63 —Nature of infringement
- § 41:64 —Actions for damages
- § 41:65 —Injunctions
- § 41:66 —Confiscation
- § 41:67 —Customs action
- § 41:68 —Proceedings for declaration of non-infringement
- § 41:69 —Threats of infringement

## VII. AESTHETIC DESIGNS

- § 41:70 Nature
- § 41:71 —Creation of rights
- § 41:72 —Beneficiaries of rights
- § 41:73 —Maintenance
- § 41:74 —Extension
- § 41:75 —Transfer
- § 41:76 —Cancellation
- § 41:77 —International aspects
- § 41:78 Attacks on ownership
- § 41:79 —Public interest
- § 41:80 Infringement actions
- § 41:81 —Nature of infringement
- § 41:82 —Actions for damages
- § 41:83 —Injunctions
- § 41:84 —Confiscation
- § 41:85 —Customs action
- § 41:86 —Proceedings for declaration of non-infringement
- § 41:87 —Threats of infringement

## VIII. COUNTERFEIT GOODS

- § 41:88 In general

## CHAPTER 42. SPAIN

### I. INTRODUCTION

- § 42:1 Types of intellectual property

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 42:2 New technical solutions
- § 42:3 —Formal creations of industrial application
- § 42:4 —Distinctive emblems or signs used in business
- § 42:5 Remedies
- § 42:6 International agreements
- § 42:7 Volume of intellectual property transactions

### II. PATENTS

- § 42:8 In general
- § 42:9 Nature—Creation of rights
- § 42:10 —Beneficiaries of rights
- § 42:11 —Maintenance
- § 42:12 —Extension and renewal
- § 42:13 —Transfer
- § 42:14 —Cancellation
- § 42:15 —International aspects
- § 42:16 Attacks on ownership—Prior inventors or users
- § 42:17 —Public intervention
- § 42:18 Infringement actions—Proceedings
- § 42:19 —Remedies

### III. COPYRIGHT

- § 42:20 Nature—Creation of rights
- § 42:21 —Content of rights
- § 42:22 —Beneficiaries of rights
- § 42:23 —Duration
- § 42:24 —Transfer
- § 42:25 —International aspects
- § 42:26 Attacks on ownership
- § 42:27 Infringement actions—Nature of the infringement
- § 42:28 —Actions for damages
- § 42:29 —Injunctions
- § 42:30 —Confiscation
- § 42:31 Customs actions
- § 42:32 —Private and domestic uses
- § 42:33 —Reproductions, distributions, and public communications
- § 42:34 —Transformation

### IV. TRADE AND SERVICE MARKS

- § 42:35 In general
- § 42:36 Nature—Creation of rights
- § 42:37 —Beneficiaries of rights
- § 42:38 —Maintenance
- § 42:39 —Transfer
- § 42:40 —Cancellation

## TABLE OF CONTENTS

- § 42:41 —International aspects
- § 42:42 Attacks on ownership
- § 42:43 Infringement actions—Remedies

## V. TRADE AND SERVICE NAMES

- § 42:44 In general

## VI. UTILITY MODELS

- § 42:45 Nature
- § 42:46 Creation of rights
- § 42:47 Beneficiaries
- § 42:48 Maintenance
- § 42:49 Extension
- § 42:50 Regulation

## VII. INDUSTRIAL DESIGNS

- § 42:51 Nature
- § 42:52 Creation of rights

## VIII. LICENSING

- § 42:53 In general

## CHAPTER 43. SRI LANKA

### I. INTRODUCTION

- § 43:1 In general

### II. PATENTS

- § 43:2 Nature—Creation of rights
- § 43:3 —Beneficiaries of rights
- § 43:4 —Maintenance
- § 43:5 —Extension
- § 43:6 —Transfer
- § 43:7 —Cancellation
- § 43:8 Attacks on ownership—Prior inventors or users
- § 43:9 —Public interest
- § 43:10 Infringement actions—Nature of infringement
- § 43:11 —Action for damages
- § 43:12 —Injunctions
- § 43:13 —Confiscation
- § 43:14 —Customs actions

### III. COPYRIGHT

- § 43:15 Nature—Creation of rights

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 43:16 —Beneficiaries of rights
- § 43:17 —Duration
- § 43:18 —Transfer
- § 43:19 —International aspects
- § 43:20 Attacks on ownership—Prior authors
- § 43:21 —Public interest
- § 43:22 Infringement actions—Nature of infringement
- § 43:23 —Action for damages
- § 43:24 —Injunctions
- § 43:25 —Confiscation
- § 43:26 —Customs action

### IV. TRADE MARKS

- § 43:27 Nature—Creation of rights
- § 43:28 —Beneficiaries of rights
- § 43:29 —Maintenance—
- § 43:30 —Transfer
- § 43:31 —Cancellation
- § 43:32 —International aspects
- § 43:33 Attacks on ownership—Prior users
- § 43:34 —Public interest
- § 43:35 Infringement actions—Nature of infringement
- § 43:36 —Action for damages
- § 43:37 —Injunctions
- § 43:38 —Confiscation
- § 43:39 —Customs action
- § 43:40 Trade and service names
- § 43:41 Trade and service names

### V. INDUSTRIAL DESIGNS AND UTILITY MODELS

- § 43:42 Nature—Creation of rights
- § 43:43 —Beneficiaries of rights
- § 43:44 —Maintenance
- § 43:45 —Extension
- § 43:46 —Transfer
- § 43:47 —Cancellation
- § 43:48 Attacks on ownership—Prior users
- § 43:49 —Public interest
- § 43:50 Infringement actions—Nature of infringement
- § 43:51 —Action for damages
- § 43:52 —Injunctions
- § 43:53 —Confiscation
- § 43:54 —Customs action

### VI. AESTHETIC DESIGNS AND PATTERNS

- § 43:55 In general

TABLE OF CONTENTS

**VII. LICENSING**

§ 43:56 In general

**CHAPTER 44. SWITZERLAND**

**I. INTRODUCTION**

§ 44:1 In general

§ 44:2 Classes of intellectual property

§ 44:3 Exhaustion of distribution right of intellectual property

§ 44:4 Freedom of imitation and unfair competition

**II. PATENTS**

§ 44:5 Practical relevance of swiss patent law

§ 44:6 Nature—Creation of rights

§ 44:7 —Beneficiaries of rights

§ 44:8 —Maintenance

§ 44:9 —Extension

§ 44:10 —Transfer

§ 44:11 —Cancellation

§ 44:12 —International aspects

§ 44:13 Attacks on ownership—Prior inventors or users

§ 44:14 —Public interest

§ 44:15 Infringement actions—Nature of infringement

§ 44:16 —Civil remedies

§ 44:17 —Penal remedies

**III. COPYRIGHT**

§ 44:18 Nature—Creation of rights

§ 44:19 —Beneficiaries of rights

§ 44:20 —Duration

§ 44:21 —Transfer

§ 44:22 —International aspects

§ 44:23 —Revision of 1992

§ 44:24 Attacks on ownership—Prior authors

§ 44:25 —Public interest

§ 44:26 Infringement actions—Nature of infringement

§ 44:27 —Remedies

§ 44:28 —Customs actions

**IV. TRADE AND SERVICE MARKS**

§ 44:29 Nature

§ 44:30 —Creation of rights

§ 44:31 —Beneficiaries of rights

§ 44:32 —Maintenance

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 44:33 —Extension
- § 44:34 —Transfer
- § 44:35 —Cancellation
- § 44:36 —Indications of origin
- § 44:37 —International aspects
- § 44:38 Attacks on ownership—Prior users
- § 44:39 —Public interest
- § 44:40 Infringement actions—Nature of infringement
- § 44:41 —Remedies
- § 44:42 —Customs action

### V. INDUSTRIAL DESIGNS

- § 44:43 Nature—Creation of rights
- § 44:44 —Beneficiaries of rights
- § 44:45 —Term of protection
- § 44:46 —Maintenance
- § 44:47 —Transfer
- § 44:48 —Design protection and copyright law
- § 44:49 Attacks on ownership; infringement actions
- § 44:50 —Customs actions

### VI. TRADE AND SERVICE NAMES

- § 44:51 Nature—Creation of rights
- § 44:52 —Beneficiaries
- § 44:53 —Maintenance
- § 44:54 —Transfer
- § 44:55 —Cancellation
- § 44:56 —International aspects
- § 44:57 Attacks on ownership—Prior users
- § 44:58 —Public interest
- § 44:59 Infringement actions—Nature of infringement
- § 44:60 —Remedies

## CHAPTER 45. TAIWAN

### I. INTRODUCTION

- § 45:1 In general

### II. PATENTS

- § 45:2 Nature
- § 45:3 —Creation of rights
- § 45:4 —Beneficiaries of rights
- § 45:5 —Maintenance
- § 45:6 —Extension

## TABLE OF CONTENTS

- § 45:7 —Transfer
- § 45:8 —Invalidation
- § 45:9 Attacks on ownership
- § 45:10 Infringement actions
- § 45:11 —Nature of infringement
- § 45:12 —Actions for damages
- § 45:13 —Injunctions
- § 45:14 —Confiscation
- § 45:15 —Customs actions

## III. COPYRIGHT

- § 45:16 Nature
- § 45:17 —Creation of rights
- § 45:18 —Beneficiaries of rights
- § 45:19 —Duration
- § 45:20 —Transfer
- § 45:21 —International aspects
- § 45:22 Attacks on ownership
- § 45:23 Infringement actions
- § 45:24 —Nature of infringement
- § 45:25 —Action for damages
- § 45:26 —Injunctions
- § 45:27 —Confiscation
- § 45:28 —Customs action

## IV. TRADE AND SERVICE MARKS

- § 45:29 In general
- § 45:30 Nature
- § 45:31 —Creation of rights
- § 45:32 —Beneficiaries of rights
- § 45:33 —Maintenance
- § 45:34 —Transfer
- § 45:35 —Cancellation
- § 45:36 —International aspects
- § 45:37 Attacks on ownership—Prior users
- § 45:38 —Government intervention
- § 45:39 Infringement actions
- § 45:40 —Nature of infringement
- § 45:41 —Action for damages
- § 45:42 —Injunctions
- § 45:43 —Confiscation
- § 45:44 —Customs action

## V. UTILITY MODELS

- § 45:45 Nature

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 45:46 —Creation of rights
- § 45:47 —Beneficiaries of rights
- § 45:48 —Maintenance
- § 45:49 —Extension
- § 45:50 —Transfer
- § 45:51 —Invalidation
- § 45:52 —Termination of rights
- § 45:53 —International aspects
- § 45:54 Attacks on ownership
- § 45:55 —Prior inventors or users
- § 45:56 Infringement actions
- § 45:57 —Nature of infringement
- § 45:58 —Actions for damages
- § 45:59 —Injunctions
- § 45:60 —Confiscation
- § 45:61 —Customs actions

### VI. DESIGNS

- § 45:62 Nature
- § 45:63 —Creation of rights
- § 45:64 —Beneficiaries of rights
- § 45:65 —Maintenance
- § 45:66 —Extension
- § 45:67 —Transfer
- § 45:68 —Invalidation
- § 45:69 —Termination of rights
- § 45:70 —International aspects
- § 45:71 Attacks on ownership
- § 45:72 —Prior inventors or users
- § 45:73 Infringement actions
- § 45:74 —Nature of infringement
- § 45:75 —Actions for damages
- § 45:76 —Injunctions
- § 45:77 —Confiscation
- § 45:78 —Customs actions

## CHAPTER 46. THAILAND

### I. INTRODUCTION

- § 46:1 In general

### II. PATENTS

- § 46:2 Nature—Creation of rights
- § 46:3 —Invention by employees
- § 46:4 —Maintenance

## TABLE OF CONTENTS

- § 46:5 —Extension
- § 46:6 —Transfer
- § 46:7 —Cancellation
- § 46:8 Attacks on ownership—Prior use
- § 46:9 —Public interest
- § 46:10 Infringement—Nature of infringement
- § 46:11 —Compensation
- § 46:12 —Injunctions
- § 46:13 —Confiscation
- § 46:14 —Customs actions

### III. COPYRIGHT

- § 46:15 Nature—Creation of rights
- § 46:16 —Creation by employees
- § 46:17 —Duration
- § 46:18 —Transfer
- § 46:19 Attacks on ownership—Prior authors
- § 46:20 —Public interest
- § 46:21 Infringement—Nature of infringement
- § 46:22 —Compensation
- § 46:23 —Injunctions
- § 46:24 —Confiscation
- § 46:25 —Customs

### IV. TRADE AND SERVICE MARKS

- § 46:26 Nature—Creation of rights
- § 46:27 —Co-existence
- § 46:28 —Maintenance
- § 46:29 —Transfer
- § 46:30 —Cancellation
- § 46:31 Attacks on ownership—Prior use
- § 46:32 Infringement—Nature of infringement
- § 46:33 —Compensation
- § 46:34 —Injunctions
- § 46:35 —Confiscation
- § 46:36 —Customs actions

### V. TRADE AND SERVICE NAMES

- § 46:37 In general

### VI. INDUSTRIAL DESIGNS

- § 46:38 Nature—Creation of rights
- § 46:39 —Invention by employees
- § 46:40 —Maintenance

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 46:41 —Extension
- § 46:42 —Transfer
- § 46:43 —Cancellation
- § 46:44 —Prior use
- § 46:45 Infringement—Nature of infringement
- § 46:46 —Compensation
- § 46:47 —Injunctions
- § 46:48 —Confiscation
- § 46:49 —Customs actions

### VII. TRADE SECRETS

- § 46:50 Nature
- § 46:51 Infringement—Nature of infringement
- § 46:52 —Compensation
- § 46:53 —Injunctions

### VIII. GEOGRAPHIC INDICATIONS

- § 46:54 Creation of right
- § 46:55 —Maintenance
- § 46:56 —Use and suspension of geographic indication
- § 46:57 —Cancellation
- § 46:58 Infringement—Nature of infringement
- § 46:59 —Compensation
- § 46:60 —Injunctions

## CHAPTER 47. TURKEY

### I. INTRODUCTION

- § 47:1 In general

### II. PATENTS

- § 47:2 Nature
- § 47:3 —Creation of rights
- § 47:4 —Beneficiaries of rights
- § 47:5 —Maintenance
- § 47:6 —Extension
- § 47:7 —Transfer
- § 47:8 —Cancellation
- § 47:9 Attacks on ownership—Prior inventors or users
- § 47:10 —Public interest (Government) intervention
- § 47:11 Infringement actions—Nature of infringement
- § 47:12 —Action for damages
- § 47:13 —Injunctions
- § 47:14 —Confiscation

## TABLE OF CONTENTS

§ 47:15 —Customs action

### III. COPYRIGHT

- § 47:16 Nature
- § 47:17 —Creation of rights
- § 47:18 —Beneficiaries of rights
- § 47:19 —Duration
- § 47:20 —Transfer
- § 47:21 Attacks on ownership—Prior authors
- § 47:22 —Public interest (Government) intervention
- § 47:23 Infringement actions—Nature of infringement
- § 47:24 —Action for damages
- § 47:25 —Injunctions
- § 47:26 —Confiscation
- § 47:27 —Customs action

### IV. TRADE AND SERVICE MARKS

- § 47:28 Nature
- § 47:29 —Creation of rights
- § 47:30 —Beneficiaries of rights
- § 47:31 —Maintenance
- § 47:32 —Transfer
- § 47:33 —Cancellation
- § 47:34 Attacks on ownership—Prior users
- § 47:35 —Public interest (Government) intervention
- § 47:36 Infringement actions—Nature of infringement
- § 47:37 —Action for damages
- § 47:38 —Injunctions
- § 47:39 —Confiscation
- § 47:40 —Customs action

### V. TRADE AND SERVICE NAMES

- § 47:41 In general

### VI. INDUSTRIAL DESIGNS

- § 47:42 In general
- § 47:43 Nature
- § 47:44 —Creation of rights
- § 47:45 —Beneficiaries of rights
- § 47:46 —Maintenance
- § 47:47 —Extension
- § 47:48 —Transfer
- § 47:49 —Cancellation
- § 47:50 Attacks on ownership—Prior users

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 47:51 —Public interest (Government) intervention
- § 47:52 Infringement actions—Nature of infringement
- § 47:53 —Injunctions
- § 47:54 —Confiscation
- § 47:55 —Customs action

### VII. UTILITY MODELS

- § 47:56 In general

### VIII. AESTHETIC DESIGNS AND PATTERNS

- § 47:57 In general

## CHAPTER 48. UKRAINE

### I. INTRODUCTION

- § 48:1 Legislation
- § 48:2 Treaties
- § 48:3 Registrations

### II. INVENTIONS AND UTILITY MODELS

- § 48:4 Nature
- § 48:5 Public interest
- § 48:6 Creation of rights
- § 48:7 Priority right
- § 48:8 Duration and maintenance
- § 48:9 Rights holders
- § 48:10 Transfer of rights
- § 48:11 Licensing
- § 48:12 International aspects
- § 48:13 Infringement
- § 48:14 Action for damages

### III. COPYRIGHT AND NEIGHBORING RIGHTS

- § 48:15 Nature
- § 48:16 Creation of rights
- § 48:17 Moral and property rights
- § 48:18 Initial holder and beneficiaries
- § 48:19 Co-authorship
- § 48:20 Rights of translator and author of other derivative works
- § 48:21 Rights of producer
- § 48:22 Rights of employer
- § 48:23 Duration of copyright and neighboring rights
- § 48:24 Transfer of rights
- § 48:25 Licensing

## TABLE OF CONTENTS

- § 48:26 International aspects
- § 48:27 Infringement
- § 48:28 Actions for damages

## IV. TRADE MARKS AND SERVICE MARKS

- § 48:29 Nature
- § 48:30 Confirmation of trade mark right
- § 48:31 Priority right
- § 48:32 Co-ownership
- § 48:33 Transfer of rights and licensing
- § 48:34 Duration and maintenance
- § 48:35 International aspects
- § 48:36 Infringement

## V. INDUSTRIAL DESIGNS

- § 48:37 Nature
- § 48:38 Creation of rights
- § 48:39 Priority right
- § 48:40 Duration
- § 48:41 Initial holder
- § 48:42 Rights of employer
- § 48:43 Transfer of rights and licensing
- § 48:44 International aspects
- § 48:45 Infringement

## VI. DOMAIN NAMES

- § 48:46 Nature
- § 48:47 Confirmation of rights
- § 48:48 Duration and maintenance
- § 48:49 International aspects
- § 48:50 Infringement

## VII. PLANT VARIETIES

- § 48:51 Nature
- § 48:52 Creation of rights
- § 48:53 Priority right
- § 48:54 Duration and maintenance
- § 48:55 Rights holders
- § 48:56 Transfer of rights and licensing
- § 48:57 International aspects
- § 48:58 Infringement
- § 48:59 Action for damages

## VIII. TRADE OR FIRM NAMES

- § 48:60 Nature

- § 48:61 Property rights to trade names
- § 48:62 Infringement

## **IX. GEOGRAPHICAL INDICATIONS**

- § 48:63 Nature
- § 48:64 Creation of rights
- § 48:65 International aspects
- § 48:66 Infringement

## **CHAPTER 49. UNITED KINGDOM**

### **I. INTRODUCTION**

- § 49:1 Intellectual property rights system
- § 49:2 Intellectual property profession

### **II. PATENTS**

- § 49:3 Nature
- § 49:4 —Creation of rights
- § 49:5 —Beneficiaries of rights
- § 49:6 —Maintenance
- § 49:7 —Extension
- § 49:8 —Transfer
- § 49:9 —Cancellation
- § 49:10 Attacks on ownership—Prior inventors or users
- § 49:11 —Public interest
- § 49:12 Infringement—Nature of infringement
- § 49:13 —Action for damages
- § 49:14 —Injunction
- § 49:15 —Confiscation
- § 49:16 —Customs action

### **III. COPYRIGHT**

- § 49:17 Nature
- § 49:18 —Creation of rights
- § 49:19 —Beneficiaries of rights
- § 49:20 —Duration
- § 49:21 —Transfer
- § 49:22 —International aspects
- § 49:23 Attacks on ownership—Prior authors
- § 49:24 —Public interest
- § 49:25 Infringement actions—Nature of infringement
- § 49:26 —Action for damages
- § 49:27 —Injunction
- § 49:28 —Confiscation

## TABLE OF CONTENTS

§ 49:29 —Customs action

### **IV. TRADE MARKS**

- § 49:30 Nature
- § 49:31 —Creation of rights
- § 49:32 —Beneficiaries of rights
- § 49:33 —Maintenance
- § 49:34 —Transfer
- § 49:35 —Cancellation
- § 49:36 —International aspects
- § 49:37 Attacks on ownership—Prior use
- § 49:38 —Public interest
- § 49:39 Infringement actions—Nature of infringement
- § 49:40 —Action for damages
- § 49:41 —Injunction
- § 49:42 —Confiscation
- § 49:43 —Customs action

### **V. INDUSTRIAL DESIGNS AND UTILITY MODELS**

- § 49:44 Nature
- § 49:45 —Applicable laws
- § 49:46 —Design defined
- § 49:47 —Creation of rights
- § 49:48 —Beneficiaries of rights
- § 49:49 —Maintenance, extension and renewal
- § 49:50 —Transfer
- § 49:51 —Cancellation
- § 49:52 —International aspects
- § 49:53 Attacks on ownership—Prior use
- § 49:54 —Public interest
- § 49:55 Infringement actions—Nature of infringement
- § 49:56 —Action for damages
- § 49:57 —Injunction
- § 49:58 —Confiscation
- § 49:59 —Customs action

### **VI. AESTHETIC DESIGNS AND PATTERNS**

- § 49:60 In general
- § 49:61 United Kingdom registered designs
- § 49:62 Copyright

### **VII. LICENSING**

- § 49:63 Nature
- § 49:64 —Geography

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 49:65 Core considerations—Type of intellectual property right licensed
- § 49:66 —Territorial scope
- § 49:67 —Term of license
- § 49:68 —Exclusivity
- § 49:69 —Sub-licenses
- § 49:70 —Payment
- § 49:71 —Ownership of intellectual property rights
- § 49:72 —Maintenance of rights
- § 49:73 —Defense and enforcement
- § 49:74 Other considerations—Recordal of registrable transactions
- § 49:75 —Consequences of recordal
- § 49:76 —Competition law

## CHAPTER 50. UNITED STATES

### I. INTRODUCTION

- § 50:1 In general

### II. UTILITY PATENTS

- § 50:2 Nature
- § 50:3 —Application procedure
- § 50:4 —Inventorship and ownership
- § 50:5 —Term
- § 50:6 —Transfer of ownership
- § 50:7 —Post-issuance correction and disclaimer
- § 50:8 —International aspects
- § 50:9 Attacks on validity—Re-examination
- § 50:10 —Prior inventorship
- § 50:11 —Invalidity and unenforceability
- § 50:12 —Public interest and government intervention
- § 50:13 Infringement actions—Nature of infringement
- § 50:14 —Action for damages
- § 50:15 —Injunctive relief
- § 50:16 —Import restrictions

### III. COPYRIGHT

- § 50:17 Nature
- § 50:18 —Creation of rights
- § 50:19 —Beneficiaries of rights
- § 50:20 —Duration
- § 50:21 —Transfer
- § 50:22 —International aspects
- § 50:23 Attacks on ownership—Original work
- § 50:24 —Public interest and government intervention
- § 50:25 Infringement actions—Nature of infringement

## TABLE OF CONTENTS

- § 50:26 —Fair use
- § 50:27 —Action for damages
- § 50:28 —Injunctions
- § 50:29 —Confiscation
- § 50:30 —Customs action
- § 50:31 Special considerations for computer software
- § 50:32 Copyright protection and management systems

## IV. TRADE MARKS AND SERVICE MARKS

- § 50:33 Nature
- § 50:34 —Registration of marks
- § 50:35 —Beneficiaries of rights
- § 50:36 —Maintenance of federal registration
- § 50:37 —Transfer
- § 50:38 —Cancellation of federal registration
- § 50:39 —International aspects
- § 50:40 Attacks on ownership—Prior users
- § 50:41 —Fraud on the trade mark office
- § 50:42 —Public interest and government intervention
- § 50:43 Infringement actions—Nature of infringement
- § 50:44 —Action for damages
- § 50:45 —Injunctions
- § 50:46 —Confiscation
- § 50:47 Other trade mark actions—Dilution
- § 50:48 —Cybersquatting
- § 50:49 —Unfair competition
- § 50:50 —Customs action
- § 50:51 Trade and service names

## V. DESIGN PATENTS

- § 50:52 Nature
- § 50:53 —Application procedure
- § 50:54 —Term
- § 50:55 Infringement actions—Nature of infringement
- § 50:56 —Action for damages

## VI. TRADE SECRETS

- § 50:57 Nature
- § 50:58 —Creation of rights
- § 50:59 —Beneficiaries of rights
- § 50:60 —Protection
- § 50:61 —Transfer
- § 50:62 —Loss of rights
- § 50:63 —International aspects
- § 50:64 Attacks on ownership—Subsequent discovery

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 50:65 —Public interest and government intervention
- § 50:66 Misappropriation actions—Nature of misappropriation
- § 50:67 —Action for damages
- § 50:68 —Injunctions
- § 50:69 —Confiscation
- § 50:70 —Customs action

### VII. LICENSING

- § 50:71 Nature
- § 50:72 Factors encouraging licensing
- § 50:73 Role of licensing in overall strategy
- § 50:74 Structuring licensing transactions
- § 50:75 —Preliminary provisions
- § 50:76 —Grant of rights
- § 50:77 —Licensee obligations regarding licensor copyrights and trade marks
- § 50:78 —Delivery
- § 50:79 Acceptance of licensed material by licensee
- § 50:80 —Payment for licensed material
- § 50:81 —Term of licensed rights
- § 50:82 —Termination of licensed rights
- § 50:83 —Other matters specific to transaction
- § 50:84 —Warranties (Licensor promises as to ownership and performance)
- § 50:85 —Limitation of liability for breach of agreement
- § 50:86 —Confidentiality
- § 50:87 —Indemnity for third-party claims
- § 50:88 —Government approvals and other requirements
- § 50:89 —Dispute resolution
- § 50:90 —Miscellaneous

## CHAPTER 51. VIETNAM

### I. INTRODUCTION

- § 51:1 In general

### II. AUTHORS' RIGHTS AND RELATED RIGHTS

- § 51:2 In general
- § 51:3 Conditions of protection of authors—Copyright
- § 51:4 —Related rights
- § 51:5 Contents, limitation, and term of protection of authors—Authors' rights
- § 51:6 —Related rights
- § 51:7 Ownership of copyright and related rights—Copyright
- § 51:8 —Related rights

## TABLE OF CONTENTS

- § 51:9 Assignment and transfer of right of use of author's rights and related rights
- § 51:10 Registration certification of copyrights and related rights
- § 51:11 —Copyright registration certificates and related rights
- § 51:12 Representative, consultancy, and service for copyright and related rights

### III. INDUSTRIAL PROPERTY

- § 51:13 In general
- § 51:14 Categories of industrial property—Patent inventions and utility solution patents
- § 51:15 —Industrial designs
- § 51:16 —Layout designs
- § 51:17 —Trade marks
- § 51:18 —Trade names
- § 51:19 — —Registration of trade names
- § 51:20 —Geographical indications
- § 51:21 —Business secrets
- § 51:22 Owners of industrial property rights
- § 51:23 Creation of rights in industrial property
- § 51:24 Rights of beneficiaries
- § 51:25 Maintenance and renewal of protection titles
- § 51:26 Extension
- § 51:27 Transfer and licensing
- § 51:28 Invalidation
- § 51:29 Limits on the right of ownership—Prior use
- § 51:30 —Government intervention in the public interest
- § 51:31 —Dependent patent
- § 51:32 —General provisions relating to compulsory licensing

### IV. RIGHTS OVER NEW PLANT VARIETIES

- § 51:33 In general
- § 51:34 Establishment
- § 51:35 Content of the right
- § 51:36 Limitations on the right
- § 51:37 Transfer of the right

### V. INFRINGEMENT ACTIONS

- § 51:38 In general
- § 51:39 Assessment procedures and intellectual property examinations
- § 51:40 Intellectual property agents
- § 51:41 —Civil remedies
- § 51:42 —Administrative and criminal remedies
- § 51:43 —Customs authority and border control measures
- § 51:44 —Inspection

§ 51:45 —Suspension measures

## **CHAPTER 52. THE EUROPEAN UNION**

### **I. INTRODUCTION**

§ 52:1 In general

### **II. PATENTS**

§ 52:2 Nature

§ 52:3 Attacks on ownership

§ 52:4 Infringement actions

### **III. COPYRIGHT**

§ 52:5 Nature

§ 52:6 Attacks on ownership

§ 52:7 Infringement actions

### **IV. TRADE AND SERVICE MARKS**

§ 52:8 Nature

§ 52:9 Attacks on ownership

§ 52:10 Infringement actions

### **V. INDUSTRIAL DESIGN AND UTILITY MODELS**

§ 52:11 Nature

§ 52:12 Attacks on ownership

§ 52:13 Infringement actions

### **VI. AESTHETIC DESIGNS AND PATTERNS**

§ 52:14 Nature

§ 52:15 Attacks on ownership

§ 52:16 Infringement actions

## **CHAPTER 53. THE REVISED BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS**

### **I. INTRODUCTION**

§ 53:1 In general

### **II. ORIGIN OF REVISED BERNE CONVENTION**

§ 53:2 History

§ 53:3 Status

TABLE OF CONTENTS

**III. ADDITIONAL INTERNATIONAL TREATIES**

- § 53:4 Universal Copyright Convention
- § 53:5 Agreement on Trade-Related Aspects of Intellectual Property Rights—Revised Berne Convention
- § 53:6 —Berne plus
- § 53:7 World Intellectual Property Organization Copyright Treaty

**IV. STRUCTURE OF REVISED BERNE CONVENTION**

- § 53:8 In general
- § 53:9 Application of Revised Berne Convention—Works
- § 53:10 —Level of creativity
- § 53:11 —Special rules for certain works
- § 53:12 —Personal application

**V. BASIC PRINCIPLES OF REVISED BERNE CONVENTION**

- § 53:13 National treatment and minimum rights
- § 53:14 No formalities
- § 53:15 Independence from protection in country of origin
- § 53:16 Proof of authorship

**VI. CONCLUSION**

- § 53:17 In general

**CHAPTER 54. THE BRUSSELS SATELLITE CONVENTION**

**I. INTRODUCTION**

- § 54:1 In general

**II. CONTENT**

- § 54:2 Scope of protection
- § 54:3 Exceptions from protection
- § 54:4 Relation to copyright and domestic legal regulations on abuse of monopoly

**III. CONCLUSION**

- § 54:5 In general

**CHAPTER 55. EUROPEAN TRADE MARK LAW**

**I. INTRODUCTION**

- § 55:1 In general

- § 55:2 National trade mark protection
- § 55:3 Madrid Agreement

## **II. COMMUNITY TRADE MARK AND HARMONIZATION**

- § 55:4 In general
- § 55:5 Harmonization Directive

## **III. COMMUNITY TRADE MARK**

- § 55:6 Nature
- § 55:7 Scope
- § 55:8 Applications
- § 55:9 Oppositions
- § 55:10 Conversion procedure
- § 55:11 Priority
- § 55:12 Seniority
- § 55:13 Infringement actions
- § 55:14 Remedies
- § 55:15 Renewal

## **IV. MADRID PROTOCOL**

- § 55:16 In general
- § 55:17 Applications
- § 55:18 Assignment of international trade marks

## **V. NATIONAL RIGHTS AND THE COMMUNITY TRADE MARK**

- § 55:19 In general

## **VI. PIRACY AND COUNTERFEITING**

- § 55:20 In general

## **VII. ENLARGEMENT**

- § 55:21 Accession of new member states
- § 55:22 Accession of Bulgaria and Romania

# **CHAPTER 56. JURISDICTION AND DISPUTE RESOLUTION**

## **I. INTRODUCTION**

- § 56:1 In general

TABLE OF CONTENTS

**II. ACTIONABILITY OF FOREIGN INTELLECTUAL PROPERTY RIGHTS IN ENGLISH COURTS**

- § 56:2 In general
- § 56:3 The Judgments Regulation
- § 56:4 —General rule: Defendant to be sued in his home state
- § 56:5 —Exceptions to the general rule

**III. THE INTERNET**

- § 56:6 In general

**IV. ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION**

- § 56:7 In general
- § 56:8 Arbitration
- § 56:9 Alternative dispute resolution
- § 56:10 Litigation
- § 56:11 World Intellectual Property Organization Arbitration and Mediation Center
- § 56:12 Advantages of World Intellectual Property Organization dispute resolution procedures

**CHAPTER 57. THE LISBON AGREEMENT FOR THE PROTECTION OF APPELLATIONS OF ORIGIN AND THEIR INTERNATIONAL REGISTRATION**

**I. INTRODUCTION**

- § 57:1 In general
- § 57:2 Purpose of the Lisbon Agreement
- § 57:3 Member states

**II. INTERNATIONAL REGISTRATION PROCEDURE**

- § 57:4 In general
- § 57:5 Mandatory content of application
- § 57:6 Examination by international bureau

**III. REQUIREMENTS FOR PROTECTION**

- § 57:7 In general
- § 57:8 Recognition, protection, and reputation in country of origin
- § 57:9 —Recognition
- § 57:10 —Protection and reparation
- § 57:11 Grant of protection

- § 57:12 —Scope of protection
- § 57:13 Refusal of protection
- § 57:14 —Remedies against refusals
- § 57:15 Tolerated use for prior users
- § 57:16 Remedies against violations

#### **IV. CHANGES AFFECTING INTERNATIONAL REGISTRATION**

- § 57:17 Modifications
- § 57:18 Renunciation of protection
- § 57:19 Cancellation of international registration
- § 57:20 Invalidation
- § 57:21 Corrections

### **CHAPTER 58. THE LOCARNO AGREEMENT ESTABLISHING AN INTERNATIONAL CLASSIFICATION FOR INDUSTRIAL DESIGN**

#### **I. INTRODUCTION**

- § 58:1 In general
- § 58:2 Purpose of Locarno Classification
- § 58:3 Revisions and editions of Classification
- § 58:4 Member states
- § 58:5 Structure of Locarno Classification
- § 58:6 Use and scope of Locarno Classification

#### **II. CLASSIFICATION SYSTEM**

- § 58:7 In general
- § 58:8 Classes and subclasses
- § 58:9 —Alphabetical list
- § 58:10 —Class list
- § 58:11 —Finding appropriate class
- § 58:12 —Search methods
- § 58:13 —Double-check test
- § 58:14 —Classification in infringement cases

Appendix 58A. Annex

### **CHAPTER 59. THE MADRID AGREEMENT AND PROTOCOL**

#### **I. INTRODUCTION**

- § 59:1 In general

#### **II. INTERNATIONAL REGISTRATION PROCEDURE**

- § 59:2 In general

## TABLE OF CONTENTS

- § 59:3 Application form
- § 59:4 Determining applicable system
- § 59:5 Entitlement to file
- § 59:6 —Designating the European Union
- § 59:7 Eligibility criteria
- § 59:8 Basic mark
- § 59:9 Specification
- § 59:10 Languages
- § 59:11 Representation
- § 59:12 Fees
- § 59:13 Transmission of application to the international bureau
- § 59:14 —Examination by the international bureau
- § 59:15 —Examination by the national offices
- § 59:16 Duration and renewal
- § 59:17 Maintenance of international registration
- § 59:18 Dependency period

### **III. CENTRAL ATTACK AND TRANSFORMATION**

- § 59:19 In general

### **IV. SUBSEQUENT DESIGNATION**

- § 59:20 In general

### **V. ASSIGNMENT**

- § 59:21 In general

## **CHAPTER 60. THE PARIS CONVENTION FOR PROTECTION OF INDUSTRIAL PROPERTY**

### **I. INTRODUCTION**

- § 60:1 In general
- § 60:2 History of the Paris Convention

### **II. SUBSTANTIVE PROVISIONS**

- § 60:3 In general
- § 60:4 National treatment
- § 60:5 Right of priority

### **III. COMMON RULES FOR PATENTS**

- § 60:6 In general
- § 60:7 Principle of independence of patents
- § 60:8 Right of inventor to be mentioned
- § 60:9 Patentability not effected by restrictions on product

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 60:10 Importation of patented products or products made from patented processes
- § 60:11 Failure to work and compulsory licenses
- § 60:12 Grace period for maintenance fees
- § 60:13 Patents in international traffic
- § 60:14 Inventions shown and marks exhibited at international exhibitions

### IV. COMMON RULES CONCERNING TRADE MARKS

- § 60:15 In general
- § 60:16 Cancellation for non-use
- § 60:17 Use in form different from form registered
- § 60:18 Concurrent use
- § 60:19 Grace period for renewal fees
- § 60:20 Independence of trade marks
- § 60:21 Protection of trade marks registered in country of origin
- § 60:22 Protection for unregistered well-known marks
- § 60:23 State emblems, official hallmarks, and emblems of international organizations
- § 60:24 Assignment of trade marks
- § 60:25 Service marks
- § 60:26 Registration of marks in name of agent
- § 60:27 Nature of goods not obstacle to registration
- § 60:28 Collective marks
- § 60:29 Industrial designs
- § 60:30 Trade names
- § 60:31 Indications of source and appellations of origin

### V. COMMON RULES CONCERNING UNFAIR COMPETITION

- § 60:32 In general
- § 60:33 Unfair competition
- § 60:34 Article 10 *bis*

### VI. GENERAL AND ADMINISTRATIVE PROVISIONS

- § 60:35 In general

## CHAPTER 61. THE PATENT COOPERATION TREATY

### I. INTRODUCTION

- § 61:1 In general
- § 61:2 History

### II. BASIC FEATURES OF THE TREATY

- § 61:3 Not a world patent

## TABLE OF CONTENTS

- § 61:4 Procedure
- § 61:5 —Filing
- § 61:6 —Search, written opinion, and publication
- § 61:7 —Demand
- § 61:8 —National and regional phase filings

### **III. STRATEGIC USE OF PATENT COOPERATION TREATY APPLICATIONS**

- § 61:9 In general

### **IV. UNITED STATES PATENT COOPERATION TREATY APPLICATION STRATEGY**

- § 61:10 Choosing receiving office and international searching authority
- § 61:11 Restoration of right of priority
- § 61:12 Filing and unity of invention
- § 61:13 Doctrine of equivalents and prosecution history estoppel
- § 61:14 Obtaining prior art date based on filing of patent cooperation treaty application
- § 61:15 Taking advantage of grace periods based on filing of patent cooperation treaty application

### **V. MOVING TOWARD PATENT COOPERATION TREATY-BASED WORLD PATENT?**

- § 61:16 In general

### **VI. CONCLUSION**

- § 61:17 In general

## **CHAPTER 62. THE PATENT LAW TREATY**

### **I. INTRODUCTION**

- § 62:1 In general

### **II. RELATION TO PATENT COOPERATION TREATY**

- § 62:2 In general

### **III. APPLICATION OF PATENT LAW TREATY**

- § 62:3 In general

### **IV. MAIN PROVISIONS OF PATENT LAW TREATY**

- § 62:4 Filing date requirements
- § 62:5 Application formalities

- § 62:6 Mandatory representation
- § 62:7 Communications
- § 62:8 Validity and revocation of patents
- § 62:9 Relief with respect to time limits and reinstatement of rights
- § 62:10 Correction or addition of priority claim
- § 62:11 Restoration of priority right

## **V. SUBSTANTIVE PATENT LAW TREATY**

- § 62:12 In general

## **VI. CONCLUSION**

- § 62:13 In general

## **CHAPTER 63. THE SINGAPORE TREATY ON LAW OF TRADE MARKS**

- § 63:1 Introduction
- § 63:2 Marks to which Treaty applies
- § 63:3 Electronic communications: Article 8 and Rule 6
- § 63:4 Relief measures in cases of failure to comply with time limits
- § 63:5 Trade mark license requirements
- § 63:6 Establishment of an assembly
- § 63:7 Resolution by diplomatic conference supplementary to Singapore Treaty
- § 63:8 Effective date of treaty and contracting parties

## **CHAPTER 64. THE TRIPS AGREEMENT**

### **I. INTRODUCTION**

- § 64:1 In general

### **II. RELATIONSHIP WITH EXISTING CONVENTIONS**

- § 64:2 In general

### **III. GENERAL PRINCIPLES**

- § 64:3 Aim and scope
- § 64:4 Concept of national treatment
- § 64:5 Most-favored-nation principle

### **IV. SUBSTANTIVE PROVISIONS**

- § 64:6 Existing conventions as basis for protection
- § 64:7 Copyright and related rights
- § 64:8 Trade marks
- § 64:9 Geographical indications

## TABLE OF CONTENTS

- § 64:10 Industrial designs
- § 64:11 Patents
- § 64:12 Integrated circuits
- § 64:13 Trade secrets and know-how
- § 64:14 Control of anti-competitive practices

## V. ENFORCEMENT AND ADMINISTRATIVE ISSUES

- § 64:15 Enforcement
- § 64:16 Dispute prevention and settlement
- § 64:17 Transition arrangements
- § 64:18 Review of TRIPS agreement

## CHAPTER 65. THE UNIVERSAL COPYRIGHT CONVENTION

- § 65:1 Introduction
- § 65:2 Background
- § 65:3 Current application
- § 65:4 Overview of provisions
- § 65:5 Main provisions—General scope of protection
- § 65:6 —National treatment
- § 65:7 —Maximum permissible formalities
- § 65:8 —Duration of copyright
- § 65:9 —Translation rights
- § 65:10 —Right to produce instructional materials

Appendix 65A. Parties to the Universal Copyright Convention

Appendix 65B. Parties to the Berne Convention for the Protection of Literary and Artistic Works

## PART II. PRIMARY LAW AND COMMENTARY

### CHAPTER 66. LAWS OF ARGENTINA WITH COMMENTARY

#### I. INTRODUCTION

- § 66:1 In general
- § 66:2 Patents
- § 66:3 Utility models
- § 66:4 Trade secrets
- § 66:5 Copyrights
- § 66:6 Trade and service marks
- § 66:7 Industrial models and designs
- § 66:8 Licensing and transfer of technology

## II. STATUTORY TEXT

- § 66:9 Patent and Utility Models Law Number 24.482, amended by Law Number 24.572
- § 66:10 Confidentiality Act
- § 66:11 Copyright Act
- § 66:12 Trade Mark Act

## CHAPTER 67. LAWS OF AUSTRALIA WITH COMMENTARY

### I. INTRODUCTION

- § 67:1 In general

### II. COPYRIGHT

- § 67:2 In general
- § 67:3 Computer programs
- § 67:4 Lists and databases
- § 67:5 Bundles of copyright
- § 67:6 Display of copyright notice
- § 67:7 Display of copyright notice—Infringement of copyright and fair dealing
- § 67:8 Reproduction
- § 67:9 Copyright in utilitarian works
- § 67:10 Secondary infringement
- § 67:11 Ownership of copyright
- § 67:12 Assignments and licenses
- § 67:13 Rights and duties of the Crown
- § 67:14 International aspects of copyright
- § 67:15 Moral rights
- § 67:16 —Recent and proposed amendments
- § 67:17 Performers' protection
- § 67:18 Proposals for amendment
- § 67:19 Case law—Green v. Broadcasting Corporation of New Zealand
- § 67:20 —De Garis and Another v. Neville Jeffress Pidler Pty. Ltd

### III. COPYRIGHT AMENDMENT (DIGITAL AGENDA) ACT 2000

- § 67:21 In general
- § 67:22 Elements of the amendment
- § 67:23 Exceptions
- § 67:24 Enforcement measures

### IV. CIRCUIT LAYOUTS

- § 67:25 In general

## TABLE OF CONTENTS

- § 67:26 Duration of protection
- § 67:27 Evidentiary labels
- § 67:28 Infringement of eligible layouts
- § 67:29 Reverse engineering
- § 67:30 Innocent infringement
- § 67:31 Ownership and licenses
- § 67:32 Rights of the commonwealth
- § 67:33 International aspects
- § 67:34 Case law—Nintendo v. Centronics

## V. DESIGNS

- § 67:35 In general
- § 67:36 Obtaining registration
- § 67:37 Duration of rights
- § 67:38 Ownership, assignments, and other dealings
- § 67:39 Infringement
- § 67:40 Rights of the Crown
- § 67:41 International aspects
- § 67:42 Proposals for reform
- § 67:43 Case law—Dart Industries Inc. and Another v. Decor Corporation Pty. Limited

## VI. PATENTS

- § 67:44 In general
- § 67:45 Obtaining a patent
- § 67:46 Patentee's rights
- § 67:47 Marking requirements
- § 67:48 Standard patent extensions only for pharmaceutical substances or human therapeutic use
- § 67:49 Computer software
- § 67:50 Microorganisms
- § 67:51 Infringement
- § 67:52 Assignments and licenses
- § 67:53 Statutory controls on patent assignments and licenses patent abuse
- § 67:54 Rights of the Commonwealth
- § 67:55 International aspects
- § 67:56 Case law—Makita (Australia) Pty. Ltd. v. Black & Decker (Australasia) Pty. Ltd
- § 67:57 —BristolMyers Squibb Co. v. F.H. Faulding & Co. Ltd
- § 67:58 —Van der Lely v. Bamfords
- § 67:59 —Windsurfing International Inc. v. Petit
- § 67:60 Patents Amendment (Innovation Patents) Bill 2000

## VII. PLANT BREEDER'S RIGHTS ACT 1994

- § 67:61 In general

- § 67:62 Purposes of the scheme
- § 67:63 Application process
- § 67:64 Eligibility
- § 67:65 Benefits of plant breeder's rights
- § 67:66 Costs of plant breeder's rights
- § 67:67 Trade practices and plant breeder's rights interaction
- § 67:68 Summary

## **VIII. CONFIDENTIAL INFORMATION, TRADE SECRETS, AND KNOW-HOW**

- § 67:69 In general
- § 67:70 Information is not property
- § 67:71 When are ideas not protected?
- § 67:72 Confidential information and franchising
- § 67:73 Reverse engineering
- § 67:74 When is the duty of confidentiality no longer binding?
- § 67:75 Employees and contractors
- § 67:76 Case law—Wheatley v. Bell
- § 67:77 —Cope Allman (Marrickville) Pty. Limited v. Farrow and Others
- § 67:78 —Secton Pty. Ltd. (T/AS BWN. Industries) v. Delawood Pty. Ltd

## **IX. REGISTERED TRADE MARKS**

- § 67:79 In general
- § 67:80 What is a sign?
- § 67:81 Descriptiveness
- § 67:82 Distinctiveness
- § 67:83 Originality and deceptiveness
- § 67:84 Special types of registrations
- § 67:85 How does a trade mark get registered?
- § 67:86 Removal
- § 67:87 Marking
- § 67:88 Licensing and other dealings with registered trade marks
- § 67:89 Trade marks and franchising
- § 67:90 Infringement
- § 67:91 Comparative advertising
- § 67:92 International aspects

## **X. TRADE PRACTICES LAW**

- § 67:93 In general
- § 67:94 Sponsorship, rights of personality, cartoon characters, and merchandising
- § 67:95 Comparative advertising
- § 67:96 Origin labeling
- § 67:97 International reputation
- § 67:98 Geographical indications

TABLE OF CONTENTS

- § 67:99 Unconscionability and franchising
- § 67:100 Case law—Pacific Dunlop Ltd. v. Hogan

**XI. COMMON LAW REMEDIES**

- § 67:101 In general
- § 67:102 Passing off
- § 67:103 Business and product names
- § 67:104 Appearance of things
- § 67:105 Rights of personality
- § 67:106 Licensing and common law trade marks
- § 67:107 Injurious and malicious falsehood
- § 67:108 Case law—Reddaway v. Banham
- § 67:109 —A. G. Spalding & Bros v. A. W. Gammage Ltd
- § 67:110 —Reckitt & Colman Products Ltd. v. Borden Inc

**XII. STATUTORY TEXT**

- § 67:111 Trade Marks Act 1995
- § 67:112 Copyright Act 1968
- § 67:113 Patents Act 1990
- § 67:114 Designs Act 1906

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**WORLD INTELLECTUAL  
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Volume 5

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# Summary of Contents

## Volume 1

### PART I. COMMENTARY

- Chapter 1. Argentina
- Chapter 2. Australia
- Chapter 3. Austria
- Chapter 4. Belgium
- Chapter 5. Bermuda
- Chapter 6. Brazil
- Chapter 7. Canada
- Chapter 8. People's Republic of China
- Chapter 9. Colombia
- Chapter 10. Costa Rica
- Chapter 11. Cyprus
- Chapter 12. Czech Republic
- Chapter 13. Denmark
- Chapter 14. Egypt
- Chapter 15. Estonia
- Chapter 16. Finland
- Chapter 17. France
- Chapter 18. Germany

## Volume 2

### PART I. COMMENTARY (CONTINUED)

- Chapter 19. Greece
- Chapter 20. Hong Kong
- Chapter 21. Hungary
- Chapter 22. India
- Chapter 23. Indonesia

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 24. Ireland
- Chapter 25. Israel
- Chapter 26. Italy
- Chapter 27. Japan
- Chapter 28. Lithuania
- Chapter 29. Luxembourg
- Chapter 30. Malaysia
- Chapter 31. Mexico
- Chapter 32. The Netherlands
- Chapter 33. New Zealand
- Chapter 34. Norway
- Chapter 34A. Panama
- Chapter 35. Peru
- Chapter 36. The Philippines
- Chapter 37. Portugal
- Chapter 38. Romania
- Chapter 39. Russian Federation

### **Volume 3**

#### **PART I. COMMENTARY (CONTINUED)**

- Chapter 40. Slovak Republic
- Chapter 41. South Africa
- Chapter 42. Spain
- Chapter 43. Sri Lanka
- Chapter 44. Switzerland
- Chapter 45. Taiwan
- Chapter 46. Thailand
- Chapter 47. Turkey
- Chapter 48. Ukraine
- Chapter 49. United Kingdom
- Chapter 50. United States
- Chapter 51. Vietnam
- Chapter 52. The European Union
- Chapter 53. The Revised Berne Convention for the Protection of

## SUMMARY OF CONTENTS

- Literary and Artistic Works
- Chapter 54. The Brussels Satellite Convention
- Chapter 55. European Trade Mark Law
- Chapter 56. Jurisdiction and Dispute Resolution
- Chapter 57. The Lisbon Agreement for the Protection of  
Appellations of Origin and Their International  
Registration
- Chapter 58. The Locarno Agreement Establishing an International  
Classification for Industrial Design
- Appendix 58A. Annex
- Chapter 59. The Madrid Agreement and Protocol
- Chapter 60. The Paris Convention for Protection of Industrial  
Property
- Chapter 61. The Patent Cooperation Treaty
- Chapter 62. The Patent Law Treaty
- Chapter 63. The Singapore Treaty on Law of Trade Marks
- Chapter 64. The TRIPS Agreement
- Chapter 65. The Universal Copyright Convention
- Appendix 65A. Parties to the Universal Copyright Convention
- Appendix 65B. Parties to the Berne Convention for the  
Protection of Literary and Artistic Works

## **PART II. PRIMARY LAW AND COMMENTARY**

- Chapter 66. Laws of Argentina with Commentary
- Chapter 67. Laws of Australia with Commentary

## **Volume 4**

## **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 68. Laws of Austria with Commentary
- Chapter 69. Laws of Belgium with Commentary
- Chapter 70. Laws of Brazil with Commentary
- Chapter 71. Laws of Canada with Commentary
- Chapter 72. Laws of Colombia with Commentary
- Chapter 73. Laws of Cyprus with Commentary
- Chapter 74. Laws of the Czech Republic with Commentary

WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 75. Laws of Denmark with Commentary
- Chapter 76. Laws of Estonia with Commentary
- Chapter 77. Laws of Finland with Commentary
- Chapter 78. Laws of Hungary with Commentary
- Chapter 79. Laws of Israel with Commentary

## Volume 5

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 80. Laws of Italy with Commentary
- Chapter 81. Laws of Japan with Commentary
- Chapter 82. Laws of Malaysia with Commentary
- Chapter 83. Laws of Mexico with Commentary
- Chapter 84. Laws of New Zealand with Commentary

## Volume 6

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 85. Laws of Norway with Commentary
- Chapter 86. Laws of Peru with Commentary
- Chapter 87. Laws of the Philippines with Commentary
- Chapter 88. Laws of Poland with Commentary
- Chapter 89. Laws of Portugal with Commentary
- Chapter 90. Laws of Singapore with Commentary
- Chapter 91. Laws of South Africa with Commentary
- Chapter 92. Laws of Spain with Commentary
- Chapter 93. Laws of Taiwan with Commentary
- Chapter 94. Laws of Turkey with Commentary
- Chapter 95. Laws of the United States with Commentary

# Table of Contents

## **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

### **CHAPTER 80. LAWS OF ITALY WITH COMMENTARY**

#### **I. PROTECTION OF COPYRIGHT AND OTHER RELATED RIGHTS**

- § 80:1 In general
- § 80:2 Works qualifying for protection
- § 80:3 Economic rights
- § 80:4 Duration

#### **II. OWNERSHIP OF COPYRIGHT**

- § 80:5 In general
- § 80:6 Moral rights
- § 80:7 Neighbouring rights
- § 80:8 Registration
- § 80:9 Cases of infringement
- § 80:10 Enforcement of rights
- § 80:11 Assignment and licensing of copyright
- § 80:12 International protection of copyright

#### **III. STATUTORY TEXT**

- § 80:13 Protection of Copyright and Other Rights, Act Number 633 of 22 April 1941

### **CHAPTER 81. LAWS OF JAPAN WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 81:1 In general
- § 81:2 Background
- § 81:3 International conventions

#### **II. STATUTORY TEXT**

- § 81:4 Patent Act

§ 81:5 Copyright Act

## **CHAPTER 82. LAWS OF MALAYSIA WITH COMMENTARY**

### **I. INTRODUCTION**

- § 82:1 In general
- § 82:2 Trade Marks Act of 1976
- § 82:3 Patents Act of 1983
- § 82:4 Copyright Act of 1987
- § 82:5 Industrial Designs Act of 1996
- § 82:6 Layout-Design of Integrated Circuits Act of 2000

### **II. STATUTORY TEXT**

- § 82:7 Copyright Act 1987 (Act Number 332)
- § 82:8 Patents Act 1983 (Act Number 291 as amended)
- § 82:9 Trade Marks Act 1976 (Act Number 175)

## **CHAPTER 83. LAWS OF MEXICO WITH COMMENTARY**

### **I. INTRODUCTION**

- § 83:1 In general—Patents
- § 83:2 —Trade marks
- § 83:3 —Administrative proceeding
- § 83:4 —Modifications with regard to defense and protection of industrial property rights
- § 83:5 —Sanctions
- § 83:6 Increase in powers of the mexican institute of industrial property
- § 83:7 Harmonization with international treaties

### **II. STATUTORY TEXT**

- § 83:8 Industrial Property Law
- § 83:9 Federal Copyright Law

## **CHAPTER 84. LAWS OF NEW ZEALAND WITH COMMENTARY**

### **I. INTRODUCTION**

- § 84:1 In general
- § 84:2 Intellectual property office
- § 84:3 Unregistered rights and common law rights
- § 84:4 Peculiarities in New Zealand legislation

TABLE OF CONTENTS

**II. MAJOR LEGISLATION**

- § 84:5 Patents Act of 1953
- § 84:6 Trade Marks Act of 2002
- § 84:7 Designs Act of 1953
- § 84:8 Copyright Act of 1994
- § 84:9 Layout Designs Act of 1994
- § 84:10 Plant Variety Rights Act of 1987

**III. STATUTORY TEXT**

- § 84:11 Patents Act (Consolidated) 1953-2002
- § 84:12 Layout Designs Act (Consolidated) 1994-1999
- § 84:13 Designs Act (Consolidated) 1953-2010
- § 84:14 Plant Variety Rights Act (Consolidated) 1987-1999
- § 84:15 Flags, Emblems, and Names Protection Act (Consolidated) 1981-2010
- § 84:16 Fair Trading Act (Consolidated) 1986-2008
- § 84:17 Commerce Act (Consolidated) 1986-2008
- § 84:18 Copyright Act (Consolidated) 1994-2011
- § 84:19 Trade Marks Act (Consolidated) 2002-2011
- § 84:20 Geographical Indications (Wine and Spirits) Registration Act
- § 84:21 Major Events Management Act 2007

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<http://www.pbookshop.com>

# Summary of Contents

## Volume 1

### **PART I. COMMENTARY**

- Chapter 1. Argentina
- Chapter 2. Australia
- Chapter 3. Austria
- Chapter 4. Belgium
- Chapter 5. Bermuda
- Chapter 6. Brazil
- Chapter 7. Canada
- Chapter 8. People's Republic of China
- Chapter 9. Colombia
- Chapter 10. Costa Rica
- Chapter 11. Cyprus
- Chapter 12. Czech Republic
- Chapter 13. Denmark
- Chapter 14. Egypt
- Chapter 15. Estonia
- Chapter 16. Finland
- Chapter 17. France
- Chapter 18. Germany

## Volume 2

### **PART I. COMMENTARY (CONTINUED)**

- Chapter 19. Greece
- Chapter 20. Hong Kong
- Chapter 21. Hungary
- Chapter 22. India
- Chapter 23. Indonesia

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 24. Ireland
- Chapter 25. Israel
- Chapter 26. Italy
- Chapter 27. Japan
- Chapter 28. Lithuania
- Chapter 29. Luxembourg
- Chapter 30. Malaysia
- Chapter 31. Mexico
- Chapter 32. The Netherlands
- Chapter 33. New Zealand
- Chapter 34. Norway
- Chapter 34A. Panama
- Chapter 35. Peru
- Chapter 36. The Philippines
- Chapter 37. Portugal
- Chapter 38. Romania
- Chapter 39. Russian Federation

### **Volume 3**

#### **PART I. COMMENTARY (CONTINUED)**

- Chapter 40. Slovak Republic
- Chapter 41. South Africa
- Chapter 42. Spain
- Chapter 43. Sri Lanka
- Chapter 44. Switzerland
- Chapter 45. Taiwan
- Chapter 46. Thailand
- Chapter 47. Turkey
- Chapter 48. Ukraine
- Chapter 49. United Kingdom
- Chapter 50. United States
- Chapter 51. Vietnam
- Chapter 52. The European Union
- Chapter 53. The Revised Berne Convention for the Protection of

## SUMMARY OF CONTENTS

- Literary and Artistic Works
- Chapter 54. The Brussels Satellite Convention
- Chapter 55. European Trade Mark Law
- Chapter 56. Jurisdiction and Dispute Resolution
- Chapter 57. The Lisbon Agreement for the Protection of  
Appellations of Origin and Their International  
Registration
- Chapter 58. The Locarno Agreement Establishing an International  
Classification for Industrial Design
- Appendix 58A. Annex
- Chapter 59. The Madrid Agreement and Protocol
- Chapter 60. The Paris Convention for Protection of Industrial  
Property
- Chapter 61. The Patent Cooperation Treaty
- Chapter 62. The Patent Law Treaty
- Chapter 63. The Singapore Treaty on Law of Trade Marks
- Chapter 64. The TRIPS Agreement
- Chapter 65. The Universal Copyright Convention
- Appendix 65A. Parties to the Universal Copyright Convention
- Appendix 65B. Parties to the Berne Convention for the  
Protection of Literary and Artistic Works

## **PART II. PRIMARY LAW AND COMMENTARY**

- Chapter 66. Laws of Argentina with Commentary
- Chapter 67. Laws of Australia with Commentary

## **Volume 4**

## **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 68. Laws of Austria with Commentary
- Chapter 69. Laws of Belgium with Commentary
- Chapter 70. Laws of Brazil with Commentary
- Chapter 71. Laws of Canada with Commentary
- Chapter 72. Laws of Colombia with Commentary
- Chapter 73. Laws of Cyprus with Commentary
- Chapter 74. Laws of the Czech Republic with Commentary

WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- Chapter 75. Laws of Denmark with Commentary
- Chapter 76. Laws of Estonia with Commentary
- Chapter 77. Laws of Finland with Commentary
- Chapter 78. Laws of Hungary with Commentary
- Chapter 79. Laws of Israel with Commentary

## Volume 5

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 80. Laws of Italy with Commentary
- Chapter 81. Laws of Japan with Commentary
- Chapter 82. Laws of Malaysia with Commentary
- Chapter 83. Laws of Mexico with Commentary
- Chapter 84. Laws of New Zealand with Commentary

## Volume 6

### **PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)**

- Chapter 85. Laws of Norway with Commentary
- Chapter 86. Laws of Peru with Commentary
- Chapter 87. Laws of the Philippines with Commentary
- Chapter 88. Laws of Poland with Commentary
- Chapter 89. Laws of Portugal with Commentary
- Chapter 90. Laws of Singapore with Commentary
- Chapter 91. Laws of South Africa with Commentary
- Chapter 92. Laws of Spain with Commentary
- Chapter 93. Laws of Taiwan with Commentary
- Chapter 94. Laws of Turkey with Commentary
- Chapter 95. Laws of the United States with Commentary

# Table of Contents

## PART II. PRIMARY LAW AND COMMENTARY (CONTINUED)

### CHAPTER 85. LAWS OF NORWAY WITH COMMENTARY

#### I. TRADE MARKS

- § 85:1 In general
- § 85:2 Filing of application and examination

#### II. INDUSTRIAL DESIGNS

- § 85:3 In general
- § 85:4 Filing of application and examination, and registration

#### III. PATENTS

- § 85:5 In general
- § 85:6 Filing of application and examination
- § 85:7 Scope of protection, duration of patent, and infringement
- § 85:8 License and compulsory license

#### IV. STATUTORY TEXT

- § 85:9 Trade Marks Act
- § 85:10 Designs Act
- § 85:11 Patents Act

### CHAPTER 86. LAWS OF PERU WITH COMMENTARY

#### I. COPYRIGHT LAW

- § 86:1 In general
- § 86:2 Scope of protection
- § 86:3 Rights conferred to the author
- § 86:4 —Moral rights
- § 86:5 —Property rights
- § 86:6 Categories of protectable works of authorship
- § 86:7 —Literary works

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 86:8 —Artistic works
- § 86:9 —Scientific works
- § 86:10 —Computer programs
- § 86:11 Duration of copyright protection
- § 86:12 Remedies

### II. PATENT LAW

- § 86:13 In general
- § 86:14 Subject matter and conditions for protection
- § 86:15 Duration of rights
- § 86:16 Scope of protection
- § 86:17 Infringement
- § 86:18 Exhaustion of rights
- § 86:19 Defenses
- § 86:20 Opposition
- § 86:21 Remedies

### III. TRADE MARK LAW

- § 86:22 In general
- § 86:23 Subject matter and registrability
- § 86:24 Obtaining protection
- § 86:25 Duration
- § 86:26 Scope of protection
- § 86:27 Exhaustion of rights
- § 86:28 Infringement
- § 86:29 Opposition and revindication
- § 86:30 Remedies
- § 86:31 Cancellation, nullification and lapse
- § 86:32 Assignment and license

### IV. OTHER LAWS

- § 86:33 Geographical indications
- § 86:34 Industrial designs
- § 86:35 Utility models
- § 86:36 Lay-out designs of integrated Circuits
- § 86:37 Industrial and trade secrets

### V. STATUTORY TEXT

- § 86:38 Copyright law
- § 86:39 Patent law
- § 86:40 Trade Mark Law

## CHAPTER 87. LAWS OF THE PHILIPPINES WITH COMMENTARY

- § 87:1 Introduction

TABLE OF CONTENTS

§ 87:2 Intellectual property code (Republic Act number 8293)

**CHAPTER 88. LAWS OF POLAND WITH COMMENTARY**

**I. INTRODUCTION**

§ 88:1 In general  
§ 88:2 International treaties

**II. COPYRIGHT ACT**

§ 88:3 In general

**III. INDUSTRIAL PROPERTY**

§ 88:4 In general  
§ 88:5 Invention  
§ 88:6 Patent  
§ 88:7 —Unauthorized use and patent infringement  
§ 88:8 —Criminal penalties  
§ 88:9 —Patent annulment and patent lapse  
§ 88:10 Utility models  
§ 88:11 Trade marks  
§ 88:12 Industrial designs  
§ 88:13 Topography of integrated Circuits  
§ 88:14 Priority

**IV. STATUTORY TEXT**

§ 88:15 Act of 4 February 1994 on Copyright and Neighboring Rights  
§ 88:16 Act of 30 June 2000 on Industrial Property Law

**CHAPTER 89. LAWS OF PORTUGAL WITH COMMENTARY**

**I. INTRODUCTION**

§ 89:1 In general

**II. INDUSTRIAL PROPERTY**

§ 89:2 In general  
§ 89:3 Patents  
§ 89:4 Utility models  
§ 89:5 Industrial designs and models  
§ 89:6 Trade marks  
§ 89:7 Awards

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 89:8 Names and insignia of establishments
- § 89:9 Logos
- § 89:10 Appellations of origin and geographical indications
- § 89:11 Unfair competition

### III. COPYRIGHT

- § 89:12 In general

### IV. INFRINGEMENT AND LITIGATION

- § 89:13 Opposition within the National Institute of Industrial Property
- § 89:14 Litigation in the commercial court
- § 89:15 Litigation in the criminal courts
- § 89:16 Litigation in the civil courts and criminal courts (Copyright)

### V. STATUTORY TEXT

- § 89:17 Copyright and Neighboring Rights Code
- § 89:18 Industrial Property Code

## CHAPTER 90. LAWS OF SINGAPORE WITH COMMENTARY

### I. INTRODUCTION

- § 90:1 In general
- § 90:2 Background
- § 90:3 International conventions

### II. LAW OF COPYRIGHT

- § 90:4 Legislation
- § 90:5 Subject matter and conditions for copyright protection
- § 90:6 Obtaining protection: “connecting factors”
- § 90:7 Duration
- § 90:8 Ownership
- § 90:9 Scope of protection
- § 90:10 Infringement
- § 90:11 Exhaustion of rights
- § 90:12 Selected defences
- § 90:13 Remedies
- § 90:14 Protection of performers

### III. LAW OF PATENTS

- § 90:15 Legislation
- § 90:16 Subject matter and conditions for protection
- § 90:17 Obtaining protection

## TABLE OF CONTENTS

- § 90:18 Duration
- § 90:19 Ownership
- § 90:20 Scope of protection
- § 90:21 Infringement
- § 90:22 Exhaustion of rights
- § 90:23 Selected defences
- § 90:24 Opposition and revocation
- § 90:25 Remedies

## IV. LAW OF TRADE MARKS

- § 90:26 Legislation
- § 90:27 Subject matter and registrability
- § 90:28 Absolute grounds
- § 90:29 Relative grounds
- § 90:30 Obtaining protection
- § 90:31 Duration
- § 90:32 Ownership
- § 90:33 Scope of protection
- § 90:34 Infringement
- § 90:35 Exhaustion of rights
- § 90:36 Selected defences
- § 90:37 Opposition and revocation
- § 90:38 Remedies
- § 90:39 Protection of well-known trade marks

## V. OTHER LAWS

- § 90:40 Geographical indications
- § 90:41 Law of “Unregistered Trade Marks” and passing off
- § 90:42 Registered designs
- § 90:43 Layout designs of integrated Circuits
- § 90:44 Law of confidentiality

## VI. STATUTORY TEXT

- § 90:45 Copyright Act
- § 90:46 Patents Act
- § 90:47 Trade Marks Act 1998

# CHAPTER 91. LAWS OF SOUTH AFRICA WITH COMMENTARY

## I. INTRODUCTION

- § 91:1 Applicable law
- § 91:2 Legislation

## II. STATUTORY TEXT

- § 91:3 Patents Act, Act Number 57 of 1978, as amended

## WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES

- § 91:4 Designs Act, Act Number 195 of 1993, as amended
- § 91:5 Copyright Act, Act Number 98 of 1978
- § 91:6 Counterfeit Goods Act, Act Number 37 of 1997
- § 91:7 Trade Marks Act, Act number 194 of 1993

### **CHAPTER 92. LAWS OF SPAIN WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 92:1 In general
- § 92:2 Copyright and other neighboring rights
- § 92:3 Trade and service marks
- § 92:4 Trade and service names
- § 92:5 Industrial designs and utility models
- § 92:6 Aesthetic designs and patterns
- § 92:7 Patents
- § 92:8 —International conventions

#### **II. STATUTORY TEXT**

- § 92:9 Royal Legislative Decree Number 1/1996 of 12 April 1996, as modified by Law Number 5/1998 of 6 March 1998, implementing European Community Directive Number 96/9/ec of 11 March 1996

### **CHAPTER 93. LAWS OF TAIWAN WITH COMMENTARY**

#### **I. INTRODUCTION**

- § 93:1 In general

#### **II. FORMS OF INTELLECTUAL PROPERTY PROTECTION**

- § 93:2 Patents
- § 93:3 Trade marks
- § 93:4 Copyright
- § 93:5 —Moral and economic rights
- § 93:6 —Electronic rights management information and technology protection measures
- § 93:7 Trade secrets
- § 93:8 Integrated circuit layouts (Mask works)
- § 93:9 Fair trade law
- § 93:10 —Regulation on monopolies, mergers, and concerted actions
- § 93:11 —Regulation on unfair competition
- § 93:12 —Remedies

TABLE OF CONTENTS

**III. STATUTORY TEXT**

- § 93:13 Patent law
- § 93:14 Trade Mark Law
- § 93:15 Copyright law

**CHAPTER 94. LAWS OF TURKEY WITH COMMENTARY**

**I. COPYRIGHT**

- § 94:1 In general
- § 94:2 Requirements for protection
- § 94:3 Authorship and ownership of copyright
- § 94:4 Rights of owner
- § 94:5 Term of protection
- § 94:6 Infringement of rights

**II. INDUSTRIAL RIGHTS**

- § 94:7 In general

**III. TRADE MARKS**

- § 94:8 Definition and scope
- § 94:9 Types and classification
- § 94:10 Persons entitled to protection
- § 94:11 Use and term of protection
- § 94:12 Infringement of rights

**IV. PATENTS AND UTILITY MODELS**

- § 94:13 Definition and scope
- § 94:14 System of granting a patent
- § 94:15 Persons entitled to protection
- § 94:16 Use and term of protection
- § 94:17 Infringement of rights

**V. INDUSTRIAL DESIGNS**

- § 94:18 Definition and scope
- § 94:19 Procedures for granting right
- § 94:20 Persons entitled to protection
- § 94:21 Duration of design right
- § 94:22 Infringements of rights

**VI. STATUTORY TEXT**

- § 94:23 Law on Intellectual and Artistic Works

- § 94:24 Decree-Law Number 556 Pertaining to the Protection of Trade Marks
- § 94:25 Decree-Law Number 551 Pertaining to the Protection of Patent Rights
- § 94:26 Decree-Law Number 554 Pertaining to the Protection of Industrial Designs

## **CHAPTER 95. LAWS OF THE UNITED STATES WITH COMMENTARY**

### **I. INTRODUCTION**

- § 95:1 In general
- § 95:2 Background
- § 95:3 International conventions

### **II. COPYRIGHT**

- § 95:4 Legislation
- § 95:5 Subject matter and conditions for copyright protection
- § 95:6 Obtaining protection
- § 95:7 Duration
- § 95:8 Ownership
- § 95:9 Scope of protection
- § 95:10 Infringement
- § 95:11 Selected defenses
- § 95:12 Remedies

### **III. PATENT LAW**

- § 95:13 Legislation
- § 95:14 Subject matter and conditions for protection
- § 95:15 Obtaining protection
- § 95:16 Duration
- § 95:17 Ownership
- § 95:18 Scope of protection
- § 95:19 Infringement
- § 95:20 Selected defenses
- § 95:21 Remedies

### **IV. TRADE MARKS**

- § 95:22 Legislation
- § 95:23 Subject matter and registrability
- § 95:24 Obtaining protection
- § 95:25 Duration
- § 95:26 Ownership
- § 95:27 Scope of protection

TABLE OF CONTENTS

- § 95:28 Infringement
- § 95:29 Selected defenses
- § 95:30 Opposition and cancellation
- § 95:31 Remedies
- § 95:32 Protection of well-known trade marks

**V. STATUTORY TEXT**

- § 95:33 Copyright Act
- § 95:34 Patent Act
- § 95:35 Trade Mark Act

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