



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

E-Commerce Checklist for General Counsel

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 Supplemental Material for Course 311
 Conducting Business Online-What General Counsel Need to Know
 ACCA Annual Meeting 2000

The following checklist is intended to assist General Counsel of companies who have an existing E-commerce website or who intend to launch an E-commerce website. If your company is about to launch a site, legal counsel should get involved early to review Internet policies and to protect all legal aspects of the proposed site. If your company is already operating a website, legal counsel should perform an audit of the site to determine if your company is protected from all Internet legal risks.

I. If you are a seller of goods:

- a. Create user and privacy agreements.
- b. Post clear policies regarding shipping, sales tax and return of goods.
- c. Make sure that your users click through and accept your user application and privacy agreements. .

II. If you are a provider of services:

- a. Create a clear statement of the services you intend to provide.
- b. Require the user to click through to a user agreement and privacy agreement.

III. Intellectual Property Issues

A. Protect Your Company's Intellectual Property

1. Takes steps to register ownership of your company's intellectual property, without which there can be no licensing of that property to hosts, developers, or affiliates.
2. Enforce ownership of your company's intellectual property to ensure that the company will avoid online infringement and to protect the value of company's intellectual property.

B. Identify "copyrightable" material on your web page

1. Review all editorial content
2. Review screens for protection as "audiovisual works" (patentable)
3. Review all graphics (place appropriate copyright/trademark sign where required)
4. Confirm that you have valid/proper licenses to use any third-party content and graphics
5. Check HTML code (metatags or "Key Words"/Banners)

C. Make sure that you follow all Internet protocol concerning agreements

D. Protect the Company's Domain Names on the Internet

1. Understand Domain names: Domain names are defined as alphanumeric addresses that are comprised of a "top level domain" (ie. ".com", ".net", ".org") and a source-identifying "second level domain that precedes the "top level" which indicates the specific user (ie. "tower records" in "towerrecords.com")
2. Strategies to reserve domain names:
 - a. Register domain names when a start-up company forms, two companies merge, or company spins off of another existing company.
 - b. Register all reasonable variations (misspellings, different top level domains) of a specific domain name to minimize "dilution" of famous marks and "cyberpirating"
 1. File trademark applications for all domain names.
 2. Pay for multi-year registration for all domain names and docket renewal dates for all applications.
 - c. To secure specific domain names, refrain from making public any possible start-up or merger until the domains are registered-this minimizes the risk of possible "cyberpirates."
 - d. In transactions that involve purchasing domain names, confirm that representations and warranties state that the company owns all rights to its domain names and that the licensing of the trademark/domain is a non-exclusive agreement
3. Protect registered domain names: Two avenues for enforcement of domain names:
 - a. The Lanham Act Suit (15 U.S.C. 1051 et seq.) allows for suit in a federal district court once trademark infringement, unfair competition, or trademark dilution occurs.
 1. The Anticybersquatting Consumer Protection Act (15 U.S.C. 1124, ratified 11/29/99) which makes it unlawful for anyone who uses "bad faith" intention to profit from registered domain name that is confusingly similar to a distinctive mark or

1. The Anticybersquatting Consumer Protection Act (15 U.S.C. 1124, ratified 11/29/99) which makes it unlawful for anyone who uses "bad faith" intention to profit from registered domain name that is confusingly similar to a distinctive mark or "dilutes" it.
- b. "ICANN" (Internet Corporation for Assigned Names and Numbers), the organization in charge of the administration of domain name registrations, provides an arbitration procedure:
 1. ICANN proceedings are designed to be cheaper than courtroom litigation
 2. "Uniform Dispute Resolution Policy" of ICANN requires a "bad faith" on the part of the "cyberpirate," similar to that in the Anticybersquatting Act.
 3. Company files complaint with any three of the "Approved Providers" who conduct arbitration services: The World Intellectual Property Organization in Geneva, Switzerland ("WIPO"), The National Arbitration Forum in Minneapolis ("NAF"), or The Dispute.org/eResolution Consortium in Canada ("DeC AF").
 4. Company must show that the registrant's domain name is confusingly similar to the company's trademark, the registrant has no rights or legitimate interest with the registered domain name, and that the registrant is using the registered name with "bad faith."

E. Methods to Avoid Online Infringement Liability

1. Understand the "Digital Millennium Copyright Act" (DMCA) 17 U.S.C. 512, specifically (a) the Online Copyright Infringement Liability Limitation Act, which creates limitations on the liability of online service providers for copyright infringement when engaging in certain activities
 - a. Protects from claims against owners of web sites that promote interactive Web sites that allow third-party posting
 - b. Creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance and repair-companies must adhere to take-down and put-back procedures
 - c. Designate an agent for purposes of notice when questionable material is posted in site
 - d. Remain passive to third-party content so as to not interfere and become an involved party with questionable information
2. Check Hyperlinks to Other Web Sites to Minimize Risk of Liability
 - a. Avoid using others' trademarks and logos in links and avoid describing sites to which you link
 - b. Link only to the first page of the site while avoiding linked sites' advertising
 - c. Be sure to include disclaimers stating no relationship with linked sites
 - d. Obtain hard-copy (written) linking agreements
 - e. Do not link to sites that display obviously infringing materials
3. Risks encountered if adoption of other web site information is necessary
 - a. Avoid appearance of adoption of stock analyst Web site by simply not linking or disclaiming content of site as having no relation to yourself
 - b. Copyright and trademark infringement
 1. Company Web site may be liable in a conspiracy-like infringement for linking to other sites where copyrighted information is illegally copied or that encourages trafficking to such sites
 - c. Lanham Act violation if consumer is confused about origin of the site or is misrepresented of the contents of the site-greatest risk if company uses sites' logo or describes the site

IV. Privacy Issues

- A. Review your company's privacy risk and take appropriate steps.
- B. Determine if your company is required by the FTC or state law to have a privacy policy:
 1. Review your own online privacy practice.
 2. Compare current written privacy policy of company with actual practice of privacy online.
 3. Analyze cost/benefit of adopting additional protections.
- C. Determine if a privacy policy is required.
 1. Does the information your company collects relate to medical sites, financial institutions, or is your site likely to be visited by children? (Note that the FTC currently does not generally REQUIRE a privacy policy).
 2. Evaluate reasons to post specific policy (and use agreement regarding company's intention of use of information gathered).
- D. Protect your company from online privacy liability:
 1. Adhere to posted privacy law as required by Federal Trade Commission (currently self-regulation) or state law.
 2. Post in-depth privacy policy on site of what information is and for what it will be used (ie with regard to data-mining, cookies).
- E. Review your company's current privacy policy (if it now exists):
 1. Clearly display current policy on web site (link to policy page when any consumer information is obtained).
 2. Determine if company's failure to observe posted policy could be an unfair business practice as in FTC v. Toysmart.
 3. Review your policy in light of FTC's current self-regulation policy's four components:
 - a. Notice: Provide clear and conspicuous notice of what information collected would be used
 - b. Choice: Allow consumers the choice of whether their personal information could be used for purposed outside of the intended transaction
 - c. Reasonable Access: Let consumers have access to the information collected in order to allow the consumers the choice of correcting the information or deleting it
 - d. Adequate Security: Provide enough privacy of the consumer information collected so as to prevent unauthorized access
- F. Protecting privacy of consumers:
 1. Cookies-Does your company's website track what information the consumer reads online?
 2. Data-mining-How does your company use/misuse consumer information that is obtained when the customers visit the company's site and

2. Data-mining-How does your company use/misuse consumer information that is obtained when the customers visit the company's site and fill out templates that ask for personal information?
- G. Protect attorney/client privilege when communicating within and outside your company.
1. Communication via e-mail.
 - a. Attorney-client privilege does exist over e-mail sent over Internet as there is a reasonable expectation of privacy and communication can be marked as confidential.
 - b. The "Electronic Communications Protection Act," U.S.C. 2510-21 maintains pre-existing privileges of intercepted e-mail.
 - c. Nevertheless, Counsel should caution clients that e-mail communication might be intercepted by a third-party.
 2. Communication via cell-phone.
 - a. Due to a reasonable expectation of privacy, attorney-client privilege should exist during cell-phone communication.
 - b. Counsel should warn client that transmitted information may be heard by a third-party.
 3. Communication via fax.
 - a. As ruled in See Larson Associates v. Nikko America, Inc., attorney-client privilege is waived because no explicit precautions are taken to avoid third-party interception, despite the fact that a reasonable expectation of privacy.

V. Workplace Issues

- A. Stress Review of Employee Handbook/Company Policies
1. Restrict Internet and e-mail use to work for company
 - a. E-mail is formal, public, and permanent.
 - b. Clearly state in employee handbook the extent to which personal/non-business e-mail/Internet use will be permitted.
 - c. Company e-mail is the property of the corporation
 - d. Prohibit (1) offensive, obscene, defamatory and derogatory material; (2) copying and transmission of copyrighted material; (3) large files and "chain" e-mail; (4) transmission of company secrets; (5) e-mail solicitations and proselytizing
 2. Clearly state that the employer has the right to randomly inspect e-mail and to monitor Internet usage
 - a. Company should comply with "Electronic Communications Privacy Act" of 1986 (18 U.S.C. 2501 et seq., 2701 et seq.) which prohibits intentional interception of use and disclosure of electronic communications.
 - b. The exception to the ECPA exists for employers to monitor employee use without any liability.
 - c. Company should still obtain employees' written consent to monitoring Internet usage and e-mail.
 3. Clearly state that employees should hold no expectation of privacy in regards to e-mail and Internet usage.
- B. Review Internal Policies (Employee Handbook) and Train All Employees and Independent Contractors on the Risk of Loss of Trade Secrets Through E-mail and Chat-Room Usage
1. Company may be liable for employee postings in chat-rooms under Rule 10b-5 under respondeat superior theory
 - a. Disclosure of stock information within a chat-room may be viewed as a "selective disclosure" with insider trading implications
 2. Responding to rumors
 - a. There is no general duty for employees to respond to rumors in a chat-room
 - b. If employee responds, it becomes necessary to update/correct response
 - c. Best policy for employees is not to comment
 3. Company policies regarding chat-rooms should be known
 - a. Employees should generally not be allowed to chat on company time
 - b. Employees should be informed not to post, even to defend the company unless specifically instructed to do so
 - c. Company should prohibit any discussions within chat-rooms of company stock
 4. Avoid hyperlinking to chat-rooms as it may be seen as entanglement with content of the site
- C. Implement a Trade Secret Protection Program That Strictly Prohibits/Limits Electronic Communication of Confidential Information
- D. Review Current Procedures Against Federal and State Employment Law Requirements Regarding the Retention of Records
1. Retention policy
 - a. E-mail should be routinely deleted
 - b. Employees should be responsible for deleting e-mail
 - c. Suspend retention policy only in times of litigation
 2. If employment decisions are being made via e-mail, maintain appropriate records
- E. Train All Employees and Independent Contractors Regarding the Importance of Attorney-Client Privilege ♦ Require Attorney-Client Privilege in the Subject Line and Dissuade Forwarding
- F. Be Sure to Include Appropriate Notices and Disclaimers, Using "Click Through" Procedures, on All Open Position, Resume-Posting, and Other HR-Related Material

VI. Insurance Issues

- A. Internet-Related Property Damage Not Covered by the Typical Policy
1. Loss of data (may that be consumer information), without physical damage to computer equipment
 2. System downtime
 - a. Web site remodeling
 3. Other causes of loss
 - a. Programming complications/failures
 - b. "Internet Service Provider" (ISP) failures
 4. Limited coverage of data media

5. Partial suspension of operations
- B. Internet Liability Not Covered Under a Standard "Commercial General Liability" (CGL) Policy
 1. Loss of data
 2. Exclusion of advertising of business, broadcasting, publishing, or telecasting
 3. Geographic scope of Web page

VII. Public Company Issues

- A. Disclosure Issues on Your Web Site
 1. Legal review of statements made on your Web site
 2. Keeping Web site current, and up-to-date on company's strategy
 3. Be sure to archive all content removed from the site and maintain a log of precise dates and times that content goes up or is taken down
 4. Separate consumer/customer information such as sales and marketing from investor information within the Web site
 5. Disclaim all linked content and avoid third-party logos
- B. Discussion of Your Company on Third-Party Web Sites
 1. Monitor Chatrooms for reference to Company
 2. Duty to Correct Errors
 3. Responsibility for employee comments

VIII. Web Site Development and Hosting Agreements

- A. Obtain warranty by the developer that content and code are not infringing
- B. Obtain indemnity for liability by developer against third-party claims for infringing content, and any negligent or intentional acts or omissions of developer.
- C. Designate developer's creative work as a "Work for Hire"
- D. Obtain pass through licenses of third-party technology
- E. Allow owner right to terminate, transfer, and assign content
- F. Provide easy access to site
 1. Provide minimum uptime of site to consumers
 2. Terminate agreement with developer if site is not easily accessible
 3. Make developer provide a prompt transfer of web site upon termination
- G. Spell out procedures for internal review of content before posting on site
 1. Legal compliance
 2. Adherence to marketing and communications strategies
- H. Designate an agent to oversee Internet activities
- I. Designate one individual of legal staff for Internet procedures:
 1. To answer questions regarding content infringement, and hyperlinking
 2. To update/revise disclaimers, terms and conditions, notices, privacy policies, etc.
 3. To supervise DMCA procedures
- J. Determine whether the Website complies with all laws and regulations affecting company's particular business

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