

# 12 WEBSITE LEGAL ISSUES

FOR SMALL BUSINESSES AND ENTREPRENEURS

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The Internet makes it possible for every small business and entrepreneur to compete on a global basis. But cyberspace can also be a treacherous place to do business. This booklet discusses 12 website legal issues that you should consider in structuring your online business strategy. As the world becomes more interconnected, it's more important than ever to retain your competitive advantages and minimize your exposure to potential problems.

## **1. DOES YOUR WEBSITE GENERATE REVENUE?**

In these tough economic times, it's more important than ever to continually identify new ways to generate revenue. Over the past 15 years, business websites have gone from online business cards to sophisticated profit centers that can generate substantial amounts of cash.

Nearly every business has the ability to increase profits by better harnessing the power of their website, but many innovative businesses can generate instant income online by implementing several simple strategies:

- Create a program to capture visitor emails, build a continuous dialogue with your prospects, and provide them with valuable content and time-sensitive offers.
- Create an education-based marketing strategy (such as a blog) to continually inform prospects about your business and systematically build your credibility in the marketplace.
- Create an online company store to sell products directly to your prospects.
- Create information products (Special Reports and eBooks) that can be instantly downloaded from your site or through a third-party website such as the Amazon Kindle bookstore.

Do you need help with your revenue generation strategies? Let's have a conversation.

## **2. INTELLECTUAL PROPERTY RIGHTS.**

Are your intellectual property rights in your website's content protected? Every small business owner and entrepreneur should make a fundamental strategic decision to protect its intellectual property rights. It's crucial to address the steps that must be taken to establish and maintain ownership of intellectual property and protect/build your company's brand. Confidentiality agreements, copyright notices, and trade secret protection should be paramount.

The ultimate value of your company will likely be directly tied to the value of your intellectual property rights. In order to seek financing or sell your company, you'll need to be able to prove and document that you've taken substantial steps to protect your intellectual property rights. Is your website content copyright protected?

Does your website infringe on someone else's intellectual property rights? More businesses are making costly – but avoidable – online mistakes.

### **3. WEBSITE PRIVACY POLICY.**

Due to the threat of identity theft, it's essential that your company's website provide visitors with notification of how their private information will be used and who will have access to such information. A company website that does not provide an appropriate privacy policy notification immediately raises a red flag in the eyes of a website visitor – not the ideal way to start a conversation with a potential customer or client.

Due to hackers, rogue employees, unintentional mistakes, and social networking, it is difficult – if not impossible – for a company to absolutely guarantee that no unauthorized disclosures will ever take place.

Failure to establish a website privacy policy places your company at risk – especially if your website collects its visitors' personal and financial information (such as credit card data). A website privacy policy can be very simple and provides tremendous clarity to your visitors who want to know that you've made an affirmative commitment to safeguarding their information, not selling it to third parties, or otherwise sharing it with nefarious individuals.

It's simple to establish a website privacy policy – let me show you how.

### **4. EMAIL AND COMPUTER USAGE POLICY.**

Email communications have become an essential tool for businesses of all sizes – from the small companies to the largest multinationals. Email is efficient, convenient, and cheap. But there's a significant downside that many companies fail to address until trouble strikes – especially given the reality that most employees consider their emails to be private communications.

A company's failure to establish a policy setting acceptable email and computer practices can lead to exposure to expensive lawsuits for discrimination, harassment, or retaliation.

Every company should have significant concerns about employee email and computer usage for the following reasons:

- Guard against lost productivity.
- Protect against the disclosure of proprietary information.
- Decrease your exposure to harassment and discrimination lawsuits.
- Reduce exposure to computer viruses and hostile code that could damage your company's computer infrastructure.
- The potential release of trade secrets or confidential information.
- The need to protect privacy information of employees and customers.

Finally, a written policy sets standards for employees to focus on work – not surfing the Internet.

When considering a company's email and computer usage policy, the most important legal standard is the reasonable expectation of privacy. When a company has not set a written email and computer policy, it is often very difficult for employees to understand the distinction between acceptable conduct and prohibited conduct.

By establishing a written policy, your company is proactively setting the applicable standards and placing the employees on notice that they have no reasonable expectation of privacy in their workplace email communications and computer usage. In addition, a written policy sends a crucial message to all employees – concentrate on your work when using email and the computer in the workplace.

What are the elements of a company email and computer usage policy?

Every company should have a written email and computer policy – regardless of the company's size. The policy should address:

- The purpose of the policy is for each person to know his/her rights and limits when it comes to accessing the company's computers, computer system, and the Internet.
- The purpose of the company's computer system.
- The legal basis for the individual aspects of the policy, including the relevant legal authorities such as the Communications Decency Act, Child Pornography Prevention Act, Computer Fraud and Abuse Act, and the Federal Wiretap Act.
- The applicable standards of usage established by the policy (i.e., what actions are prohibited).
- The disciplinary action and penalties that will be imposed for violation of the policy.
- That the employee acknowledges receipt of the policy. The policy and acknowledgement should be signed by each employee, dated, and kept in each employee's permanent file.

A well-written email and computer policy establishes important standards for employee conduct, addresses the reasonable expectation of privacy, and reduces the company's exposure to legal problems. Don't allow your employees to venture out into Cyberspace without one. If you need legal advice on setting your policy, let's have a discussion and see if I can help.

## **5. EMAIL MARKETING STRATEGY.**

One of today's most effective Internet marketing strategies is to capture email addresses of visitors to your website and then periodically contact these visitors with valuable information and offers. This strategy builds a dialogue with your prospective customer or client and allows

you to continuously build credibility.

The CAN-SPAM Act of 2003 establishes standards for sending commercial email and authorizes the Federal Trade Commission and the Department of Justice to enforce the Act. CAN-SPAM requires: (i) the use of accurate headers in email messages, (ii) procedures for recipients to opt out of future emails, (iii) clear labeling of commercial email as advertising, and (iv) listing a valid physical address within the email.

How can you legally avoid sending bulk email messages that violate the CAN-SPAM Act? By establishing a permission-based marketing system whereby your website visitors voluntarily agree to “opt-in” to receive an email newsletter or future email communications.

Does your email marketing strategy comply with the CAN-SPAM Act?

## **6. PRE-SUIT MEDIATION.**

There have been very few times in my career when I’ve encountered a legal client who was enthusiastic about the prospect of litigating a dispute in court. One of the best ways to avoid litigation is to include a pre-suit mediation provision in your contract. A pre-suit mediation provision sets forth a mandatory process for mediating a dispute, the applicable procedure, and how the parties will share the mediation costs. This innovative provision has gained increasing popularity over the past few years as more businesses owners take proactive measures to guard against costly litigation.

If the parties to a civil dispute go to court, the judge will require mediation at some point in the litigation process anyway. Why not save the time, effort, and expense of litigation by first attempting pre-suit mediation? Plus, there’s a high likelihood that the dispute will get resolved at the pre-suit mediation stage – most do.

What are the compelling reasons for a pre-suit mediation provision?

- **Cost.** As a business person, would you rather (a) initiate and conduct an informal mediation conference within 30 days of a dispute arising, or (b) write the check for a team of attorneys to litigate the dispute over the course of the next year?
- **Speed.** In the Pre-suit Mediation provision, the parties can specify the time period in which the mediation conference will be initiated. For example, the parties can specify that the conference will be held within 30 days of a party requesting mediation.
- **Informality.** The mediation conference can be held in one of the parties’ offices or in the conference room of the mediator. Contrast one of these informal settings with the formality of an imposing courtroom complete with attorneys, a judge, and jury.
- **The parties control the process.** In a mediation conference, the parties are at liberty to tell their stories and negotiate a resolution in an informal, private setting without a judge or rigid rules

dictating the process.

- Confidential. A trial is open to the public. A mediation conference is a private meeting in which the parties are obligated to maintain confidentiality.

Inclusion of a pre-suit mediation provision in your web-based contracts is one of the most cost-effective ways to reduce your exposure to expensive litigation. Do your contracts include this innovative provision?

## **7. CHOICE OF LAW.**

What law applies to the commercial transaction between your company and the consumer? It depends on whether your website or contract specifies a specific choice of law. If there is no specific choice of law, then it becomes a question of what court has jurisdiction over the dispute and what law should be applied.

If you sell to overseas consumers, then failure to specify the applicable jurisdiction can cause many problems. For example, there is a substantial difference between the European Union and United States approaches to jurisdiction. EU law looks to where the harm occurred and not to whether the defendant targeted a specific state.

U.S. law considers whether the defendant “purposefully availed” himself or itself (corporation) of the forum state. U.S. courts (i) look for some action by the defendant to establish purposeful ties with the forum state, (ii) whether it was foreseeable that the defendant would be hauled into court in the forum state, (iii) the impact of fairness factors, and (iv) whether there are minimum contacts with the forum state to warrant a finding of personal jurisdiction.

For companies selling goods and services through websites, the spectrum of jurisdictional possibilities is:

- Active website – transmitted files to the forum state or contracted with residents in the forum state.
- Interim website – depends on the level of interactivity and the commercial nature of any information exchanged.
- Passive website – only information has been posted and communications have been limited.

Obviously, it pays to include a choice of jurisdiction provision in your website contracts (i.e., Terms and Conditions).

## **8. CHOICE OF FORUM.**

The choice of forum determines where a dispute will be heard. The choice of law and choice of forum should be consistent (i.e., the law of a specific U.S. state applies and a dispute would be

heard in the courts of that specific U.S. state).

I strongly encourage clients to structure their business and contracts so that they have a home field advantage whenever possible. Although it's certainly preferable to avoid litigation, most companies are more comfortable seeking redress in a "friendly" court than litigating a dispute in an unfriendly court in another state or country. Inclusion of a choice of forum provision in your Terms and Conditions allows you to control your own destiny.

Do your website contracts include choice of law and choice of forum provisions?

## **9. ATTORNEY'S FEES AND COSTS.**

Many Web-based businesses do not include an attorney fees and costs provision in website contracts. Without this provision, it's unlikely that the Web-based company will be able to get an award of attorney's fees – even if you win the case on the merits.

In addition, there's a certain degree of deterrence that can be achieved by the inclusion of a contractual provision that requires the losing party in litigation to pay for the prevailing party's attorney fees and costs. Most people don't want to pay one attorney, much less two. This provision forces a potential litigant to address the merits of their case before filing a lawsuit and come to grips with the possibility they may not prevail.

It's been my experience that many small business owners and entrepreneurs gloss over this important provision and only learn of its relevance after a costly dispute strikes. Are you protected?

## **10. DISCLAIMER.**

A disclaimer is a defensive maneuver and is incorporated into a website to protect against unwanted claims or liability. If your website does not include a written disclaimer, you're simply playing with fire. Contrast the protection provided by no disclaimer with the sample disclaimer below (courtesy of the U.K. Business Link):

"The information contained in this website is for general information purposes only. The information is provided by [business name] and while we endeavour to keep the information up to date and correct, we make no representations or warranties of any kind, express or implied, about the completeness, accuracy, reliability, suitability or availability with respect to the website or the information, products, services, or related graphics contained on the website for any purpose. Any reliance you place on such information is therefore strictly at your own risk.

In no event will we be liable for any loss or damage including without limitation, indirect or consequential loss or damage, or any loss or damage whatsoever arising from loss of data or profits arising out of, or in connection with, the use of this website.

Through this website you are able to link to other websites which are not under the control of

[business name]. We have no control over the nature, content and availability of those sites. The inclusion of any links does not necessarily imply a recommendation or endorse the views expressed within them.

Every effort is made to keep the website up and running smoothly. However, [business name] takes no responsibility for, and will not be liable for, the website being temporarily unavailable due to technical issues beyond our control.”

After reading this sample provision, I’m confident that you’ll agree that inclusion of a disclaimer in your website is truly a no-brainer. Does your website contain this vital provision?

## **11. BINDING CONTRACTS AND ELECTRONIC SIGNATURES.**

If your company does transactions through its website, it’s essential that the Terms and Conditions clearly specify how and when a binding contract has been formed. The issue of whether a binding contract has been formed most often arises when:

- Capacity to contract is in question – minors and mentally disabled individuals lack the capacity to contract. This issue is determined by an application of the law governing the contract.
- Notification of changes to the contract is in question. One party is not allowed to unilaterally change the terms of the contract unless authorized to do so with appropriate notice (which can easily be included in the Terms and Conditions of the website or contract).

The Uniform Electronic Transactions Act (adopted by 46 U.S. states and the District of Columbia) states that “a record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”

The E-SIGN Act (Electronic in Global and National Commerce Act) provides legal validity to contracts entered into electronically and applies to emails, PDF documents and digital signatures with encryption. The signature can be a scanned version, the signer’s name typed into a signature space, or clicking an “I Accept” button.

Does your website make it easy for your customers to form a binding contract?

## **12. INTERNET SALES TAX.**

In 1992, the U.S. Supreme Court ruled in *Quill v. North Dakota* that a mail order merchant could not be forced to charge and collect sales taxes if the merchant did not have a physical presence in the state where the consumer lived. Absent a physical presence or nexus with the state, the merchant had no obligation to collect that state’s sales tax.

The rationale of the *Quill v. North Dakota* decision is also applicable to Internet sales. Thus, an Internet retailer is not obligated to charge or collect sales tax on purchases made by American consumers unless the Internet retailer has established a physical presence in one or more

American states. A physical presence generally means a bricks and mortar store, office, warehouse, or distribution facility.

Although an Internet retailer may not be obligated by current law to charge and collect a state sales tax, it doesn't mean that a consumer is not obligated to pay the sales tax. Technically, a consumer who resides in a state that collects sales tax is obligated to pay the tax on Internet purchases even when the merchant does not collect the sales tax. When the consumer is obligated to pay the tax directly to the state, it is characterized as a use tax rather than a sales tax.

Recently, many tax-strapped states (notably New York and California) have significantly increased their efforts to collect use tax on internet purchases and several legal challenges are now pending on state laws imposing internet sales taxes on companies with "affiliates" having a physical present in that state.

Internet sales tax will continue to be a fast-moving issue with far-reaching implications to every business that sells products and services in Cyberspace. Are you up-to-date on how Internet sales taxation impacts your business?

## **CONCLUSION**

The Internet presents exciting and unlimited opportunities for small businesses and entrepreneurs. Your attention to the 12 website legal issues discussed in this booklet will be vital to your company's success in cyberspace.

A lot of small business owners and entrepreneurs have questions about the impact of website legal issues on their business. Many of these issues can be resolved quickly in a simple, straight forward manner before expensive complications arise. Would you like to discuss any of these issues with me?

## **HOW I WORK**

I've been an attorney since 1986. I recognize that most prospective clients are busy, skeptical, and cautious about hiring an attorney. I also recognize that there are negative perceptions about attorneys (always busy, overpriced, only interested in making money, slow to respond, etc.).

The bottom line is this - I understand that prospective clients want information before making a decision to hire an attorney so they can make the best choice possible.

With these points in mind, I can appreciate that a client wants certain things from their attorney. Although I cannot ethically guarantee results, my commitment is to:

- Be accessible via personal appointments, telephone calls, Skype video calls, and email.
- Provide quick responses. I am not slow to return calls or emails.

- Provide aggressive, strategic, and proactive advice.
- Be willing to listen carefully to a client's problem so that I can fully understand what is important to the client.
- Consider and present a range of options for the client's consideration.
- Recommend a specific solution to the client's problem and explain how the client will benefit from the solution.
- Answer the client's questions.
- Provide information and advice in plain English.
- Work hard to add value and make every client experience outstanding.
- Strive to minimize and eliminate "surprises."
- Provide legal services in an efficient, cost-effective manner.

## **MY QUALIFICATIONS**

- Licensed to practice law in California, Florida, and as an English Solicitor.
- Admitted to practice before the United States Supreme Court and the United States Court of International Trade.
- Awarded Masters degree (LL.M.) in International Business Law by The London School of Economics and Political Science.
- Awarded Juris Doctorate by The Cumberland School of Law, Samford University. Associate Editor of The Cumberland Law Review.
- Awarded B.S. (Management) by The Kranner School of Management, Purdue University.
- Adjunct Professor at Polk State College (Winter Haven, Florida).
- Fred Reilly is the author of *Slash Your Attorney Fees* available through the Amazon Kindle Book Store.

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## **IMPORTANT NOTICE**

The purpose of this booklet is to inform and not to advise. The statements are general in nature and individual facts in any given situation may alter their application or involve other laws not referred herein. You should always seek advice from a competent professional if any questions arise.

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