

DO'S AND DON'TS FOR YOUR WEBSITE: TEN CONSIDERATIONS

Whether you are already operating an online business or website, or you're considering launching an online business, you should know what laws apply and how these laws may affect you. There are a wide variety of laws, and violations may subject you to substantial civil liability and sometimes criminal liability. Following is a listing of ten areas of particular concern:

1. **Are Your Trademarks and Copyrights Protected?** As in the "brick and mortar" world, online businesses need to be diligent in protecting their intellectual property rights, for example through registration of trademarks with the U.S. Patent & Trademark Office and through diligent enforcement of their trademark rights. Similarly, you need to ensure that ownership in the copyright for the Website is formally in your company's name (not with the Website developer or third party contractor), that you have posted proper copyright notices, and that you have timely registered your copyrights with the U.S. Copyright Office.

2. **Are Your Domain Names Protected?** Whereas in the brick and mortar world, entities in different businesses may own trademarks using the same word (for example, Apple computers and Apple records), in the online world, only one company can own the dot-com domain name. Have you registered appropriate domain names containing your trademark? Domain names are inexpensive, which makes it easy to register various permutations of your trademarks. However, it also makes it easy for "cybersquatters" to register the same domain names. If this happens, there are several options: you can bring a lawsuit under the Anticybersquatting Consumer Protection Act, an arbitration proceeding under the Uniform Domain Name Dispute Resolution Policy, or both. Also, make sure that you don't lose your registered domain names by ensuring that domain registration records show the domain names are owned by your company and that email correspondence from the domain name registrar will reach you (and not a former employee whose email address is no longer recognized by your email servers)—you don't want to miss the renewal notice, and have some cybersquatter grab up your domain name.

3. **Does Your Website Allow Third Parties to Post Content or Materials?** Does your Website invite postings of material by third parties? User submitted content could subject you to liability for a wide variety of violations, for example, for copyright or trademark infringement, defamation, violation of other U.S. and foreign laws, etc. In addition to effective terms of use (see # 4 below), you will need to take whatever additional steps are required to insulate you from liability, where possible, for the postings of third parties. For example, in order to achieve "immunity" from liability for copyright infringement of third party postings, the Digital Millennium Copyright Act ("DMCA") requires the Website operator to post contact

information for an agent designated to receive notices of infringing content 1) to the U.S. Copyright Office, and 2) on your Website. Further, once you receive a notice that someone has posted copyrighted materials on your site, you must follow certain procedures, beginning with "expeditiously" removing these materials from your Website.

4. **Are your online contracts enforceable?** Do you have online contracts for purchases via your Website? Do you require that online users agree to terms in which they take full responsibility for their activities on your site? Are your contracts and terms of use enforceable? In order for online contracts to be considered enforceable, courts generally require that the following be provided to the customer/Website user:

- a) Notice of terms & conditions
- b) Opportunity for the user to review such terms
- c) Meaningful agreement to the terms (not enforceable if the user can proceed with an order or using materials on your Website without explicitly agreeing to the terms) and
- d) Record retention (ideally, you will record and retain IP address, time, and date as evidence of user's agreement to the terms)

5. **Is Your Privacy Policy Appropriate and Is It Being Enforced?:** Is your Website's privacy policy appropriate for your business? Do you accept participation from children under 13, and if so, does your Website comply with the Children's Online Privacy Protection Act ("COPPA")? Have the appropriate employees been trained to ensure that privacy policy is followed precisely? It isn't sufficient to merely post the policies. You also need to ensure that you enforce your policies by implementing the procedures to ensure that your policies are not circumvented. For example, it is one thing to state that you don't accept participation from children under 13, but it is another thing to implement the steps that will satisfy the Federal Trade Commission (FTC) that you have taken all reasonable steps to prevent the participation of children under 13.

6. **Have You Limited Your Liability With The Judicious Use Of Disclaimers?** Have you posted all disclaimers required by your industry or profession? Have you posted disclaimers on your Website limiting your liability for malfunctions with technology on your site, and disclaiming responsibility for the content on sites to which your Website links? Certain disclaimers are required by law or industry regulation and others may help limit your liability in the event a disgruntled user decides to sue you.

7. **Does Your Website Comply With Advertising Laws?** Does your Website meet the FTC's traditional advertising requirements as well as specific requirements for online advertising? Do you send email to your Website users and if so, are your emails compliant with the CAN-SPAM law? The laws regarding online advertising and use of commercial email are very exacting.

8. **Are Your Online Promotions Legal?** The laws for sweepstakes and contests are very complex. Many states in the U.S. (including Colorado) have strict and exacting contest laws, and the penalties for violation of these laws can be substantial. (For more information on Promotions, see Isaacson Rosenbaum's article, *Promotions: Trips and Traps for the Unwary*).

9. **Are You Subject to Specific Rules & Regulations Because of Your Business or Profession?** Are you a public company or are you in an industry for which you must ensure

that your Website complies with specific rules? For example, in July, the Securities and Exchange Commission stated that posting timely information on a public company's Website can be enough for some companies to comply with Regulation FD's public disclosure requirements.

10. **International Issues: Does Your Website Offer Products To Residents In Countries Outside The U.S.?** If so, be aware of international consumer laws. For example, you must comply with the European Union's Data Protection laws before collecting any personally identifiable information from customers in the EU. You also must prevent sales to individuals in embargoed countries in violation of the export control laws. The U.S. Commerce Department's Bureau of Industry and Security is very strict when there have been sales to customers in embargoed countries (even in the digital context where the vendor is unaware that subscribers are from embargoed countries).

This article is a very brief overview of the issues you may face as an online business owner or Website operator. Whatever your online needs, Isaacson Rosenbaum's Intellectual Property Practice Group is available to assist you.