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**The Commercial
Law of
Intellectual Property**

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THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY

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*Profesor Alces dedica este libro a sus suegros
Antonio Oscar Perez y Isora Cabrera Perez*

*Professor See dedicates this book,
with loving gratitude, to
Harold F. See, Sr., and Corinne See*



PREFACE

Commercial lawyers cannot ignore the intellectual property law without choosing to ignore what may shortly be the single largest industry in our economy. Intellectual property lawyers cannot choose to ignore the transactional law that has evolved to facilitate transfers of value in our economic system. Commercial legislation and intellectual property principles are experiencing dramatic adjustment as a result of technological, social, and legislative innovation; it is, therefore, propitious to discern the available common threads. While disintegration of essential property and commercial concepts may be in the short-term interest of some specialists, it is ultimately inimical to the fundamental integrity (and, ultimately, the coherence) of the law. It is appropriate, indeed imperative, that we take stock of the congruities.

In this book we effect a rapprochement of commercial law and intellectual property principles. The uniform commercial sales and lease law is preoccupied with *tangible* property; it is the *intangible* nature of ideas that has determined the substance of intellectual property principles. That tangible/intangible dichotomy has obscured the fundamental affinities. Though we would not argue that the fit between commercial law and intellectual property principles is always easy, we choose to emphasize the bases of affinity rather than the dissonance.

This book is ambitious: We reveal the commercial law to the intellectual property lawyer and we reveal the intellectual property law to the commercial lawyer. No other source, to our knowledge, has confronted this challenge.

We have shaped our presentation of the intellectual property law with the commercial lawyer in mind and we have shaped our presentation of the commercial law with the intellectual property lawyer in mind. The design is to make each subject accessible to those whose practice is concentrated in the other. The first portion of the book surveys the sources and operation of the intellectual property law, both common law and statutory. Then, we describe the structure and terms of the uniform commercial contracts law of Articles 2 and 2A of the Uniform Commercial Code. In Chapters 10, 12, 14, 16, and 18 we describe the operation of the substantive parts of U.C.C. Articles 2 and 2A; in Chapters 11, 13, 15, 17, and 19, we examine the application of those respective parts to particular intellectual property interests.

Our objective is to introduce the commercial law to intellectual property lawyers in terms that will reveal the U.C.C.'s flexibility, its resiliency, and, to the extent possible, its delineation of fundamental commercial principles that could (we believe, should) inform all commercial contracts transactions, with our focus on those that involve intellectual property interests. We have not strived to offer a thorough and comprehensive treatment of either the commercial sales and lease law or the intellectual property law. There are other treatises that accomplish such surveys quite effectively. We do not describe the common law of contract governing intellectual property transactions or the standard form contracts that have evolved in the intellectual property licensing practice. Other available sources provide that type of guidance as well.

The book advances a thesis: The courts and drafters of commercial law should look for fundamental conceptions and emphasize what is common to commercial transactions and should appreciate argument by analogy and elaboration of existing rules by reference to U.C.C. principles. In order to support that argument and to serve the narrower pedagogical purpose of the book, we have included a survey of the extant forms of intel-

Preface

lectual property and the bodies of law governing them as well as a survey of Articles 2 and 2A of the U.C.C. We believe that the sales and lease articles are a source of fundamental commercial principles.

We then review the cases in which intellectual property interests have been subject to Article 2 principles in order to better make our point that the U.C.C. does not require very much alteration at all to be responsive to a significant number of the issues that may arise in intellectual property transactions. While we acknowledge that some adjustment of Article 2 might better accommodate the ultimate coordination of the commercial law with the intellectual property law, we would prefer to start such an adjustment process from a perspective that focuses on what is possible as the U.C.C. is now conceived rather than from a perspective intent on revolutionary change.

We hope that in addition to serving as an aid to those who are engaged in commercial transactions at the frontier of the expansion of intellectual property interests, this work will also be part of a continuing dialogue as the law governing intellectual property and the U.C.C. evolves.

The presentation of both the intellectual property law and the commercial law of Articles 2 and 2A in the chapters emphasizes the flexibility of the U.C.C. provisions. In fact, we would have to acknowledge that our exposition may offer a reading of Articles 2 and 2A that occasionally discerns more flexibility than the drafters, unaware of the issues that would confront us, may have intended. But we are intentionally writing on the horizon: what the U.C.C. can mean if intellectual property transactors will read it in a manner indulgent of its possibilities, rather than its limitations.

We have included as an Appendix, the “model” Article 2B, composed by the Section on Business Law of the Massachusetts Bar Association. The draft model represents an accommodation of Uniform Commercial Code (leasing) principles and intellectual property realities. Though it is unlikely that the Massachusetts Proposal will become law in anything like its current form, it is an important jurisprudential effort and we are grateful to the Committee for making their work product available to us.

All citations to the Uniform Commercial Code in the text and footnotes of this book are to the 1990 Official version unless otherwise indicated.

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November 1993

SUMMARY OF CONTENTS

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxix</i>

1 THE CONFLUENCE OF COMMERCIAL LAW AND INTELLECTUAL PROPERTY	1
---	---

I	
INTELLECTUAL PROPERTY LAW	33

2 PATENT LAW	35
3 TRADE SECRET LAW	73
4 COPYRIGHT LAW	109
5 SEMICONDUCTOR CHIP PROTECTION	159
6 TRADEMARKS AND TRADE NAMES	187
7 OTHER INTELLECTUAL PROPERTY INTERESTS	239

II

SALES AND LEASES INVOLVING INTELLECTUAL PROPERTY 249

- 8 SCOPE OF UNIFORM COMMERCIAL CODE
ARTICLES 2 AND 2A 251**
- 9 APPLICATION OF ARTICLES 2 AND 2A
TO INTELLECTUAL PROPERTY 265**

III

APPLICATION OF SALES AND LEASES LAW TO INTELLECTUAL PROPERTY 303

- 10 FORMATION OF SALES AND LEASE CONTRACTS 305**
- 11 FORMATION OF SALES AND LEASE CONTRACTS
INVOLVING INTELLECTUAL PROPERTY 339**
- 12 PERFORMANCE TERMS IN SALES AND LEASE
CONTRACTS 383**
- 13 PERFORMANCE TERMS IN SALES AND LEASE CONTRACTS
INVOLVING INTELLECTUAL
PROPERTY 417**
- 14 TITLE, EFFECT OF CONTRACT, AND THIRD-PARTY
INTERESTS IN SALES AND LEASE TRANSACTIONS 455**
- 15 EFFECTIVE CONTRACT, AND THIRD-PARTY INTERESTS
IN SALES AND LEASE TRANSACTIONS INVOLVING
INTELLECTUAL PROPERTY 477**
- 16 PERFORMANCE, REPUDIATION, AND EXCUSE IN SALES
AND LEASE CONTRACTS 497**
- 17 PERFORMANCE, REPUDIATION, AND EXCUSE IN
INTELLECTUAL PROPERTY SALES AND LEASE
CONTRACTS 529**
- 18 DAMAGES 563**
- 19 INTELLECTUAL PROPERTY DAMAGES 595**

Summary of Contents

APPENDIX 629

Table of Cases 723

Table of Statutes 727

Index 733

CONTENTS

Preface

xxix

1		
THE CONFLUENCE OF COMMERCIAL LAW AND INTELLECTUAL PROPERTY		1
§1.1	Development of a Frame of Reference	2
§1.1.1	Importance of Commercial Law for the Intellectual Property Lawyer	3
§1.1.2	Importance of Intellectual Property Law for the Commercial Lawyer	6
§1.2	Nature of Property Interests	7
§1.2.1	The Impact of Article 2A on the Article 2 Scope Issue	10
§1.2.2	Expansive Direct Application of Article 2	13
	§1.2.2.1 Reference to Underlying Purposes and Policies	13
	§1.2.2.2 "Transactions" in Goods	14
	§1.2.3 Argument by Analogy	16
§1.3	General Contours of Intellectual Property Law	17
		xi

§1.3.1	Patent Law	19
§1.3.2	Trade Secret Law	21
§1.3.3	Copyright Law	22
§1.3.4	Semiconductor Chip Protection Law	24
§1.3.5	Trademark and Trade Name Law	25
§1.3.6	Publicity Rights	26
§1.3.7	Contract Law	27
§1.3.8	Conceptual Contours	28
§1.4	Consideration of Pending Initiatives	30

I

INTELLECTUAL PROPERTY LAW	33
----------------------------------	-----------

2

PATENT LAW	35
-------------------	-----------

§2.1	Introduction	36
§2.2	Nature of the Property Interest; Basic Elements of Invention	36
§2.2.1	Novelty	38
§2.2.2	Nonobviousness	43
§2.2.3	Utility	50
§2.2.4	Patentable Subject Matter	51
§2.2.5	Abandonment, Amendment, and Correction	54
§2.3	Special Patent Provisions	55
§2.3.1	Design Patents	55
§2.3.2	Plant Patents and Plant Variety Protection Act	56
§2.4	Ownership	57
§2.4.1	Originality	57
§2.4.2	Joint Invention	57
§2.4.3	Nature of the Exclusive Rights	58
§2.4.4	Conception, Reduction to Practice, and Operability	59

Contents

§2.4.5	Priority	60
§2.4.6	Shop Rights	62
§2.5	Securing the Patent	62
§2.6	Notice	63
§2.7	Scope of the Patent Right	64
§2.7.1	Infringement	64
§2.7.1.1	Direct Infringement	64
§2.7.1.2	Contributory Infringement	67
§2.7.1.3	Presumption of Validity and Defenses	69
§2.7.1.4	Remedies	69
§2.7.2	Licenses	71

3

TRADE SECRET LAW	73
------------------	----

§3.1	Introduction	73
§3.2	Sources of Trade Secret Law	75
§3.2.1	Common Law and the Restatement of Torts (First)	75
§3.2.2	State Statutory Law and the Uniform Trade Secrets Act	79
§3.3	Nature of the Property Interest: Elements of a Trade Secret	80
§3.3.1	Secrecy	80
§3.3.2	Use in Business	83
§3.3.3	Continuous Use	84
§3.4	Misappropriation	84
§3.4.1	Nature of the Right	84
§3.4.2	Confidential Relationship	85
§3.4.3	Improper Means	87
§3.4.4	Third Party Discovery	93
§3.4.5	Loss by Other Means	96
§3.5	Remedies	102
§3.6	Licenses	105