# Legal Issues for Online Sellers

Prepared By:

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Gary enjoys working with creative people including entrepreneurs, small business owners, people who create new technology, and artists. His practice includes:

- Computer/Internet Law & Litigation
- Intellectual Property (copyright, trademark, trade secret & licensing)
- Art & Entertainment Law
- Corporate/Business Law
- Complex Business Litigation

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## 1. Introduction

An overview of the legal issues you need to be aware of as an online seller. I start with the basics, including what form of business entity you should be and why and where to register that entity, and a review of the Amazon and eBay seller agreements. Then I cover a number of other important legal issues facing the online seller. Your business touches upon many different areas of law. Most of them are technology related. The law is constantly changing as it tries to keep up with the changes in technology.

## 2. Avoid litigation

Of paramount importance when running a business is to avoid ending up in litigation. Make all of your business decisions with this goal in mind. Litigation is a terrible way to resolve disputes. It is very expensive, and even more importantly, it takes away your mental energy. You may think that you are in the business of selling widgets, but while you are in litigation, you are in the litigation business instead, and you will have difficulty focusing on work and on your home life. They will both suffer. You are better off turning down many good customers, to avoid the one bad one who sues you, and avoid many good deals, to avoid the one deal that ends up in court.

## 3. Use common sense

The law consists of many rules and precedents. But you can determine the correct outcome most of the time by simply applying common sense. If a deal feels to good to be true, it probably is. If a deal feels bad, it probably is. Most of the time when my clients get in trouble, they had a sense that they might, but they got greedy and decided to do something anyway. Apply the common sense rule and you will need lawyers less often.

## 4. Form of business entity and where to register the entity

The form of business entity is actually a very complex area of law. In this section, I am oversimplifying the law and making recommendations that will work for most people most of the time.

### a) form of business entity

Whenever you conduct business, you are a business entity. By default, if you are one person (or one person and their spouse in some states), you are a sole proprietorship. If you are two or more people working together, then you are a partnership. You do not need to take any legal steps to be a sole proprietorship or partnership.

You can choose to become a different kind of business entity instead. The most common forms of business entity are 1) corporation (“C Corp” or “S Corp”), and 2) Limited Liability Company (LLC). All of these entities are created by state government. Each state has its own corporations division and its own procedures for creating these entities. These days every state has streamlined the process on its website.



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You create both a C corp and an S corp the same way with the state. You are automatically a C corp for federal tax purposes, unless you file a form and pay a large fee to the IRS to become an S corp.

A C corporation is your standard corporation with shares of stock. (The C comes from the section of the IRS tax code that describes how this type of corporation is taxed, it is described in section C). A C Corp must file an annual federal tax return and pay federal taxes on profits.

A S corporation is similar to a C corporation with one big exception. (The S comes from the section of the IRS tax code that describes how this type of corporation is taxed, it is described in section S). A, S Corp must file an annual federal tax return, but it is taxed as if it is partnership, so there is no separate corporate tax.

An LLC is also like a corporation in many ways, but is automatically taxed as if it is a partnership. There is no separate federal income tax for LLCs.

## b) advantage to incorporating

There are several advantages to incorporating, either as a corporation or an LLC.

The main advantage is protection from personal liability. The shareholders of a corporation and the partners of an LLC are not personally liable for the acts of the entity, except to the extent of their ownership interest in the entity. If your LLC harms someone and is sued, you can not be held personally liable. There is one major exception. You are liable for your own acts. If your business consists of you alone, then everything the business does is done by you, and you have no protection from the corporate entity. However if you have even one employee, it is very important that you incorporate in order to protect yourself from personal liability for the acts of your employees.

A second advantage is that other people tend to take you more seriously. They think that because you have become a business entity your company is more serious and more stable than a sole proprietorship. It is a lot like wearing a business suit to a meeting. It does not really mean anything. But perception is important. For this reason alone, most individuals should still incorporate.

A long time ago there were some tax advantages to working as a corporation rather than as an individual, such as the ability to write off medical insurance expenses. These advantages no longer exist.

## c) which entity to choose

A corporation is slightly more work to maintain than an LLC.

If you are going to have many owners of the company, and have outside investors, then you should be a corporation. The advantages of an S corp are overstated. Usually you are better off as a C corp.

If you are one or two people, running a small operation, and you do not intend to become the next Microsoft, then you should become an LLC.

## d) where to incorporate

Generally you should incorporate in the state in which you are headquartered. It is just easier that way.



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Many people think that there is an advantage to incorporating in Delaware. that was true a long time ago, but has not been true for more than 50 years. At one point Delaware had good laws for corporations and most other states did not. These days, every state has good corporation laws. Delaware has a very nasty annual corporation tax that is based on number of shares authorized, not income. Most small companies should avoid incorporating in Delaware.

## 5. When you need contracts

### a) elements of a contract

There is no magic language that makes a contract a contract. Any agreement between two parties where they each agree to do something may be a legally binding contract.

A contract is legally binding when two or more parties intend that their agreement be legally binding. If you agree to go to the movies Friday night with a friend, you have not formed a contract. Neither of you expects to end up in court if one of you cancels at the last minute. But if a writer and a publisher agree that the writer will write a magazine article and the publisher will buy it, they have formed a contract. If the writer goes off and spends six months or more writing that article, the writer can reasonably expect that the publisher will pay for the article when it is finished. The parties have formed an agreement that they expect the law to enforce.

In order for a contract to be legally binding, it must be clear what the parties agreed to do. There cannot be an agreement unless certain basic elements of the contract are agreed upon. At a minimum, you must be in agreement on the following items in order to have an enforceable contract:

identity of the parties;

common objective (what you intend to accomplish);

"consideration" (what each side gives & what each side gets);

the time for performance (if not specified, often a 'reasonable' time period can be assumed)

acceptance of the contract by both sides

### b) oral contracts

Most oral contracts are just as enforceable as written contracts. But they often lead to disputes over what was agreed to. It is extremely unlikely that two friends will remember a conversation they had a few days before exactly the same way. It is highly improbable that two parties who no longer get along will remember a conversation that took place a year ago or more the exact same way. To avoid confusion, put all contracts and understandings in writing. You do not need to put all agreements into fancy, lengthy contracts drafted by attorneys. Often, a simple letter will do:

Dear Joe:

I really enjoyed our lunch conversation today. As I understand it, we have agreed that you will provide me with 500 widgets for $500. I will sell them online and pay you after I collect. If this is not your understanding, please let me know right away. I'm looking forward to working with you.



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Sincerely,

Gary K. Marshall

## c) know what you are signing

The courts treat written contracts seriously. You will be held to the wording of the fine print, whether you read and understand it or not. As one Washington court said:

> Defendants admit they did not read the instrument when they signed it. If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.[1]

You should try not to sign a contract without reading and understanding it first. Realistically, most people will not read everything they are asked to sign. But you should.

To see what you are missing, you may want to try an experiment some time. For one week in your life, be very careful to read every piece of paper that you come in contact with that could be considered part of a contract. Read every sales slip, every receipt, and every piece of paper you are asked to sign. Read the back of tickets to shows and sporting events that you attend. Read the notices on the walls of parking lots, stores, repair shops, dry cleaning outlets, etc. You may discover that you have agreed to all sorts of things that you were not aware of.

## d) online contracts

When doing business online, you are often faced with many contracts that you are asked to agree to. Sometimes the user is asked to accept the agreement before using the website. Other times the agreement simply states that by using the website the user is agreeing to the terms of the website agreement. But there is no opportunity to negotiate. Most people do not read these contracts.

These contracts have various interesting sounding names.

A shrink-wrap license refers to the cellophane wrapping that seals boxes of mass marketed products. Manufacturers will include license agreements inside the packaging of their products, which bind the consumer to the terms of the agreement upon removal of the shrink-wrap.

A click-wrap license refers to a license or other contract that is presented to the user on his computer screen. He must click on a button that says "I agree" or "I accept," the licensee agrees to the terms of use of the contract in order to proceed beyond that screen. In this case the user actually has an opportunity to read the contract before proceeding, although it is often not easy to read or print the contract.

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[1] *Peoples Nat'l Bank v. Ostrander*, 6 Wn.App. 28, 33 (1971), quoting from *Washington Central Imp. Co. v. Newlands*, 11 Wn. 212, 214 (1895).



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A browse-wrap agreement is a contract or series of contracts in which the terms of the contract are displayed on a website page. By using the website the user is presumed to agree to be bound to these contracts.

Are these agreements enforceable? For the most part yes. Normally an agreement has to be negotiated between two parties and they have to reach mutual agreement. A contract that is drafted unilaterally by a dominant party, and presented as a final offer to a party with very little bargaining power is called a contract of adhesion. The terms are generally presented as a preprinted form to the weaker party, who lacks any realistic ability to negotiate the terms. In some areas of the law these contracts are not enforceable.

It is impractical for a website that handles thousands or millions of users to negotiate terms with each user. Most judges accept the practicalities of the situation and will enforce the contracts, even though the user has no ability to negotiate and often has not affirmatively agreed to the contract.

## 6. Guide to reseller's agreements, quick review of Amazon, eBay, craigslist, buy.com selleragreements

The short answer is that most online seller agreements are enforceable and you can not negotiate any changes to them.

Most websites contain one or more online agreements that govern how the website and its owner operate. These agreements usually define the terms of agreement between the company that owns the website and any user of the website. Websites that allow third parties to sell products and services usually have separate agreements for sellers and purchasers. At a minimum, these contracts will include 1) terms of use, 2) privacy policy, and 3) reseller agreement.

Sometimes a judge will refuse to enforce particular terms of the agreement that the judge finds too offensive. See for example a case in Washington called *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 123 Wn.App. 355, 98 P.3d 66 (Wash.App. Div. 1 2004). In that case the Judge said:

> Procedural unconscionability occurs when an 'irregularity' taints contract formation resulting in 'the lack of a meaningful choice' in the circumstances, including "[t]he manner in which the contract was entered, whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print.' " [The burden of proof to show unconscionability rests with the party attacking the contract.
>
> Substantive unconscionability occurs when contract terms are "one-sided or overly harsh." "Shocking to the conscience," "monstrously harsh," and "exceedingly calloused," are terms also used to define substantive unconscionability. Parties must be given wide latitude to contract, even if a decidedly one-sided agreement results.

Both types of unconscionability would seem to apply to most online contracts. Yet judges do not see it that way. They only strike down the most extreme of the clauses. One such clause that



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is occasionally struck down is a clause that requires the user to settle all disputes with the company by arbitration before an industry panel in the company's home town.

A major website like Amazon.com will have not one, but dozens of different online agreements. They refer to and incorporate each other. I tried to follow all of the agreements and gave up after half an hour of tracing through the connections. What I was able to gather from the website turned into 56 pages single spaced in Microsoft word. Similarly buy.com was 45 pages. eBay was only 29 pages, but there were many references to additional terms that each occupies a single page. The total is probably also around 56 pages. Craigslist was the shortest at only 24 pages. In each case I was not able to gather a complete set of the agreements.

Basically the company can do anything it wants, including banning anyone from using its website for any reason, and removing any items for sale at any time. The company does not have to give a reason and does not have to provide dispute resolution. Again, using Amazon.com's participation agreement as an example,

- No ability to accept or decline or even negotiate:

BY REGISTERING FOR AND USING THE SERVICES, YOU AGREE TO BE BOUND BY ALL TERMS AND CONDITIONS OF THIS PARTICIPATION AGREEMENT, AND ALL POLICIES AND GUIDELINES OF THE SITE ARE INCORPORATED BY REFERENCE.

- Resolution by arbitration only (conditions of use agreement)

Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court

- no class action lawsuits (conditions of use agreement)

We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action.

- you may be disqualified from the site at any time for any reason or not reason at all

5 k. We may refuse service to anyone for any reason.

21. Termination. Amazon, in its sole discretion, may terminate this Participation Agreement, access to the Site or the Services, or any current fixed price sales immediately without notice for any reason. Amazon, in its sole discretion, also may prohibit any Seller from listing items for fixed price sales.

- Amazon is not responsible for anything.

4. Amazon's Role. Amazon provides a platform for third-party sellers ("Sellers") and buyers ("Buyers") to negotiate and complete transactions. Amazon is not involved in the actual transaction between Sellers and Buyers and is not the agent of and has no authority for either for any purpose.

15. No Warranties. THE SITE AND THE SERVICES ARE PROVIDED ON AN "AS IS" BASIS. AMAZON MAKES NO OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION:


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> 16. General Release. BECAUSE AMAZON IS NOT INVOLVED IN TRANSACTIONS BETWEEN BUYERS AND SELLERS OR OTHER PARTICIPANT DEALINGS, IF A DISPUTE ARISES BETWEEN ONE OR MORE PARTICIPANTS, EACH OF YOU RELEASE AMAZON (AND ITS AGENTS AND EMPLOYEES) FROM CLAIMS, DEMANDS, AND DAMAGES (ACTUAL AND CONSEQUENTIAL) OF EVERY KIND AND NATURE, KNOWN AND UNKNOWN, SUSPECTED AND UNSUSPECTED, DISCLOSED AND UNDISCLOSED, ARISING OUT OF OR IN ANY WAY CONNECTED WITH SUCH DISPUTES.

Each website offers similar terms. And this is only a sample.

The most common complaint I get about websites like Amazon is that there is no way to talk to someone when you have a problem. This is probably intentional. The Amazon business model is to keep costs down by automating every aspect of the interaction between customer, seller, and Amazon.

I have been able to have reasonable discussions with online companies, both attorneys and customer service people, after they have threatened legal action against my clients. (Note that that is not the same as threatening legal action against the company. That does not seem to get their attention.) But short of legal action, I am not currently aware of any way to actually get a company's attention.

Amazon does have a reseller dispute resolution process, called "Appeal the Removal of Selling Privileges." You can email Amazon a request for reinstatement. The request must include a plan of action that you have developed "that shows you have identified the problems in your selling and/or inventory management practices and addresses how you will change your practices to resolve them." It is clear from this wording that this process is not about reviewing whether you should have lost your selling privileges in the first place. This process assumes that you are guilty.

There is still no easy way to deal with these companies to resolve legitimate disputes and misunderstandings.

## 7. Dealing with dissatisfied people

What should you do when someone writes a bad review of your service, or an angry online post, or starts a flame war against you?

Realistically there is very little you can do. What you should do is respond in a public forum in a non-attacking non-defensive way. Say something like you have a disgruntled former customer. You do not know why they are dissatisfied. You go out of your way to provide excellent customer service. This person has made some very aggressive accusations that have no basis in fact. You wish that they would have contacted you directly if they had a problem with your company. Do not name the person or repeat their accusations. There is no sense in giving them free publicity. If you can get the website to take down his posting, you may want to do so. But he can always post elsewhere and he will know he has your attention and is getting to you, which is what he wants.



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If the person sounds like they might be reasonable, you can try contacting them directly. Sometimes all they want is some attention.

Often this type of person has a lot of anger that he is misdirecting at you. If you attack him you will only provoke him to attack you more aggressively. If you largely ignore him, he will get bored with you and find someone else to attack. That is the best you can do.

You could file a lawsuit and spend tens of thousands of dollars identifying and suing him for defamation .You might eventually end up with a small money judgment that is much less than the attorneys fees that you spent and may very well not be collectable anyway. It will not provide you with a sense of satisfaction. You will provoke him to attack you further in the meantime. You will also give him free publicity for his accusations.

Some attorneys would disagree with this advice and recommend that you actively pursue the person by retaining a skilled and reputable private investigator who specializes in internet and cyber offenses to determine the identity of the poster. You could then engage legal counsel to seek a restraining order in court and to make certain aggressive moves against any assets of the poster. An assets assessment can be made before launching any sort prolonged or expensive damages action. I do not recommend this course of action but it is an option.

Most people understand that there is much “misinformation” on the Internet and you can not believe everything you read online. You will get points with potential customers for handling the situation in a mature fashion.

## 8. Copyright law and the online seller

Copyright law protects creative expression, such as text, pictures, sound and video. It does not protect the underlying ideas and concepts. Copyright protection attaches automatically. Works do not need a copyright notice or registration with the U.S. copyright office to be protected.

Generally, you can not use something you find on the Internet without the copyright owner’s permission. You must assume that anything you want to copy is protected. You do not have permission to use a work until you actually have permission. If you can not find the author, you do not have permission. If you contact the author and the author does not respond, you do not have permission. You must have actual permission in order to be able to use a copyright protected work that you find on the Internet.

There are no special rules for writings on blogs, twitter, Facebook, and other social media. The same analysis applies as for other content. Usually the author of the work owns the copyright. The author does not surrender the copyright by posting the work in a public forum, such as a blog, a twitter tweet, or a Facebook page. Some websites contain terms of use contracts that state who owns the copyright in posts to that website and what people may and may not do with the posts.

There is a common perception that posts on social media sites are free for the taking. That is not true. Copyright law still applies. The custom of freely sharing material may favor a finding of fair use, but only if the other criteria of the fair use exception are mostly met.

You can use a small amount of someone else’s work in your work under certain circumstances. This is called “fair use.” Fair use is a very complicated legal concept. Each


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situation is very fact based. There are no easy rules to follow. There are many easy rules that are repeated all the time, such as it is fair use to copy one chapter of a book or one verse of a poem, etc. These easy rules are all false.

Sometimes a website will include the terms under which you can copy works from that website. If you comply with those terms, you may copy the work.

Copyright law is very strict. If you copy a copyright protected work without the permission of the author, you have committed copyright infringement and you may be sued.

On the other hand, common practice is much less strict than the letter of the law. For example, people often post videos that they have created on YouTube and include commercial music in the video without the copyright holder's permission. Technically that is copyright infringement and the author could sue. But no one has ever been sued for this practice.

Be aware that common practice and copyright law are often at odds with each other. The fact that you followed common practice is no defense to a copyright infringement lawsuit.

You can often use common sense to determine when you can copy a work. As a rough rule of thumb, you should consider if the person whose work you are copying would likely be offended by your use of their work. If the answer is yes or maybe, do not copy. If the answer is no, then proceed at your own risk or consult a copyright attorney. Since there are no easy rules, do not expect a copyright attorney to be able to give you a definitive answer. Usually all they can say that it is or is not likely to be considered copyright infringement.

For example, you should not use a picture of a product that you find on the manufacturers website or print catalog, or on a competitors' website or print catalog without permission.

Generally you can take a picture of a product, even when that product itself consists of or includes a picture. A small picture of a book cover is usually permissible. But if your picture captures the essence of the product, you probably need permission to post your picture. If you are selling someone else's photographs, you can not put their photographs online, but you may be able to use low resolution thumb nail pictures of their products.

You should not copy marketing materials, product lists, or other materials from other websites, especially form a competitor, without permission.

If you have valuable content on your website that you own, you should consider registering that material with the U.S. Copyright office.

## 9. Sending unsolicited or misleading emails and the CAN-SPAM act

The language of this section is taken from the FTC website. See http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business.

The CAN-SPAM Act ((15 U.S.C. 7701, et seq ) is a federal law that sets the rules for commercial email, establishes requirements for commercial messages, gives recipients the right to have you stop emailing them, and spells out tough penalties for violations.

Despite its name, the CAN-SPAM Act doesn't apply just to bulk email. It covers all commercial messages, which the law defines as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service," including email that promotes content on commercial websites. The law makes no


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exception for business-to-business email. That means all email – for example, a message to former customers announcing a new product line – must comply with the law.

Each separate email in violation of the CAN-SPAM Act is subject to penalties of up to $16,000, so non-compliance can be costly. But following the law isn't complicated. Here's a rundown of CAN-SPAM's main requirements:

1. **Don't use false or misleading header information.** Your "From," "To," "Reply-To," and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message.

2. **Don't use deceptive subject lines.** The subject line must accurately reflect the content of the message.

3. **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.

4. **Tell recipients where you are located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you've registered with the U.S. Postal Service, or a private mailbox you've registered with a commercial mail receiving agency established under Postal Service regulations.

5. **Tell recipients how to opt out of receiving future email from you.** Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that's easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you. Make sure your spam filter doesn't block these opt-out requests.

6. **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request within 10 business days. You can't charge a fee, require the recipient to give you any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request. Once people have told you they don't want to receive more messages from you, you can't sell or transfer their email addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you've hired to help you comply with the CAN-SPAM Act.

7. **Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your email marketing, you can't contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.


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## 10. Trademark law

### a) trademarks generally

A trademark is a particular mark that is associated with a particular product. One of the strongest marks is “Coca-Cola”. When anyone sees that mark, they think of a particular soft drink sold by the Coca-Cola Company. Even if you see a car that was called a coca-cola car, you would think that it must somehow be associated with the Coca-Cola Company.

You can not use someone’s trademark in any way that suggests that you or your work might be associated with them. If you do, that is trademark infringement and you can get sued under federal and state law.

There is a trademark term called dilution. It has been around for a long time, but was not in common use until recently, when the federal trademark law was amended to expand the cause of action for dilution. The law of dilution is not settled yet. You can not use a mark in any way that dilutes the owner’s value of that mark, even if your use does not create customer confusion. For example, if you were to create a very evil company and call it the Coca-Cola company, you might be diluting the actual Coca-Cola mark even though not one would think your work is actually associated with the Coca-Cola company.

You can use a mark to refer to the mark itself, as long as you are not creating confusion as to source or diluting the mark. The use of Coca-Cola in this handout is an example of a permitted use. This is called fair use, although it is very different from copyright fair use.

Generally, if you are selling a product, you can use the trademarks associated with that product, as long as it is clear whether you are an authorized reseller or not. And generally, you can refer to the trademarks associated with a competitor’s products when you are comparing products, again as long as you do not imply that your company is actually associated with the company whose trademarks you are using.

There is often no clear distinction between fair use and trademark infringement or dilution. In many cases reasonable minds can differ as to which it is. As with any other legal issue, if you are in doubt do not use the mark or consult an attorney experienced in this area before you proceed.

### b) business names and domain names

Business names and domain names are not necessarily trademarks. But they can be trademarks if those names are associated with a particular good or service and a particular source. For example, as discussed above, the business name “The Coca-Cola company” is a trademark, because the name is associated with the product. On the other hand, Proctor and Gamble is not a trademark, even though it is a company name. Proctor and Gamble sells many products under many familiar trademarks, including Duracell batteries, Charmin, Pampers and Puffs baby products, Ivory Soap. Cascade, Joy and Dawn dishwashing detergent, Tampax feminine hygiene, and many many more. But that does not make Proctor and Gamble a trademark. The typical consumer is not aware of the company behind these products.

### c) choosing a trademark

It can be helpful for your marketing efforts to develop and use a trademark that your customers will associate with trust and good will. You should develop a trademark strategy early


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on in your company's existence. Keep in mind that your business name and domain name can be a part of that strategy.

You want to choose a trademark that is distinctive enough that you can keep other people from using similar names. The more arbitrary and fanciful a trademark is, the easier it is to protect. The more descriptive and generic the mark, the harder it is to protect. Apple as the name of an apple orchard is both descriptive and generic. But Apple applied to a computer company is both arbitrary and fanciful.

You also need to choose a trademark that is not substantially similar to a trademark that is already in use. That is a very difficult task to accomplish. There are so many companies out there using so many trademarks already. Try to find something that is very personal to your company (Mrs. Fields Chocolate Chip Cookies), or very fanciful (Amazon for an online retailer).

## 11. Linking

Generally it is permissible to link to any website page. There are some exceptions. You can not link to a page embedded in a website if doing so bypasses online adds or other information that the website owner wants people to see. Ticketmaster has successfully sued people who link directly to internal parts of its website. It wants everyone who uses its website to start at its main page. You can not link to a website page if doing so is misleading in some way. For example, it is misleading if you talking about sex offenders, and link to the personal page of someone who is not a sex offender.

## 12. Importing and exporting

It is a lot easier to sell products from the United States to other countries and import products from other countries into the United States than it used to be. But there are still many technical rules that are beyond the scope of this author's expertise. If you intend to import or export products, you should research what rules and regulations you need to follow.

One area where legal issues may arise is grey market goods, importing manufactured goods that would normally be unavailable or more expensive in the U.S. It is generally not illegal to sell gray market goods. (Obvious exceptions are restricted products such as prescription drugs and alcohol.) But the use of trademarks associated with those goods can be considered trademark infringement. And the sale of goods protected by copyright can be considered copyright infringement. A case on whether gray market goods infringe upon copyright is now before the U.S, Supreme Court (John Wiley & Sons Inc. v. Kirtsaeng d/b/a Bluechristine99.) In the past courts have ruled in favor of the copyright holder. If you intend to deal in gray market goods, you may want to consult an attorney before proceeding.

## 13. Product content issues

There are legal restrictions on selling a variety of products over the Internet. You are responsible for complying with all national and regional laws and regulations. You can not rely on the fact that a particular site is allowing you to sell goods.



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Each website is free to make its own rules as to which products it will carry. Most of the rules that prohibit the government from censoring or otherwise restricting activities do not apply to private companies.

Keep in mind that these rules vary by region, both by country and by local authorities within each country. If you sell goods within a certain geographic area, it is your responsibility to know and follow the rules and regulations of that geographic area.

The fact that products that are available over the Internet can be purchased form anywhere in the world is putting pressure on local regions to adopt international standards. But most local regions are resisting.

One interesting case in the United States involved child pornography. The United States Supreme Court has developed a local standards test for pornography –would the average person, applying contemporary community standards, find that the work, taken as a whole, appeals to the prurient interest. But this local standard is under attack in the age of the Internet.

One local bookstore owner somewhere in the south (I do not remember the details) was arrested for distributing child pornography. He was selling books that contained pictures of nude children. He was convicted. He appealed. The appellate court overturned his conviction. The court noted that the same books are readily available over the Internet from Amazon and Barnes and Noble, so how could they violate community standards.

## 14. Data collection issues (including marketing to children)

When you collect date from your customers, you are responsible for how you use that data. It is good policy to spell out in your online privacy policy exactly what information you collect, how you intend to use that information, under what circumstances you may share that information with others, and how customers may have that information changed or deleted.

If you collect personal information such as social security numbers or date of birth, you are required by federal law to take significant steps to protect that information from disclosure to third parties. You must delete all computer files and shred all papers files of sensitive information when you are done with it.

When you collect information from or about children, you are held to a higher standard of care for maintaining that data. any time you collect data from or about individuals who are less than 18 years old, you should be very careful about what information you collect, how you use that information, and how you protect that information from discovery by others. Your online privacy policy should disclose how you intend to use that information and how people can have their information removed from your database.

This is especially true for dealing with children under 13 years old. There are very strict rules established in The Children's Online Privacy Protection Act of 1998 (COPPA): If you operate a commercial website or an online service directed to children under 13 that collects personal information from children or if you operate a general audience web site and have actual knowledge that you are collecting personal information from children, you must comply with COPPA. The Federal Trade Commission may and does bring enforcement actions and imposes civil penalties for violations of COPPA. (See http://www.ftc.gov/privacy/coppafaqs.shtm for more information.)



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Consider having a third party such as Amazon or PayPal handle the collection and protection of sensitive information for you.

If you sell products outside of the Untied States, keep in mind that some parts of the world, including Europe, have much stricter rules that the U.S. does about collection of customer information.

## 15. Website contracts

If you run your own website, you should have at least three agreements posted online.

The first agreement should cover the terms and conditions for people using your website. Some of my clients prefer to keep this agreement very general, while others prefer to cover how their website works in detail. I do not recommend one way over the other. It is a matter of personal style.

You should have a privacy policy that spells out what information you collect and how you use it. If you are dealing with children, you need to add very specific terms to your agreement. I generally recommend that you spell out your policies in detail. But this may not always be to your advantage. See for example, the article "Well Written Website Privacy Policy May Backfire" on my technology law blog.

And you should have a legal notices agreement. In this agreement you should include a copyright notice and any appropriate trademark notices. You may want to include any legal disclaimers here as well.

## 16. Collecting money, whether you handle the financial arrangements or someone else does

If you collect money directly from customers, and collect personal information such as credit card numbers and bank account numbers, you have a strong duty to protect that information. A large company such as Amazon has an entire division that deals with detecting fraud and other problems with online payments.

If at all possible, let someone else collect the money for you. Amazon, eBay and other major websites will do this for you. You can also have Paypal collect the money, for you even if you run your own website.

## 17. Collecting and paying taxes

If you sell goods or services within a particular area, you are responsible for knowing the laws regarding taxes.

Online sellers have had a fairly easy time dealing with taxes due to the concept of Internet Neutrality. This concept mainly means that Internet Service Provides can not discriminate against particular customer by limiting their access to the Internet. But this principle also means that local authorities should not tax activity conducted on the Internet. This concept is not legally binding on anyone. It is simply a principle that has been applied generally to the Internet.

For example, states that have local sales taxes have not generally required Internet sales to be taxed.


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Internet Neutrality made sense when the Internet was young and people needed encouragement to conduct commerce over the Internet. Now that Internet commerce is well established, we can expect to see Internet Neutrality gradually erode away. Some states and localities are now trying to collect sales tax from online sellers. It is not yet clear if they can legally do so.

Keep in mind that if you have a physical presence in a state, you may still be subject to taxation within that state. For example, Amazon is located in Washington and must collect sales tax when it sells goods to Washington residents.

It is also possible for a state or other region to tax your activities simply because you are directing commercial activity to their region.

## 18. Jurisdiction, where can you be sued and where can you sue

In order for you to be sued in a particular court, that court must have jurisdiction over you. Jurisdiction is the authority to exercise control over you and your property. When you sell products on the Internet, your potential customers can be anywhere in the world. Because your commercial activity is directed everywhere, potentially, you could be sued anywhere in the world.

Courts will not exercise jurisdiction over you simply because you might make a sale in a particular place. There must be a certain minimum contact with that location. In the Untied States the principle of minimal contact was established in a major U.S. Supreme Court case referred to as International Shoe. (*International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The court ruled that due process requires that, in order to subject a defendant to the jurisdiction of a particular court, he does not need to be present within the territory of the forum, but he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

In the context of Internet commerce, the cases are not consistent, but generally they attempt to determine if the defendant had directed commerce toward a particular territory and had sufficient additional contact with that territory so as not to offend traditional notions of fair play and substantial justice. A certain amount of home towning does happen though, that is, local courts will tend to favor their own citizens over people from out of town.

If you want to sue a customer, you will generally have to sue them where they reside. The fact that they purchased something from you is not sufficient by itself to obtain jurisdiction over them in your home court.

## 19. Liability issues

You can always be held liable for our own personal conduct. If you manufacture and sell a defective product that injures someone, you can be held accountable.

If a product or service that you sell or advertise harms someone, then the rules are not as clear. It is a good idea for you to disclaim any liabilities over third party products in your terms of use/sale.

This is an area of law where common sense usually works. If you sell a book and the book describes how to rob a bank, you will not usually be held liable if a bank is robbed. But if you


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are promoting an alternate society where bank assets should belong to everyone and you are encouraging someone to rob a bank, then you can be held liable.

But the cases are not consistent. In two nearly identical cases, Solder of fortune magazine printed adds in which mercenaries offered their services. In both cases the mercenary was hired by a magazine reader to kill someone. In both cases the intended victim survived and sued the magazine. In one case the magazine was held liable. In the other there was no liability.[2]

## 20. When you have to comply with a state's statutory requirements

Some states take a very aggressive stand over regulating products sold within their state, California comes to mind. If you are going to sell products to citizens of a particular state, then you may be subject to that state's statutory requirements. Again, it is up to you to know and comply with state regulations. A sense of fair play has tended to keep states from regulating the sale of most products, with obvious exceptions such as alcohol and lottery tickets.

## 21. Other publications for entrepreneurs by this author

The following publications for entrepreneurs are available for free download at the Law Offices of Gary Marshall website on the resources page at http://www.marshallcomputer.com/resources.html.

*Top Ten Legal Mistakes Entrepreneurs Make (and how to avoid them)*

*Intellectual Property (IP) Licensing Agreements Top Ten*

*Legal Issues for Online Resellers*

Also check out Gary Marshall's Technology Law Blog at http://marshall2law.com/.

[2] See *Norwood v. Soldier of Fortune Magazine*, 651 F.Supp. 1397 (E.D. Ark. 1987) and *Eimann et. al v. Soldier of Fortune Magazine*.



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## Legal Disclaimers

This brochure is not intended to be a substitute for personalized legal advice. I have presented only an overview of the legal issues. There are many nuances and some exceptions to these general legal principles. The Law can vary from state to state. This general legal advice may not apply in your state. The law is constantly changing, especially in the areas addressed in this article. In addition, real problems are usually very fact based. This brochure may contain descriptions of legal experiences and outcomes of prior cases. Each legal matter is composed of unique issues and these examples are not intended to promise nor do they guarantee future results. Every situation is different and the law may apply differently depending on the specific facts of your case. This brochure and any discussion with the author or talks by the author related to this brochure do not create an attorney-client relationship. If you have a specific legal problem, you should consult an attorney.

Because I touch upon some tax issues and some import and export issues in this brochure, I need to tell the reader that I am not a tax attorney or an import/export attorney. To the extent that I have raised issues related to taxes, imports, and/or exports, I have done so only to inform the reader that certain legal issues might apply to them. Other issues that I am not aware of might apply as well. If you have or think you may have a tax issue, or an import/export issue you should consult an attorney who is experienced in that particular area of law.

**IRS Circular 230 Disclaimer**: To ensure compliance with requirements imposed by the Internal Revenue Service IRS Circular 230 Disclosure, I must inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any business transactions or other matters addressed herein that are intended to be structured in a tax-efficient manner.



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