How Law Works

Collected Articles and New Essays

Thomas Hemnes

Series in Law

VERNON PRESS

www.vernonpress.com

In the Americas:
Vernon Press
1000 N West Street, Suite 1200
Wilmington, Delaware, 19801
United States

In the rest of the world:
Vernon Press
C/Sancti Espiritu 17,
Malaga, 29006
Spain

Series in Law

Library of Congress Control Number: 2020939831

ISBN: 978-1-62273-826-7

Cover design by Vernon Press. Cover image by Joe Moore.

To my wife Carole, who has put up with my academic avocation over all these years; to our children (children no more!) Anna, Abigail, and Jonathan; to our grandchildren, who might one day wonder why on earth Grandpa was typing all the time; to those friends and colleagues whose opinions of this work I value most highly; and to that future reader who wonders what lawyers were thinking when the digital age dawned.

Contents

List of Figures and Tables

Table of Abbreviations

BLC	Bankrupt Licensors Coalition
CAFC	Court of Appeals for the Federal Circuit
CBEMA	Computer and Business Equipment Manufacturers Association
CCPA	California Consumer Privacy Act
CISG	UN Convention on International Sales of Goods
COPPA	Children's Online Privacy Protection Act
CTM	Community Trademark
EU	European Union
FACTA	The Fair and Accurate Credit Transactions Act of 2003
FCRA	Fair Credit Reporting Act
FTC	Federal Trade Commission
GDPR	General Data Protection Regulation
GLB	Gramm-Leach-Bliley Act
GNP	Gross National Product
GTC	GTC Law Group PC & Affiliates
HIPPA	Health Insurance Portability and Accountability Act
IP	Intellectual Property
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code
UCITA	Uniform Computer Information Transactions Act
UK	United Kingdom
USPTO	United States Patent and Trademark Office

Foreword

It's fairly typical, I think, for a busy practitioner to take a quick look back as the welter of issues, problems, clients, and projects whizzes by. The thought is reflexive: "Wow, this (deal, case, legal field) is important, something new; or, this (deal, case, etc.) would have been different back in the day." But the harsh edge of the lawyer's life is this: in a business where you literally sell your time, you often have precious little to yourself. And so the passing intention to take a look back glides by, lost in the oncoming rush of whatever your clients cook up next.

Well, much to my delight and benefit (and yours too), Tom Hemnes decided to take the road less traveled. He has committed a valuable act of follow-through and retrospective: this book. What many professionals think they might one day do, Tom has done. He got off the professional freeway often enough and long enough to slow down to the writer's pace. He put the words down on paper about some of the issues he's wondered over in the field of IP law these past forty years or so. And about law practice, its ways and means. And about a few other topics to which he has given thought and attention.

I was a newly hatched law professor when I first met Tom Hemnes at an IP-related event in Boston. Since that time, I've learned that if he is interested in something, and puts that interest to work with attention, what he has to say is something I want to hear. It started with copyright protection of software, which was, when we met (c. 1990), a hot topic in Boston, Silicon Valley, and any place that cared about the software industry. But I soon saw that Tom was interested not in just one issue, or even one field of law; he had an interest in all the areas of law his practice touched on, and a number of others besides. I came to realize that Tom was blessed with a nimble and inquiring mind, and he liked to think things through until he was satisfied. We had an affinity, because this is what I was being paid to do.

You will see the imprint of this lively mind in the chapters that follow. They all hold interest, and are all worth a thorough read. You have to appreciate an author who guides you through a nuanced dissection of law firm paralegal economics and then glides into a discussion of John Rawls and Robert Nozick, whose philosophizing marked one of the twentieth century's great substantive contributions to Harvard University's Department of Philosophy. There are equally interesting discussions in this volume of feudal land tenure law, the intricacies of the merger, and idea/expression concepts in copyright law — and a host of other ideas and topics as well.

But Tom is a lawyer, and for me, the most appealing parts of this book are when he turns his wide-ranging analytic powers on the nature and operation of IP law. Put simply, I just enjoy watching Tom think about this intricate field. Take as one of many potential examples Tom's explanation of the difference between a material object (a sculpture in his example) and an IP right covering the object:

> Copyright law declares that the sculptor has created not just a sculpture (achievement enough in itself!) but a "work," which is a Platonic abstraction that is embodied in the sculpture as a "copy," but exists independently of the particular sculpture, hovering, one might say, above and beyond it. (p. 294)

This is not only philosophically grounded (hard to beat Plato); it is an excellent visual metaphor that reveals the presence of an experienced and thoughtful IP practitioner. Clients live mostly in the world of things, but IP lawyers are instead professional metaphysicians. They live in a world of expansible conceptual categories or sets, where material objects are just elements of the sets. Or candidate elements anyway. A good portion of the IP lawyer's job is to argue that item X is, or is not, an element of the (IP protected) set. It helps to have a clear head when working as a professional metaphysician in this fashion, partly because all lawyers (or at least senior lawyers) are parttime educators. This kind of brief sketch of how the law will see the client's case is absolutely essential. The clients may want to dive right into "what will it cost, and will we win?" but Instructor Hemnes knows from experience that the answer to the clients' pressing questions will not make sense until he explains the risk factors and contingencies in the case. For these, he needs the client to understand the issues from the law's point of view. The idea that an IP right "exists independently" of the material objects captures this. And the suggestion to see a penumbra of rights "above and beyond" the object — that's inspired. It is an excellent visual metaphor that helps people begin to view the world in the slightly orthogonal manner of the IP specialist. I personally speak of IP rights and transactions as existing "behind" or "in the background of" the world of things, but "above and beyond" works just as well.

Aside from the evident imprint of a master craftsperson, there are some other elements to this book that I found particularly distinctive. For myself, the most valuable part of the book is the middle chapters on private law topics. In Chapter 4, Author Tom speaks of "the plasticity of the common law," a wonderful phrase that captures a facet of IP law often overlooked by the academy: the place of IP rights in a private law system. As Tom puts it, also in Chapter 4:

> [T]he instinct of intellectual property law and lawyers . . . is to give the intellectual property rights holder the greatest possible freedom in constructing, subdividing, and exploiting the intellectual property rights. In other words, restraints on alienation and downstream restrictions on the use of chattels are anathema to the common law, but the norm in the context of intellectual property licensing. (p. 183)

Trust a lawyer who has seen his share of deals to drive this point home. As much as every IP right issued by the government and backed by the courts embodies numerous policy tradeoffs, in the hands of a business person, it has an entirely different appearance. As Tom says, this can cause problems. While post-contracting restrictions can add value in a private deal, they may impose costs on third parties. And so, even in this bastion of private ordering, the public policy issues enfolded into every IP right may well show themselves again.

But there is a bigger picture here. IP rights support and contribute to all kinds of business arrangements. The IP rights (and licenses) covered here in Chapter 4 may wind up in bankruptcy proceedings, but they started as leverage or strategic components in business deals of one kind or another. The "open source" contracts Tom describes in Chapter 3 ("Abracadabra") represent clever private law solutions to a perceived *excess* of IP rights. And so on through the book.

The problem with scholars who teach full time is they don't see enough of the private deals that pervade this volume. So they miss the private law role of IP rights and focus only on the headline-grabbing policy issues emanating from IP: incentive and monopoly, public access versus private appropriation. In this manner, they are apt to miss an entire dimension of what makes IP rights important. Studying deals also makes something else clear: to business people, IP is an asset like any other. It can be bought, sold, mortgaged, pledged, and so on, in the same fashion as a truck or a piece of machinery. The private law perspective could thus add a touch of humility to the field as well. (And perhaps, he said coyly, this explains why it's overlooked.)

I will close with this same theme of humility. Tom reminds us to have faith in the versatility of lawyers and basic common law tools. It's a faith not based on the need or even expectation that government will always get the issues right. The faith stems from the adaptability of business people, helped along by the kind of experienced and savvy legal advisor Tom represents. The flaming debates over the proper copyright doctrine for software user interfaces stand as a good example. To hear the oral arguments in the *Lotus v. Borland* case, some years ago now, or dip into the IP journals and law reports of the time, one would think a decision was at hand having a momentous potential impact. In the event, however, Tom reminds us that the issue is more or less a

dead letter today. Anyone today who hangs out a shingle saying "software interface IP lawyer" will have a dusty shingle before she has many clients. Between the ease of crafting an interface, usually out of widely shared public domain elements, and the consolidation of many parts of the industry (online platforms, enterprise databases, popular mobile apps, etc.), there is not much contestation over interfaces anymore.

At the end of the day, this is good news. Maybe, as Tom hints, the high hopes and soaring aspirations of us "there at the beginning" of the digital era in IP were never fully realized. Maybe IP in the digital era was not really such an earth-shattering locus of policy. But on the other hand, this has conveniently limited the damage we have done as well. It will be for future economic historians to definitively survey the impact of IP policy on the dawn of the digital era. But even before that final verdict, Tom and his cohorts, including me, can say with some authority, "At least we didn't kill it. Plenty of good software available today." And maybe more important, to those who enjoy the metaphysical intricacy of the IP field, we can say, "we had fun at it too." If you, like me, think this is worth something, read on. You'll find an experienced voice that has traversed some fascinating mysteries of the law and elsewhere, and emerged with some wise and insightful thoughts. We should be grateful that Tom took the time to look backward and pull these thoughts together. I know I am.

Robert Merges, UC Berkeley Law School

Acknowledgments

I owe a debt of gratitude to the many colleagues with whom I worked to pull together these assembled articles. Some were named as co-authors with me; others are gratefully acknowledged in the credits for each of the articles. The errors are all mine, but the depth and quality of research is largely theirs.

A further debt of gratitude to the gifted lawyers at Foley Hoag who mentored me during my formative years: Hans Loeser, Ken Fish, Mark Clark, David Walker, and Jerry Preston, to name a few and to omit too many. Foley imbued the values of excellence, respect for the law, respect for others, and ethics that all of us carry with us, whether still at Foley or as part of the Foley diaspora, where we strive to continue these traditions.

And thanks also to my partners and shareholders, both at Foley and at GTC Law Group, who have tolerated my taste for the unremunerative researches and writings that make up this work.

Pulling together these articles, which were published over a forty-year period in who knows how many formats, and then conforming them to the publisher's requirements, was an ordeal that I would not wish on anybody, but that I did wish on the publishing experts Bridget Leahy and Hannah Fischer. I could never have done it without their dedicated work. And then indexing and re-indexing a manuscript that ballooned to almost 1000 typed pages was a further task that fell to Chris Crane. Without Bridget, Hannah, and Chris, this whole project would have foundered on the shoals of my shallow patience. Thank you, all.

Introduction

The original plan for this book was to collect in one place legal articles chronicling the dawn of the digital age. This was a period of time that began when the practice of law was so hide-bound that Oliver Wendell Holmes would have felt perfectly at home had he walked into Foley, Hoag & Eliot, the Boston law firm I joined in 1975. It was a comfortable old profession with partners, associates, personal secretaries, typewriters, and yellow pads. Legal advertising was considered champerty, and the very largest firms had perhaps 200 lawyers. In only a few years, the legal profession had morphed into an industry boasting 2000-member profit-driven firms, secretaries replaced by voice recognition software, and personal injury lawyers whose blaring ads dominate daytime TV. And the law itself struggled to make legal sense of the digital technologies that drove this transformation — first video games, then computer software, social networking, big data, and finally, privacy. The collected articles chronicle and analyze these developments.

During the collection process, it became obvious that the articles could be assembled around several interwoven themes. It also became obvious that some of what I had thought when the articles were written cried out for reconsideration — it might be said that I saw an opportunity to take advantage of the principle that hindsight is 20/20. This spawned the new essays introducing each thematic chapter and improved the work's title from "Collected Articles" (boring!) to the more intriguing "How Law Works."

One of the largest and most enduring issues the articles address is the question of how legal reasoning works, and more specifically, the relationship between language and legal analysis. A lawyer's tool is language, and the law is embodied in words. This suggests that something might be learned about how the law works from studies of how language — the stuff of which law is made — works. The philosophy of language, and in particular ordinary language philosophy, was a core discipline when I was an undergraduate and graduate student in philosophy. In law school, I was convinced that it had much to offer in understanding how law works. This led to the Note I wrote and published in the *Harvard Law Review* in 1974 that is the springboard for Chapter 2. It was also central to the discussion in Chapter 3 of the "idea/expression dichotomy" in copyright law that was central to considerations of the scope of copyright protection of computer software.

The question of the relation between language and the law has become particularly relevant at a time when politicians want to appoint judges who are "strict constructionists" and believe — or purport to believe — that the

words in the Constitution or a statute supplant the exercise of judgment. Like today's "strict constructionists," as a law student, I believed that a minute examination of Constitutional language would avoid — or at least limit — the unfettered exercise of judicial judgment, which seemed rudderless to me, a 25-year-old who was steeped in logical analysis. The second and third chapters raise the question of whether I was right about this. If not, then "strict construction" misapprehends the way language works — and, as a creature of language, the way law works. If not, then words provide a vocabulary in which one can express a conclusion; but they do not, without more, dictate the conclusion.

Another recurring theme is the way lawyers work and the purposes served by the law and law firms. Chapter 1 considers the economic organization of business law firms, which changed dramatically in the decades covered by this book. It also touches on the use of legal practice to resolve disputes. Chapters 3 and 4 show how lawyers and judges used the legal tools at hand to create the legal and contractual environment in which the computer software industry prospered, and how lawyers' zeal to protect their clients often overshot the mark from the standpoint of the software industry as a whole.

Chapters 5 and 7 raise the question of whether intellectual property and its near cousin personal data can be considered property at all. That intellectual property, at least, should be protected as property, was comprehensively argued by Professor Merges in his landmark book *Justifying Intellectual Property*, but the fact that the question required such a book is telling. Although it has become a staple of modern commerce, fueling the enormous value of such companies as Google, Amazon, Facebook, Microsoft, Oracle, and Adobe, neither intellectual property nor data ever fit neatly into the traditional categories of property. They are not goods; they are not real estate. At one time, when computer software was stored on floppy disks and sold in boxes, one might have compared it with movies or books, in that it was an intangible property "fixed in a tangible medium of expression." But even this anchor has slipped its hold, as software becomes "software as a service," and most data is lodged in the "cloud." Taking a security interest in software or the assets of a data-driven company begins to assume the difficulty one would have in taking a security interest in a law firm: the real value is in the programmers and the institution standing behind the service, or in the individuals using the service and donating their data to it, and they are not easily made subject to repossession and sale. And trademarks protect both the interest of their putative owners and also the interest of the public who relies on them. Intellectual property is, one might say, the platypus of property law: it has some, but not all, of the features of personal property and real estate, but it also can seem more like a service or a public good.

I've presented this high-minded stuff in the context of a series of articles on some of the nuts and bolts of intellectual property law, especially as applied to computer software and personal data. I hope to deliver some big ideas in small, more easily digested packages. I also hope that some readers may find practical value in the nitty-gritty discussions, especially of mundane things, such as whether a license agreement can bind downstream purchasers, how to find a safe trademark, and how to make an indemnification clause realistic and workable.

As I look back on these articles — many of them from a standpoint many decades later — I am struck by a sense of paradise lost. The story begins in 1974, before cellphones, before personal computers, before there was word processing. I wrote the Note discussed in Chapter 2 on an Olympia portable manual typewriter, referencing a pile of hardbound books. The manuscript was then sent to the *Review*'s printer for typesetting. The printer returned long galleys with big margins in which the editors were expected to rip the draft to pieces and then write improvements using pencils and erasers and a set of proofreading symbols like the single loop for deletions and inverted "y" for insertions. This was the language of editing; we were proficient in it. The edited galleys were then sent back to the printer to typeset the edits and then sent back to us for more proofing and editing. The *Review* had been drafted and edited this way for as long as anyone could remember.

This was all about to change. The digital age was just dawning, creating a very heady legal environment for those of us involved in intellectual property law. What had once been a backwater of legal practice — the place of patent engineers and others practicing areas of law that, with the occasional exception of copyright, were not even taught in the "major" law schools — was suddenly front and center in commercial life. Law firms, mine included, scrambled to build expertise and capture the lucrative business associated with intellectual property litigation and transactions. We thought we were building a brave new world in which international cooperation, technology, and digital access would transcend the national boundaries that had so poisoned the first half of the twentieth century. We believed that the resolution of issues like the scope of copyright in computer programs and the consistent international protection of intellectual property would be as critical to this new world's health and success as the consolidation of the European Union following the collapse of the Soviet Union.

The story since then has grown much darker. The promise of the digital age has given way to fears of loss of privacy, social disintegration, and corrosive political manipulation. Sadly, the same digital technologies that gave us such high hopes are now the source of our loss, much as the great technologies of the previous century — electricity, steam power, transportation — have

produced the nightmare of global warming. It has been for me, and for many in my generation, a disheartening decline from the hopes and dreams that many of us had shared.

My editors and peer reviewers have expended some worry over the audience for this tome. Many wish that the book would have a single audience: law students, law professors, lowly laborers in the legal vineyard trying to figure out the best way to draft an indemnity clause. Any of these might find value in parts of the book, but I have failed utterly at the goal of distillation.

My great hope is that there might be someone years, decades, or longer in the future, picking this dusty volume off the shelf in a library — if there are such things then — who might wonder what was going on in legal and social thought during that period of time when the digital world was spawned. The last is, I think, my most valued reader. Here is a record of what I, at least, was thinking about when the world moved from an industrial society to a new age when digital data overwhelmed all else. I fancy that I lived through a time of historic ephemera when the early Internet and early websites were lost to history, but when a new world of data, AI, social media, and disconnection through connection, were formed. If this volume can provide some small record of that time, it will have served a valuable purpose.

I begin, though, with an article on legal practice and its evolution from the guild structure I joined as a young associate to today's brutally capitalistic model.

PAGES MISSING

FROM THIS FREE SAMPLE

Table of References

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

Selected Bibliography

Abramson, Ronald, "Why Lotus-Paperback Uses the Wrong Test and What the New Software Protection Legislation Should Look Like." *7 The Computer Lawyer 6* (August 1990).

Allen, G. Ross. "The Basics of Indemnification." *21 Intell. Prop. Litig. 7* (Spring 2010).

Ambrosio, Christina, and Roni Schneider. "Copyright Misuse . . . Getting Defensive: *Lasercomb America, Inc. v. Reynolds*." *6 J. Legal Comm. 181* (1990).

Antton, D. Lee, and Gary M. Hoffman. "Copyright Protection and Innovation: The Impact of *Lotus Development v. Paperback Software*," *Computer Law* 1, no. 8 (1990).

Archer, Gleason L. *The Law of Real Property*. 2nd ed. Boston: Suffolk Law School Press, 1927.

Askin, Frank, "Police Dossiers and Emerging Principles of First Amendment Adjudication." *22 Stan. L. Rev. 196* (1970).

Austin, John L., *Philosophical Papers*. Edited by J. Urmson and G. Warnock. 3rd ed. Oxford: Oxford University Press, 1979.

Barbas, Samantha. "Saving Privacy from History." *61 DePaul L. Rev. 973* (2012).

Bartow, Ann. "Our Data, Ourselves: Privacy, Propertization, and Gender." *34 U.S.F. L. Rev. 633* (2000).

Beard, Mary. *How Do We Look: The Body, the Divine, and the Question of Civilization*. New York: Liveright Publishing (2018).

Bender, David. *Bender on Privacy and Data Protection*. New York: Matthew Bender (2019).

Bennett, Steven C. "Regulating Online Behavioral Advertising." *44 J. Marshall L. Rev. 899* 908–09 (2011).

Bergelson, Vera. "It's Personal but Is It Mine? Toward Property Rights in Personal Information." *37 U. C. Davis L. Rev. 379* (2003).

Berger, Dustin D. "Balancing Consumer Privacy with Behavioral Targeting." *27 Santa Clara Computer & High Tech L. J. 3* (2011).

Black, Hugo. "The Bill of Rights." *35 N. Y. U. L. Rev. 865* (1960).

Brennan, Jr., William J. "The Supreme Court and the Meiklejohn Interpretation of the First Amendment." *79 Harv. L. Rev. 1* 5 (1965).

Breyer, Stephen. "The Uneasy Case For Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs." *84 Harv. L. Rev. 281* (1970).

Buckman, T. "Comment, Protection of Proprietary Interest in Computer Programs." *51 J. Pat. Off. Soc'y* 135 (1969).

Calabresi, Guido. *The Costs of Accidents: A Legal and Economic Analysis*. New Haven: Yale University Press, 1970.

Calabresi, Guido, and A. D. Melamed. "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral." *85 Harv. L. Rev. 1089* (1972).

Callman, Rudolf, *The Law of Unfair Competition, Trademarks and Monopolies*. 4th ed. St. Paul, MN: Thomson/West, 1982.

Carrier, Michael A. "Cabining Intellectual Property Through a Property Paradigm." *54 Duke L. J. 1* 1 (2004).

Casner, A. James, and W. Barton Leach. *Cases and Text on Property*. Boston: Little Brown, 1951.

Cauthorn, Kim, Tom Britven, and Tamara Turek. "Sharing the Risk: Patent Infringement Liability Indemnification and Insurance." *Intell. Prop. Litig.* (Spring 2010).

Cavell, Stanley. *Must We Mean What We Say?* (New York: Charles Scribners Sons., 1969).

Chafee, Zechariah. "Book Review." *62 Harv. L. Rev. 891* (1949).

Chafee, Zechariah. "Equitable Servitudes on Chattels." *41 Harv. L. Rev. 945* (1928).

Charee, Zechariah. *Free Speech in the United States*. Athenium, 1941.

Chafee, Zechariah. "Reflections on the Law of Copyright" (pts. 1 & 2). *45 Colum. L. Rev. 503* (1945).

Chafee, Zechariah. "The Music Goes Round and Round: Equitable Servitudes and Chattels." *69 Harv. L. Rev. 1250* (1956).

Chisum, Donald S. *Chisum on Patents: A Treatise on the Law of Patentability, Validity and Infringement*. New York: Matthew Bender, 1991.

Concoff, G. "Motion Picture Secured Transactions under the Uniform Commercial Code: Problems in Perfection." *13 U.C.L.A. L. Rev. 1214* (1966).

Cooper, Frederick L., and Walter Sapronov. "Software Protection and Pricing in a LAN Environment." *26 Jurimetrics J. 162* (1986).

Corbin, Arthur L. *Corbin on Contracts*. St. Paul, MN: Thomson/West, 1952.

Countryman. V. "Executory Contracts in Bankruptcy: Part I." *57 Minn. L. Rev. 439* (1973).

Countryman, V. "Executory Contracts in Bankruptcy: Part II." *58 Minn. L. Rev. 479* (1974).

Currie, R., and D. Crampton, D. *Conflict of Laws: Cases – Comments – Questions*. St. Paul, MN: West Academic Publishing,1968.

Davidson, Duncan. "Protecting Computer Software: A Comprehensive Analysis." *1983 Ariz. St. L.J. 611* (1983).

Davidson, Duncan. "Common Law, Uncommon Software." *47 U. Pitt. L. Rev. 1037* (1986).

Dumbauld, Edward. *The Bill of Rights and What It Means Today*. Norman, OK: University of Oklahoma Press, 1957.

Dvorak, A., N. Merrick, W. Dealey, and G. Ford. *Typewriting Behavior*. New York: American Book Company, 1936.

Ehrlich, Amy. *The Random House Book of Fairy Tales*. New York: Random House, 1985.

Ellickson, Robert. *Order Without Law: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press, 1991.

Emerson, Thomas. *Toward a General Theory of the First Amendment*. New York: Random House, 1966.

Farnsworth, E. Allan. *Contracts*. 4th ed. New York: Aspen/Wolters Kluwer, 2004.

Frantz, Laurent B. "The First Amendment in the Balance." *71 Yale L. J. 1424* (1962).

Freund, Paul. "Constitutional Dilemmas." In *On Law and Justice*. Cambridge, MA: Harvard University Press, 1968.

Fried, Charles. "Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test." *76 Harv. L. Rev. 755* (1963).

Gilbert, Stuart. *James Joyce's* Ulysses*: A Study*. New York: Penguin/Random House, 1955.

Gilburne, Miles R., and Ronald L. Johnston. "The Protection and Enforcement of Trade Secrets in Software and High Technology Information." In Daniel T. Brooks and Michael S. Keplinger, *Software Protection: Current Developments in Copyright and Patent and Their Relationships to Trade Secrets* (1982).

Gilmore, Grant. *Security Interests in Personal Property*. Boston: Little Brown & Co., 1965.

Haar, Charles M., and Lance Liebman. *Property and Law*. 2nd ed. Boston: Little Brown, 1985.

Heller, Michael A. "The Boundaries of Private Property." *108 Yale L. J. 1163* (1999).

Hemnes, Thomas M. S. "Computer Software Licensing After the Enactment of the Intellectual Property Bankruptcy Protection Act." *Computer Law* 7, no. 10 (Oct. 1988).

Hemnes, Thomas, "Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing," *71 Denv. U. L. Rev. 577* (1994).

Hemnes, Thomas. "Three Common Fallacies in the User Interface Copyright Debate." *7 Comp. Lawyer 14* (1990).

Hemnes, Thomas, and Susan Montgomery. "The Bankruptcy Code, The Copyright Act, and Transactions In Computer Software." *7 Computer Law Journal 327* (1987).

Henry, Matthew D., and John L. Turner. "The Court of Appeals for the Federal Circuit's Impact on Patent Litigation." *35 J. Legal Stud 85* (2005).

Horwitz, Ethan, and Lester Horwitz. *Intellectual Property Counseling and Litigation* §11.03[3][a] (LexisNexis, 1994).

Igo, Sarah. *The Known Citizen*. Cambridge, MA: Harvard University Press, 2018.

Jackson, Thomas. "Bankruptcy, Non-Bankruptcy Entitlements, and the Creditor's Bargain." *91 Yale L. J. 857* (1982).

Jeuss, Sara, Robin Feldman, and Joshua Walker. "The America Invents Act 500: Effects of Patent Monetization Entities on Litigation." *11 Duke L. & Tech Rev. 357* (2012).

Kalven, Jr., Harry. "The *New York Times* Case: A Note on 'The Central Meaning of the First Amendment'." *1964 Sup. Ct. Rev. 191* (1964).

Kant, Immanuel. *Critique of Pure Reason*. Translated by N. K. Smith. New York: Macmillan & Co., 1929 [1781].

Kant, Immanuel. *Foundations of the Metaphysic of Morals*. Translated by Lewis White Beck. New York: Liberal Arts Press, 1959 [1785].

Kaplan, Benjamin. *An Unhurried View of Copyright*. New York: Columbia University Press, 1967.

Kaplan, Benjamin, and Richard Field. *Materials for a Basic Course in Civil Procedure*. 3rd ed. St. Paul, MN: Foundation Press, 1973.

Kesan, Jay P., and Gwendolyn G. Ball. "How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes." *84 Wash. U.L. Rev. 237* (2006).

Kirsch, Matthew S. "Do-Not-Track: Revising the EU's Data Protection Framework to Require Meaningful Consent for Behavioral Advertising." *18 Rich. J. L. & Tech. 2* (2011).

Kline, Michael. "Requiring an Election of Protection for Patentable/ Copyrightable Computer Programs." *1985 J. Pat. Off. Soc'y 280*.

Koch, Adrienne. *Jefferson and Madison: The Great Collaborators*. New York: Oxford University Press, 1950.

Koch, Adrienne, and William Peden. *The Life and Selected Writings of Thomas Jefferson*. New York: Random House, 1972.

Kutten, L. J. *Computer Software: Protection/Liability/Law/Forms*. Deerfield, IL: Clark Boardman Callaghan, 1993.

Levy, Leonard. *Legacy of Suppression*. Cambridge, MA: Belknap Press of Harvard University Press, 1960.

Lindberg, Van. *Intellectual Property and Open Source*. 3rd ed. Sebastopol, CA: O'Reilly Media, 2008.

Locke, John. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge: Cambridge University Press, 1988 [1690].

Lynch, Jennifer. "Identity Theft in Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks." *20 Berkeley Tech. L. J. 259* (2005).

Markman, Joanna S. "In Re Gault: A Retrospective in 2007: Is It Working? Can It Work?" *9 Barry L. Rev. 123* (2007).

McCarthy, J. Thomas. *McCarthy on Trademarks and Unfair Competition*. 4th ed. Toronto: Thomson Reuters, 2012.

McGeveran, William. "Disclosure, Endorsement, and Identity in Social Marketing." *2009 U. Ill. L. Rev. 1105* (2009).

Meiklejohn, Alexander. *Free Speech and Its Relation to Self-Government*. New York: Harper Brothers, 1948.

Mell, Patricia. "Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness." *11 Berkeley Tech. L. J. 1* (1996).

Merges, Robert. *Justifying Intellectual Property*. Cambridge, MA: Harvard University Press 2011.

Miller, John C. "40 Indemnification Clauses Review Tips." *Cont. Mgmt.* 55/56 (2007).

Murphy, Paul L. *The Meaning of Free Speech*. Westport, CT: Greenwood Publishing Company, 1972.

Nelson, Richard. "On the Complex Economics of Patent Scope." *90 Colum. L. Rev. 839* (1990).

Nimmer, Melville B., and David Nimmer. *Nimmer on Copyright*. New York: Matthew Bender, 1963–2019.

Note, "Computer Programs and Proposed Revisions of the Patent and Copyright Laws." *81 Harv. L. Rev 1541* (1968).

Note, "Judicial Review of Military Surveillance of Civilians: Big Brother Wears Modern Army Green." *72 Colum. L. Rev. 1009* 1047 (1972).

Note, "The Chilling Effect in Constitutional Law." *69 Colum. L. Rev. 808* (1969).

Note, "The First Amendment and the 'Abridgeable' Right of Self-Expression." *72 Colum. L. Rev. 1249* (1972).

Note, "The First Amendment Overbreadth Doctrine." *83 Harv. L. Rev. 844* (1970).

Note, "The Speech and Press Clause of the First Amendment as Ordinary Language." *87 Harv. L. Rev. 374* (1973).

Note, "Transfers of Copyright Under the New Copyright Act." *88 Yale L. J. 125* (1978).

Nycum, Susan, Dexter Kenfield, and Margaret Keenan. "Debugging Software Escrow: Will It Work When You Need It?" *4 Computer L. J. 441* (1984).

Oddi, A. Samuel. "The Tragicomedy of the Public Domain in Intellectual Property Law." *25 Hastings Comm. & Ent. L. J. 1* (2002).

O'Rourke, Maureen A. "An Essay on the Challenges of Drafting a Uniform Law of Software Contracting." *10 Lewis & Clark L. Rev.* 925 (2006).

Page, John. "Grazing Rights and Public Lands in New Zealand and the Western United States: A Comparative Study." *49 Nat. Resources J. 403* (2009).

Plato. "The Republic." Translated by Paul Shorey. In *Plato: The Collected Dialogues*, edited by Edith Hamilton and Huntington Cairns. Princeton, NJ: Princeton University Press, 1961.

Plucknett, Theodore F. T. *A Concise History of the Common Law*. 5th ed. Indianapolis: Liberty Fund, 1956.

Porter, Andre J. "Should Business Method Patents Continue to be Patentable?" *29 S.U. L. Rev. 225* (2002).

Posner, Richard. "The Law and Economics Movement." *The American Economic Review* 77, no. 2 (1987).

Prosser, J. W., and W. P. Keeton. *The Law of Torts*. 5th ed. St. Paul, MN: West Publishing Co., 1984.

Quittner, Arnold. "Franchises in Bankruptcy: Termination, Rejection and Assumption." *1984 Comm. L. J. 84.*

Rawls, John. *A Theory of Justice.* Cambridge, MA: Harvard University Press, 1971.

Raysman, Richard. "Licensing Issues in Network Environments." *12 New Eng. Computer L. Inst., 339* (1992).

Rendleman, Doug. "Collecting a Libel Tourist's Defamation Judgment?" *67 Wash. & Lee L. Rev. 467* (1964).

Rilee, Edward. "The Protection of Property Rights in Computer Software." *19 Pub. Ent. Advert. & Allied Fields L.Q. 265* (1980).

Robbins, Jonathan. *Advising eBusinesses*. Deerfield, IL: Clark Boardman Callaghan, 2012.

Rosenberg, Peter D. *Patent Law Fundamentals*. 2nd ed. Deerfield, IL*:* Clark Boardman, 1991.

Rudnick, Robert E., and Andrew M. Grodin. "Drafting and Negotiating Defense and Indemnification Provisions." *Intell. Prop. Litig.* (Spring 2010).

Samuelson, Pamela. "CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form." *1984 Duke L. J. 663* (1984).

Schwartz, B. *The Bill of Rights: A Documentary History*. New York: McGraw-Hill, 1971.

Silbey, Jessica. *The Eureka Myth*. Stanford, CA: Stanford University Press, 2015.

Silverstein, Lee. "Rejection of Executory Contracts in Bankruptcy and Reorganization." *31 U. Chi. L. Rev. 467* (1964).

Sommer, Henry J., and Richard Levin. *Collier on Bankruptcy*. 15th ed. New York: Matthew Bender/Lexis Nexis, 1985.

Spivack, Peter G. "Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software." *35 U.C.L.A. L. Rev. 723* 741 (1988).

St. Martin, Anne Louise, and J. Derek Mason. "Arbitration: A Quick and Effective Means for Patent Dispute Resolution." *12 N. C. J.L. & Tech. 301* 317 (Spring 2011).

Thomas, Robert E., and Larry A. DiMatteo. "Harmonizing the International Law of Business Methods and Software Patents: Following Europe's Lead." *16 Tex. Intell. Prop. L. J 1* (2007).

Tiffany, Herbert Thorndike. *A Treatise on the Modern Law of Real Property and Other Interests in Land*. Abridged by Carl Zollmann. Chicago: Callaghan & Co., 1940.

Tindall, William. *A Reader's Guide to Finnegans Wake*. Syracuse, NY: Syracuse University Press, 1969.

Warren, Samuel, and Louis Brandeis. "The Right to Privacy." *4 Harv. L. Rev. 193* (1890).

Wild, Robert W. Comment, "Computer Program Protection: The Need to Legislate a Solution," *54 Cornell L. Rev* (1969) 586–87; *81 Harv. L. Rev.* (1968), 1541, 1543–45.

Williston, Samuel. *Williston on Contracts*. 4th ed. Edited by Richard Lord. Rochester, NY: Lawyers Cooperative Publishing/Thomson Reuters, 2003–2019.

Wittgenstein, Ludwig. *Philosophical Investigations/Philosophische Untersuchunen*. 4th ed. Translated by G. E. M. Anscomb, P. M. S. Hacker, and Joachim Schulte. Hoboken, NJ: Wiley Blackwell, 2009 [1953].

Xiang, Joy Y. "How Wide Should the Gate of 'Technology" Be?: Patentability of Business Methods in China." *11 Pac. Rim L. & Pol'y J. 795* (2002).

Zhuboff, Shoshana, *The Age of Surveillance Capitalism*. New York: Hachette, 2020.

Index

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

X