

The ABC's of Website Law

By Judith Silver, Esq.¹

Age

The age of your users impacts the website. According to Federal Trade Commission regulations through the Children's Online Privacy Protection Act (COPPA), a website must get a parent's permission for children under 13 to disclose information. Also, remember that children under 18 should not be permitted to view information which is adult in nature. In addition, children under 18 may not be able to agree to contracts such as your website user agreement and purchase contracts. Finally, FTC also regulates advertising and other content directed at children.

Bulletin Boards, Chat Rooms, Etc.

Any posting ability by users should be subject to site submission rules and a user agreement. The rules should obtain users' consent not to post pornographic, defamatory or infringing materials and, through your user agreement, consent to your company not being liable for other users taking such actions.

Copyright

The footer of your site should display a copyright notice for the content of the site. The notice should read "© [date] [copyright owner name] All rights reserved. You should also deposit a copy of the site with the Copyright Office to record ownership of the site's content, and look and feel. Finally, under the Digital Millennium Copyright Act, depending on the purpose and the users' activities on the site, your company may be eligible to register for limited liability offered by the Act for the site. You should consult your attorney for review of the Act and how to register.

Domain Name

When building your website, domain names are an important part. Often they are directly tied to your business name, your logos and your brand. Businesses often fail to give proper thought to which domain name to choose.

Picking a domain name should have the same careful thought as naming other products or services. Choosing a domain name should include analysis of trademark law in relationship to the name. Under current law, domain names may be awarded to trademark holders over others through arbitration or

¹ Judith Silver is a computer, internet, intellectual property and free speech attorney licensed in CA, FL and TX. This article is informational only and not to be relied on as legal advice.

litigation. This means that that having trademark registration in the same name as your domain name may ensure that you retain ownership of the name.

Export

If persons from other countries use your site, then you are exporting. If you sell to such persons, you are exporting the item you sell and entering into contracts with persons of other countries. If you use encryption on the site, then you are exporting technology regulated by the Department of Commerce and Defense. Various government departments regulate the countries with which US companies may do business and when a company needs an export license to transmit items, technology or information abroad. Doing business with certain countries, such as Iraq, Iran, Cuba, North Korea, Syria, Yugoslavia and others, is severely restricted. Depending on the information on your site, what kind of business you do, the technology and information involved, your site may be subject to these regulations and you should consult with your attorney about these business decisions.

Framing

It is important to be careful how your website frames to other sites. There have been trademark cases regarding consumer confusion over which site is which, and which site is the source of the content and data. Also, be careful because some sites' "terms and conditions" and/or "user agreements" prohibit collecting and reprinting data displayed on the site – even if such data is factual, such as times and places for events.

Giveaways

Sweepstakes, contests, lotteries and giveaways are governed by state and national laws as to how they must be conducted. Florida and New York require registration with the state if the prizes are over \$5000 in value. Most important, you should have rules outlining the terms and conditions of the giveaway. The rules are an offer from the sponsor which the entrant accepts by entering. The offer, plus the acceptance, make a binding contract covering the giveaway.

Home Page

On the footer of the home page of the site, you should have a link to your privacy policy, your user agreement or terms and conditions, and your copyright notice.

Insurance

Be sure that your business insurance covers website activities. Often website activities are excluded from errors and omissions and other business insurance. Lloyds of London and a few other companies have insurance specifically covering materials and sales via websites, including security of credit card numbers and other important data.

Jurisdiction

One of the primary reasons for having a User Agreement is to better address the issues of jurisdiction. Under current law, website owners may be subject to jurisdiction and law in any state or country where its users are located. Being subject to the law of so many different locations makes trying to comply with the law and trying to assess your risk tricky. An attorney can help you consider which markets are your highest risk and how to lower your risks through consultation with local counsel or blocking users from those regions. Additionally, you should consider that many foreign jurisdictions do not offer protections for intellectual property which are comparable to the US. Therefore, if a user in such a region steals content or software from your site, you may have little recourse by law, and a hard battle to fight on foreign soil and in a foreign language.

Kill all the lawyers.

A mean and horrible, horrible joke which Shakespeare penned in Henry VI and I hear far too often, although never in reference to me.

Linking

When linking to other sites, you should consider two factors. One is what word or image you are using for the link and whether it is a trademark of another site or company. If so, you need the trade mark owner's permission to post the company's trademark on your site. Second, you should always link to the home page of a web site since there have been "deep linking" cases claiming loss of advertising revenue which would have been gained if the users had been directed through the home page.

Metatags

Courts have not permitted use of another company's trade marks as metatags on competitors sites. These cases arose when company A used company B's trademarked term in the metatagging of company A's site so that when a user looked for company B, company A would come up in the listing. For example, it would not be permitted for Coke to use the metatag "Pepsi" on the Coke website.

Notification

Under the Digital Millennium Copyright Act, there are required procedures for someone to notify a website that materials on the site may infringe that person's copyright. If the Digital Millennium Copyright Act applies, these procedures should be outlined in a notification policy on the site.

Obscenity.

Materials which are considered "obscene" by state or federal law are not permitted on the internet and, especially, may not be viewed by children. What is obscene is based on the local standards of the viewing community. This makes prior determinations of what is acceptable somewhat complex. If you have questions about your site and its content, you should review them with your attorney.

Privacy Policy

If you collect any information from users of your site, using cookies or otherwise, the Federal Trade Commission requires you to have a privacy policy. The privacy policy should contain explanation of how you collect the users' information, how and where the information is stored, how the user can delete or change the information, and to whom the information is disclosed and for what purpose. The European Union also has similar and strict regulations on collection of information via websites.

Quick, call Judith Silver with your legal questions . . .

Rules for Mail Order

The FTC and some states have guidelines for selling items by mail which have been extended to cover internet sales. These guidelines cover return policies, customer contact and other information about how to inform your customers about your products, shipping and sales procedures.

SEC

The Securities and Exchange Commission considers a website a means of disclosing information to the public about a company. Therefore any information disclosed on your website should be given the same review and consideration that your company gives all public disclosures with regard to "forward looking statements" and "material" information.

Trademark

Trade marking the name of your company, logo, mottos and domain name is an important part of your business development and should be reflected on your website. Your nationally registered marks should display an ® and unregistered marks should display a ™ or ™.

User Agreement

Having a user agreement or “terms and conditions” may be the most important part of a website. A user agreement requires each user to agree to be bound by a contract governing his or her use of the site by clicking “I agree” before being permitted to use the site. Be aware that simply posting your legal agreement without forcing the user to click “I agree” prior to use is unlikely to bind your users to the terms. The user must take an active step through which she agrees to the terms and must not be allowed to proceed to use the site without such step.

A user agreement allows a company to:

- a) dictate how the site may be used (for example, for reading and printing materials),
- b) dictate how the site may not be used (for example, reverse engineering the coding tricks, copying content, for illegal purposes),
- c) dictate who may use the site (for example, persons over 18, US citizens)
- d) dictate procedures or policies for the site (for example, return policies, complaint policies, notification of copyright infringement policies)
- e) dictate your company’s waiver of implied legal warranties (for example implied warranties of non-infringement, fitness for a particular purposes, etc.)
- f) dictate the limit of your company’s liability for the site, other users postings on your site, sites you link to, etc.
- g) dictate jurisdiction for any disputes about relating to the site

View Source

The ability for users to view the source code of nearly all websites by using the “view source” command in browsers means that the source code for your website is not a protectable by trade secret law. For something to be protected by trade secret law, it must not be publicly known, the owner must take some effort to keep the information secret, and the information must have monetary value to the owner. If the information is publicly available on the web through “view source”, the information is not a trade secret.

Warranties

Statements on your website about your products and services are express warranties to customers. It is important to carefully review all website text to be sure that what your company promises is true and corresponds with its other policies and advertising.

When you review, look for statements that are absolute statements which may be hard to prove or verify if the Federal Trade Commission were to request that you do so. Examples of such statements are: “Our printer works with all software.”, “Our services are the best.”, “We guarantee that our product will always perform perfectly.” Also, be aware that the FTC has specific guidelines that should be followed for use of the words “free” and “guarantee” in advertising or on your website.

Also review your website to be sure that the text matches your regular business contracts. For example, your website should not promise a sixty-day money back guarantee if your contract states only a thirty day warranty.

XXX.

If your site contains adult materials, be sure to consult your attorney regarding special legal requirements regarding notice prior to entering the site, notice requirements under federal regulations and other laws applicable to the adult entertainment industry.

Your Risk.

The law is all about risk. The more you time and money you spend following laws and regulations governing your business, the lower your risks of fines or successful claims by government or third parties.

Zero.

The amount your company may have left after ignoring all the laws, regulations and risks.