

**#1 International Best Seller**

# **COVER YOUR ARSE ONLINE**



**A Guide to Protecting Your Online  
Business Assets**

**Jeanette Jifkins**  
**LLB LLM GDLP**

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Online Business Assets**

**By Jeanette Jifkins  
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# Copyright

Cover Your Arse Online

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## Foreword

Currently around the globe companies, and even Governments, are struggling to keep up with the ever-changing world of digital business and E-commerce.

When it comes to creating an online income or taking your traditional business to the internet, it's never been more important to make sure you are compliant with the needs of the digital commerce world.

Traditional business thinking will only get you so far in the digital world, and then you need to recognise that what you thought you knew, just might not apply to the online world.

Jeanette has become a specialist in helping people cross this potential mine field by becoming an expert on the requirements of meeting your legal obligations online. Capped with the fact that she can also help you protect your interests, giving you the space and ability to do what you do best, knowing your best interests are taken care of.

Having been in the online space since 2006 I've had a number of challenges including copyright theft of writing as well as images, Trading Name legal challenges, and Trade Mark violations, to name a few. Thankfully, having received the right advice, I was able to handle these challenges and come out on top every time.

All of these challenges can be overcome simply and easily, if you follow the correct steps as outlined by Jeanette in this leading edge book and in the next level strategies she can do for you.

## Cover Your Arse Online

As an online marketer; using strategies ranging from email marketing, affiliate marketing to employing customer testimonials, you need to make sure what you do has an impact, while balancing the correct protection your digital asset may need.

This new digital frontier can be daunting and exciting at the same time, and if you're ready for the challenge, it's a highly worthwhile one.

Follow the advice shared in this fantastic, comprehensive, yet simple to follow book, and you'll be glad you invested your time, money and energy into reading it.

To your Success

### **Matthew Clarkson**

eBay Expert, Author, International Speaker

[www.EasyHomeBusiness.com.au](http://www.EasyHomeBusiness.com.au)

# Introduction

*“Any business that is looking for new customers needs to understand the Internet and how to market their goods or services through it.”*

**Eric Lefkofsky**

You don't know what you don't know.

No one uses yellow pages anymore. If you want to find anything, you just search online. So if you are one of the 78% of Australian businesses, 56% of US businesses or 68% of UK businesses not already online, you are missing a lot of customers.

Just think about your own behaviour.

The last time you wanted to find a new mobile phone, what did you do? You search online for features and plans before heading down to your local supplier to really see what it looks and feels like. We do the same with vehicles, household items, and even education.

Loads of retailers are now enabling people to buy online and pick up in-store, adapting to online shopping habits really well. They still provide the option of delivery, but they have anticipated that you'd rather collect your new item straight away than wait a week. So what's stopping you getting online?

## Cover Your Arse Online

This book has been designed to alert you to the risks you might not really understand, help you get your business online, explain the key concepts in a practical way to give you peace of mind and cover off the legal issues that might otherwise be holding you back.

You might have heard some horror stories. Things like...

Trade mark disputes, where an enterprising couple spent six months developing and investing in products and branding. Three weeks prior to launch they made their shiny new website live and immediately received a legal letter of demand to take it down due to trade mark breach. Unfortunately, they didn't go through the simple step of checking for competing or potentially competing businesses. We'll show you how.

You might have come across stories about companies that have been hacked and had to pay a ransom (Crypto-lock or Ransomware) to get access to their website and make it visible and accessible to the public again. Although the implications are legal, the set up to protect yourself is mostly technical, and we'll give you some tips there too.

An increasing number of people are receiving letters of demand in the mail asking for take down and then payment for copyright material. These demands should not be ignored! Yes, there are some really low-risk situations where you can take down the offending content (writing, image, video, audio), apologise and move on, but in some cases, you may need to negotiate more carefully to avoid a court action.

Other problems arise more indirectly and are about the way you do business. People who sell products have specific consumer protection laws to comply with, and once you understand those rules, compliance is pretty straightforward.

However, if you are a service provider you have the challenge of making sure that both you and your client understand what you can and cannot do for them.

## Cover Your Arse Online

We've developed a legal system that provides ample opportunity for people to abdicate any responsibility for their own actions and blame others if they can. This leads to higher professional indemnity insurance premiums and 'he said, she said' arguments. If you have a clear service agreement in place, lots of disputes can be avoided. The challenge with a service agreement is to make it logical, easy for you and your client to understand and relevant to your business, not copied and pasted from someone else.

And for ease of understanding, this book has been produced with you in mind. You won't find a whole lot of references to cases or legislation. Specific examples and case studies are based mainly on Australian examples, but the areas of law you are reviewing are fairly consistent around the world. No matter what country you live in, the principles described in this book will have some application to your online business.

The object of this book is to help you recognise where there might be risks to your business, and then to be able to make an informed decision about what you can do to protect it. You will need to talk to a lawyer in your country who understands the online space to get specific advice relevant to your business. This book helps you to ask the right questions and provides context for the answers.

## Cover Your Arse Online

## Endorsements

*I found this book to be a surprisingly easy read - really important for business people. I enjoyed the specific examples coming from Jeanette's own experience that emphasised the point and made it easier to relate to. The advice on trade marks was quite timely for me as my Diploma of Business clients had to research that information during their studies. I'm glad to find such a useful book that I can confidently share with the business people I work with.*

**David Green**

Business Coach

ActionCOACH

[www.actioncoachnorthbrisbane.com.au](http://www.actioncoachnorthbrisbane.com.au)

*This book is very comprehensive in an area where I have had to learn to correct errors by experience! A new person to the field of using the internet for their business would be well advised to read this book and be guided by this very practical advice.*

*Having been on the internet with websites and blogs for 15 years, this advice back then would have saved me considerable angst, time and some money, let alone an enormous waste of time and energy. I lost my original website .com through a silly forgetting to renew my registration on time!*

**William MacLean**

Corporate Finance and Wealth Strategist, MacLean Finance

[www.maclefinance.com.au](http://www.maclefinance.com.au)

## Cover Your Arse Online

*Wow, a legal guide that makes sense, is a joy to read, and helps a small business owner navigate the minefield of running a small business. Jeanette nailed it. A must read!*

### **Suzanne O'Shea**

Owner, SOS HR Services

<http://www.soshrservices.com.au>

*What some may call a boring subject, written in a clear and entertaining way, providing all the tools and facts you need to have a safe and legal online business.*

### **Piemur Thomson**

Project Management Student

*Cover Your Arse Online is a must-read for anyone in online business. I have had an online business for 3 years, and WOW, am I behind the times already. Make sure you are ticking your boxes, there's so much valuable information whether you are starting out, already established, or even just thinking about a website business. Thanks Jeanette you have opened my eyes! Don't start without it, don't continue without it!*

### **Trish Hammond**

CEO & Founder, Plastic Surgery Hub

<http://www.plasticsurgeryhub.com.au>

*Informative, exceptional advice and guidance for anyone getting online for business or even personally. Recommend to all my clients as a mandatory resource.*

### **Phil Sealy**

CEO Pro Leaders Academy

<http://proleadersacademy.com.au>

## Cover Your Arse Online

*I am really impressed with how simple yet comprehensive this book is. I knew most of this but I still got a couple of valuable reminders about some actions I must take.*

### **Tracey Gilmartin**

Manager, Y Marketing

<http://ymarketing.com.au>

*“Cover Your Arse Online” is a user-friendly and essential guide for any business with an online presence, whether a local start-up or well-established global entity. I found the sections on the obligation for web-accessibility for disabled users, the dangers of cut & paste conditions, and how to limit liability for viruses and malware passed through your website particularly useful.*

### **Sue Lester Mindset Coach,**

Growing Content

[www.growingcontent.com.au](http://www.growingcontent.com.au)

*As professional website investors, we know the importance of protecting our online assets and this book is essential reading if you own a website, or about are to invest in one! Jeanette has been sharing this important knowledge at our digital marketing conferences for many years, and her greatest skill is breaking down the complexity and confusion of law into a simple, easy to understand guide so you can protect your wealth and business. There is many thousands of dollars worth of legal knowledge here, and it could save you millions.*

### **Matt and Liz Raad**

Website Investors and Educators

[mattandlizraad.com](http://mattandlizraad.com)

## Cover Your Arse Online

## About The Author

*“What do lawyers learn in law school? They learn to win... What we’ve got to start thinking about is ‘How do we solve problems?’”*

### **Ben Carson**



Being a lawyer isn't the same as being a police officer. We don't go around prosecuting people for doing things wrong, we either work to create structures or agreements to help our clients avoid problems, or help solve problems after they arise.

Funny that most jokes about lawyers don't reflect that. And yes, I've heard most of them, and some are even amusing.

It wasn't always my ambition to be a lawyer, but it is something I am good at. When I started law school I was hooked. I enjoy thinking through problems looking for workable and practical solutions and I love to write contracts. It's intellectually challenging work, and rewarding when clients are happy with how I've helped them.

## Cover Your Arse Online

It seemed like I studied for a long time completing a bachelor degree, a Masters with a focus on international business, an honours paper on international arbitration that after two years in assessment hadn't been graded, so I gave it up, and a graduate diploma in legal practice. During that time I also managed to live in two countries, get married and divorced and have my first child.

Since then I've worked in small, medium and large law firms, in-house in a not for profit and then a medium enterprise and now running my own legal practice and consultancy.

Most people comment that I'm not what they expect from a lawyer. I'm open and approachable and easy to talk to, which seems to be a surprise. After years of encouragement from my husband, I also ride a motorbike and don't mind presenting at business groups in my motorcycle gear.

If you'd like to get in contact, you can find me at  
[www.onyxonlinelaw.com](http://www.onyxonlinelaw.com)

## Chapter 1

# Getting Started

*"When we launched the WineLibrary website in 1996, I didn't even own a computer yet. I just understood that there was an opportunity here to market in a different way."*

**Gary Vaynerchuk**

## Cover Your Arse Online

# Domain Names

## Domain Name Basics

We don't need to go into reams of technical detail about domain names. Your domain name is the website address used for finding your website. It is not the website, just the address. You don't own it either.

A domain name is a lot like a post box, instead of leasing it from your local postal outlet, you lease it from a domain registrar. That's right, if you forget to pay to renew your registration when it comes up, you can lose your domain name. Most registrars have a system in place to remind you to renew months out from the expiry, but if you've changed your email address and don't receive those reminders, you will need another method for making sure you renew in time.

A 'URL' or Uniform Resource Identifier is just another name for a domain name.

**\*\*DON'T PANIC** – Go to the checklist on our web page to help you keep track of actions to take, and reminders. You are probably familiar with top level domain names with endings like:

.com | .edu | .gov | .org

There are country specific domain names ending in:

.au | .ch | .cn | .uk and loads more (by the way, .ch is Switzerland and .cn is China)

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From time to time ICANN (Internet Corporation for Assigned Names and Numbers – preserving the operational stability of the internet) also proposes and coordinates the release of other domain names in English and other languages as a result of community feedback, like:

.house | .maison | .haus | .casa – all meaning “house”

Geographic top level domains are also periodically released, like:

.london | .melbourne | .tokyo

Second level domains are domain names with an extra “After the main domain, like:

.com.au | .co.uk

And subdomains generally occur before the domain name, like:

m.telstra.gov.au

Domain name registrars around the world are licenced by ICANN to lease domain names and local second level domains with country identifiers.

All domain name registrars agree to abide by ICANN rules or lose their licence.

There is usually a primary registrar in each country, and that registrar can create additional rules for local registration, and sublicensing permission for other registrars to operate in that country.

Although local domain registrars must comply with local laws, the fundamental governance or rules that cover the issue and use of domain names rests in the contract between ICANN and each registrar.

## Choosing a Domain Name

You should have it in mind that you won't always be able to secure the name you want.

Despite that, you will probably be surprised at the sheer variety of domain names that are available. There are people who secure domain names for the sole purpose of trying to sell them to you at a profit, but there will always be alternatives.

We'll get to the legal aspects in a minute. There are other things you should take into consideration when choosing a domain name, like:

- your existing or desired brand name or business name and whether it is also available
- search engine optimization (or what people type in, or ask out loud when they are searching for your product or service)
- what the words look like with no grammar (consider how Pen Island might look like as a domain name)
- whether your domain name will work for someone else running the business if you decided to retire
- how easy it is to remember and to type (long domain names with difficult spelling make it hard for your customer)
- how easy is it to find using a mobile phone?
- Your domain name does not have to be the same as your brand, so don't worry if someone else has already taken the brand name you wanted to use.

Here are some pretty standards tips on choosing a domain name:

- Choose a .dot ending that is right for you
- Choose a unique domain name
- Make it easy to spell without mistakes (some words are spelt differently in other countries - tyre/tire)
- Make it easy to remember
- Make it easy to type (if you have to look at the keyboard or keypad to find that letter, avoid it!)

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- Make it short (although if it is easy to remember, length is not such a problem)
- Have a domain name that relates to your product and makes sense to searchers, or invests heavily in branding
- Pick a name that won't be confused with others - plurals, and alternate spellings can lead to confusion
- Decide whether or not to use numbers and hyphens will make it harder or easier for your customers to find you
- Don't use acronyms that your customers don't know (who knew BJJ = Brazilian Jujitsu)
- Secure your existing trade mark if it is well known, or you intend for it to be well known

And I am sure you can come up with some more...

### **Choosing a Domain Name to Avoid Legal Challenges Later**

Don't have your business stopped in its tracks just because you picked the wrong domain name; it's a sure-fire way of ending up on the receiving end of a legal letter.

Common (and wrong) assumptions people make...

- if it's available for registration I can use it without a worry
- if I am a distributor I can use the product name in my domain name without asking
- I can set up a fan site using my hero's name
- famous people or products should just expect other people to use their names and be grateful for the additional brand recognition

So what happens if you get it wrong?

- you get nasty letters demanding you 'cease and desist' using that domain name
- you get legal letters telling you to hand over the domain name
- you receive a letter from an ICANN approved authority de-registering your website

Know your Strategy - What do you aim to achieve in registering this domain name? What's the Plan?

### **Strategy 1 - trade off an existing trade mark until you get caught**

I did have a client who had a collection of car servicing websites using the make of particular cars in the domains. This worked really well in driving business to his auto-repair business for about six years before the car manufacturers caught on.

It was only after the authorised service provider asked the manufacturer for advertising help that the websites even came to their attention. So don't assume that all multi-nationals are up to date with what is going on online.

The law in Australia is focused on whether or not the use of a trademark in a domain name is a breach of that trademark. It may not be. Unfortunately for my client, in this case, it clearly was a breach, and he agreed to end the website registration.

In 2011 in California a different decision was reached. The trade name that went to court was 'Lexus' and the court decided that there was no breach. Different country, different law.

### **Strategy 2 - describe your product or service using a simple and unique domain name**

"Cheap Sheds" is not only short and sweet, it quickly and easily identifies exactly what the customer is searching for. Unfortunately, it is also easy to copy and may not qualify for trademark registration. Even so, cheapsheds.com.au can still protect their website content from being copied.

### **Strategy 3 - promote the product or service that you use the most, with permission**

“myobcourse.com.au” include this disclaimer at the bottom of their page “EzyLearn Pty Ltd courses are not associated with MYOB® Technology Ltd or MYOB®. MYOB® is a registered trademark of MYOB® Technology Pty Ltd.”

Presumably, they have discussed the use of the MYOB logo and gained permission to use it before developing their website. If they don't have permission from MYOB, they run the risk of receiving notice from MYOB to cease using the trademark in the domain name (and probably all over the website) or face legal proceedings. That website clearly uses the registered trademark as a trademark.

### **Strategy 4 - create a unique brand and use it as the domain name**

Uber, Airbnb, and Kiva are all unique brand names. For those businesses, brand recognition is important. Because the names are so unique, it would be difficult for anyone else using the same name to argue that they were not breaching the trademark if using it in the same type of business.

Xerox was an example of the pre-internet case that successfully fended off potential copycats.

### **Strategy 5 - use your own name as part of the domain**

Using your own name in a domain might work if it is uncommon. As a test, I looked up johnsmith.com and discovered that a domain name was registered back in 1997, but no website exists. You may find that there are lots of domain names around the world that have been 'collected' by enterprising people attempting to make a profit by selling those names to people who might actually want them for big dollars.

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I had a request once to MAKE someone sell or hand over a URL for their name, e.g., barbarabrown.com. Like johnsmith.com it was not being used, but it was registered. Unfortunately, there is often not a lot you can do to acquire your own name unless you are famous, and your name is effectively a trademark - a bit like 'George Clooney'. A lot of celebrity names are now 'forbidden' domain names to avoid disputes or blackmail over names.

### **Check out different domain names that suit your Strategy**

Once you have decided on a strategy and have come up with some ideas about what you want to use, then do a search and see if they are available.

It's a good idea to write the whole name as it will look like a URL, just to test it. Words run together can appear quite differently, again, the 'pen island' example.

Search the keywords to see what else is out there that might be similar. You'd be surprised how easily a simple keyword search can turn up potential legal threats. Just because a company is overseas does not mean they are not a potential threat. Many foreign businesses cross borders and then register trade marks in a new country, and if you didn't register one first, you face a potential legal argument to defend your rights.

### **CASE STUDY**

A client assumed that because a foreign company didn't appear to do any business in Australia that she would be fine in setting up her business with a similar name. Part of the word was 'star', which has rather limited and commonly associated images.

An American company gained ONE Australian client and registered a trademark in Australia, then threatened my client with legal proceedings if she did not change her name and her branding. Costly exercise for her!

## Cover Your Arse Online

Most domain name registrars will allow you to search out different names. Beware, though, from a purely cynical and unsupported viewpoint, if you repeatedly search for a particular word or name, the price may appear to go up over the time it takes you to complete your searches!

### **Check for registered trade marks**

Trade mark registers are management by government departments. If they have no association with government, then don't trust the website.

Some English language trade mark registers you should know about are - and all will have (gov) in their domain names:

- IP Australia
- United States Patent and Trademark Office
- Canadian Intellectual Property Office
- Intellectual Property Office UK
- Intellectual Property Office of New Zealand
- Intellectual Property Office of Singapore

## What is Website Hosting?

Your domain name is your address, but unless you have website hosting in place, once people get to your address it will be an empty page or show an advert from your hosting provider. Your content doesn't just magically appear.

Hosting is about content. For your content to be accessible online it has to be stored somewhere. Instead of every person having a server at home hooked up to the internet, there are companies that have buildings full of servers and they make space available for your content.

When you buy hosting you are either contracting directly with a company that owns server farms around the world or a reseller of their space. It is important that you know which it is and where your data is stored. Where your data is stored can affect which data protection laws apply. At the time of writing the US and the EU are in discussions about who has control over data collected by companies with a link to the US. In short, the US wants it all and the EU doesn't want the data about its citizens open to spying by the US government.

If your data is stored outside your country, you should have that written into your privacy policy. Data laws are different around the world and can affect the laws and rules you have to operate under when doing business.

## Cover Your Arse Online

Where possible, invest in business grade web hosting. This has a better chance of delivering a more stable platform with faster speeds and better service. Avoid cheap shared hosting packages, especially if you have more than one website. These usually have shared cPanel access, which can make maintaining security challenging. If one website is compromised, then any other website linked to that cPanel can also be compromised.

## Cloud Systems

It used to be that you couldn't log in to your email or even your work folders without being tied to a desk. With the increase in high-speed internet connections and advances in technology for handheld devices, it became important to have access to information wherever you are.

Whether it is healthy or not is a whole different question!

So, to enable universal access cloud systems were developed. There are three main components of cloud-based systems:

1. Infrastructure as a service (IAAS) – the main example is data storage like Amazon S3, Google docs
2. Platform as a service (PAAS) – this allows consistent development, like Wordpress, Google App Engine
3. Software as a service (SAAS) – think of your online customer management systems and accounting, like Salesforce, Xero

Without cloud computing, social media services would have struggled.

The main areas of legal concern in cloud computing are:

- Identifying and deciding which laws apply
- Copyright and the protection of intellectual property

## Cover Your Arse Online

- Regulation and compliance affecting your product or service
- Identifying who is liable for what is done with your product, service or online information
- Data protection and portability

We'll cover these issues through the book.

### **Software as a Service**

It used to be the case that you bought a box of software and CD Roms when you purchased a new computer. Not anymore. It is unusual to purchase software anywhere other than online these days. This saves heaps on packaging (good for the planet) but it also means that software providers have your contact and billing details for as long as you use their systems.

A significant concern when purchasing software as a service are the entry and exit clauses from the agreement, how much access does the software has to your data and confidential information, how much automatic reporting and data is going back to the provider, and who is liable for any corruption to your systems or data in the event of a fault.

Three key things you should be looking for when buying software as a service:

- What happens if the provider is acquired or goes bust?
- What happens to your data if you stop using that software?
- How easy is it to extract all of your data from the system and what format does it come in?

There are lots of companies out there who are stuck using older software systems that just don't do what they want anymore simply because the cost of transition to a new system is too expensive. When upgrading or changing systems you need to consider:

- What data is essential to bring across
- What data can be securely destroyed

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- What can be archived without immediate access and how it can be accessed if needed
- How long you might have the old and new systems working concurrently
- Training in the new system
- The time and cost of transition

You are encouraged to skim through the terms and conditions (and keep a copy) for any software you sign up to use. Unfortunately, it is a 'tick and flick' exercise for most people until they have a problem.

## Security and Backups

It's not that hard to put in place the systems you need to protect your website and your online presence from a technical perspective. Really simple things, like using a robust password can make a huge difference.

Yes, there are whole websites and groups that collect hacks and teach hackers. The people learning that stuff will look for easy to hack accounts and have a go. You don't even have to have your website up for very long or have anything of great value on it. It's difficult to understand why they'd bother, but they do.

When mentoring people setting up new websites, particularly if they are using the popular Wordpress platform, the first things I recommend are:

- DO NOT use 'admin' or 'administrator' as a username
- Always use a robust password
- DO apply security plugins to their website
- DO immediately start backing up content independent of your hosting provider

One young man I suggested this to didn't follow through. His website was hacked and all his content lost within the first six weeks.

Backup all the content you put online.

## Cover Your Arse Online

Why? Because, if you back up your content properly you can tear down a hacked website and rebuild it quickly, rather than paying to remove ransomware. Unless you are technically minded, you will need help from your Internet and Communication Technology (ICT) provider to get this done, but at least with their help, you have the chance of creating a secure website less prone to hacking. If you pay to remove ransomware, you'll never be sure what still lurks in the code of your website.

One option available is to use a content delivery network or content distribution network (CDN). A CDN is a network of proxy servers set up in multiple data centres spread out around the world. If you use a CDN you should be able access a cached copy of your website during certain site interruptions or outages. Many CDN's can also offer services for Website Application Firewall (WAF) and SSL services. These can help to protect your website from online threats, such as brute force attacks.

How structured you are with backups is up to you. Remember, you do not need to do it yourself, but you do need to understand whether it is in place or not and how to manage it.

If you are using an ICT provider read through the terms of service they provide to you and double check that regular back-ups are included in the services provided. If not, ask!

When discussing a backup system with your IT provider, ask the following questions:

- How often are back-ups made?
- Where are they kept? Is there a backup independent of my hosting provider?
- What is being backed-up? Content, framework, plugins etc.
- How easy is it to recreate the website from the backup? How long will it take?
- How many backup copies are there?

## Cover Your Arse Online

Can you imagine how long it would take you to recreate all of your website content from the bits and pieces you've stored over time on your business computers? Not only that, but if you have made improvements and modifications to your website, has that framework been backed up?

Your backups should be part of any disaster recovery plan you have for your business. Thinking about what you would do to keep working if the building you are in burnt down is a similar exercise to thinking about what you would do if your whole website was lost, and worth the time to complete that exercise. Do it now, before any problems crop up.

### **Keep Plugins up to date**

It is imperative to keep the website and plugins updated as they often act as a backdoor for hackers. Plugins usually need to be updated manually, so it pays to schedule regular reminders.



**For checklists, recordings,  
templates and other useful  
resources, go to**

*[www.coveryourarseonline.com/readers](http://www.coveryourarseonline.com/readers)*

## Chapter 2

# Copyright – Using Images, Video and Music Online

*"I have always found it interesting... that there are people who regard  
copyright infringement as a form of flattery."*

**Tom Lehrer**

## Cover Your Arse Online

## Copyright Basics

Copyright is only one aspect of intellectual property, and possibly the least understood and most controversial online. This is not a comprehensive overview of copyright, but a highlight of the key issues that affect you doing business online.

Just because you can find it online, doesn't mean it's free!

To have copyright in a work you have to either create the work yourself, have employees creating the work for you or have a written agreement assigning or transferring the copyright to you. You don't need to own copyright in a work to use it, you just need to have a licence to use that work, which may or may not be in writing.

Never assume that because you are paying someone to produce something for you that you have copyright in the resulting product. You are almost guaranteed to run into trouble.

Have a written agreement stating that you are the owner of the copyright in the work once complete and that the creator gives up all intellectual property rights as soon as they are paid. This is important when you are working with web developers, designers, and branding specialists.

In a work for hire situation you want the creator to give up all of their intellectual property rights in the work and consent to not being identified as the creator, as soon as they are paid.

## Cover Your Arse Online

This is to ensure that you can use the created work in the way you always intended, without being stopped or sued by the original creator.

Once you own the copyright in a work, you can license different aspects to other people. For example, if you are a photographer you might give permission for someone to use your image in a particular way (like on a website to illustrate a post) for a set fee, and retain the right to licence anyone else to do the same thing. Your licence would probably exclude any rights to on sell your image for use by others, unless you have uploaded it to a stock image website where they will continue to resell it and pay you a commission on each sale.

In the case of copyright, gaining forgiveness after the fact is not always as easy getting the permission up front. It can cost a lot of money to acquire an assignment of the copyright in a work once its value has already been proven. Just think about the money that has been paid for the rights to the music of The Beatles or David Bowie.

### **Getting It Wrong**

Common (and wrong) assumptions people make...

- If I can get it online then it is “public domain” and I can use it any way I like!
- The internet is huge; no one will ever find out...
- Everyone else does it and gets away with it.
- It’s no big deal, surely!
- It’s not stealing; they are giving it away.

So what happens if you get it wrong?

- Google can stop indexing your website, and your website disappears off all search results, for months!
- Your internet service provider can shut down your account.
- You can end up in court.
- You can get nasty letters in the mail, or email, demanding you take

down content from your website.

- You can suddenly get bills in the mail, from companies prepared to take you to court to get you to pay them!

### **CASE STUDY**

Anton managed a wallpaper website. One of those websites allowed you to choose from a whole collection of pretty pictures and download them to set as the backdrop on your computer. Against my advice, he used a robot to trawl the internet and find high definition pictures to display on his website, without seeking copyright permission first.

Anton lives in Australia and received a letter of demand from Australian solicitors on behalf of a US-based photographic artist. The same artist had already started at least nine other court cases in the Australian Federal Courts, so it wasn't a demand to ignore.

Anton wrote an email back to the solicitors apologising and saying "it wasn't his fault, it was the 'bot', before contacting us! That is a clear admission of guilt. He was then surprised to get a demand for the payment of \$15,000 in licence fees.

Your immediate response to a letter like this should be –"In good faith, I have removed the image from my website and make no admissions. I am getting advice and will get back to you by xx date." Then get legal advice.

Because Anton had already admitted guilt, we were only able to negotiate the licence fee down to \$1,000 instead of \$15,000, and resolve it without going to court.

### **So what is Copyright really?**

Copyright was designed to ensure that the people who create wonderful artistic and creative works continue to do so for the benefit of the rest of us who aren't so creative.

## Cover Your Arse Online

By respecting copyright, you support someone else's business, and ensure that you also have the ability to make money from your own creative works. What goes around comes around.

Copyright is not one thing. It's actually a bundle of rights, a whole collection. For example, when you opened this book, in the front with the publishing information it says, "All rights reserved."

One of the rights attached to this book is publishing it. Others include communicating the content online, or the right is to create an audio version. If it was fiction, we could create a screenplay, and then another right would be to turn that screenplay into a movie. Another right might be to translate this book into other languages, each different language potentially being a different right to be granted.

The legislation in your country will spell out specific rights.

### **Top 10 things you need to know about copyright:**

1. Things like writing, video, music and images are able to be protected by copyright
2. Copyright is a bundle of different rights and can have different licence terms for use
3. Copyright automatically exists upon creation of the original work
4. Ideas are not protected by copyright
5. Names, titles, phrases etc are generally too short to attract copyright protection
6. Copyright does not need to be registered and you don't need a © for protection (but it lets other people know you plan to protect your interests)
7. Copyright law is different in each country, but mostly consistent
8. Copyright usually belongs to the person who created the work, unless they are an employee
9. Copyright can only be transferred in writing
10. Copyright does eventually expire and then work becomes "public domain" and can be used by anyone

## Cover Your Arse Online

Some people are familiar with the economic rights protected by Copyright, but it now comprises both economic and moral rights. Moral rights were introduced in the early 2000s, and protect:

- the creator's right to be known as the writer/ artist/ performer etc of that work
- the right not to have that work falsely attributed to someone else
- the right to stop the work being treated in a way that is detrimental to the creator's honour or reputation

This creates a legal right to seek attribution for a work.

### **Attribution**

A creator of a work can demand that you acknowledge them as the creator when the work is:

- reproduced or copied
- published
- exhibited in public (like displaying a painting in a café)
- communicated through a website or other electronic means
- adapted or translated

You don't have to attribute work to a creator if they have consented in writing not to be identified or it is 'reasonable' in the circumstances not to identify them.

It is generally accepted that copyright in works produced by an employee are owned by the employer and it is reasonable not to identify the employee as the author.

If you are developing website content with the assistance of outsourcers, ghost writers or contractors, you will need to have a specific provision in your agreement that the creator agrees that their name will not be used with the work produced.

## Cover Your Arse Online

It used to be that you could hire a ghost-writer and they would waive all of their rights in the work created. Copyright law now states that moral rights cannot be waived and this means you need careful consideration of how you contract with people in that position in order to avoid disputes, or claims for payment, in the future.

A common question is “Is it ok to use a copyrighted work if I attribute the work to the creator?”

Attribution covers only the moral and not the economic rights. Just because you properly identify the creator of a work, does not mean that you have automatic permission to use that work. An example might be using a photograph from a news story. You might identify the photographer and the publisher, but it is still possible you will get a letter of demand for payment of a licence fee to use that image.

### **Tangible, Creative Work**

The kind of things that copyright protects are written works, images, films (all the videos you see, the little short clips on websites) and music. To be protected by copyright it actually has to be in a tangible form. So talking about an idea, singing a couple of notes in anticipation of creating a piece of music, all those sorts of things, they're not protected because there's no way to demonstrate that they exist. They're not in tangible form.

Copyright is automatic upon creation of the work. If there's sufficient creative content, then it is protected by copyright. Different countries look differently at the degree of creative effort involved in producing a copyrighted work. Some creative effort is required, but the bar need not be very high.

There have been a couple of court cases around the Yellow Pages directories (fast going out of style). In the early days the Yellow Pages were able to say there was copyright in their production because there were people who collated that information, who typeset it, who formatted it, who did a whole lot of work behind it to create the Yellow Pages.

## Cover Your Arse Online

In the 1990s the Yellow Pages became largely automated, and there was very little human input into what it looked like when it came out, because really all they did was input information in a computer and the computer sorted out the rest.

Now, that proceeding in the 1990s resulted in a decision that said, “Actually there’s no copyright in the Yellow Pages because there’s insufficient creative input. It’s a machine doing it. There’s not enough people involved in the process of making decisions around what it looks like in the end for it to be considered creative.” There has to be an element of creativity for it to be protected by copyright.

### **Registration and © symbol**

There is no need to register copyright. The only country in the world with a copyright register supported by legislation is the US. They created a register for digital works so that people publishing online had an ability to easily enforce their rights without first having to prove their entitlement.

Any other body that says it can register and protect your copyright, can’t. You’ll be funding a commercial enterprise that can’t help you.

If you look at the front of this book you’ll find a little © symbol followed by the date and the name of the copyright owner inside the front cover.

Copyright protection comes into being upon creation of a work, so there is no legal requirement to include the © symbol in your work. Most people do.

A really good reason to use the © symbol is to alert everyone else that your work is subject to copyright protection, and you intend to protect it. If you don’t have the © symbol, it doesn’t mean you’d lose copyright protection.

The usual format is the © followed by the date. Sometimes people put the name of the business operating the website in there, whatever works for you.

You've also probably seen people put © and then the date of first creation of a website, then a dash and the current year. There is no particular format. Whatever your business wants to do, that's going to be okay.

### **No Copyright Protection**

Headlines, brand names, quotes and short phrases are just too short or insubstantial to be considered capable of copyright protection. That also applies to individual lines in song lyrics. No matter how creative they might be. Anyone involved in marketing will understand that the 'hook' in advertising can mean the difference in 10s of sales and 1000s of sales. All the same, there are times when you just wish you could stop other people from using a really good headline, which is why people register trade marks, which are covered later in this book. You might wonder why, with all the effort that goes into creating a great headline, there is no protection. One argument accepted by the court is that every bibliographic reference would then constitute a breach of copyright. After all, how many unique title combinations do you think there are? If it's short, don't assume you have copyright protection. Look at your alternatives.

# Top 3 Legal Mistakes in Creating Website Content

## Top Mistake 1 – copy and paste

One of the most common mistakes that I have seen people make is the simple “copy and paste” what they find online. Making something available to the public to view online is not the same as granting rights to communicate, copy, amend, adapt, incorporate or re-publish work.

Copyright is a bundle of rights, including the right to decide who can or cannot republish or communicate your work online.

With so few people understanding the basics of copyright and so many people sharing content online, it isn't easy to find out what is available for use and what isn't. Rather than assuming that it is free to use, your first assumption should be that it is NOT free to use. If you start with that assumption you have a better chance of protecting your business.

So what can you do? If you are absolutely desperate to use someone else's material, there are the ways to do it:

Get their permission (It is so easy to ask! You may even have the chance to build a relationship!) Use a short extract (rule of thumb is less than 10%, but this has no legal basis and can be challenged and overturned). When you use an extract, you can reference back to the original source.

## Cover Your Arse Online

Link - do not imbed! Use it in a way that is classified as fair use, fair comment or fair dealing.

Fair use is an American concept and an unpredictable defence to the breach of copyright, so know your facts before you attempt to rely upon it. Some common fair use examples are:

- making comments on the original work
- criticising the original work and possibly the creators (although be very careful)
- news reporting by recognised journalists, not just anyone
- research
- teaching
- archiving and storage

Fair dealing is the Australian version and more limited, covering news, criticism, parody and satire.

You might have also heard of “creative commons” licences. A creative commons licence allows a user to set the terms of permission for the use of their work and is very popular in helping give clarity online.

Have a look at:

- [Creativecommons.org](http://Creativecommons.org)
- [chooseCreativecommons.org.uk](http://chooseCreativecommons.org.uk)
- [Creativecommons.org.au](http://Creativecommons.org.au)

If you are happy to share your work without payment, you can attach a creative commons licence, or simply include specific copyright clauses in the terms and conditions of your website.

Tips on checking permissions on work you would like to use:

- Read the terms and conditions on the website, particularly around copyright.
- Check for a creative commons licence - there should be a link on the footer of the page that opens up the licence terms for you.

## Cover Your Arse Online

- Use the Advanced Search tool in Google, found at the time of writing in the settings cog. Look down the search parameters until you find “usage rights”.

When you click on “usage rights” you will have the choice of:

1. not filtered by licence
2. free to use or share
3. free to use or share, even commercially
4. free to use, share or modify
5. free to use, share or modify, even commercially

Beware that Google takes no responsibility for results and you will still have to check the licence terms for the work you find.

Some people ask “Why worry? No one will ever find out that you copied them.”

**WRONG!**

Anyone can simply sign up for a Google Alert for a name, title or description. There are heaps of simple software programs out there that trawl the web looking for duplicate content. When they find it, the owner gets alerted and can check and see what is being copied.

Software for the internet is so sophisticated and quick today that it is easy to find copied content. Companies that are in the business of selling copyright, like Getty Images, automate their whole system so that they find the image you are using without permission, send you a letter demanding payment of a licence fee and follow up without necessarily needing human interaction.

Some programs available for checking written content are:

Copyscape, Grammerly, Writecheck and Turnitin.

Programs available for checking images are:

## Cover Your Arse Online

Tineye and Google Image Search.

For music try:

Shazaam, SoundHound, Audiggle, AudioTag and Tunatic.

There may not appear to be a functioning reverse search engine for video at this stage, but a quick search through YouTube will find infringing content and they are very prompt in pulling it down.

Be aware that there are a growing number of copyright owners who will send you a demand in the mail if you use their content without a licence.

### **Top Mistake 2 - no agreement**

Just because you pay someone to create something for you does not mean that you own the copyright in what is created.

There are lots of curly circumstances that can change the rules, but the fundamentals are these:

The person who created it, owns the copyright. If an employee created it as part of their work, the company that employs them owns the copyright. If you work for the government, the government owns the copyright (unless you are able to negotiate otherwise). If you pay a contractor to create it for you, who owns the copyright will depend on what is in the agreement between you.

If you are not sure who owns the copyright, then get something in writing to say that it is you. If you don't you could run into all sorts of problems later. You don't necessarily need a formal contract. An exchange of emails or messages that clearly set out who is to own copyright and how that is agreed can also form a written agreement.

Copyright can only be transferred to another person / entity in writing, although it can be licenced (limited permission given for a particular use) verbally or by actions.

## Cover Your Arse Online

A great example of this is for you to have a guest write an article for your website. The guest owns copyright as they created the work, but by giving it to you for the purpose of publication on your website, you have an implied licence to use the article for publication on your website. This would not include permission to then compile that article with a load of other articles from your website into a book. You would need to seek permission to do that.

Professions that typically seek ownership of copyright are:

- architects
- illustrators/ graphic designers
- authors
- photographers (think wedding photography)
- scientists
- academics

If you want to make sure that you have peace of mind and can run your business, or even sell your business, without interference from someone claiming breach of copyright, then make sure you have an agreement in writing giving you that ownership.

### **Top Mistake 3 – assuming public content is public domain**

Sure, it is out there for access by the general public, but “public domain” is a legal concept

Just because you can access something online, or that it is available for the public to view, does not mean that it is “public domain” content. “Public Domain” is a legal term used to describe things that no longer have copyright protection – with legal consequences.

For a piece of work to lose copyright protection and become public domain content, the copyright must expire. The period of copyright protection varies for different works and ownership, but generally speaking, copyright protection is limited to the life of the creator plus 70 years.

## Cover Your Arse Online

For something now in the public domain, like a book, you can republish and gain copyright in part of the new work, like the layout (typesetting and appearance) of the way a book is presented, but you won't get copyright in the actual story or words. You will find a lot of different copies of "Think and Grow Rich" by Napoleon Hill out there for just this reason.

What you should do is ensure that you properly identify the creator. Have a look at any one of the multitude of books on "The Science of Getting Rich" authored by WD Wattles that have been published out there. You will find that each has a different introduction by the person publishing the new edition.

### **Where can I get public domain books?**

There are a number of websites that have a host of public domain publications and explain the origin of those publications. You are safest with books and writings created prior to 1900, however there are many writings published after that date now out of copyright. Gutenberg <http://www.gutenberg.org/> is a great example.

Checking whether or not a book is in the public domain depends upon the country in which it was first published, when it was published and when the author died. In the US the law changed from 1 January 1978 so that copyrights expired in 2006 unless it was specifically renewed. I am aware that the copyright in Napoleon Hill's work "Think and Grow Rich" was not renewed, and has therefore expired and is in the public domain in the United States, and according to international conventions, is most likely to be internationally in the public domain. That is only in respect of the original version and not with respect to any of the more recent published editions with introductions by different authors.

Always double check first. Better to be safe than sorry.

# Letters of Demand

## **Responding to a letter of demand for copyright infringement**

It is common for letters of copyright infringement to include unrealistic time-frames for compliance, like 48 hours. This puts many people in a state of panic. Don't panic!

Your immediate response to such a letter should be like this –“In good faith, I have removed the image/offending content from my website/ other and make no admissions. I am getting advice and will get back to you by xx date.” Then get legal advice.

The kind of things you need to think about before responding are:

- Where did I get the content?
- Do I think the claim is credible?
- Is this a high or low-risk demand?
- Do I want to pay, or defend?

If the claim is small, it may be cheaper to pay it and move on than to seek legal advice. In paying, you should ask for a release from any future claim or action by that party or a related entity in regard to the content complained about. Any credible claimant should be happy to provide that release.

If the claim is made by a person in a foreign country without the assistance of a lawyer, they are probably unlikely to spend the money to file a court proceeding where you are.

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That situation is probably a low risk to you, and you might be prepared to remove the content, or provide attribution, and an apology, but politely decline to make any payment.

If the claim is large, particularly if it is sent from a lawyer local to where you are, take it more seriously and get appropriate advice.

### **Issuing a letter of demand for copyright infringement**

It is becoming increasingly common for local businesses to keep an eye on the websites of their close competitors and 'copy' ideas and content. Whether or not this forms copyright infringement will be a question of degree and you may need legal input to work that out.

If you do wish to send a letter, have in mind what you want to achieve first, and how much you want to invest to get that result. Some people will simply ignore a letter of demand, and if they do, you need to be prepared to commence legal proceedings to protect your interests. Unfortunately, this is a significant hurdle for small to medium businesses and part of the reason that copyright infringement is rampant.

A letter of demand should establish you as the copyright owner, clearly identify the infringing content, ask the infringing party to take action to stop that conduct and set a timeframe to comply. Your request could include:

That they immediately stop using the infringing work, pay an amount for the prior use of the infringing work, enter into a licence (for a fee) for the future use of the infringing work, stop selling items that contain the infringing work, account for profits of sales of items that contain the infringing work, deliver up all copies of the infringing work

If you do not get the response you wanted, or worse, abuse for even sending that letter, then you will need to consider whether or not you are prepared to invest in legal proceedings to protect your rights.

## Cover Your Arse Online

As a side note, legal proceedings are risky. I've seen cases you can't lose lost, and unwinnable cases won. Don't go into a legal claim expecting to win. Regardless of the strength of your claim, if you start with the thought that you have no better than a 50/50 chance, you will have a more realistic expectation of what could happen. Also, even if you are entitled to an order that the other party pays your legal costs, you will never recover more than a fraction of what you have spent, and in many cases, nothing at all.

There is no 'win/win' in court action.

# Digital Millennium Copyright Act (DMCA)

You might have seen reference to the DMCA or even received a takedown notice said to be made pursuant to that law. It is US based law essentially for the protection of material that can be shared electronically.

If you have created a website that allows other people to add content, you might consider including a DMCA notice or something similar on your website. The purpose for doing this would be to set out what you will and won't do in response to claims of copyright infringement for material displayed on your website, particularly where you have no real control over it getting there.

Take YouTube for example. Anyone can open an account and upload video content. When that video content includes a music video that has been copied from the company that has the rights to communicate it online, they will send a DCMA notice to YouTube.

YouTube is pretty efficient and within hours of getting that notice, they will usually have disabled the alleged offending content. It is up to the person who has had the video removed to respond to the notice and explain why they have the right to put it up if they can. If there is no response, the content stays removed. If there is a response, YouTube sends it to the original complainant and says "you've got 10 days to make your claim, or we put it back up."

## Cover Your Arse Online

The complainant then has to demonstrate that they have started a claim if they want the content to stay removed. Otherwise it might be restored.

A process like this allows you to have the minimum involvement in a copyright dispute to avoid liability for the content being displayed and puts it back on the person posting the content to defend the claim.

There are other aspects to the legislation, but this is how it is most commonly applied to online content.



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## Cover Your Arse Online

## Chapter 3

# Protecting Your Online Content

*"I was an online service provider. It's not my job to police what people are uploading. It's the job of the content owners, and the law is very clear. If you create content, and you want to protect your copyrights, you have to do the work."*

**Kim Dotcom**

## Cover Your Arse Online

# What is Intellectual Property?

Intellectual property is not a specific legal right but a collective term for a bundle of different legal rights including:

- copyright
- trade marks
- designs
- patents
- confidential information
- trade secrets

Different things attract different types of protection. The point is that identifying the areas where you have intellectual property in your business allows you to work out what you own, what you don't own, what you don't know about and what you have protected.

You can then make a commercial assessment about whether you spend money now to take ownership or to protect the intellectual property you are using.

When you go to value or sell your business, being able to identify and demonstrate that you have full rights to the intellectual property in your business can have a positive impact on the value of your business.

Protecting your Intellectual Property – is it worth it?

Factors influencing decisions to protect or not protect intellectual property

## Cover Your Arse Online

- Lack of understanding about how to protect it
- Too costly. Some businesses have simply given up trying to protect their inventions
- Reputational and financial costs of failure in an action to protect
- Staff time involved in the process
- Overseas enforcement simply unaffordable

If you have an idea with potential value and want to present that idea to someone with the resources to develop it, then there are actions available to protect that idea.

## What You Need to Know About Protecting Your Ideas

You won't be the only person who thinks they have come up with the next 'great idea' that is going to make millions of dollars. Unfortunately, the value of an idea is in showing that it works and makes money, not the idea itself.

This is not to discount the value of great ideas, if it weren't for creative people challenging the way we have always done things, there would be no innovation. What is important is having a realistic expectation of the value of your idea and at what stage it actually becomes something worth taking action to protect.

People will pay more for what they want than what they need.

If your concept is something people need, think about whether or not your ideal customer is prepared to pay for it before you invest a load of money into development.

Everyone is not your customer.

Even if your idea is something that everyone will use, like toilet paper, it does not mean that your product is for everyone. There is still a huge variety of different types of toilet paper made to cater for different sectors of the market; from 4 ply extra luxurious paper to eco-friendly, down to the cheapest, thinnest paper, you can buy. Think about who your target market is and how you are going to get in front of them.

## Cover Your Arse Online

Not every idea is viable. I wouldn't have thought that a boat you can fold up and put on the roof of your car was something people wanted, but the people at Quick Boats knew their target market and developed it.

Imagine the first conversations around the idea... "wouldn't it be great if we could just fold it up and stick it on the roof rather than dragging a trailer around." It is unlikely that anyone hearing those first conversations would be in a position to 'steal' the idea and run with it. A lot of development had to go into designing the product and developing the materials that helped make it work.

Develop your concept then bounce the idea off someone who might be able to help.

There is greater risk in sharing your ideas with people who won't understand it and who will say you are wasting your time, than sharing ideas with people who might actually have the experience and background to help you prove your concept.

Turning an idea into a reality takes passion, persistence, and dedication. 99.9% of people you share your idea with won't have the energy or inclination to make it work.

Once you have a workable idea, a plan and maybe even a budget for implementation, at that point you might have something worth protecting, and it's then that you need to think about how you can protect it.

An idea alone is not protected by copyright or trade mark or patent, but you might persuade someone to enter into a confidentiality agreement or a non-disclosure or non-circumvention agreement before you discuss it. All of these protections are grouped as 'intellectual property'.

## **Is it worth spending money to protect your idea?**

YES, where –

- you want to use the idea to make money
- your idea is more than just common sense
- your idea has a novel approach or specialised application
- you can prove you have put time, effort or inspired thought into your idea
- the idea has commercial value
- you have identified a potential market

NO, where –

- you don't even know whether or not you can make money yet
- your idea is common sense
- your idea is a small variation on someone else's idea
- everyone will want to buy it! (but you can't say specifically who your target market will be)
- you don't know how to make money with your idea; it is just such a great idea that you are bound to make money!

## **How to make a decision about what to do**

### **Identify the purpose**

When you identify the 'purpose' of your idea, this will help you to decide what actions and how much money you are prepared to spend to protect it. Look at the end result of your idea, then simplify it to its key concept.

What has this got to do with legal advice? Saving you money!

If you consult a lawyer and ask them to do XYZ to protect your idea, that is what they will do. A lawyer won't always ask you whether or not it is worth spending the money; they assume that you have already made that assessment.

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Examples of purpose:

- to generate income for you
- to generate income for others
- to provide a product or service for community benefit
- to educate people who need it
- to 'enlighten' the world

### **CASE STUDY**

Comic Relief launched Red Nose Day in 1988 with the sale of red noses to raise money for charity. The idea of using a gimmick to raise the profile of a cause was a great concept and has been copied all over the world. The purpose of the red nose was to attract attention and generate income for the cause.

The 'red nose' was worth protecting to ensure the unique identification of the cause, but the idea of using a gimmick could not be protected, or restricted. In Australia, we now have Daffodil day, jeans for genes day, pink ribbon day and many more. That marketing concept alone could not be protected, but the use of a red nose could be protected.

If your idea is a concept which could be referred to as common sense, could have been thought up by just about anyone and is very easy to implement, then it is unlikely that you will be able to protect it as your own; like selling water in 600ml bottles.

You might have something you are able to protect, if you have put considerable research, or used a novel approach, or you developed the idea from specialized knowledge.

Even showing dedicated effort, you can't just have a great idea. You need to have something that will also have a commercial value.

Check key elements for protection

- Not just common sense
- Research or unique intuitive connection
- Novel approach or specialized knowledge
- Commercial value
- Potential market

### **CASE STUDY**

Raising awareness of world climate issues is a great idea, but it wasn't until that idea was converted into a film, which required some significant research, planning, and effort that "An Inconvenient Truth" became a product and a brand with commercial value capable of protection.

If you can identify a market and a potential commercial value for your idea, then you have a basis for determining whether or not you want to spend some money to protect it before presenting it to anyone.

### **Collate the evidence**

It can make a big difference to your success in protecting your idea if you collate the evidence to demonstrate that your idea is original to you, required some applied effort on your part and that you came up with it first. You may have:

- computer files
- notebooks
- recordings
- rough drafts and so on

Your records should provide evidence of the background work put into producing your idea. You may simply have had a flash of brilliance.

Either way, you can effectively date stamp your ideas by posting them to yourself via email or through the postal system. This little tactic is sometimes referred to as "poor man's copyright".

In the US you can also register digital materials before publishing them online in order to protect the copyright in that work. Be aware that this still doesn't protect the concept alone, only what you actually register, like the contents of an ebook.

### **FICTIONAL CASE STUDY**

As a great example that is easy to follow, Melanie Griffith's character (Tess) in the movie "Working Girl" demonstrates that a particular idea was hers by referring to the articles she had read in a newspaper which initiated the particular train of thought that led to the final proposal.

Tess wanted to sell an investment idea to a business, with a commission for finding the investment. Her boss wanted to make out the idea was all her own and nothing to do with Tess. Tess produced seemingly unrelated newspaper articles and explained how she linked them to come up with her proposal. Her boss had no explanation for where the idea came from. A small amount of independent proof goes a long way!

### **Be ready to share**

Accept that you will be sharing your idea and let go of any fear around sharing it. Then take appropriate steps to protect yourself.

## 5 Ways to Protect Your Ideas

You can share your great idea with the world like Martin Luther King Jr did in 1963 in his “I have a dream” speech.

You can keep it to yourself; but Carl Jung’s theory of collective consciousness suggests that your idea is available to anyone, anywhere, anytime, whether you tell someone about it or not.

You can bounce your idea off a few close friends or trusted advisors and see if they think it has any merit. The main legal areas for protection are:

1. Contracts - confidentiality, non-disclosure, non-circumvention
2. Trade mark
3. Copyright
4. Design
5. Patent

Oh, and of course, you always have the option of never sharing your idea with anyone and trying to do everything yourself...

### **1. Using contracts - confidentiality, non-disclosure, non-circumvention**

A verbal contract isn’t worth the paper it is written on – Samuel Goldwyn, movie producer

“Yeh, yeh, I’ll keep it confidential” is hard to prove in court. Get it in writing first!

Relying upon unsupported oral testimony in court is not ideal. Preferably you should have something in writing that is independent of you, like the post dated letter or a diary note made at the time you came up with the idea.

### **What is a Confidentiality Deed?**

A non-disclosure agreement achieves the same thing.

- legal agreement
- sets out what information is to be kept confidential
- can require one or more parties to keep information confidential
- enables a party to take remedial action if there is a breach

### **When could you use a Confidentiality Deed?**

- Before sharing your idea with a potential investor
- Before asking an expert to work on your idea
- Before bringing a potential partner in to develop your idea
- Before talking to a publisher about your idea
- Before talking to a TV producer about your idea

Not all potential developers or investors will be prepared to sign a confidentiality agreement prior to presenting them with your idea. At that point you need to make a commercial decision about whether or not you are going to be able to move forward without their help, and whether they are likely to do anything with your idea if you don't get an agreement in place. What is your greater risk?

### **When do you need a Confidentiality Deed?**

In theory, you should not need to enter into a confidentiality agreement with your professional advisors, eg., your lawyer or your accountant, because they have ethical obligations not to share your information.

It is worth making a diary note that you are going to discuss your idea with your professional advisor before you do, as there has been the rare occasion when ideas have suddenly been taken up by others with no explanation...

### **What is non-circumvention?**

If you are taking your idea to someone who has the ability to run with the idea, without you being involved, then you need a non-circumvention agreement. If you have non-circumvention, the person you share your idea with cannot develop or make money from it without involving you.

### **Key Elements to Include:**

**WHO** - The person entering into the non-circumvention agreement must have the necessary authority to make sure the company behind them is also covered. Let me give an example. If you go to a TV executive to share an idea, you want to make sure that no one in that company, or any related entity to that company, or anyone else the executive deals with as part of his or her work, can develop that idea. If they don't have the authority to enter into that agreement, you might end up out in the cold!

**WHEN** - Make sure the time frame of your agreement is realistic. Ideas that are shelved one day can look more attractive when business is slow. Depending on the company you are sharing it with and the type of idea, a lifetime might not be unreasonable.

**WHAT** – Put it in writing! You need to be specific about the nature of the idea you want to share (“new comedy sketch show for television involving impromptu acts and a variety of recognised comedians”) and any specific information you are going to present, like a budget or business plan.

**WHY** - There should also be an acknowledgment that you have put some effort into developing this idea for commercial exploitation and that the person you are disclosing this information to understands that you will suffer financial loss if you are excluded.

### **Enforcing a Confidentiality Deed**

To enforce the terms of a confidentiality agreement you will need to be able to be sure that you can bring the offending party to court.

If you are based in Australia and share a great idea with someone in Singapore, to enforce your agreement you would probably have to bring an action in Singapore rather than Australia, because the money or property to meet the payment of any judgment is likely to be in Singapore.

It is also important that you can prove to a court that the idea was unique to you and the other party did not have it before speaking with you. If you have proof that the other party would not have had the idea without your input and that there is money in it, you'd probably be able to find a law firm prepared to take the risk in exchange for payment of their fees from the judgment.

## **2. Copyright**

This has already been covered. The important things to remember are:

- Copyright automatically exists upon creation in certain types of products, like written works, photography, film and music and there are similar copyright laws all over the world.
- Copyright is automatic, and it is free.
- You can warn people that you will take action to protect your copyright by using the © symbol. You're still protected without it.
- Single words and short phrases, slogans and catchphrases cannot be copyrighted, they must be considered under trade mark protection.

### **3. Trade Mark**

This will be covered in more detail later, but the key things to remember are:

- Letters, words, phrases, numbers, logos, images, smells and sounds can be protected as trade marks
- Protection under trade mark law requires registration
- Registration bodies are government or semi-government bodies
- Not everything can be registered as a trade mark, generic words or phrases will usually be excluded
- You don't have to register a trade mark, but it's easier to protect if you do
- When you register your trade mark it is only protected in your country of registration
- It is easy to check for existing trade marks through trade mark registers before settling on a brand name
- There are 45 categories for trade mark registration, you're only protected within the categories you register and every category attracts a fee
- Trade mark registration is valid for 10 years, then requires renewal
- Trade mark registration can be challenged and overturned if you don't actually use the mark

### **4. Designs**

Design protection is not as common as other forms of protection for intellectual property and a highly specialised area. In a lot of cases copyright or patent protect are used as an alternative to design protection. In general:

- design registration protects the shape, layout, pattern or decoration that makes an item look unique
- design must be new and distinctive to gain protection
- to get protection a design will usually have industrial or commercial use

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Examples of products that have design protection in Australia are:

- the shape of the Holden Monaro
- the Speedo full-body swimsuit
- flood-proof building panelling

Design registration is limited to the country of registration, regulated by government and legislation and lasts for five years.

### **5. Patents**

This is another highly specialised area and patent attorneys are often qualified in science and engineering. Once a patent is registered, the information you want to protect becomes publically available. In general:

- patent registration protects newly invented methods, processes, devices or substances
- prior to granting protection, there is substantial technical investigation into uniqueness
- if you share a patentable idea without confidentiality protection in place, you might not be able to file your patent successfully

Examples of things that can be patented:

- the Aussie hills hoist (a clothes line)
- pharmaceutical drugs
- software

Again, registration is not international and there are requirements to demonstrate the uniqueness of the product before it will be accepted for registration.

Patent registration lasts up to 20 years, although it is also possible to register an 'innovation patent' for 8 years where the application is not sufficiently strong to gain a full patent. An innovation patent is not a default and there are still a number of things you have to prove.

# Trade Mark Protection

## Trade Mark

A trade mark and a trademark are both the same thing. A bit like metre and meter. It just depends on which country you are in.

For something to be a trade mark and protected, you do actually have to be able to show that you are using it in business. If you register a trademark then don't use it, you can lose your registration. So think it through and be prepared.

Consider whether or not you want to invest in registration and wait at least six months getting something registered, only to change your mind about the direction of the business and not use it.

Using a trade mark in the course of business may include:

- advertising in the country for the purpose of sale (this needs more testing in the internet age where advertising might be internationally accessible, but delivery into a country might not be possible)
- making available for sale in Australia
- overseas manufacturers may 'use' their mark by selling wholesale into Australia
- use subject to a licence agreement with an overseas supplier
- selling retail is use

## **CASE STUDY**

The actual sale of a dozen bottles of wine under the 'Barefoot' brand in Australia did not constitute 'use' because the trademark owner had no knowledge, intent or influence on how those bottles of wine got into the Australian market.

The wine was actually sold into Germany, then imported to Australia from the German purchaser. The amount imported was only small and the sales of the wine were correspondingly very small. At the same time, the manufacturer was in discussion with McWilliams (an Australian winemaker) about possible imports to Australia.

This came up in an argument over beer and wine. Lion Nathan started selling 'Barefoot Radler' beer after seeking to have the 'Barefoot' mark removed for non-use in relation to alcoholic beverages. The argument in court was that Lion Nathan breached the trademark. Lion Nathan argued that the trademark should be removed for non-use.

The court order the mark be removed and that Lion Nathan was able to sell 'Barefoot Radler'.

## **Registering a trade mark**

Trade mark registration is unique to each country and usually lasts around 10 years. Registering a trademark in one country does not mean that it is registered in any other country. Registration and renewal are the responsibility of the trade mark owner.

Some countries follow a first-to-file system (China, Japan, Germany, France) where you gain priority of trade mark rights only by filing an application for registration and ultimately obtaining a registration. However, some countries follow a common law system recognising trade mark rights acquired through being the first to use a mark in commerce.

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Examples of common law system countries are Australia, the United States and the United Kingdom. In these countries, it is most important to not only search for prior pending registration applications and prior registered marks but also to search for marks that are already in use in commerce in these countries.

Taking action to protect an unregistered mark is generally more cumbersome and harder to do than taking action to protect a registered mark. People are also more likely to stop using a trade mark after getting a legal letter advising them that it exists and they are infringing upon it, rather than having to go through court action.

### **Deciding to register a trade mark**

It is always advisable to assess your risk position before deciding whether or not to register a trade mark. Some lawyers will urge you to register a trade mark without delay, but it really depends on the type of business you have and the likely competitors who might copy or leverage your brand.

For start-ups, you may choose to delay an application for registration until your business is generating a cash flow to support it.

On the other hand, if you are concerned a foreign company may bring in the same or a similarly branded product or service, check the trade mark register to see whether or not it has already been registered. If not, consider registering without delay.

### **CASE STUDY**

A client had been importing and marketing a particular brand of product for about four years before a foreign supplier decided they also wanted to sell to the Australian market.

The foreign supplier registered the trade mark then sent threatening letters to the client. The client did have an argument for prior use as a defence to the claim.

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The problem with having a potential defence is that if the other party does not agree with you, you have to wade through court proceedings at a high cost and over a long period of time to get a result.

We negotiated to continue the client's business without interruption during a reasonable change-over period, rebrand and sell the client's domain name to the company making the complaint, rather than participate in court proceedings. The client didn't lose any business and paid minimum costs.

Get support rather than operating blind in this area. You will have greater peace of mind if you are confident that you are using your own and other people's intellectual property appropriately.

### **What is a trade mark?**

A trademark is something capable of distinguishing the goods or services of one enterprise from those of other enterprises. Commonly used expressions are generally not capable of protection, nor is a geographic location.

For example, BUTCHERS APRON may not be able to be registered as a trade mark for apparel, where it is a common description, but it might be registrable as a trade mark for food and books.

A trade mark can be any one or combination of things including:

- a letter
- a word
- a name
- a signature
- a numeral
- a device
- a brand
- a heading
- a label
- a ticket

Trade marks must be used or intended to be used:

- to distinguish goods or services
- dealt with or provided in the course of trade
- from goods or services dealt with or provided by anyone else

### **Examples of trademarks:**

This is not an endorsement of any particular business, just examples.

#### **1 - COMBINATION OF LETTERS**

The National Australia Bank spent millions of dollars on rebranding its 'NAB' brand from capital letters to lowercase to be 'less threatening and more accessible'. As far as I know, it made not a jot of difference to anyone!

The combination of the letters 'nab' constitute the trade mark.

Any protected acronym of a company name is probably a protected trademark:

BMW, KFC, MGM ... what others can you think of?

#### **2 – WORD**

A large number of mundane words that are now internationally recognised as brands, and also protected trade marks, words like:

- VIRGIN
- FORD
- the SHARK

#### **3 – NAME**

Many celebrities and loads of sports people protect their names as brands.

Some companies have spent vast amounts of money coming up with new names to distinguish themselves from others and protect that new name.

- MICROSOFT
- PIXAR
- NIKE

The trouble with some brands that lead the market is that they go from being trade marks to common language. When a former trade mark is considered common language, it can no longer be protected as a trade mark. Things like -

POST-IT NOTES, BAND AID, ASPIRIN no longer have trademark protection.

### **4 – SHAPE**

Shapes have been controversial in seeking trademark protection. Weird and wonderful things have gained protection.

The shape of Cadbury's Freddo Frog has trademark protection, but when Guylian applied to stop a cheap Asian copy of their shell chocolates, the court decided that the shells were not sufficiently distinctive to warrant protection. The Toblerone triangles are protected too.

Whistles, dog toys that hold biscuits for dogs, the Rubix cube all have protection.

### **5 – COLOUR**

Cadbury ran into trouble trying to stop other companies from using its distinctive purple colour for wrapping chocolates.

Weis have gained trademark protection for the distinctive white ice cream and coloured fruit ice-cream bars.

This means that no other ice-cream manufacturer can distribute a similar looking ice-cream bar in Australia.

### **6 – SOUND**

What are some of the most easily distinguished sounds in the whole world? The tones that phones and computers make when you turn them on. Each brand has a different collection of notes and many are trade marked.

#### **Categories of Trade Mark**

A trademark is not something that can be protected ‘across the board’.

You can only protect your trade mark against a competitor in the same category. There are 34 different classifications for goods and another 10 different classifications for services - 45 in total.

When you choose to register a trade mark, you pick one or more classifications for the protection of that trademark to DISTINGUISH your product or service from other providers in the same industry. Cars are a great example.

Consider how many different brands of cars there are on the road. You may not be able to tell one immediately from the other by shape, size or colour, but you can certainly distinguish the car by its badge.

When car manufacturers are bought and sold, one of the most valuable items on their list of assets is the brand and associated trademarks.

For example, throughout history the Jaguar brand has been owned by the original founders, British Leyland, Ford and currently Tata Motors. Most people don't care who owns the company provided the car displays the Jaguar brand.

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In Australia, the Jaguar trade mark is registered in a variety of categories including:

Class: 3 Perfumes, cosmetics, soaps, non-medicated toilet preparations; cleaning and polishing preparations for motor land vehicles

Class: 14 Smokers' articles of precious and semi-precious metals; watches; clocks; jewellery; parts of and fittings for all the aforesaid goods

Class: 18 Articles included in class 18 made of leather or of imitation leather but not including any made from or resembling jaguar skin; travelling bags; handbags; document cases; suitcases; pocket wallets; purses; parasols; umbrellas; walking sticks

If the trademark is likely to cause confusion with another merchant in the same class, it probably won't get registered. In fact, you'll probably get accused of infringing the mark, or passing off. "Passing off" is a legal cause of action that applies where there is a representation that one person's goods or services are those of someone else so that the person making the representation is falsely getting the benefit of the first person's branding.

Crazy John's mobile phones challenged Crazy Ron's mobile phones successfully for passing off, but it was not successful on appeal in stopping Crazy Ron's from applying to register a trademark. Why? Because Crazy John's trademarks were composite marks, the first with words and picture and the second with stylised words. The words by themselves were never trademarked.

In the end there was no point in Crazy Ron registering the mark because they would still be passing off by using it...

IMPO: Don't think that you can use a clever play on your competitor's trademark and get away with it.

## Trade mark symbols

™ ® ™ ® ™ ® ™ ® ™ ® ™ ® ™ ® ™ ®

The quickest way to warn the public that you will take action to protect a trade mark is to include a ™ next to that mark. It is also the quickest way to work out whether or not someone intends to protect their mark before you copy it.

™ indicates that it is a trademark of the business where ® shows that the trademark is registered. Don't use ® if it is not registered! That is an offence.

It is not a requirement of registration to use a trade mark symbol, and many businesses don't bother to clutter up their advertising or product badges with one.

### When is a Trade mark not a Trade mark?

There have been a few cases around the world that highlight the limits of trade mark protection.

In Singapore, the Court found that the use of a distinctive floral pattern with four pointed petals similar to the Louis Vuitton trade mark on the face of a watch, was not using the pattern as a trade mark, but merely decoration.

The trademark 'Solvil' was written in small typeface on the watch faces and the watches were marketed at the bulk market, rather than exclusive merchandise.

The Court in Singapore found that to be a trade mark, the mark needed to be used in the promotion of the product.

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In Australia, candy makers Nature's Blend and Nestle have had a similar tussle over the expression "Luscious Lips" used as a descriptive term on the advertising blurb of packet of Allens Retro Party Mix (Nestle).

Nature's Blend held the trade mark "Luscious Lips" for the class of products covering confectionery and claimed trademark infringement. The Court said 'no'.

The Court pointed out that if any customer actually took the time to read the blurb on the packet, it would only be after they were very clear as to which brand of sweets the customer was buying. (It is kind of obvious)

The mere presence of the words "luscious lips" in the blurb on the packet was insufficient to mislead customers in any way as to who was the maker of the product. So there was no breach of trade mark.

### **Keywords – Yours, or Your Competitors?**

Recently decided US cases provide more pragmatic and realistic approaches to trade mark infringement using keywords.

In *Toyota Motor Sales v. Tabari*, the court recognised that online shoppers are pretty savvy about what they are doing. "They skip from site to site, ready to hit the back button when they're not satisfied with a site's contents . . . consumers don't form any firm expectations about the sponsorship of a website until they've seen the landing page — if then."

In that case the court refused to uphold an injunction stopping a car sales yard from using the trademark "Lexus" in domain names.

In *Network Automation, Inc. v. Advanced Systems Concepts, Inc* the court looked at the use of infringement of trademarks in the use of keyword search terms.

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As close competitors, Advanced systems purchased the use of a keyword “activebatch”, which just happened to be the name of Network’s main product. Of course their ads showed up – although in the sponsored field, not the natural search field.

Previously, companies upset about having their competitors ads show up have been able to argue that:

- advertising is part of trade
- the mark belongs to the company complaining
- both companies use online advertising, which could lead to confusion on the part of the customer

Now the 9th Circuit Court is asking keyword abuse complainants to show:

- what is the strength of the trademark (well known?)
- is there any evidence of actual confusion by customers?
- what type of goods are being advertised and what degree of care is the purchaser going to exercise before hitting the “buy” button; and
- looking at the results page, the appearance of the ads and surrounding text on the page, is the customer likely to be confused?

The last point addresses the fact that Google users are pretty familiar with the results page format and can tell the difference between natural results, paid advertising and premium advertising and often trust the natural results first.

The result was that the Court removed an injunction stopping Advanced from using the “activebatch” keyword in its advertising.

A 2016 decision in Australia in the Veda Advantage v Malouf Group case clearly stepped out the legal position, finding that:

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When selecting keywords and including them in an Adwords campaign, the advertiser is not using those words to distinguish the goods or services from goods or services of another trader. The advertiser is using those keywords to identify internet users who might have an interest in the product or service.

All Adwords account users have the ability to use the same keywords at the same time, which adds weight to the argument that those keywords are not being used as trade marks.

Where the keywords used are “invisible and inaudible, indeed imperceptible, to consumers” their use cannot be as a trade mark to distinguish goods or services. Where trade marks are used in a way that is merely descriptive of services, like “fix my Veda file”, that is not used as a trade mark.

Similarly, use of someone else’s trade mark in metatags is not considered a breach either. For more, see <http://onyxonlinelaw.com/trade-marks-in-keywords-metatags>

Prior to this decision the European Court had found Google not liable for the purchase of trademarks as keywords for advertising, although it did comment that the advertiser itself may be in breach. In Australia trademark protection has not been the chosen approach. Instead, the Australian courts have looked at whether or not the behaviour can be considered to be misleading and deceptive from the perspective of the customer – more in line with the 9th Circuit Court’s new approach.

It will be interesting to see what other international decisions take note of this approach.

### **What does this mean for you?**

- Using another company’s trademarks as keywords is something you do at your own risk
- You can now test the argument that customers are not stupid and are likely to know the difference between what is a paid advertisement and what is a natural search result

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- If the courts think your use of another company's trademark is likely to confuse customers, you're more likely to be in trouble than not
- As long as the domain name dispute resolution bodies pay attention to court decisions, it may be possible to register new domain names including the trademarks of other companies

Good planning makes all the difference. See the planning checklist we have on our website.

## Automated Content Creation

There are software systems available that can create written content from scratch. Reviews suggest that although the content may be understandable and indistinguishable from that written by a human being, it is boring to read. If you are going to use automatically generated content, test it first to see if it is suitable for what you want to achieve.

There are also systems available that assist you in curating content automatically from the internet. These systems use your nominated keywords to find appropriate material and repost it on your website.

Depending on how you use curated content will affect whether or not you are in breach of copyright. Don't rely upon the content curator to take responsibility for copyright. What you are paying for is for the system to collate content. Check your settings for how it is displayed.

Some systems do it well. Content gets created and displayed in a newspaper type format with headings, thumbnails and a snippet of the article and a link back to the original.

Some systems don't do it well. Full-size images are scraped together with a large portion of the original content and rather than a link back to the original article, you get an attribution to the original website and no direct link. A system that does this places you at high risk of copyright breach, for which you are responsible.

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Check our website for a review of some of the different software available.



**For checklists, recordings,  
templates and other useful  
resources, go to**

*[www.coveryourarseonline.com/readers](http://www.coveryourarseonline.com/readers)*

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## Chapter 4

# Digital Marketing

*"Your customers are not you. They don't look like you, they don't think like you, they don't do the things that you do and they don't have your expectations or assumptions. If they did, they wouldn't be your customers; they'd be your competitors."*

**Mike Kuniavsky**

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# Marketing in the Information Age

Digital marketing could simply be described as marketing using digital channels, which is broader than the traditional channels of print media, radio and television. Digital channels now include radio, television, the internet and mobile phones.

Marketing used to be about interrupting your target audience with a promotion. It is now more about engaging your audience to become involved in your brand, and using data to provide responsive marketing, but the old legal rules still apply together with some new risks.

Examples of digital marketing activities are:

- display advertising, banner ads etc
- e-mail direct marketing
- search engine optimisation (SEO)
- search engine marketing (SEM)
- content marketing
- social media marketing
- mobile phone SMS and MMS marketing
- phone call back marketing

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Some significant difference with pre-digital marketing, are:

- broad reach of digital marketing
- speed of access, response and interaction with the market
- comparatively low cost of digital marketing
- flexibility of format
- accumulation of data and how that influences marketing approaches
- the ability to refine target marketing with technology

# Key Legal Concerns for Digital Marketing

The close interaction between a business and consumers through digital marketing gives rise to the following primary concerns:

- Avoiding copyright infringement (Chapter 2)
- Compliance with data protection and privacy laws (Chapter 9)
- Anti-spam compliance (Chapter 10)
- Avoiding reputational damage
- Testimonials
- Consumer protection
- Email marketing and communications
- Online sales and e-commerce

We'll be looking at the last five in this chapter.

## **Avoiding Reputational Damage**

Everything anyone wants to know about you or your business is now available online with a little digging, even if you didn't put it there. One of the benefits of digital marketing is that you can create the message you want people to find.

This is no excuse for lying, as VW found out in 2015 when their false information about the emissions levels of their vehicles came to light.

With the flexibility of communication platforms and the speed of delivery, it's very easy to put your business in a position of risk.

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The key to protecting your business is:

- understand the brand and culture of your business
- understand the key messages you want your clients to get
- have trusted people in charge of communication who understand the brand and culture of the company, with the flexibility to respond to public comment
- think about the customer and how they will respond to your marketing

### **CASE STUDY**

Uber has entered the market as a disrupter in transport services. Their rating system means that the success of a driver is reliant upon customer service over price. Real-time reporting is available to customers so the power of choice rests with them.

Taxi industry organisations have done their best to respond to the threat to their market share. Taxi companies tried to scare consumers and promote taxi services, without understanding the key complaints that passengers had. Messages around insurance, professionalism, safety, cleanliness and timeliness all backfired.

In Australia an attack on a female passenger was reported and widely trumpeted as a reason not to use Uber, only to discover the driver responsible was an off-duty taxi driver. Uber has been able to respond to every concern raised by taxi organizations.

Know your market before crafting a message.

### **CASE STUDY**

Telco provider 3 in the UK had system-wide issues extending over a couple of days and some initially irate customers.

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They had policies in place and trained staff trusted to respond quickly, politely and with good humour to customer complaints on social media. Result? Customers were prepared to be patient and wait for the issues to be resolved because they felt heard and respected.

What does this mean for you?

Put in place some policies and procedures that enable staff to respond quickly to online communications, in a way that supports the culture and reputation of your business. Train people, then trust them to look after those communications. Don't just let anyone say anything, anytime.

## Using Testimonials

A testimonial is a statement from a client or customer about your business that you may use for promotional purposes.

Did you know that there have been court cases against people who have posted “testimonials” about their own products on either their own or other people’s websites? It’s called “misleading and deceptive conduct.”

I’ve just been doing a little online research and came across this promise –

“New push button software creates powerful, easy, and convincing testimonials in just seconds!”

The advertising around that product then goes on to say that it is only for busy people who’ve been asked to provide testimonials for every man and his dog, and don’t have the time or energy to think too hard about putting something unique together in answer to each request.

That sounds fair enough, but really, you can see the temptation for people promoting online just to generate a couple of testimonials to add to their advertising? Be tempted, but don’t do it!

Some quick answers to some frequently asked questions about testimonials are:

**YES** – You can ask people to provide you with testimonials

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**NO** – You cannot ask/ pay/ bribe people to make up false testimonials for you

**YES** – You can help people to write a testimonial for you. What you need to do is get their final approval of the words used and their agreement that what you have written is what they mean.

**YES** – You can edit testimonials that you are given, as long as you do not change the meaning and you ask the person giving the testimonial to agree that they are happy with the edited version.

**NO** – You cannot publish testimonials that make out that your product or service is better/ different to what it really is.

How you manage testimonials is important. It can affect your business reputation and credibility and can expose your business to charges of misleading and deceptive conduct if found to be false.

ACCC Chairman Rod Sims had this to say:

“Australian consumers are increasingly relying on online consumer reviews to inform their purchasing decisions. Fake testimonials can mislead consumers as a great deal of trust is often placed on these reviews. They also harm competitors who do the right thing,”

So with consumers placing more and more reliance on testimonials they can definitely be a positive addition to your website, providing you follow these seven tips:

### **1. Testimonials must be real**

This may seem quite obvious, but fake testimonials do happen. It is fine to ask someone to provide a testimonial.

You may also assist the person in writing the testimonial providing the person gives final approval of the wording and agrees that it represents their opinion.

You can also edit a testimonial, but again you must get final approval from the person making the testimonial.

### **2. Testimonials must be true**

You must not ask someone to provide a false testimonial. Nor may you pay or bribe someone to provide a false testimonial.

While editing a testimonial is ok, any editing you do must not alter the meaning of what was actually said.

The testimonial must not represent or exaggerate that your product or service has performance characteristics, accessories, uses or benefits that it does not have. The testimonial must not exaggerate the need for goods or services. Something like “you simply can’t do this without having that...” in a way that creates a false expectation.

Don’t infer that you have an endorsement from anyone, particularly not a celebrity, for the promotion of one of your products. Sports and entertainment stars get paid big money for their endorsements, and they do tend to sue people who try to use their celebrity power to make money when they haven’t been involved in the process.

Depending upon the regulation of your industry, you might also have to monitor what other people say about you on your social media profiles and even feedback websites like TripAdvisor.com to avoid liability for exaggerated endorsements.

### **3. Testimonials must be current**

You must only use testimonials that are about a product or service that you currently offer.

If someone provides a testimonial for a specific product or service that you no longer offer you should remove the testimonial as there is a risk that a consumer may be misled into thinking that the testimonial refers to the current product or service.

Failing to remove the testimonial may result in a finding of misleading conduct against you.

### **4. Testimonials must be about your current products or services**

You cannot publish testimonials that make out that your product or service is better/ different to what it really is.

If the testimonial is based on the personal experience for a specific product/service, then you cannot use it to promote different products and services. The testimonial must be related to the item to which the testimonial is "attached" to.

### **5. Testimonials must not be misleading**

The wording of the testimonial must also only reflect the true nature of any relationship your product/service has with the person making the testimonial. This means the testimonial must not suggest any sponsorship, approval or affiliation that does not exist. For example, you can't use an image of a sports player and use words that suggest they use your product or service unless they actually do and are happy to endorse it.

### **6. Keep a record**

Keep a log of testimonials so you know when you received them and from whom. You don't need to identify someone by their full name or other details, but you do need to be able to prove who they are and when they made the testimonial and that it is valid. This information should be easily found in your customer relationship management system.

One company I have seen do this well is [BuyMyPlace.com.au](http://BuyMyPlace.com.au). They have kept every one of their testimonials for years and uploaded them on a page of their website with a picture of the property sold. All testimonials after 2010 are dated. Easy!

## 7. Testimonials and disclosure

There are laws in the United States that require you to disclose the following things if they relate to the testimonial:

- if you have given the person giving the testimonial a free product/ service you both have to say so;
- if the giver of the testimonial receives any benefit from you or through you, you and they have to say so;
- if you pay a celebrity for an endorsement then you have to say so;
- if the person making the testimonial claims to be an expert, then they must be.

Even where these requirements have not been incorporated into the law of your country, it is the nature of the judicial system that where the law is “silent” on an issue, they may look to other jurisdictions for cases dealing with similar issues to guide their decision making.

With this in mind, it is recommended that you are as open and honest as you can be with your potential customers when presenting testimonials.

# Your Consumer Protection Obligations

The first rule of online business: Do Not Piss Customers Off – They Will Tell the Whole World!

Consumer protection laws impose quite substantial penalties on businesses that don't meet their obligations under those laws. It is easy for an unhappy customer or client to file a complaint with a regulator (there are even Apps for it!) and if more than one complaint is received, that could start a possible chain of investigation of all your business practices. It doesn't matter what size your business, big or small, non-compliance can result in fines, product recall, refunds, remedial advertising and civil claims.

It is understandable that you want to advertise your services in a way that entices hordes of eager customers to your door.

Direct response advertising is all about triggering the emotions of your buyers by identifying their wants and giving them all the reasons they need to overcome any hesitancy to buy. In doing so you must be careful how you describe your goods and services. Here are some of the things you need to be aware of when describing your services. Make sure:

- Your services are of the particular standard, quality, value, history etc that you claim them to be.
- Your services have actually been used or bought by the people that you claim have used or bought them. (ie, don't claim that you

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gave the latest sport's hero some coaching if you didn't!)

- If you claim to have sponsorship, approval or benefits to your services, the claims are true.
- You state the price clearly and in a way that isn't going to confuse people
- You can provide what you say you can when you say you can
- If you claim your knowledge, experience or qualifications came from someone or somewhere, that they actually did
- You realistically state the need for a particular good or service
- If you offer a condition, warranty, guarantee, right or remedy, you actually meet that commitment
- You make claims that you can realistically substantiate

Consider that this long list of requirements has been developed over the years and often in response to the activities of people whose business practices were considered to be unacceptable. I've left out a few that deal more with manufactured products and have concentrated mainly on those dealing with services.

What consumer protection law does is identify all the tricky things that business people have done in the past to persuade people to buy and attempts to identify some of the tricky things they might do in the future, with a view to prohibiting anything that might be considered unfair to the consumer.

### **Buyer's remorse...**

It's that impulse buy, or the purchase made after focused attention from a good sales person that tend to lead to later regret. It is that after-purchase regret that leads to complaints. If your customers feel unhappy about their purchase, for any reason, that is when you start to run into trouble.

What you want is satisfied customers. You do not want your business coming to the negative attention of regulators, because once your business is on their radar, it's hard to get it off again.

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The consumer protection agencies of 34 countries from the International Consumer Protection and Enforcement Network (ICPEN) have now banded together to create the [ecommerce.gov](http://ecommerce.gov) website to help consumer protection agencies around the world spot trends and work together to prevent international scams.

That website offers a very simple (if long winded) complaint filing process for international transactions. Complaints are collated by the US Federal Trade Commission before being dealt with. Make sure your business doesn't come to their attention by understanding and complying with your consumer obligations.

The complaints from consumers for online purchases over 2014 were identified on [ecommerce.gov](http://ecommerce.gov) as:

- 22% not classified
- 18% product or service never received
- 13% failure to honour refund policy
- 11% misrepresentation
- 10% seller couldn't be contacted
- 8% poor quality
- 6% unauthorised account access
- 4% billed for products or services not requested
- 3% failure to meet warranty or guarantee
- 3% didn't match order description
- 2% delay in delivery

The primary categories of business giving rise to complaints were identified by the ICPEN as:

- Online shopping / ecommerce services / computer equipment
- Jobs and making money
- Travel and vacations
- Credit and debt
- Imposter scams / family, friend, government, business or romance
- Telemarketing and Spam
- Lottery, sweepstakes or prize scams and

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- Others (health care / cars/auto / home / charitable solicitation / grants/education / ad space/directory listings / property/ inheritance tracers / jewellery/watches)

### **Consumer Guarantees**

In Australia, businesses are required to meet minimum consumer guarantees when offering products or services, businesses need to make sure they are:

#### 1. Of acceptable quality

In assessing whether a product is acceptable consideration will be made of the type of product it is, the price and any representations made by the business. So if you were to compare a brand new lounge suite with a second-hand lounge suite, what is acceptable will be varied to some extent.

The consumer also has a responsibility to ensure the product is used in the manner it was designed for and in a reasonable manner.

#### 2. Fit for purpose

This guarantee relates to any representation you have made to consumers about your product's suitability for particular purposes.

### **CASE STUDY**

ACCC v Apple Pty Ltd

In this case, the ACCC brought an action against Apple Pty Ltd before the Federal Court.

This issue to be considered by the Court is related to an advertising campaign by Apple Pty Ltd, which included a representation that their newest iPad could connect to the 4G network.

Unfortunately, the iPad could not connect to the 4G network and for this false representation, Apple Pty Ltd was fined \$2.25 million.

### 3. Match description

This guarantee gives a consumer an entitlement to a remedy if the goods they purchase do not match the description provided. For example, if the goods have a different colour to that described, made of a different material or simply not what they were made out to be, like a “hand crafted Harry Potter wand” that is clearly just a stick.

### 4. Match sample or demonstration model

Closely linked to the guarantee that goods must match the description is the guarantee that the goods must match any sample or demonstration model shown.

An example of a sample would be a carpet swatch that is used to pick out a carpet and then finding upon installation that the carpet installed is a different material or weave. It does not matter if the difference between the product sold and the sample/demonstration model is unavoidable. The customer may have the right to a remedy if the difference is substantial.

### 5. Reasonable access to repair facilities and spare parts

This guarantee applies if you are a manufacturer or an importer of goods. When you supply goods you must also take reasonable steps to provide spare parts and repair facilities for a reasonable time after purchase.

An exception to this is where you inform the customer in writing at the time of the purchase that repair facilities and spare parts will not be available after a specified time period. An example would be where a customer purchases a brand new fridge. Two months after the purchase the customer breaks one of the shelves.

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When they contact the manufacturer to get it repaired they are advised that they cannot supply a replacement shelf. The customer is entitled to some sort of remedy from the manufacturer.

What is deemed as a reasonable amount of time will depend on the type of goods purchased.

### 6. Express warranties

An express warranty is a promise made to consumers about the product being offered. Express promises are often made about characteristics such as the quality, durability or performance.

Any promise made to a consumer must be satisfied or else you will breach this guarantee and be liable.

An example of an express warranty would be to guarantee that a mattress will last for 10 years. If the mattress fails to last this long then the consumer has the right to a remedy. The remedy may be a replacement or reimbursement.

Very similar to an express warranty is a manufacturer's warranty. The manufacturer warranty relates to a period where the goods or services will remain free from any defects. If a defect arises during the stated period then the consumer will be entitled to free repairs, replacement, a refund or other compensation.

You can see how closely related these two types of warranties are. In basic terms, an express warranty provides assurance to the consumer that the goods or services are of a certain quality, or will last a certain period, or will perform in a certain manner...whereas the manufacturer warranty deals with what happens if something goes wrong.

Using a container as an example, an express warranty may say that the container can hold 10 litres.

If the container then leaks, then this is a defect and the manufacturer's warranty applies.

### 7. Right to sell

In order for someone to have the 'right to sell' something, they must have what is called 'title'.

A supplier of goods must guarantee they have the right to sell the goods, i.e. they hold the title. This provides assurance to the consumer that the goods they are purchasing cannot later be taken by someone else who claims to be the true owner.

An example of where the goods may be seized is when the goods were stolen. The rightful owner (from whom the goods were stolen from) can ask a court to have the items returned to them.

### 8. Undisturbed possession

Closely related to the 'right to sell' is this guarantee of undisturbed possession. As explained above, the consumer is provided with a guarantee that they will not later lose possession due to the supplier not having the right to sell the goods in question.

An exception to this guarantee is lease agreements, where the consumer is aware that the goods are only to be in their possession for the length of the lease.

### 9. Free of undisclosed charges

When most of us think of charges...we think of a fee...or the price of something. For example, a consumer may ask how much you charge for a certain service.

This guarantee however, relates to a different concept of a charge. In this case, the goods are not owned outright by the supplier and therefore a "charge" exists over them.

This charge is a claim that entitles the financier to take back the goods if the debt is not repaid. If the consumer is not informed about the existence of the charge, then the supplier will be liable and the consumer will be entitled to a remedy.

### **Misleading and Deceptive Conduct**

The complaint that appears to get the greatest attention of regulators is misleading and deceptive conduct. Any statement that cannot be substantiated falls within this category.

### **CASE STUDY**

In 2015 the FTC extracted \$1.4m in fines from the makers of a dietary supplement called Procera AVH because they deceived consumers with claims that their supplement was clinically proven to improve memory, mood, and other cognitive functions.

### **CASE STUDY**

Heinz is another example. Big multinational food company. They bought a little Australian company formerly owned by a farmers' co-operative.

The packaging included words such as "Australian Grown" and "Australian Owned". Heinz is clearly not local to Australia. The ACCC took action and, amongst other things, Heinz was ordered to 'donate' over \$1m worth of wrongly packaged product to charity.

That's a whole lot of pineapple!

### **CASE STUDY**

Ribena blackberry cordial sold millions of litres to parents who believed their advertising when they said it contained more vitamin C than oranges.

That was until a New Zealand schoolgirl did a simple test in a chemistry class to show that there was no vitamin C present at all. Large fines were imposed as well as corrective advertising campaigns, and packaging changes, not to mention further prosecution in other countries.

### **Five promises you should be wary of making on your website**

The use of seemingly harmless phrases on your website may seem like just a clever ploy to attract customers but may in fact, result in your being found liable for misleading conduct. It is an offense to use misleading conduct so take note of the following common mistakes.

#### 1. "The Best"

Puffery is a wildly exaggerated claim that no reasonable person would treat seriously. Misleading conduct, however is a claim that a reasonable person would rely on.

Compare these two statements:

Wear our clothes and you will be the best-dressed girl in town;

Our phone plans are the best offer available.

The phrase 'the best' is used in both statements but the first is likely to be considered puffery whereas the second may lead the business into trouble if a competitor is able to prove it has a better offer.

#### 2. "The Only"

The use of the phrase 'the only' should be avoided unless it relates to a definite statement of fact.

## CASE STUDY

ACCC v On Clinic Australia Pty Ltd & Ors

This case involved newspaper advertisements by On Clinic promoting their impotency treatment. As part of their advertisement the following representations were made:

- the ONLY Impotence Treatment Ever Proven to Work;
- improve your SEX LIFE with the ONLY impotency treatment EVER proven to work.

Following complaints by medical professionals, the matter went to court. The Court held that the terms 'only' and 'ever' were unequivocal and do not allow for exceptions so were deemed to be misleading.

### 3. "Expert"

Imagine that a person on the street walked up to you and told you that wearing rayon will make your skin peel. You wouldn't believe them. Now imagine watching the news and there is a story with a leading expert in skin disorders saying the same risk. You'd probably give more credibility to the news story, despite previously dismissing it. This is the power of the expert and the basis of a lot of infomercials.

Care needs to be taken when associated claims with experts in your digital marketing.

### 4. Health benefits or miracle "cures"

The promotion of health products often exaggerates the benefits of a product while down-playing its weaknesses or side effects.

A prime example is the use of the term 'cure' or '100% effective.' It is commonly recognized in the medical community that nothing in medicine and health care is 100%. Everyone responds differently as no two people are the same.

Not even in cases where you have tested a product and achieved 100% success rate should you use this term.

### 5. Future Predictions

Another area where great care needs to be taken in digital marketing is future predictions.

On the one hand a statement about a future event that in time does not occur is not necessarily classified as misleading conduct, however, if a prediction is made under the following circumstances you are in trouble:

- you knew the prediction was untrue or incorrect at the time it was made;
- you didn't care if it were true or not;
- you had no reasonable reason for making such a prediction.

### **Consumer Guarantees are Implied Warranties**

Many products have written warranties. Think about buying a mobile phone. In the box, or when you first log in to set up your phone, you'll probably find a warranty form. It probably says something like "12-month warranty on mobile phones and battery packs and accessories from the date of purchase".

What that means is that if structure of the phone stops working for no apparent reason within 12 months from when you bought it, you can return it for repair or replacement. If you can take it back to where you bought it, then you can return it without extra cost.

Of course, the warranty doesn't cover the phone if you drop it, it only covers repair or replacement if something is actually wrong with the way the phone was made or the way it works – or doesn't work.

### **An implied warranty is something NOT written in a warranty**

Warranties are implied by law. In different places around the world, there are laws about consumer protection or fair trading.

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Those laws imply certain warranties into the supply of goods or services.

The warranties implied by law are promises that have to be kept. There is no getting out of them. In fact, the law says that if you include a term in your contract or terms and conditions that says that the implied warranties do not apply, depending on where you are, that clause could be void and unenforceable.

Other types of contracts, like building contracts, contracts for borrowing money, and contracts for the provision of financial advice may attract implied warranties specific to that industry. It is worth checking out what you are signing up for when you want to market goods or services to the public.

### **Why should you comply with consumer protection laws?**

Well, the difference between complying with consumer protection and fair trading laws, and not complying, can be significant. There are fundamental expectations that customers are entitled to have about the products and services they buy, and it is the job of the fair trading commissions of this world to protect those expectations.

You don't need to be spending your precious time defending lawsuits and handling difficult complaints, so be very careful how you describe your products in the first place.

# Email Marketing and Communications

## Anti-spam compliance

Anti-spam rules apply to telephone messaging as well as emails. Anti-spam is not just about bulk messaging. It only takes one text message or one email to contravene the law.

If you have a new business and you don't use one of the common auto-responder or CRM services like Aweber, MailChimp or Salesforce then you might not be complying with anti-spam laws.

If you are non-compliant and there are enough complaints made against you, your text or email system can be blocked or canceled leading to your whole method of communication being disrupted.

Being anti-spam compliant is so EASY I am constantly surprised at the businesses that don't get it right.

## Three Simple Steps

1. Get consent from the people on your database to send them messages on an ongoing basis.
2. Include clear and accurate information about the sender, and on the email include a valid physical postal address.
3. Provide an accurate and functioning unsubscribe facility on every single message you send out.

### **Consent**

If you want customers from all over the world, then you have to choose the highest level of compliance which is getting express consent. That means that whoever you have in your database must have opted in rather than just having the option to opt out of your list.

The elements of the highest level of compliance are:

- clear request and
- conspicuous request for consent
- response of the own initiative of the recipient

If your target market is Australian, you can infer consent. This is a soft opt-in and occurs when someone enquires about a product or buys a product from you and you chose to send them marketing material about a similar product. The email to that customer has to include a functioning unsubscribe facility and if the customer doesn't unsubscribe, they are taken to have opted in.

### **Business Cards**

Don't assume that receiving a business card is permission to add that person to your marketing list. Inferred consent only applies to products or services that a reasonable person might expect to be relevant to that business. So if you send a lawyer material about printing, that might be reasonable, but probably not something about garden products. The key factor is what the recipient would reasonably expect.

I have some standard responses to people who send me marketing emails that I haven't opted in to, one for those who are spam compliant, and one for those who are not. You can copy those responses from our website.

## **Bought Lists**

Buying a list is not the same as getting consent. Unless you can prove that the people on the list you purchased have consented to receive marketing and advertising messages either specifically from you or about your business, else don't use them.

## **Indicators of Scam**

Scam messages usually disguise or conceal who the sender is and often don't provide contact details or list contact details that don't work, so the minimum level of compliance for sending electronic messages is that you identify who the sender is.

The purpose of having accurate contact details (this can be a functioning link) is so that recipients can check to ensure that your business is a legitimate business. It is to inspire consumer confidence. After all, what legitimate business would be unhappy about letting their customers find them?

## **Unsubscribe**

There is simply no excuse not to provide an unsubscribe facility on your messages. If you are sending out bulk messages make sure that the unsubscribe facility is working. Any bulk message system you use, whether it is free or paid, should have an automatic unsubscribe facility so that you don't have to worry about updating your database yourself.

When you are starting out it is tempting to take shortcuts in setting up your database just to save money. That is ok, provided that you know how you are using your systems and migrating information so that you don't end up with multiple lists of people. I have worked with someone who changed auto-responder systems every 12 months and reloaded all the unsubscribed people back into the active list on every change. There is no excuse for poor administration, that is non-compliance.

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If you have a small business and you are operating on a shoestring and haven't set up a CRM system then, at the very least, what you will need on your emails is a message that says "To unsubscribe from receiving this email (insert appropriate email address) with UNSUBSCRIBE in the subject line to have your details removed from our list" and for your text messages, include "respond STOP to unsubscribe". If someone unsubscribes, then remove them permanently from your system.

If you need help in putting together procedures for your staff or want a poster for the wall that spells it out, check our website.

### **Mobile Phone Spam**

Tired of those marketing text messages? Text messaging, unwanted calls from marketers and people soliciting for charities, automated messages, and automated missed calls are all mobile phone spam.

There are just as many regulations around mobile phone spam as there is around email spam. The publication of an email address or mobile telephone number on a website is not an open invitation to send messages.

Just as with email, it has to be easy for people to unsubscribe from receiving SMS or MMS content, usually by replying "STOP" to an unwanted text. If a customer notifies you that they want to be removed from your marketing call list, you should remove them.

Regulators in most countries provide email and mobile phone numbers that you can now simply forward Spam messages to.

Don't risk your business with opportunistic behaviour and be prepared to apologize and make undertakings and clean up your act if you do get told off!

## **Social Media**

Social media platforms set their own rules around what you can and can't do within their platforms.

Across the board, social media platforms prohibit using their information to create independent marketing lists to be used outside of the platform. The risks in doing that are that you have your account permanently deleted from a social media platform and cannot create a new one.

# Online Sales and E-commerce

## **Doing business across borders**

Globalization will make our societies more creative and prosperous, but also more vulnerable.

This quote by Lord Robertson (10th Secretary General of NATO), whilst aimed at the threat of terrorism, is equally valid when considering the ease in which online commercial transactions cross borders. Whether these borders are states and territories within a country or further abroad with the crossing of international borders.

It is important to note that the laws that govern commercial transactions are not the same everywhere and this may impact on how a dispute arising out of a transaction may be decided by a court.

This section is about reducing the vulnerability of your business when transacting across borders.

## **The United Nations Convention on Contracts for the International Sale of Goods 1980**

Most western countries are a party to this Convention, which applies to contracts for the sales of goods between parties who have places of business in different countries.

It does not apply to sales of goods where the goods are bought for personal, family or household use, or goods sold via an auction.

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It can be specifically excluded from applying to a sale if you make that a condition of the sale. This can be done in terms and conditions on your website.

If your business does include the export of goods that are not for personal, family or household use, and you don't have terms and conditions that exclude the Convention, you might need further legal advice as to how this convention applies to any contracts you may be party to.

### **Conflict of Laws**

The phrase "conflict of laws" relates to disputes where there is a connection (or claimed connection) with a legal system of more than one jurisdiction. A simple example would be a person in Australia who buys an expensive piece of jewellery from a business in the United States.

If the Australian customer is unhappy with the jewellery for some reason (it is fake) and can't get a refund, where would they start a proceeding?

### **Choice of Law**

'Choice of law' is the process of deciding which laws apply to an international contractual dispute. Most countries apply principles identifying which system of law has the closest and most real connection with the transaction. The definition and application of these principles differ around the world, creating uncertainty.

For example:

You sell children's t-shirts online. You run your online business from your home in Australia. The shirts are manufactured in Taiwan. When an order is placed, the shirt gets sent directly from Taiwan to the purchaser.

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Your customer is based in the UK and is unhappy with the shirt they receive and a dispute arises. Here there is a potential choice of three legal systems: Australia, Taiwan, and the UK.

To overcome some of this uncertainty you can include in your terms and conditions which legal jurisdiction will apply. This is known as “choice of forum”.

### **Choice of Forum**

It is a generally accepted principle that parties to a contract can select which forum will apply to a dispute arising out of the contract.

This means that you may draft a contract that is valid under Australian law but still nominate for instance that disputes will be resolved according to US law.

This choice of forum can also be extended to the way a dispute may be resolved. For example, you may include as a term of your agreement that any dispute is to be resolved through mediation.

Whatever you do, keep in mind that going through any legal or quasi legal process to get an order or agreement will be expensive, and after that you may have to take additional steps to enforce it. If someone in a foreign country refuses to pay a court order, you may have to find somewhere in the world where you can register and enforce that order against their property before you will recover funds.

### **Escrow**

It is not unusual to enter into escrow arrangements for large international transactions.

The sale of online businesses internationally is not completed through PayPal. A deposit is generally paid prior to entering a due diligence process, then when that is complete, the balance of funds is held in an escrow account until all assets are transferred.

There are fees for using escrow accounts, and rules around how and to whom funds are released.

### **Online Banking**

You are going to need to handle money online, but what does that involve?

Getting into business can provide great returns, so work out what tools you need to help support the growth of your business. Getting it wrong, or worse, making it hard for your customers to buy can really hit your bottom line. Plan your business strategy around where you do want your business to go in the future.

The **first** thing you need to know is that banking changes all the time and unless you want to pay more than you need to, don't expect to just 'set and forget' your bank accounts.

The **second** thing you need to understand is what a 'merchant' account actually is and whether or not you need one. Like most of you, I have never worked in a bank and don't know the whys and wherefores of banking systems.

Today, there are so many new payment options like Bitcoin, Stripe and Square that you may not need to hold a merchant account. But just in case...

### **What is a Merchant Account?**

IT IS:

- a type of bank account
- for accepting payment by debit or credit card
- can include different processing options

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### IT IS NOT:

- the same as an everyday business bank account
- a payment card gateway by itself
- without fees
- automatically available to you

### How does it work???

Banks and debit or credit card providers are not the same thing. Visa, Mastercard, Amex and Diners are probably the most well known card providers in the world. Traditionally they only entered into agreements with banks and other financial institutions, but you might have noticed a growing trend for supermarket chains, airlines and other large companies to offer their own form of credit.

Your bank should be able to offer you a variety of services. Just be aware that different services attract different fees.

Consider whether or not it might be easier to give your customers the option to pay by B-Pay. Yes, ideally we would all like to be paid up front because that means we do not spend time chasing debtors instead of sales, but sometimes you do have to issue an invoice and wait for payment.

### **Relationship Building**

When I was growing up my parents owned a health food store. At some point they included a healthy lunch bar serving quiche and salads to customers. The banking for sales went through one account and the banking for the lunch bar went through a different account in another bank. When they sold the business they had done the deal when one of the local bankers commented to the purchasers that the business was not worth what they were offering for it. That comment, was not only a breach of confidentiality but was wrong because he knew nothing about the income from the lunch bar.

## Cover Your Arse Online

From that time on I haven't really trusted banks in general.

On a similar vein, it took me a long time to find an accountant who I felt actually added value to me and my business. All this adds up to excuses for me not to spend time with or ask questions of the people who look after my business with the tax office and with the bank.

Don't make the same mistake!

In tough economic times it is the people who know your business who will be in the best position to support growth and development when you need it. Meet with your accountant and your relationship manager at the bank regularly to find out what is happening in their world. What pressures are being put on them by their managers to lend more money out or bring more money in? What new products is the bank offering that might work for your business?

I have dealt with banks that have been really hard working, and other banks that have made everything so easy. I spent half a day with one bank to set up a business account only to find out at the very end of the process that they were not able to offer me a business debit card - something I told them was a key requirement before we got started! When I went to another bank it took 15 minutes to complete the same process, debit card included!

Don't be afraid to shop around until you are satisfied that you have someone who understands your needs and will let you know if something new becomes available to support your business. Try and find someone who understands that your business is online and your needs are not the same as a retail shop.

It is easy to get confused. I paid \$20 per month for 18 months for a system I did not need because my bank said I needed it. The bank never suggested that I might want to close the facility because I wasn't using it. It is better to spend a little more time up-front working out what is available and best suited to your business.

## Cover Your Arse Online

Make sure you ask plenty of questions and review regularly to get the best deal. Don't be afraid to change! There are new offers and new technologies are being launched all the time.



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## Chapter 5

# Working with Others Online

*“Collaboration is important not just because it’s a better way to learn. The spirit of collaboration is penetrating every institution and all of our lives. So learning to collaborate is part of equipping yourself for effectiveness, problems solving, innovation and life-long learning in an ever-changing networked economy.”*

**Dan Tapscott**



## Having Other People Create Content for You

The world is a big place and the internet has made just about every corner accessible. What this means is that you can access labour in other countries at a reduced cost. There are a large number of platforms that provide easy access to thousands of workers with the qualifications and experience you don't have. Some of the well-known outsourcing platforms are:

- [Freelancer.com](https://www.freelancer.com)
- [Guru.com](https://www.guru.com)
- [UpWork.com](https://www.upwork.com)
- [Fiverr.com](https://www.fiverr.com)
- [99Designs.com](https://www.99designs.com)

This is just a small sample of what is available. Explore!

You may find different platforms more useful for different types of work. 99Designs connects you with graphic designers in a virtual space. You have to come up with a design brief and then designers compete to win your job. Fees are fixed up front and there are time limits for the competition. This is a great option for start-ups who don't have thousands of dollars to invest in a whole brand proposal. Branding experts will disagree, but at least you will have options.

UpWork was originally called ODesk and was known as a good place to find people with technical and coding skills.

## Cover Your Arse Online

It has since become much broader in scope and like Freelancer, you can find just about anyone to do anything that can be done remotely for you, including customer service. It is also possible to find people in your own country to complete work for you.

There are also industry specific websites popping up all of the time. These sites aim to bring together people who specialise in a field (like law) and offer fixed fee services at either a discounted rate or on a competitive basis.

Some sites allow you to submit a scope of work and ask for tenders. This is common in trade services, where you can put a call out for someone to put in some electrical power points, and you receive a selection of bids on email.

Whatever help you need, you will be able to find it online. Just like local services, some trial and error will probably be involved before you find the best person for the job.

### **Tips for finding reliable outsource workers include:**

- Check their feedback
- Interview your prospect online to make sure you can easily understand each other. The interview process should be similar to what you would go through to employ someone into your business on a full-time basis.
- Be clear on what results you are looking for. Many people who have had bad experiences with outsource workers because they did not really understand what they wanted until half way through the process.
- Don't assume knowledge on the part of your worker. It is very easy in an office environment to assume that the person you are giving instructions to already has a base level of understanding of both your business and your expectations. Outsource workers do not. They need to get to know you and need the same level of supervision and feedback as a brand new employee.
- Use small projects to trial performance. Give the same small

project to more than one worker to quickly assess who might be better to work with again.

An example might be getting a report or manual written for you. You might provide all of the data and information as well as some references to other work that you want to be included in the report. You might also provide an explanation about how you want it to look and the kind of layout or images you want someone to use in that work.

### **Terms and conditions**

Each platform has its own terms and conditions of the relationship between you and the person you hire to complete your work. It is important you understand what those terms and conditions are and any additional terms you might want to expand upon.

It is unlikely that the terms and conditions of engagement provided through the outsource platform are that specific, and you will need to make those terms specific up front, before hiring a worker. If you do so, and it is recorded within the outsource platform, in the event of a dispute you may be able to get help from that platform. If you take an agreement outside an outsource platform, do not expect them to help you.

Keep in mind that there are hurdles to enforce agreements with people in other countries. Enforcement if there is a breach can be very difficult, but most people want to do a good job and meet your expectations. It is up to you to assess whether or not you are happy to take the risk of putting your information on to one of those platforms. If the risk was high, outsourcing platforms would not be so successful. Your risks are possibly no higher than they are with internal staff.

It is worthwhile having your own list of key provisions and to get your outsource worker's agreement to those provisions before you start. This simply reinforces what is important to you in the relationship.

## Cover Your Arse Online

One big area of concern here is confidentiality and protection of intellectual property. I have received examples of work from prospective workers that still includes all of the personal and confidential details of their former client. In the legal industry, where confidentiality is one of our prime responsibilities, this is a worry.

I would not work with a para-legal who provided me with examples of their work that had not been de-identified, because this would demonstrate to me that any work I commissioned is at the risk of being shared in the future.

Terms you might like to highlight when employing an outsource worker include:

- All intellectual property in the created work vests in you upon payment in full
- The Worker must not use any of the work you have commissioned as examples of their work for publication at any time
- The Worker must not disclose that they have worked with you, unless you provide publically visible feedback on their profile
- All work must be original and the Worker must warrant that any work produced is not in breach of any third party intellectual property rights and they will indemnify you if it is (I've seen some logo designs that are blatant copies, presented as original work).
- That any images put in the work have appropriate copyright licences for your use and you are provided with details of where each image was sourced.

From experience, hiring outsource workers successfully may take a little practice. You need to think about how the person receiving instructions is going to make sense of them. You may need to do more planning and stepping out of procedures to get the results you are looking for. I have had good successes and complete failures with outsourced work. Once you do find someone who works well, look after them!

# If You Outsource or get a Contractor, Who Owns the Content?

Short answer – put it in writing so there is no confusion.

In a small business, it is tempting to do a lot of work on a handshake and worry about the details later. This often works and works well.

It tends to stop working when one party is making the money, and the other is not, or the relationships between the parties break down.

## **CASE STUDY**

EdSonic Pty Ltd v Cassidy [2010]

Cassidy worked with EdSonic to adapt some teaching materials into an online format for sale. They were her materials to start with, but EdSonic had the idea to put them online. Cassidy was promised shares in EdSonic and royalties from sales of the online materials.

Cassidy must have some skills because at about the same time she was asked to write some material for the Property Council of Australia for its own online courses. She didn't want the hassle and paperwork of setting up as a sole trader so she asked EdSonic to sign the contract for the work and then pay her. EdSonic did.

There was a breakdown in the working relationship between Cassidy and the director of EdSonic and EdSonic claimed ownership of the material that Cassidy had developed; all of it.

## Cover Your Arse Online

Of course, Cassidy didn't agree and the Court was asked to sort it out.

EdSonic relied upon a provision in the Copyright Act (section 35(6)) [Australia] which says that copyright material created by an employee as part of his or her employment or contract of service, belongs to the employer.

So the court had to work out what the combination of shares, royalties, and employment benefits worked out to for the teaching materials and the Property Council Materials.

What the Court decided was that there was not just one answer, with evidence suggesting that Cassidy was AND wasn't an employee. The Court decided that Cassidy kept copyright in the teaching material she was adapting because she was doing that work under an agreement that she would receive shares and royalties, rather than under a contract of employment.

On the other hand, even though the PCA approached her directly to complete their work, she actually performed the work under an employment contract with EdSonic, so that copyright did belong to EdSonic.

Work out from the start who will own what, when and why and document it.

When having logo or branding created ensure that you request the source files in multiple formats that are editable, like PSD or AI. Where possible ask the designer to provide the details such as colour codes, fonts, and any vector or image files used.

# Affiliate Marketing

Affiliate marketing has fast become a mainstay of conducting business online. So just what is meant by affiliate marketing? If you are the affiliate, it means that you use your website to direct people to someone else's website and you are rewarded for this referral.

There are different ways that affiliate marketing can occur:

- Commission per successful referral (where success is deemed to be where the referred person enters into an agreement with the other party e.g. a sale);
- Fixed remuneration per click (where you have a hyperlink to the other website on your site);

Displaying an advertisement for the other website on your site.

Whether you are the affiliate or whether you use an affiliate...it is sensible business practice to formalise the arrangement with an affiliate agreement. This will create a clear understanding of the scope of the arrangement and will set out things like the jurisdiction that will apply if a dispute were to arise. Defining the jurisdiction is important given that the internet is worldwide.

The payment arrangement between the affiliate and the referral website party is generally reliant on cookie technology.

A cookie will be deposited on a user's computer when they are referred from the affiliate website to the referral site.

## Cover Your Arse Online

If the referral is a success, then the presence of the cookie will indicate a commission is to be paid to the affiliate.

Unfortunately, there are unscrupulous affiliates who undertake a practice known as 'cookie stuffing' which involves the affiliate placing a cookie on a user's website without the referral occurring. The affiliate then receives a commission payment with no referral having occurred.

## Paying for Referrals

Referrals can generate a lot of business for you, whether you are doing business online or offline. There are loads of people online who, if you have a great product that they think they can market, would like a cut of your profits to help you increase sales.

There are different schools of thought about paying for referrals. Some people are happy to pay, and others are not. When you are thinking about what you might do, consider what it is that you are getting.

Are you paying for an introduction to, or details of a prospective client, or are you paying for a sale? Paying for a sale is a lot like affiliate marketing and usually, no money changes hands unless the sale goes through. Other people are happy to pay for an introduction because they believe they can turn an introduction into a client.

If you are going to pay, some things to think about are:

- Work out what the average income is that you receive from your customers once they know you (lifetime value) and how much it usually costs you to get a new customer (acquisition cost). These concepts come from sales and marketing.
- If your customers spend on average of \$500 per year with you, and you spend on average \$90 per year per new client in advertising costs, then you might be happy to pay someone \$50 to refer a new client to you because this would be a saving in your marketing costs.
- Work out how much administration is involved in paying referral fees. Some people might be looking for trailing commissions (like

## Cover Your Arse Online

what insurance agents and mortgage brokers receive), which is a fee on all business from that client after introduction. This can be a pain to administer and it might be better for you to just pay a once off fee rather than agreeing to ongoing fees.

- If you are working with more than one referrer, have a really clear process in place for identifying where a referral came from first. You don't want to get into a dispute with your referrer because they think they introduced a customer that heard about you from someone else.

# Getting in Front of Someone Else's Audience

There are some really successful businesses with huge databases of followers and you might like to get in front of those audiences. The most common examples of this are:

- an event organiser looking for speakers to add value to their audience
- an educator or seminar presenter who runs live events on a regular basis
- an online presenter who holds regular webinars that are well attended
- someone with a large social media following

If you aim to get in front of someone else's audience, then you need a clear plan on what you are prepared to do, and for who. If you are going to present regularly, or you want to engage others in presenting regularly, then know what your rules are for engagement.

Questions you need to be answered, whether you are putting on an event (online or offline) or presenting at one are:

- Can the presenter promote a product for sale?
- If so, can they keep the proceeds of a sale, or do they have to share them with the event organiser?
- If not, what is in place to monitor and manage that on the day?
- What date, time and duration is the presentation? Can you remove people from the stage if they go over time?

## Cover Your Arse Online

- What kind of presentation can the presenter bring (eg. PowerPoint) and how long before the event? Does it have to be provided?
- Who promotes the event and how?
- Is it paid? Are expenses paid?
- Will it be recorded? Who gets a copy? How can the recording be used?

I've seen plenty of disputes arise from these types of arrangements, so again, have it in writing.

It is common for seminar providers to either require you to become an event sponsor in order to get a speaking gig, or share 50% of any revenue from sales with them if promoting from the stage. Education providers who are looking for you to add value will often ask you to cover all your own expenses of presenting and not market to the audience. Your benefit is in becoming known as an expert in your field. A lot of continuing legal education is provided in this way.

Instagram and Pinterest are platforms that are now generating good incomes for many people. Anecdotally, you need more than 15,000 followers to start attracting the interest of businesses who want to get in front of your audience.

### **CASE STUDY**

A mother started an Instagram account when her daughter was born and posted cute baby photos. Because of her engaging style, she had over 15,000 before her daughter was 3 months old and started receiving offers of free products from baby product and baby clothing suppliers if she would feature their products in posts. This progressed to include not just free products, but also payment of between \$20-\$50 per post.

The baby is now 2 years of age with a following of over 20,000 people. The family have not had to buy clothes, toys or children's products for their daughter since she was three months old and now receive an income equivalent to working for someone else.

## Cover Your Arse Online

The time commitment is 4-5 hours per day.

That family learnt as they went along and are good negotiators, making it clear to their suppliers what they will and won't do, how often and at what cost.

There are now marketing agencies that work with successful bloggers and people with large social media followings to get product placements from multinationals. If you go down this path you will need to become a good negotiator, have a clear understanding of the contracts you are entering into and know how to manage your clients.

# Advertising

The process of advertising has changed a great deal with online technologies. You no longer need to have print copy mock-ups six weeks out from your campaign. Advertising can be instantaneous. From a legal perspective, your risks are also more immediate.

There are two aspects of legal risk in advertising one is the public facing advertisement, and the other is your agreement for advertising, whether you are the advertiser or hosting the advertising.

If you are hosting the advertising, you will need to work out the basis for charging your clients, whether that is pay per view, pay per click or a flat fee for a period of time. If it is pay per view or pay per click, you need appropriate software set up, tested and working in the background to provide accurate reporting. A lot of businesses have some form of analytics attached to their website, particularly high traffic websites.

Google Adwords is an excellent example of the pay per click basis for charging fees. Their algorithms for calculating what you pay are fairly complicated, and most people simply accept whatever the cost at the end of the day. In setting up a system or using a system like Google Adwords, you need to ensure that the fee per click is clear, and you provide people with an opportunity to select a maximum daily budget for their advertising.

YouTube advertising is pay per view, but only if the viewer doesn't skip your ad within the first thirty seconds. Again, they have sophisticated analytics backed with the ability to set a daily budget.

## Cover Your Arse Online

If you have a high traffic website and people are interested in advertising on your website, then work out all the key metrics that you would have for print advertising – size of audience, engagement, location of distribution etc, the size, location and type of advertising you will permit and what you believe to be a fair price for that advertising. You never know, with an audience of 10,000 unique visitors per month in a specific target market, you might find someone prepared to pay you \$300 a month to have a banner on your website. You would also want to allow yourself the ability to refuse to display any advertising that you felt was offensive or inconsistent with your website ethos.

You also might have noticed that a lot of larger companies now test the popularity of their advertising online before paying for television advertising. You can also see different layers of advertising on top of popular advertisements, depending on the system you are using.

If you are advertising online:

- Understand the process and have someone to manage it – different platforms have different terms and conditions
- Place a daily budget limit on your advertising so that you don't suddenly end up with an unexpected debit on your account

Set parameters around where you are happy to have your advertising displayed – e.g., A children's activity centre probably doesn't want to have their advertising show up on a website for adult entertainment.



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## Chapter 6

# Social Media

*“Social media is changing the way we communicate and the way we are perceived, both positively and negatively. Every time you post a photo, or update your status, you are contributing to your own digital footprint and personal brand.”*

**Amy Jo Martin**



## Social Media in Business

The astonishing growth of social media has prompted many businesses to claim a place in its platforms. An eMarketer report in 2014 found that 88% of businesses in the United States were using Social Media for marketing purposes and in the first quarter of 2016 there was over \$86.3 billion in e-commerce sales reported by the U.S. Census Bureau.

As a business exploring the benefits of Social Media for promotion you probably haven't got as far as thinking about a Social Media policy. Even if you have gone that far, do you have any idea of what legal problems you need to cover?

If you want to be able to give clear direction to your employees, then Yes you do!

So what problems do most lawyers focus on?

I've been to numerous presentations and read a bunch of legal articles about social media in the workplace. The most common problem raised by lawyers is corporate espionage. Seriously?

The chance of a casual comment from the weekend BBQ disclosing a new product before launch, then suddenly being spread across the internet and impacting on a big business is real, and greater than ever. But what about the millions of small and medium enterprises out there that employ most people and create a substantial proportion of our gross national product? I doubt corporate espionage is even on their radar.

So what are the real problems with social media in small business?

### **Defamation in Social Media**

Business is personal. People get really upset when nasty things are said about them or their business, and the easiest way to track that is online. The problem is that actions for defamation are not usually open to business, only individuals, charities and businesses with less than 10 employees. Defamation is also generally enforceable in the place defamed, which might not be where you are, so working out which laws apply can be a challenge.

Defending your business is not necessarily easy. On the other hand, if an employee makes a statement that can be attributed to your business, then potentially the business can be liable! If you have social media business accounts set up, or people are linked to the business through their social media accounts, make sure that you have some rules (and common sense) in place around what comments are and are not acceptable.

### **Vilification in Social Media**

Odd word, but what does it mean? Vilification is some form of behaviour that gets other people riled up against a particular group based usually on race. In some states of Australia it can include gender or religious beliefs. The problem here is when an employee's behaviour can be attributed to your company.

If an employee is on the kids' local soccer club forum and suddenly starts a damaging racial rant that results in a huge argument with other parents, then it's unlikely to be able to be linked to your business. On the other hand, an intranet newsletter or union correspondence is likely to be associated with them as an employee and potentially a problem for your business.

## **Discrimination in Social Media**

There are only a few activities where anti-discrimination law is enforceable, and employment is one of them. If you search an existing or potential employee online and come up with information that affects your decision to keep them or hire them as an employee, then you must be sure that is not associated with any of the protected attributes covered by anti-discrimination laws. Having a social media policy is now essential if you want to protect your business from being sued for unfair dismissal.

Protected attributes include gender identification, sexual orientation, race, skin colour, ethnic origin, age and disability, as well as some others.

Staff responding to customer questions and complaints should be trained to avoid exhibiting behaviour that could be considered discriminatory.

## **Bullying and Harassment on Social Media**

The most severe impact of bullying is death, and as an employer you can be held responsible for what your employees do to each other both inside the workplace and online. As a workplace health and safety issue you must take reasonable steps to eliminate or at least minimise the risk to your employees. Having some guidance in place and training staff in their obligations is necessary to reduce your risk in this area.

## **Privacy and Confidentiality in Social Media**

You have an obligation to protect the personal information that you collect as a business – whether that of employees or that of your customers. You also would want to make sure that your employees are not sharing confidential business information through casual conversations online. “Yes, traveling again, got a deal happening interstate and will be away until it’s over the line.”

Simple comments can tell your alert competitors a lot about your business.

### **Copyright and Trademarks on Social Media**

Just because you can copy it online does not mean it is not protected material. If you don't give your staff guidance they might be breaching copyright on images, videos or articles without any bad intention. This can have negative impact on your business – unnecessary litigation!

### **Misleading and Deceptive Conduct in Social Media**

Even if you didn't authorise any exaggerated claims about the products or services of the business, if your employees or customers are talking up the business on social media and a customer believes the hype to their detriment, you could be liable. It's easy to set some guidelines and train staff on what can and cannot be said and how to respond to comments from enthusiastic customers that might be a little 'over the top'.

For Five Steps To Help You Develop Your Social Media Policy have a look at the resources and links on the website.



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## Social Media in Courts

Social Media is now regularly mentioned in court cases. The most common references to social media in court cases are:

- jury members using social media to talk about a trial they are sitting on
- jury members researching the background to the trial they are sitting on
- employees sharing company secrets through social media, by accident or on purpose
- companies trying to claim social media accounts (with heaps of valuable followers) when employees leave

Most courts now have specific rules around the use of social media in courts and relating to court proceedings. If you are involved in any court matter, you should be aware of the rules before you get online. A number of people facing charges for minor criminal offenses have had the leniency they were shown by the court reversed as a result of imprudent comments made on social media about the result afterward. One young man who received a good behaviour bond and didn't have to go to jail, ended up in jail after bragging on social media.



## Chapter 7

# Privacy and Data Protection

*“Although we leave traces of our personal lives with our credit cards and Web browsers today, tomorrow’s mobile devices will broadcast clouds of personal data to invisible monitors all around us.”*

**Howard Rheingold**



## Privacy and Data Protection

There are whole books written on these topics, so the purpose of including it here for you is simply to get an overview and an understanding of your obligations in doing business online. This isn't about the steps you can take to protect your own privacy, although there are simple things you can do like:

- only put limited personal information in your social media profile
- use different email accounts
- do not allow access to your devices from Apps or websites
- only use specific encrypted systems for storing passwords – don't allow your browser to remember them for you
- regularly clear your browser and internet cache
- regularly clear your temp folders and recycle bin
- use a privacy browser extension
- adjusting your browser settings to block third party cookies
- turn off tracking cookies and enable "do not track" in your browser settings
- block location data
- using a re-router network that disguises the origin of your communications
- using your own virtual private network (VPN) to hide your IP address, apparently favoured for avoiding censorship and to disguise snooping

Protecting the privacy of your customers and clients online doesn't have to be complicated. Admittedly, if you attract the attention of hackers you could run into trouble fast (just ask Ashley Madison).

# Your Privacy Obligations in Business

Privacy laws were designed to assist people in retaining the right to choose how their personal information is used, and who has it.

Generally speaking, privacy laws pertain only to the protection of information about individuals and not in respect of information about corporations. Personal information is any information about an identified or identifiable individual; their name, date of birth, photograph, contact details and so on. There is also sensitive information, for example, medical records, which may require a higher degree of protection. In some countries, there is a more extensive right to privacy which extends to enabling a party to sue for having their private affairs interfered with.

The data protection laws are pretty similar around the world and cover the following fundamentals:

- collecting personal information
- using personal information
- sharing personal information
- allowing people to access and update their personal information
- security procedures
- sending information across borders
- having an identified contact person

## Cover Your Arse Online

For 5 Tips on Managing Privacy Online check out the resources and links on the website. There is an infographic to help you meet compliance with Australian Privacy laws, and give your clients the confidence to share their details with you. And it's not just online. If you're collecting personal information anywhere in your business it should be protected and handled in a way that is consistent with your privacy policy.

As a business, it is almost impossible to provide your contact information online and not have it scraped by bots and included in random junk email or phone lists. Put in place some decent software systems that will block as much junk mail as possible and delete as soon as you get junk mail.

If any email looks suspicious, do not open it! You're likely to download a crypto-lock virus and jam up your whole system. For 5 Ways to Check Whether or not Questionable Email is Spam, have a look at the resources and links on the website.

# Data Protection

Today it is rare to find a business in the developed world that holds all or the majority of its records on paper. Most businesses has significant information stored electronically including their employee details, policies and procedures, supplier contract and contact information and customer details.

Not every business understands how to protect the data they hold.

Due to the complications on technology, it is more important to have an employee who understands your IT systems and is able to ensure that all relevant protections are in place, or hire an external provider to do it for you.

Your obligation in business is to take all reasonable steps to protect data, and this includes protection against potential hacking events. Bigger businesses with higher revenue have greater obligations to put protective measures in place. As a small business, at a minimum, you should understand:

## **Where your data is stored and the level of security around it**

- chose a reputable provider
- understand their security measures
- find out what kind of notice they will give you (if any) if your data is compromised
- make sure you have a regular and consistent backup system in place

## **Know who has access to your systems and how that access is secured**

- no business should have their information available on systems that aren't at least password protected
- you need a system for regularly changing passwords so that it is harder for casual observers and past employees to access your systems
- have policies around how mobile devices are used. It is astounding how many children have ready access to their parent's work mobile devices
- ensure there are systems in place to delete lost devices – even NASA managed to lose a laptop that held all the access codes for the International Space Station, and they are supposed to be one of the most security-conscious organisations on the planet.

If you are covered by privacy laws, you probably have an obligation to let people know if their information has been compromised. Understand your responsibilities and make an effort to comply with them. Know what your disaster response is going to be with the hope that you never have to implement it.

The European Union has the most robust privacy laws in the world. Some points of difference that will affect people doing business internationally are:

- EU laws will impact anyone selling to EU citizens or collecting personal information about an EU citizen
- future system design must start with the goal of collecting the minimum required personal information, rather than the default "everything we can get". This will impact App development which appears to have a default approach of wanting to access and control the information on your mobile device whether it is needed or not.
- There will be no implied consent for the collection, particularly with regard to sensitive personal information.
- the requirement to have a system that allows people to be

## Cover Your Arse Online

forgotten – meaning that a customer can contact you and require that their information is completely deleted from your systems or de-identified so that you cannot track that person in the future. So your customer should be able to come back to you as if you had never had contact with them before.

- Affected people must be notified of any data breach affecting their information.
- Fines for breach can be up to 4% of annual turnover (not profits)



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templates and other useful  
resources, go to**

*[www.coveryourarseonline.com/readers](http://www.coveryourarseonline.com/readers)*

## Chapter 8

# Accessibility and Discrimination

*"The most important blind visitor to your website is Google!  
In the same way that creating accessible web pages helps a disabled  
person access your content, it also helps Google index your pages so that  
the right people can find your service or product."*

**Jim Byrne, Founder of Guild of Accessible Web Designers**



## Being Accessible

Accessibility isn't about being mobile friendly, although that is a relevant consideration. You really need to think about how people might be able to get your information, whether by touch screen, mouse or some other method.

Put simply, website accessibility is about avoiding discrimination.

Advocacy groups argue that having an inaccessible website is tantamount to discrimination and violation of human rights. Some have even gone on to file high-profile lawsuits against multinational companies like Target, Southwest Airlines, AOL, and others, and received favourable decisions in court.

These cases were able to set some important precedents so that if your site is not yet optimized for users with a disability, your business may be at risk of civil litigation.

Besides the potential legal repercussions, there is also your bottom line to consider.

### **People with a Disability**

It's easy to assume that everyone will be able to use a mouse to navigate, but not everyone has the use of their hands.

When it comes to touch screens, how easy would your website be to navigate for someone who has limited fine motor skills?

## Cover Your Arse Online

Apart from physical access, think about what people can see and hear. The sight impaired use software that 'reads' your website to them. If you don't use descriptions or other meta-data on images or tables, then they won't be able to get your information.

Consider a price table for example. You might have three different product options with different descriptions and different prices. Do you even know if reader software will read out those tables?

For the hearing impaired, do you provide transcripts for videos and audios on your website? To be honest, I often don't have the patience to sit through a video and would prefer to see the print myself, so providing a transcript can expand your audience.

Millions of users with a disability access the internet for the same reasons you do: writing email, instant messaging, social networking, paying bills, checking the weather and most importantly, shopping online.

A disability need not even be permanent or debilitating. Some people may be temporarily housebound due to an accident or surgery. Make it easy for someone during a time that is difficult for them and chances are you will earn their loyalty as customers, long after recovery.

According to World Internet Stats in 2015 there were approximately 3.6 billion people identified as internet users.

In 2006, the Canadian National Participation and Activity Limitation Survey (PALS) found the disability sector made up about 14.3 percent of the entire population (so 4.4 million people in Canada). The disability rate is similar in other industrialized countries including France, Germany, Japan, United Kingdom and the United States.

A 2009 Australian Survey of Disability, Ageing and Carers (SDAC) found that 62% of people with a disability had internet access at home and of those people, around 50% used the internet to make purchases and pay bills.

That's a lot of people you could be helping to buy from you online.

### **Ageing population**

Another common international trend is aging populations.

The youngest of the Baby Boomer population turned 50 in 2014, so will be 65 in 2029. The oldest baby boomer turned 65 in 2011. A Yahoo study has suggested that in the United States alone the baby boomer generation has control of around US\$220 billion in discretionary spending.

As populations continue to age, the percentage of people with a disability is bound to increase. Thanks to medical technology a large percentage of those people are projected to stay active well into their older age. So, can you afford to ignore this market?

### **What do you need to do?**

Putting it simply, stop worrying about how pretty your website is and start worrying about how easy it is to use!

Also look at how you use technology as a business and what additional tools you can put in place to help your staff. A UK company learned the hard way when refusing to put technology in place to help a visually impaired person complete a computer-based certification test she needed for her employment.

Instead of allowing her to use screen reader software, she had to employ someone to sit with her and explain the diagrams. She passed her certification but sued the test provider, who was ordered to pay damages.

In 2006 a blind Californian who encountered incompatibility problems with a screen reader software sued Target for violating various laws with their Target.com website.

## Cover Your Arse Online

The case was turned into a class action and Target had to pay \$6 million dollars in damages or a prorated share of about \$3,500 per claimant. It was also ordered to make its online storefront fully accessible by February 2009.

### **The global campaign for web accessibility**

The United Nations Convention on the Rights of Persons with Disabilities came into force in December 2008 with a landmark 144 signatories. The aim of this Convention is to “ensure that persons with disabilities enjoy all human rights on an equal basis with others”.

That Convention contains very specific language about accessibility and technology for people with a disability. For example, it highlights the importance of research and development into new technologies, specifically “information and communications technologies, mobility aids, devices and assistive technologies” (Article 4.1.g-h).

The World Wide Web Consortium (W3C) also promotes the rights of the disabled by developing standards under the Web Accessibility Initiative (WAI). Most guidelines have been updated in 2015. As a minimum it is recommended that a website be:

- perceivable
- operable
- understandable
- robust

In simple terms, an accessible website operates the same way for all its users, regardless of their ability.

### **Web accessibility makes for good business**

If Web accessibility has serious legal ramifications and helps to improve the bottom line, why haven't all e-commerce merchants embraced its principles?

## Cover Your Arse Online

Some companies simply aren't aware of their legal obligations or the size of the market requiring accessibility. Others have recognized the market potential of the disabled and senior populations and adopted web accessibility practices. For example:

In 2007, Yahoo established its Accessibility Lab – managed by Victor Tsaran, who is himself visually impaired – to allow its developers to experiment with assistive technology applications and gadgets. Programmers from other companies, including Google, use those facilities as well.

Amazon.com introduced improvements to Kindle to make it more user-friendly for blind users.

Apple's iPhone now comes with screen reader audio and iTunes is accessible to visually impaired music lovers.

Twitter tweaked its Captcha system to be more compatible with screen readers.

Videos on YouTube now come with captions to benefit hearing-impaired viewers.

### **Cost of accessibility in design**

Consider accessibility-related expenditure as an investment instead of just costs, not only from a market standpoint but also for potential benefits within their operations including the increased productivity and reduced turnover among disabled employees that comes with adopting e-accessibility practices.

It has been estimated that building a disabled-friendly site should add only one or two percent to a web development budget and consequently expand your market by around 15% percent. It would seem that designing for accessibility might actually pay for itself.

## Cover Your Arse Online

Today there are various standards, technologies, and devices available to open the internet to disabled users. These solutions should make it easier and simpler for you to implement the accessibility guidelines and reap the proven benefits: reduced risk of litigation, a wider market, enhanced competitiveness and increased sales.



**For checklists, recordings,  
templates and other useful  
resources, go to**

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## Chapter 9

# Why You Should Have Terms and Conditions for Your Website

*"You have to learn the rules of the game. And then you have to play better than anyone else."*

**Albert Einstein**



# Why You Should Have Terms and Conditions for Your Website

Creating an online business allows you to interact with people all over the world. You no longer have the relative security of watching someone walk through the front door of your store and being able to make a judgment about how you want to behave with them, and how you might expect them to behave.

In an online environment, the space is open and accessible 24/7 and you don't necessarily get to check out your customers before they go to buy. The beauty of being online is that you get to set your own rules, within the context of the laws you choose to apply to your website.

Terms and conditions provide you with the opportunity to set your own 'house rules'. Ever played monopoly? Did you ever have a rule that no-one could buy property until after they pass 'Go' for the first time? We did, even though it was never in the written rules of the game.

The internet and the use of websites have evolved so quickly that there aren't any rules of the game like there are for monopoly. The World Wide Web Consortium ([www.W3.org](http://www.W3.org)), has been doing its best to make some rules ever since, and those rules are voluntary.

With terms and conditions, you have the opportunity to set some of the 'house rules' around the way customers and visitors use your website.

## Cover Your Arse Online

Online, unless your terms and conditions offend local laws (eg. unfair terms under consumer law), customers have one choice, comply or don't visit your website.

### **Warning**

Don't just copy and paste terms and conditions. Unless you understand the legal terms you are copying and how they apply to you in your country, you could be completely exposing your business instead of protecting it. Keep in mind that whoever you copy and paste from might have also done the same thing and you end up being the person down the line who has no understanding of the origin or force of your own terms and conditions.

Unless you are part of a franchise, your business will most likely operate just a little bit differently from any other business; even other businesses in the same industry. If you copy and paste terms from somewhere else, there is a chance that there will be something in there that just doesn't apply to you.

I have worked with someone who downloaded a pack of legal forms for her website, and on reading through those terms, realised that some contradicted others! This meant that although she had legal forms on her website because some terms contradicted others, they were worse than useless, in fact, they could have got my client into more trouble.

## Governing Law

One of the first things that you can do is choose your area of law and legal venue.

If you don't think this is important, do some searching on a case brought by the owners of the Evony computer game against a rather vocal British blogger who commented on their business structure. It is pretty difficult for companies to sue for defamation of character, but under Australian law, certain types of organisations with less than 10 staff members can bring an action.

So the Evony people (from the US) sued the British blogger in Sydney, Australia as a result of some of the things he said on his blog.

If the blogger had had terms and conditions on his blog which set out where in the world he was and which laws applied, chances are that the Evony people would have been in England, where he lived, trying to bring a case, and not in Sydney.

Wouldn't you rather be on your home turf?

This same principle can be used to excuse liability in countries where what you are doing is considered an offense. So for example, online gambling is not legal all around the world. If you have pop-up ads on your website that advertise online gambling, you might be committing an offense if accessed in one of those countries.

## Cover Your Arse Online

You can include a term which says that the people accessing your website are in a better position to know those rules and take responsibility for what they are accessing.

Think about where you customers are, and what steps you need to take.

## Right to Remove People

Other benefits of writing your own terms and conditions are that you create the rules around removing people from your site. Facebook does this very well. It can be handy to be able to make those rules.

### CASE STUDY

A client regularly selling products through Gumtree.com.au (like Craigslist and eBay) has his account terminated and was not able to open a new account. He came to me asking me to make Gumtree take him back. The problem was that he had breached Gumtree rules about communications with customers and had more than one complaint made against him. Under Gumtree's rules, they could cancel his account and stop him from using the site, at their discretion.

You can use terms and conditions to communicate a wide variety of things relevant to your online business, like how you do comply with consumer laws and what licenses you make available for use of your website content.

You can also incorporate disclaimers, compliance statements relevant to your industry and provide a privacy policy consistent with the way you operate your business. This is particularly important for small businesses who offer products (free report/ebook/competition entry) in exchange for personal information and those businesses that fall into the category of 'health' services.

If you do have current terms and conditions, congratulations!

## Cover Your Arse Online

There aren't many small to medium enterprises that do. The laws changes, so be sure to get them reviewed at least every two years to remain up to date and protected.

See our website for a self-assessment checklist that will help you check your website for what you have right, and areas for improvement.

## Avoiding Disputes

Disputes can be avoided with the right website terms and conditions. Do you perform labour or sell products or services to clients? Having your terms of service available on your website can make the difference if a customer complains about what you have done, or what you have sold to them.

### **CASE STUDY**

A builder ended up in dispute with a client about window shutters. The client was withholding almost \$20,000 in payment for the building work because they were unhappy about the performance of the window shutters.

If your terms and conditions are easy to find and you refer to them in your print media, that may be enough to show that if the client did not read them, they should have!

The client claimed that they did not know the terms and conditions for the building services.

The Tribunal Member hearing the matter identified that there had been an extensive discussion between the parties over 14 months before a contract was formed and that throughout that time the builder had always had full terms and conditions available on its website. The builder's quote referred the client to the terms and conditions on the website or suggested that the client asks for a hard copy.

## Cover Your Arse Online

In those circumstances, the Tribunal Member rejected the client's argument that the client did not know what the terms and conditions of the contract were.

Some key issues raised in this case:

- The terms and conditions on your website can be used as proof of your contractual terms if they are accessible and brought to the attention of your client, even if the client does not read them.
- Reference to terms and conditions on your website can be incorporated in your printed documents, saving you printing costs.

Make sure you understand what your terms say.

Even big companies with whole legal teams working for them can get it wrong, or at least be on shaky ground. Why do you think companies like eBay, Google, and facebook all have such extensive terms, conditions and policies for use of their websites? And they keep updating those terms and conditions.

That's why it is a good idea to have your terms and conditions designed for your business.

### **CASE STUDY**

In 2007 Jetstar received a bit of a fright because of the way its fare terms and conditions were stated on its website and applied.

A customer booked return flights from Australia to Hawaii for herself and her sister. The seats were bought at a bargain basement price because Jetstar had only just started flying to Hawaii. Closer to the departure date, the customer's sister couldn't make it and they decided that her niece would go instead.

Jetstar was happy to accommodate the change, with payment of a processing fee for each flight, as well as payment of the difference in fare price from the date purchased to the date of the change. The difference in fare costs almost doubled what the customer had

## Cover Your Arse Online

originally paid for the flights. The only change was the name of the passenger.

The customer applied to a Tribunal claiming that the term of the contract was unfair and that Jetstar had behaved in a way that was unconscionable, both in breach of relevant fair trading laws. She claimed a refund of the difference paid for the fare and the Tribunal agreed that she should have it after finding that the term requiring payment of the difference in fares simply for a change of passenger name was unfair.

Naturally, Jetstar was a little shaken up by the Tribunal's decision and appealed the matter to the Supreme Court, who decided that the way in which the Tribunal had worked out what 'unfair' meant in the context of the case was wrong.

Some key issues raised in this case:

If you don't know what your terms and conditions say, how can you defend them?

- Your terms and conditions must comply with consumer laws.
- If you end up in court, be prepared the first time! Appeals are expensive.
- The easier your terms and conditions are to find, and to understand, the more likely they are to be enforceable.

Big business is always looking to take out up and coming competitors and once you secure a corner of the market, you come to the attention of the major players. Great if you are someone big, not so great if your business doesn't fit into the picture so well.

### **CASE STUDY**

iiNet discovered this the hard way. They grew gradually acquiring smaller players in the market until they had a noticeable market share. Just big enough to attract attention, but not yet big enough to be a threat.

## Cover Your Arse Online

Then the film industry took another step in trying to stop illegal movie downloads by going after the internet service providers who give you and me and all those teenagers the bandwidth to download whatever we want from the internet. But did they go after the big guns like Telstra? Nope! They went for iiNet instead.

Fortunately, iiNet was able to demonstrate both in its terms of service and in its practice that it did what was reasonable to provide service to its customers and to stop people from using their bandwidth to download pirated movies. iiNet was lucky. They were able to show that the procedures they had in place did actually support the terms of service they entered into with their customers and that if they did receive notice from a film company that a particular customer was committing illegal downloads, they could suspend or close the account.

Some key issues raised in this case:

- Read your terms of service and know what they oblige you to do.
- Make sure your procedures back up your terms of service.

Can you backup your terms of service? Better read them and find out!

# Working Out What Legal Forms You Need

The content you have on your website and the nature of interactions users may have will dictate the type of legal forms you require. Every new interaction you have with users makes a difference to the type of terms you will need.

- Terms of use set the rules for how visitors use your website in browsing and maybe quoting or copying
- Privacy Policies set the rules for how you manage any personal information you collect
- Membership terms provide more rules for people who have a more permanent and ongoing relationship with your business
- e-commerce terms, or commercial terms, set out how you deal with money, deliveries, warranties and so on
- Advertising terms can set rules for advertisers
- Affiliate terms set the rules for people promoting your website

It is a good idea to have some basic terms and conditions on your site.

If you have terms and conditions, then you can use them to explain to people:

- which law applies to your site
- who owns the site
- the purpose of your site
- how you expect users to use it and the conditions they are required to agree to in using your site

## Cover Your Arse Online

- what responsibility you are taking for what is on the website
- what responsibility you are disclaiming (not taking) for what is on the website (a legal disclaimer)
- what happens when people use links you post on your website
- what intellectual property rights you have in the contents of your site

If your website involves user interaction you should consider the following:

- a click through agreement that the user will indemnify the owner of the site for any loss suffered as a result of what they put on the site
- the privacy policy

For an e-commerce site where you actually have online purchasing capabilities you also need to include:

- a statement that the purchaser warrants that they are over the age of 18 and have the authority to enter into the contract (some sites require a date of birth or year of birth to be included in their request for personal information in order to verify this)
- whether a stated price includes all costs to the customer and if not, what other fees and charges apply (consider what you go through to purchase a plane ticket)
- the available payment options, including what currency will show up in their account and that any of their bank's fees for currency conversion are their responsibility
- what happens if payment is declined
- what the refund or return policies are, if any
- the terms of delivery
- available complaint procedures
- in what countries the goods or services are available to be purchased

## Cover Your Arse Online

The terms and conditions of an e-commerce site will often repeat some of the information that has already been made available to the customer during the purchase process. There may be other requirements depending upon which law applies to your business.

# Disclaimers

## What is a disclaimer?

A disclaimer is a statement or group of statements generally designed to limit the scope of legal obligations owed to the user. Although in some countries, like the United Kingdom, 'disclaimer' may be the generic term used to bring your attention to all website terms and conditions.

A disclaimer may also be added to a website in order to 'protect' the user by including a warning in an attempt to minimise any risk or potential harm that may arise from using the site.

It is not possible to disclaim all legal liability because there are certain obligations implied into contracts. In Commonwealth countries, those obligations were originally common law (law of common practice recognized by the courts) and are now included in legislation.

A disclaimer needs to be written clearly and acknowledged by the customer or client.

Disclaimers written in small font and hidden in documents are generally not effective. For a disclaimer to be effective, it must be readily available to a purchaser before the point of purchase and easy to understand.

You need to be able to demonstrate that your disclaimer was brought to the attention of the customer or client and that they have acknowledged having read it and agreed to the terms.

We know that not everyone reads them, so you need a process which makes it the client's obligation to explain why they didn't if they didn't.

### **CASE STUDY**

To demonstrate the limitations of a disclaimer we can look to a case from Victoria, Australia in 2001 where a buyer took eBay to court after purchasing a computer online which was never received.

On the website where the buyer made his purchase were the words 'Buy with Confidence. eBay insured. Automatically insured' prominently displayed.

Less prominently displayed was a smaller link to a 12-page terms and conditions. Within these 12 pages was a condition stating eBay limited its liability insurance claims to \$270.

The buyer argued that these conditions contradicted the prominent wording but admitted he had not read the terms and conditions when he made his purchase.

The Court held that eBay had a responsibility to the consumer to ensure that any limitations should be clearly notified to the website user. It was not sufficient to have these limitations 'tucked away' in a terms and conditions document when prominent wording on the primary web page contradicts them.

### **CASE STUDY**

Australian Telco Optus had trouble with a promotional campaign for broadband internet known as "Think Bigger" and "Supersonic" in about 2011. The campaign used a combination of media including internet advertising.

The Australian Competition and Consumer Commission (ACCC) had concerns over the advertising of download quotas which displayed prominently the terms "peak" and "off-peak."

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In reality, the plans being advertised did not have two distinct download allowances for peak and off-peak. Rather what happened was when a customer used up their quota under the peak allowance then the download speed would slow and this slower speed would also apply to off-peak sessions.

The disclaimer used in the advertising material was “Speed limited once peak data exceeded.”

The Court held that this disclaimer was not enough to cancel out the misleading nature of the advertisement as a whole. While the Court agreed the disclaimer was “technically correct” they held it to be too small and too subtle.

The penalty for this action? Optus was ordered to write to any customers that had subscribed to this plan, place corrective signs in their stores, place a notice on their website and received a penalty of AU\$5.26 million.

All in all...a very costly mistake.

### **Using disclaimers**

The need for a disclaimer will depend on the nature of your website. Some common scenarios that may give rise to you becoming liable are:

- unlawful use of the information provided on your website;
- inaccuracies contained in your website;
- breach of privacy;
- issues with the posting of user content (corruption, interception or modification);
- viruses;
- unsupported opinions being posted by users.

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Keep in mind that disclaimers like all legal contracts are not 'watertight'. I've heard people claim that you can have a watertight contract that no one can dispute. That disregards the fact that there are high-conflict individuals around who will raise a dispute regardless of what is in your contract.

Your disclaimers are there to limit your liability. They are one form of risk management. A disclaimer is not a guarantee that you'll never get sued or queried about your actions online.

### **Disclaimers on emails**

There is some debate as to whether or not disclaimers on emails have any benefit at all. The main reason is that they tend to be included as an aside at the end of the email and your recipient has no chance of reading it BEFORE opening your email. The real benefit of disclaimers is to provide people with the opportunity to consider whether or not they want to proceed after reading it, having had the opportunity to view it before 'buying' or going ahead with any other action.

In any event, people still use them and whether you need one or not can only be answered in relation to your business and the way you use email. There is no one right answer.

# Types of Disclaimers

## Disclaimers for Content

To minimise your liability for your website content and the reliance a user may place on it, it is recommended that your disclaimer include a statement indicating that the currency, completeness, reliability, performance, suitability and availability of the information being used is at their own risk.

If your website includes the function where users can post comments, you may wish to include a disclaimer that the content does not reflect the views of your business/organisation.

## Disclaimers for Links

If your site contains hyperlinks to other websites it is recommended you include a statement in your disclaimer as to your website's relationship with that site.

If you are not affiliated with the other website it is recommended you include a statement that the link is provided for convenience only and is not in any way an endorsement or responsibility of the other site.

Also (as seen above) ensure that the site you are creating a link to is not breaking the law (i.e. don't create links to a music download site that is breaching copyright).

Depending on the nature of the other website you may want to include statements about your business/organisation having no control of the content or accuracy of the other site.

### **Security Disclaimer**

Given the internet is a public network there are always threats of viruses. You may wish to include a disclaimer that shifts the liability to the user so that the user bears any risk or loss associated with the use of your website.

### **Notifying your users**

It is important that if you do use a disclaimer on your website that it is presented in a way that ensures users of the site are aware of it.

This makes the placement and level of visibility of the disclaimer on your site an extremely important consideration.

One such technique is having a mandatory 'accept' button for users before continuing that acknowledges the user has read and understood the disclaimer.

### **For Your Entertainment**

What's the strangest disclaimer that you have ever read?

goldmark.org lists the following entertaining email disclaimer:

"This message represents the official view of the voices in my head."

Here is one I found on enf.org, but they don't claim copyright, it is a collection of disclaimer snippets mishmashed together, some of which could be useful if properly put together.

"This product is meant for educational purposes only. Any resemblance to real persons, living or dead is purely coincidental.

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Void where prohibited. Some assembly required. List each check separately by bank number. Batteries not included. Contents may settle during shipment. Use only as directed. No other warranty expressed or implied. Do not use while operating a motor vehicle or heavy equipment. Postage will be paid by addressee. Subject to approval. This is not an offer to sell securities. Apply only to affected area. May be too intense for some viewers. Do not stamp. Use other side for additional listings. For recreational use only. Do not disturb. All models over 18 years of age. If condition persists, consult your physician. No user-serviceable parts inside. Freshest if eaten before date on carton. Subject to change without notice. Times approximate. Simulated picture. No postage necessary if mailed in the United States. Breaking seal constitutes acceptance of agreement. For off-road use only. As seen on TV. One size fits all. Many suitcases look alike. Contains a substantial amount of non-tobacco ingredients. Colors may, in time, fade. We have sent the forms which seem to be right for you. Slippery when wet. For office use only. Not affiliated with the American Red Cross. Drop in any mailbox. Edited for television. Keep cool; process promptly. Post office will not deliver without postage. List was current at time of printing. Return to sender, no forwarding order on file, unable to forward. Not responsible for direct, indirect, incidental or consequential damages resulting from any defect, error or failure to perform. At participating locations only. Not the Beatles. Penalty for private use. See label for sequence. Substantial penalty for early withdrawal. Do not write below this line. Falling rock. Lost ticket pays maximum rate. Your cancelled check is your receipt. Add toner. Place stamp here. Avoid contact with skin. Sanitized for your protection. Be sure each item is properly endorsed. Sign here without admitting guilt. Slightly higher west of the Mississippi. Employees and their families are not eligible. Beware of dog. Contestants have been briefed on some questions before the show. Limited time offer, call now to insure prompt delivery. You must be present to win. No passes accepted for this engagement. No purchase necessary. Processed at location stamped in code at top of carton. Shading within a garment may occur. Use only in well-ventilated area. Keep away from fire or flame. Replace with same type. Approved for veterans. Booths for two or more. Check here if tax deductible. Some equipment shown is optional. Price does not include taxes. No Canadian coins.

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Not recommended for children. Prerecorded for this time zone. Reproduction strictly prohibited. No solicitors. No alcohol, dogs, or horses. No anchovies unless otherwise specified. Restaurant package, not for resale. List at least two alternate dates. First pull up, then pull down. Call toll free before digging. Driver does not carry cash. Some of the trademarks mentioned in this product appear for identification purposes only. Record additional transactions on back of previous stub. Decision of judges is final.

This supersedes all previous notices."



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## Cover Your Arse Online

Chapter 10

# **Contracts**

*"A verbal contract isn't worth the paper it's printed on."*

**Sam Goldwyn**

## Cover Your Arse Online

## Contract Basics

A contract in its basic form is an agreement between parties that is legally binding on them.

When a dispute arises the court looks to identify the enforceability of the bargain. This is no different in the online world.

To ensure the point of agreement and the terms of this agreement are clear it is suggested that you use a standard form contract in all your repeat transactions.

Contracts and agreements mean the same thing, just terminology. Although the terminology is the same, whether or not a contract is enforceable will depend on what law applies.

The common law system applies in most Commonwealth countries and a civil law system applies in the United States and most European countries. Civil and common law systems have a different approach to contracts and you are best to choose the system you understand as a governing law for your standard online agreements.

One example that might be relevant to you online is Crowdfunding. Under common law system, a pledge of a donation is not enforceable because the recipient has offered nothing in return. Anyone promoting a project will need to offer something in exchange for a pledge to make that pledge enforceable. In a civil law system, it doesn't matter if the recipient offers nothing, it can still be an enforceable contract.

Also be aware that there are cultural differences in the attitude to contract formation around the world.

### **Contracts don't have to be formally signed documents**

You can form a contract through an exchange of emails or private messages, through a telephone call or a combination of those activities. In the case of contracts, actions can speak louder than words.

The beauty of having something in writing is that you have a permanent record of what was agreed, whether a formal contract or exchange of written messages. Something in writing can be useful even a few days after you have concluded the deal because most people have imperfect memories.

Different countries may require certain contracts to be in writing so that verbal agreements are not enforceable. In Australia, land transactions like sale or leases must be in writing and transfer of copyright from the creator to someone else must also be in writing. That writing can still be an exchange of emails and need not be a formal agreement.

You also need to be aware that a contract or agreement need not necessarily be signed to be enforceable if the circumstances surrounding the contract are enough to demonstrate that something in writing has accurately set out the parties' intentions. These are technical legal arguments that generally only arise at the point of dispute.

### **Electronic transactions**

Many countries have adopted laws that recognise the binding nature of electronic transactions even though the parties may never meet, speak or even know about each other. With more and more commercial transactions occurring online it is important to understand how a client/customer will become bound by a contract.

## Cover Your Arse Online

It is important to note that it will be the responsibility of the provider to bring the terms of the contract to the attention of the consumer/client.

If there is a dispute about whether an agreement has occurred, the court will look at what steps the provider has taken before or at the time of the “contract formation”. This means looking at what the consumer/client was required to do in order to place an order or subscribe to a service etc.

It is highly recommended that if you are conducting commercial business online that your website includes a step that requires the consumer/client to indicate their acceptance of the terms of the agreement. This is most commonly done via an “I agree” button at the bottom of the contract terms which must be clicked before the “transaction” can proceed any further.

‘Click wrap’ agreements are recognised electronic transactions. If you have a social media account you must have gone through the process of ticking one or more boxes agreeing to the terms and conditions associated with holding an account before you were able to use it.

Although a high proportion of people probably never read the terms and conditions and just click the boxes, it has been recognised that it would be unreasonable to require a business to do more than make the make terms and conditions readily accessible and available prior to the point of entering into an agreement.

It is the user’s responsibility to decide whether or not they are prepared to take the risk of not reading the terms before they sign up.

## Legal capacity

If you've ever wondered why terms and conditions sometimes state that you have to be over the age of 18 years to enter a competition, complete a purchase or sign up for an account, this is because only people who are considered adults have the capacity to enter into a legal agreement. Ages may change in different jurisdictions, but for contractual purposes the age of 18 is fairly standard.

Other things that may affect capacity, such as an understanding of the language of the agreement, having a cognitive impairment or cognitive degeneration like Alzheimer's disease.

## Forming a contract

The basic elements of forming a contract at common law are:

- Offer
- Acceptance
- Consideration through payment of money or taking an action
- Intention to create legal relations

Whenever people want to dispute terms there is an opportunity for technical legal arguments, but in most cases, the fundamentals will apply. Gain confidence in understanding these elements and you won't be unpleasantly surprised.

### 1. What's the offer?

Once you put a product or service on display on your website or through your social media, you are offering that product or service for the price you have stated.

If you don't list a price, your potential customer will obviously need to contact you to find out more information and at that point, things could get tricky.

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If you are having a conversation with your customer that goes back and forth about what products or services are included and different prices, then the offer can get a little murky. It is always worthwhile to confirm in writing.

### 2. What is acceptance?

Acceptance is pretty obvious really. When a price is listed online, hitting a 'buy it now' button and proceeding to payment details is acceptance of the price. If you are working more directly with clients, you might have confirmed in an email what products and services are being offered. People often ask for quotes, and it's not until they come back to you and confirm that they are happy with the quote that there is an acceptance.

If they come back with a counter-offer, you may be starting the whole 'offer – acceptance' cycle again. Be sure you are all on the same page and happy to proceed before investing time and money into providing services, or before delivering products.

### 3. How much consideration is enough?

Consideration is the taking of an action in support of an agreement reached between the seller and the buyer. The action does not have to be significant, it just demonstrates reliance of one party on the expectation that the agreement is binding. Full consideration is payment of the purchase price, but partial consideration, like the payment of a deposit or putting money into escrow can support an argument for enforcement of a contract for purchase.

### 4. Did you really intend to reach an agreement?

Mistake, duress, and fraud can all indicate that at least one party to the agreement didn't intend to be there. It is also difficult to demonstrate something meant as a joke "I'll give you \$100 if you post that silly picture on your website" was intended to create an enforceable contract.

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Under the civil law system the basic elements are essentially the same, just differently expressed. It might seem like common sense, but it is also an essential element of a civil law contract that the purpose and legal cause are expressed. This is really about identifying what the obligations are. So for a product sale, it is that the seller will make the product available and for the buyer that they will pay the purchase price.

There are different nuances in all legal systems. Look at the type of contract you are entering into and the risk to you in doing so. If the contract has the potential to cost you a lot of money if things go wrong, then get legal help.

# Standard Form Contracts – Do You Need One?

Standard form contracts are designed to promote efficiency and consistency in your business. If you are doing a lot of similar transactions, a standard form contract means that you don't necessarily have to negotiate each transaction anew.

Standard form contracts include things like:

- service agreements for anyone providing a standard set of services.
- consultancy agreements for advisors and coaches.
- presenter agreements for event organisers.
- venue hire agreements for venues.
- lease agreements for buildings.
- advertising agreements for online or print publications.
- supply agreements for manufacturers and distributors.
- employment agreements for organisations

Do you need a standard form contract? If you answer “yes” to any one or more of the following questions, then you probably could use a standard form contract:

- Does your business do the same thing, or almost the same thing, over and over again?
- Would you complete 5 or more transactions in a year that are almost the same?

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- Do you have one consistent set of expectations before you go into most transactions?
- Do you do a lot a business that is not “face to face”?
- Do you have agents or employees doing business on your behalf?

If you are doing any volume of business, then standard form contracts save you time and money. They create a predictable business relationship so that it is easy for your staff to answer questions and to know what should be happening in your business. Standard form contracts do not have to be inflexible. I have dealt with companies that say – “No, we won’t change that because it is part of our standard terms” no matter how unreasonable the term might be. You can change them. The point of having a standard form contract is so that you have a baseline that does well for most people (80%+ of people probably won’t ever read the terms) and forms a starting place for you to negotiate from with others.

Your website terms and conditions set out your standard contract terms for doing business with your customers. It would be unrealistic to negotiate a new agreement with each customer in the online space.

## What's the Best Template?

Beware the use of templates until you understand the legal implications. Because contracts are written to favour one party or the other, assuming your agreement is appropriate for all circumstances is risky.

Templates are a great way to save money if you are confident they will do what you need them to do. There is a reason that lawyers write every contract differently for every client – very few people tend to do business exactly the same way.

Terms and conditions for websites are no different. Don't assume that you are protected simply by copying and pasting someone else's terms. Their business may not even relate to you. I have seen examples where the governing law has been that of an entirely different country to the business, and an example where a manufacturer had terms taken from a funeral director on their website!

### **CASE STUDY**

A client entered into an agreement with a business coach who then proceeded to tell them it should be good enough for the business to use with sub-contractors they planned to hire. When I sent through a new agreement the client challenged me on the difference because to her business coach, they looked like the same contract.

Here is a table comparing two contracts to provide an example of the differences.

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<b>Consultancy Agreement</b>	<b>Contractor Agreement</b>
Provided by Business Coach Favourable to Consultant	Provided by Lawyer Favourable to Consultant Backed by professional indemnity insurance
	1. Services You can work with as many consultants as you need
3. Exclusivity You are limited to employing only one consultant for the type of service they provide	Contractor promises that the other work they do does not interfere with what they do for you Contractor uses all their own resources
4. Duties Contractor – limited warranties consistent with Australian consumer law Company – consultant can avoid liability for their own errors by relying upon what you give them Company - obligation to keep the consultant apprised of your financial viability	4. Payment for Services  - spells out requirements of a tax invoice for unsophisticated contractors  - specific terms to avoid liability for taxes and employee entitlements where contractors are sole traders
	5. Insurance  - alerts Contractors to their responsibilities
6. Confidentiality  Requires separate agreement	7. Confidentiality  Incorporated in agreement rather than requiring another separate agreement

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<b>Consultancy Agreement</b>	<b>Contractor Agreement</b>
	8. Privacy Covers management of personal information received from people who want work completed by Contractor
8. Indemnity Consultant is indemnified by Company	6. Indemnity - allows you to refer claim back to Contractor rather than Company being liable
	9. Intellectual property - protects your intellectual property

It is not just the words of the contract that are important, it is the legal implications of what is written into it and what is important to your business. If in doubt, get legal help.

# Contracting with Web Developers

Are you looking for someone to help you build your website? Here is where to start...

Regardless of who develops your website, be sure that there is a written contract in place that both parties have agreed to. This should also apply to friends who are doing you a favour.

Hiring a website developer often means that you are providing extensive information about your business to the developer, so you want to be sure that your information is protected.

The developer is also either giving you permission to use their work or transferring ownership in their work to you, so he or she wants to make sure that you are not using that work improperly. It is a delicate relationship that works wonderfully when everything is going well, but both parties should be protected if the relationship breaks down.

The following is a short list of tips to help with any web developer relationship. This information is not extensive, so contact us today if you need help setting up a web developer contract.

## **Key Provisions**

Every contract should include an overview of the project that the web developer has been hired to complete. It should include the specific work to be delivered, due dates, and what happens if things change.

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It should outline the duties of each party (i.e., the company will provide the content, and the web developer will create the framework for that content). It should also include an overview of the liabilities involved if either party does not fulfill those obligations. After the basics, look for the following:

### 1. Protect Sensitive Information

The information that the web developers obtain about your business varies a great deal. If you want your web developer to create new content out of existing materials, you may not be concerned about sharing that information. However, if information goes beyond standard web content, be sure that your web designer is restricted from sharing that information with others, particularly competitors. This is especially important for new product launch information or pending product or service ideas.

### 2. Allowing the Web Developer to Use your Website in their Portfolio

Many web developers want to create an extensive portfolio to attract new customers. Most experienced web developers will likely assume that they have this permission. If, for any reason, you do not want your website featured in their portfolio, be sure to include that clause in your written contract.

### 3. Ability to Terminate the Project

Sometimes the web developer's vision and yours will not mesh. The written contract needs a clause that allows either party to terminate the contract if things are not working out. Build in a notice agreement so that both parties must provide reasonable notice if they want to terminate the contract. Without a termination clause that clearly sets out what happens if either party wants to end the relationship, unnecessary arguments are likely to arise.

### 4. Resolving Disputes

Contracts often contain a dispute clause that specifies what will happen when a dispute arises. The contract can require negotiation, mediation, arbitration or state a specific district or location for a court action. Web developers could be in a separate district from your business, so this type of clause is helpful in ensuring any dispute is resolved in a place convenient to you.

### 5. Product Testing and Alterations

Be sure that your contract includes that you'd like the website tested on a variety of browsers and formats – PC, tablet, mobile etc. You also want the ability to tweak the final product as well. Although it is rare, web developers may give you a final product without these options, so be sure that those final touches are part of the agreement.

In summary, know what you expect from your web developer, put it in writing and get an agreement before you start building anything. Contact us today if you need help reviewing or putting together a contract with a web developer.

### **Domain names – getting them back from your web developer**

You might remember that we started with domain names. It is important to ensure that you or the business you control is the registrant of your domain name. Your web developer should never register it in their name, there simply is no excuse.

Getting registration sorted out can be a very easy process if your developer is cooperative and difficult if not. You will need help if your developer is being difficult about this. Drop me an email and we can go from there.

## How to Read a Contract

Whether it is terms and conditions on a website or a legal contract the key things to look for are these (which you should keep in mind if writing a contract as well):

### **Who are the parties?**

A client sent me through a contract that they thought was an incredibly exciting and lucrative opportunity. The annual value was around \$400,000 and neither party had a lawyer involved. Thankfully, a business advisor had strongly encouraged the client to get a legal review before agreeing to anything and more importantly, he listened!

There were significant risks to the client in the contract, heavy obligations with no guarantee of payment, but the biggest concern was that the party who was supposed to pay the money wasn't even mentioned in the agreement. When queried, the party wanting my client's services didn't see the need to include them. Needless to say, that agreement never got off the ground.

If you are entering into an agreement, know who it is with.

- Do an online search to find out whether or not they are a legitimate company.
- Check the free business registration searches online at a minimum.

At least then you know the business exists. The next step is to check and make sure the people who say they have the right to enter into a contract on behalf of the company, actually do have that authority.

A little investigation should turn up the answers fairly quickly and if not, a paid government registration search should produce results.

### **What is the purpose of the agreement?**

A client sent me a contract for review and he had three clear purposes in mind. The contract had been provided by his proposed joint venture partners. The parties knew what they wanted, unfortunately, the contract drawn up didn't cover it at all. Didn't even mention the purpose of the agreement but made some vague reference to a schedule which wasn't even written up or attached.

When reading a contract it should be obvious what the purpose of the contract is in the clauses of the contract. Just giving it an appropriate title is not enough.

If you can't tell what the point is, then ask.

### **What are the obligations of the parties?**

Look for the obligations or responsibilities of each party and any limitations on liability. As an example, in a software re-seller agreement, the re-seller probably has obligations to meet minimum sales levels, is probably restricted in the areas where he or she can sell and may have some training and support obligations.

The software vendor probably has an obligation to make the software accessible and to ensure that it does everything the marketing says it will do. With platforms in the cloud, software accessibility is more about ensuring the platform is online, available and in an appropriate format to ensure it can be downloaded and installed in a timely fashion.

There might be mutual liabilities around the performance of each party's obligations.

A colleague gave me a really good example of how lawyers look at agreements. He said:

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*“When I’m explaining to a client what we do with agreements I let them know that for us, 1 + 1 does not equal two. Depending upon who we are working with, 1 + 1 could be closer to 1, or it could be closer to 2. We aim to work in your best interests. To be more commercial the terms might be more balanced, but they will rarely be equal.”*



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## Chapter 11

# Business Structures

*"Start with good people, lay out the rules, communicate with your employees, motivate them and reward them. If you do all those things effectively, you can't miss."*

**Lee Iacocca**

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## Business Structures

People start new businesses all the time and you don't need to go through any mysterious legal process to do so; you just get started! The only real legal obligation that you have when starting a business is to account for the income you make, and that (in Australia at least) can be done with your personal tax if you don't have a separate structure in place.

You certainly will need to work out a few things, but before you go and spend a great deal of money, why not try something out and see if it works first? Baby steps. The first thing you really need to look at is your worst case scenario.

What is the worst that can happen if I pursue this business? How much can I lose financially if I jump in right here, right now? If you hear a presentation about a franchise business and the non-refundable fees that you must invest just to get the details are more than you can afford to lose right now, then don't do it.

You don't want to feel obliged to continue because of the money you've already spent.

Start with the end in mind. If you plan on creating something big, take the time to invest to get it right. If you are experimenting with a small business and not sure whether or not it is something you will continue with, maybe don't invest so much in getting it off the ground.

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By all means, set everything up legally if that fits your risk profile and you feel more comfortable doing it that way. Just don't let "getting it right" be an excuse to stop you from pursuing your dream. Richard Branson ran into trouble with the tax office with his first business. He accepted that he made a mistake, learned a lot, paid all his obligations and never made the same mistake again.

Once you have a concept working and making a little income, there are a lot of reasons for setting up a legal business structure:

- professional image
- privacy
- asset protection
- risk reduction
- growth
- succession planning
- ability to bring in other people
- ability to on-sell the business
- reduced tax
- ability to claim business expenses and other deductions against income

Let's look briefly at why you might start looking at separating your business from yourself.

Firstly, let's say you are operating a successful home business, say as a tradesman. You might have started out small, doing \$2,000 a month in business. Well done!

You might have your business in your own name as John Doe, electrician and you pay personal income tax on your profits. So what's your position?

- the business is you, so you don't necessarily have anything to sell
- the business is you, so you are personally liable if anything goes wrong

Let's explain.

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People find it much easier to associate value with tangible things. If you have a business set up in an entity that is separate from yourself, eg. 'Sparky Pty Ltd', then people automatically imagine that there is a separate business in place. It's easier to identify that the contacts recorded by the business are customers of that business and not just a bunch of numbers in your cell phone. It might also be easier to identify what tools of trade belong to the business and which ones belong to you personally.

In terms of risk, a typical a company has \$2 worth of shares and not a lot in the way of assets. If a customer's house burnt down due to faulty wiring and their invoice is in the company name, they sue the company. If your business, your house, and your car are all in your personal name, anyone suing you successfully could in effect take the house and car away to pay the debt.

What you do with your business essentially comes down to two things – value and risk, which cover all businesses, no matter what size or stage of development.

If the risks inherent in your business are small, and you have no immediate desire to be able to sell it, get started! If the risks inherent in your business are likely to be high, or you are putting your business together for the specific purpose of being able to on-sell it in the near future, then set up a separate entity.

# Choosing a Structure

The most common business structures in Australia are:

- sole trader
- trust
- company
- partnership

## **Sole Trader**

This is the simplest structure that is the cheapest to establish. It also has great flexibility and it is fairly easy to move from a sole trader to a more formal business structure. Sole traders can still employ other people in their business.

If you trade in your own name, you don't need to register a business name. Eg - if I traded as "Jeanette Jifkins, Solicitor" then I wouldn't need to register a business name, but when I traded as "Law For Your Website" that was a registered business name.

NOTE: In Australia, a registered business name is not a separate legal structure. It is just a name. There is no separation from you, and you remain personally liable for your business.

Downside -

Sole traders often don't know how to separate their personal affairs from their business affairs.

As a sole trader there is also no separation between you and your business, so if something goes wrong in your business your personal assets are on the line.

See our website for a guide on how to set up as a Sole Trader.

### **Trust**

There are two main types of trusts. One is a discretionary trust, the other is a unit trust. The difference is that a unit trust sets out from the beginning what shares each beneficiary is entitled to and with a discretionary trust, the trustee can decide to make a distribution to as few or as many beneficiaries as they feel is appropriate.

A trust is a structure where the person or company managing the trust (Trustee) is responsible for ensuring that the business and or assets of the trust are managed for the benefit of others (Beneficiaries). Unless the Trustee is also a Beneficiary, they have no ownership or entitlement to the assets of the trust, only the responsibility for managing it.

A trust is started by a Settlor, who is someone who puts down a few dollars with the intention that a trust is founded for the benefit of the Beneficiaries. The Settlor usually has nothing further to do with the trust after it is established. The trust deed should also include a provision for naming an Appointor. That is the person who has the power to remove or change the Trustee.

You can establish a trust as a trading trust or it can be an investment or a holding trust that holds assets. It is better to use different trusts to do different things. You don't want to have your property trust and your business trading trust as the same trust. Talk to an advisor for more details about your personal circumstances.

The benefits of using a trust are:

- It is private. You don't have to register a trust, although in some jurisdictions you do have to get your trust deed assessed for stamp duty. It is still a private document, though, not searchable by the public. Be aware that it is easier to find a trust now if it has a registered ABN (Australian Business Number) or other tax identifiers.
- You may be able to divide up the income of the trust between the beneficiaries in a way that minimises tax
- Succession is clear - the assets go to the beneficiaries.

NOTE: When using a trust it is the TRUSTEE that is the legal entity, not the trust itself. I know this might be confusing, but the trust cannot do anything. It is the trustee who does everything on behalf of the trust, so they are recognised as the legal entity. This is also part of the privacy that can be associated with a trust. The trust needs never be disclosed.

Downside -

If you don't understand the structure, don't use it! It can be complicated. Trusts can be difficult to pull apart. You will need to have annual accounts done for a trust and there are separate reporting obligations.

Generally, distributions must be made each year and the Beneficiaries pay the tax on the money they receive. The trust still needs to put in a tax return to show that distributions were made. There are rules about nominating beneficiaries for tax purposes, making distributions and allocating capital where the trust holds assets. There are penalties if you break the rules.

### **Company**

Business is often done through companies. There is a lot of certainty once you set up a company, but there are still some people who run their business like the assets of the company are their own.

I was once involved in the winding-up of an abattoir where we had to sort through hundreds of smelly boxes of documents to track the purchases that the owner had made for himself with company money. There were properties, cars, a boat, shares in a racehorse and all sorts of things that the owner wanted to keep!

The benefits of doing business through a company are that it is a separate legal entity and directors and shareholders have limited liability if they have acted correctly and not signed personal guarantees. It may also be easier to get funding and investment because liability is limited. Of course, you would still have to demonstrate that the company will make returns on that investment! Companies are well recognised and may appear to be more 'professional' or 'legitimate' than a sole trader business.

Downside -

There are rules and reporting obligations for companies and penalties for non-compliance. The record keeping is more onerous than that for a sole trader or trust. Changes to the company can only be made in line with the rules that govern it - from the Corporations Act and the company constitution. Company records are also available for public search.

### **Partnership**

Partnerships used to be the only structures available to lawyers for the running of a business. Partnerships can be formed between different legal entities. You can have partnerships with individuals, companies or trusts or combinations. Remember, when you are just starting out, keep it simple!

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Partnerships can be quick and easy to set up. Word of warning, if you don't have a partnership agreement in place, then you never know what will happen if things go wrong! Get it in writing!

Partnerships allow people with different skill sets to combine their skills for the purpose of profit. The key to a partnership is that it is formed to make a profit! Generally speaking, each individual partner will be responsible for their own taxation liabilities based upon their distribution from the partnership in accordance with the partnership agreement. You might have three partners with different levels of interest - eg 60%, 15% and 25%.

Downside -

If you are in a partnership you can be 100% liable if anything goes wrong. I have a friend who was a partner in a law firm where one of the other partners stole some client funds from the trust account. That partner went to jail and now the people who lost their money are chasing my friend for payment. He did nothing wrong, didn't know about the theft (even the auditors missed it!) but now he is paying the price, just because he was in the partnership and he has some personal assets that might cover the money claimed. OUCH!

Another problem with partnerships is the complexity involved in changing partners. If a key person leaves, that may be the end of the business.

# Keeping Hold of Your Business

Start with the end in mind. Would you like to sell your online business for \$40 million?

That's what Dean McEvoy and co from Spreets.com did after only 9 months of dedicated and focused work. Where did they start? With the end in mind! They had -

- an already successful model to copy from
- a clear plan for implementation of their idea
- put in place a structure that made it easy to transfer the business
- protected their intellectual property
- knew they wanted to be able to sell the company if anyone came offering
- could immediately identify the value in the business every step of the way

## Covering the basics

There are some basics that you will need to know regardless of which structure you use. Like:

- Do you need any licenses or registrations to operate your business? Eg, you can't sell alcohol, pharmaceutical or milk without the appropriate licenses.
- What insurances will you need to operate your business effectively and in a way that means you won't lose your house if something goes wrong?
- Register your business and display your official number on all your

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public documents like your website, letters, and invoices.

- Know your bookkeeping requirements and put arrangements in place.
- Search for start-up grants. Small business in Australia is the primary employer and a significant contributor to the Gross National Product of our country. The government wants to support you getting started. Do some searches to find out what money you can get to help build your business.
- Be ready! Money is not just thrown around. You will need to put together proposals to demonstrate how you will use the money if you get it.
- Keep a record of what your business owns (like your website, its content, the list of customers you have built up, etc.) so that when it comes to getting a business loan or value the business for sale, it is easy to show what you have in the business.

### **Having Something to Sell**

Let's suppose you have a business idea, a model in mind that you'd like to copy and a plan to move forward. What we're going to look at is making sure you have a structure in place so that you have something to sell. However, new or old your business is.

Here are three simple rules for setting up your business structure:

1. It does not have to be perfect
2. You must be able to understand it and explain it easily
3. It should be cost effective (no over-capitalization please!)

It doesn't have to be perfect, but the better your records, the better chance you have of getting a higher value. I've seen many transactions where the purchase price was reduced simply because there was too much uncertainty about what was in the business and what was not.

In one transaction where there was a lot of stock in a warehouse but nobody was exactly sure what was there. The purchaser had to either negotiate an audit by a quantity surveyor (someone who does a stock-take on current and expired stock) or a discount based on guesswork.

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The buyer took a punt on guesswork and negotiated a reduced price.

In the online space, you should be clear about who is in your database and how long it has been since they were contacted. A list of 10,000 names and email addresses has little or no value if there has been no contact with anyone on that list for two years.

It does take a lot more time and a lot more money to get ready to sell a part of the business, or review the due-diligence material to buy a business if you haven't got it somewhat together.

Just remember that there is a point where the amount of time it takes to 'get it right' becomes counterproductive.

Know what you want to achieve and have the most important 20% absolutely right, and the rest should take care of itself. So, how do you identify the most important 20%?

### **CASE STUDY**

I once worked with a very simple business which was manufacturing and selling a high in demand item. They were always looking to expand their business, but the key to their 'bread and butter' income was four long-term contracts for the supply of their base product.

We had standard contracts in place and a straightforward dispute resolution process. The core value in the business was maintaining the four long-term supply contracts, and because those four contracts were in order and my client had a good relationship with those four customers, his business had fundamental provable value. That allowed him to go out and experiment with expanding his product range. Having four written contracts with specific dates, times and minimum quantity orders was the key to the value.

### **Governance**

Governance is how you run a business. It's the accumulated rules and procedures you put in place to make sure everything happens as it should.

With sole traders and small companies, it is common for one person to be making all of the decisions all of the time, whether that is in completing a piece of work for a paying customer or determining the strategy for the business over the coming five years. With publically listed companies it is the responsibility of the Board to set and monitor the strategic direction of the business and for management to look after the day to day operations. Ideally they support each other and don't encroach too much on each other's area of responsibility.

Different structures have different rules. A trust deed is likely to contain rules about what a trustee can and cannot do, a company constitution or memorandum and articles of association will do the same thing.

The more people involved and invested in the business, the more important governance tends to be.

### **What happens if?**

Plan for the unexpected. There are a variety of things you can do to protect your business if something happened to you. This is about being practical, not fatalistic. If you were diagnosed with aggressive cancer tomorrow, what would you do, and could you do it quickly enough, to ensure that your business was able to continue without you? Equally, consider what you have in place if you were involved in an accident, whether or not it was fatal.

Insurance, business plans, powers of attorney, shareholder agreements, alternate directors, an acting senior executive you can tap on the shoulder and advisors who know enough about your business and assets to be able to support your family in transition.

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Think it through and prepare a briefing document for the unexpected, with supporting authorities, so that you don't lose what you've worked so hard to build.



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## Cover Your Arse Online

## Chapter 12

# Risk Management

*"I have learned that nothing is certain except for the need to have strong risk management, a lot of cash, the willingness to invest even when the future is unclear, and great people."*

**Jeffrey R. Immelt**

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## Risk Management Basics

Risk management doesn't have to be difficult. It's simply a matter of identifying the key areas of your business and then looking at what risks might affect you in those areas, and putting in place something to manage the impact.

People can get completely overwhelmed trying to identify every last risk that could impact their business, and this leads to avoidance of risk management processes, simply because they seem so hard.

With an online business selling products your key areas might look like this:

- Business structure
- People working in or on the business
- Technology
- Payment processes
- Reliability of supply
- Customers
- Legal compliance

Taking people as an example, the risks you might look at could be:

- Employee behaviour causing loss to the business like poor customer service, negligence or even fraud
- Employee taking legal action against the company for discrimination, bullying or unfair dismissal
- Workplace health and safety injury resulting in less than one day away from work through to a death in the business

## Cover Your Arse Online

- Lost corporate knowledge due to departure of employee, expected or otherwise

As on online business, technology might also be a priority and require more specific risks to be considered, particularly where access to systems is the key to productivity and sales, for example:

- No internet access for one or more staff members for more than one hour
- Primary system (access to files, emails, customer details, accounting) down for more than one hour
- Ransomware attack
- System hack
- Loss or theft of intellectual property
- Registrant or hosting provider goes out of business
- Personal information accessed or stolen

And so on.

As you can see, there is a broad range of things that you consider but before you stress about trying to come up with all the risks you could potentially be exposed to, get some context. Think about your realistic exposure. If you run a manufacturing plant your health and safety risks are likely to be more than if you have an office.

Realistically look at the likelihood of risk in your business and focus on those that you think are more likely than others rather than chasing down the rabbit hole after every risk.

In the United States, there is a demonstrated potential for unexpected and seemingly random shootings in workplaces. However, when looked at in the context of all the places of business in the U.S. it is a tiny percentage and therefore a very rare chance of occurrence. Rather than specifying that as a risk, it is better to address it more broadly so that you can put controls in place that can cover a number of different scenarios.

## Cover Your Arse Online

This could be done by categorising risks as:

- event giving rise to multiple injuries in the workplace
- reputational damage arising from publicised event involving the business
- event causing closure of the workplace for more than one day through to permanent closure
- event causing damage to the workplace so that future work is disrupted by repairs

A control is simply a way to manage and reduce a risk. Your objective should be to put in place as a control that reduces the risk as to the least acceptable risk as much as reasonably possible in the context of your business operations. It is unrealistic to think that every single risk can be avoided. Controls include:

- Policies and procedures
- Training
- Insurance
- Work methods
- Barriers (like guards on machinery)

The kind of controls you might put in place around technology are:

- Policies for account creation and access including:
- who can establish an account and what identification is required?
- protocols for passwords and frequency of when they are changed
- limits on what programs can be downloaded and installed
- access and use of 'bring your own device' BYOD
- what systems staff have access to (not everyone in the business needs access to the financial systems)
- when staff can have access (some businesses enable 24/7 remote access, others might limit access to social media or games to certain time periods)
- sourcing an appointment of third party providers
- backup systems
- disaster recovery and business continuity plans
- system security

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- data security, storage, access, and destruction

Don't reinvent the wheel. When you are creating a risk management plan do some online research to find out what other people are doing and what you can mirror and adopt for your own business. Otherwise get help from someone experienced in risk management who is able to invest some time in understanding your business and where the real risks might be.

# Insurance

Some people think that insurance solves all problems. It doesn't. I saw a comment recently that claimed insurance companies would do everything possible to avoid paying. That is not my experience, but you do need to be clear on the limits of the policies you have in place and what circumstances might lead to the refusal of a claim.

Getting to know a good insurance broker is worthwhile. Get someone who understands the nature and history of your business, responsive and prepared to negotiate premiums on your behalf. Good insurance brokers can save you a great deal of money in avoiding unnecessary policies or premiums and helping you to manage claims if you need to make one.

When looking to purchase business insurance there are three types of people that you will come across:

1. An insurance Broker
2. An insurance Agent
3. A direct employee

The insurance broker - A broker is someone you hire to search for the most suitable insurance policy for your particular circumstances, at the best price. They tend to have a broad knowledge of what is available which enables them to find a tailored solution.

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While some brokers may charge you a fee for their services, the broker is generally paid a commission from the insurance company whose policy you end up purchasing.

The broker's responsibility is to look after you and your interests which means if you later have an issue with a claim, they should be able to help you.

The insurance agent - An agent tends to work as a representative for a group of insurance companies. They will often represent a small group. Their responsibility lies with these companies. Given an agent only represents a specific group of insurance companies, they have a more in-depth knowledge of the insurance policies offered by those companies.

A direct employee - Dealing with a direct employee of an insurance company means you are really dealing with the company itself. An employee should have the best knowledge of the policies offered by their insurance company and may have some understanding of the offers provided by direct competitors.

### **Choosing the right professional**

If you decide that an insurance broker or insurance agent is better suited for your needs, then the next step is to ensure to choose the right one. If you know other people within your industry, then it is often useful to ask who they used and what they thought about them. By asking around, you will find out who has a good reputation.

It is also very important that you trust and feel comfortable with your insurance professional. A high level of trust and comfort generally comes from the professional demonstrating they possess a good working knowledge of your business and insurance needs. Your level of comfort is also closely linked with how they conduct themselves as a professional i.e. are they easily accessible, do they answer your questions in a prompt manner etc.

## Cover Your Arse Online

Finally, you must feel confident that they will support you if you need to make a claim against the insurance policy. It is good sense to ask what level of assistance they will provide shall an issue arise with a claim.

Buying insurance online might be cheap, but unless you really understand the policy wording, and you are confident in making a claim, you might not be achieving the protection you aimed for.

Even though insurance does not solve all problems, it is worthwhile in helping to reduce the impact of a problem affecting your business. The key to getting the right insurance is in first completing the risk assessment exercise we were talking about earlier. There may be some areas you are comfortable 'self-insuring' and others you simply are not.

Self-insurance is either keeping a reserve of funds that will cover the costs of repair or replacement of damaged goods, or simply deciding that if something is damaged to a point where it needs to be replaced, you will wear that cost.

It is not uncommon for companies with significant hard assets, like machinery, property or vehicles, to self-insure for part of the value of those assets, or in the case of assets that may have been fully depreciated in value, be prepared to wear the cost. However, when doing this exercise always consider how you are using your assets and what the replacement value might be.

A piece of machinery that is 30 years old and no longer has a book value, but carries out an important function in your business, might have a high replacement value. In that instance, you might actually be prepared to pay a higher premium to have replacement cover, even though the machinery being covered has no value of itself.

## Cover Your Arse Online

Some or all of the following may be relevant to the type of business you have:

- Product liability
- Professional indemnity
- Public liability
- Income protection
- Life insurance
- Business interruption
- Cyber risk

## Other Controls

There are situations where you need something other than insurance to protect your business.

In a consultancy business, for example, you might be asking people to pay you money without any guarantee of results. Part of the reason you may not be able to guarantee results is that you are reliant upon the business you are advising to be actually following your advice. Even with the best intentions in the world, a business might reject or change your recommendations.

So, let's consider some of the risks:

### **1. Client not happy, they want their money back.**

Insurance is not going to protect you in this situation. The control that you would put in place is a clear written agreement that sets the terms of engagement.

What you need to do is be very clear at the start of the relationship on what it is that you are providing. As an example, if you use a set monthly fee, paid in advance, and that fee entitles the client to a certain amount of time with you, not their results, and that results will vary based upon the actions they take.

Have something in writing for your client before starting any work so that they understand what they are paying for and what you will do in exchange for that payment.

## Cover Your Arse Online

Never promise what you can't deliver. Be mindful of who you choose to work with and be prepared to provide a refund. Ultimately it will be a learning experience for you and of greater value to your business to investigate and learn from the complaint and move on.

Where services are provided to support a business, then you may be able to include a limitation of liability in your terms of service to the cost of providing the service again.

The law is different depending on where you are in the world, what laws apply and whether you are working under common law or a civil law system. In some jurisdictions, you can exclude all liability and in other jurisdictions, like Australia, if you attempt to exclude all liability your limitation will be void. In Australia consumer law prohibits you from excluding liability for breach of consumer guarantees listed in the legislation, and for loses a business might suffer as a result of your services, even if you did not cause that loss directly.

### **2. Your client does something stupid, and you get the blame.**

That might sound flippant, but you really have no control over the actions of another person. It is possible that you could end up on the receiving end of a complaint resulting from your work with a client.

There are loads of traveling education programs where a bunch of people get up on stage and talk about what they are doing as the next best way of doing something. It might be presented as a sure-fire way of making money. This is not uncommon and sales made from the stage during workshops and seminars can exceed six figures in a session, depending on the product and the audience.

So what if someone invests in an education program or property or trading system and they lose money. Can they go after the presenter, and if you were the presenter what would you do to protect yourself? Some form of professional indemnity insurance may assist you in these circumstances.

## Cover Your Arse Online

Be clear on the terms of your insurance policy and what it covers and what kind of evidence the insurer will require from you in the event of a claim. Additional controls would be:

- ensure that invitations and event promotions let participants know that offers will be made during the event
- have clear terms and conditions for any program offered
- have clear and simple release forms for all participants to complete before they start
- retain a percentage of payment received for refunds

In any situation where you are acting as an advisor, have a system for recording what advice you give and when, and specific responses from your client. Records like this can assist you in demonstrating what you have done without having to rely on memory alone.

### **3. Injury in your premises**

If you are going to run a business from home or any premises, you might consider getting public liability cover so that a claim from anyone tripping over a bump in the carpet and losing a tooth on the door frame will be covered.

Other controls you would put in place include a physical assessment of hazards in the workplace, and taking action to reduce or remove those hazards. Trips and falls are apparently the most common category of workplace injuries. You might:

- remove trip hazards like power cords draped across the floor
- repair damaged carpet
- have a policy not to pile boxes higher than one metre off the ground
- train staff on correct lifting procedures
- train staff on appropriate use of ladders in the workplace
- test and tag all electrical equipment

and so on.

## Reduce Your Legal Risk

Unless you let the world know otherwise, you are assumed to be responsible for everything that happens on and as a result of using your website. We're making a broad generalisation here. There are legal technicalities that could change that position, but you will be better protected if you start with the assumption that you are responsible.

Practically, what does this mean?

If your website is hacked and malware is attached without your knowledge, then each visitor to your website might be affected. This may or may not be picked up for some time. If someone else suffers a loss as a result of getting malware through your systems, then potentially they could claim against you for their losses.

Most people probably wouldn't be able to identify your website as the problem but any forensic investigation of the affected person's system might identify your website.

So how do you limit your liability?

Two things:

- have terms of use that limit your liability for losses occurring as a result of your systems
- you may have an email disclaimer that notifies recipients that they are responsible for their own virus protection and system security
- put in place security and checks appropriate to your business.

## Cover Your Arse Online

What is appropriate to your business will depend on your industry, the demographic of your users, your website traffic and possibly also your revenue. People are more likely to take action against you if they think you can afford to pay a claim.

If you have appropriate controls in place, you might then also look at cyber security insurance.

Be creative in the ways that you look at reducing risk. Humour is often more memorable than reams of policies and procedures. Virgin lead the way in using humour in their legal terms to make them easier for people to digest, and to encourage people to read them. I've seen terms and conditions put together in simple infographics that are very easy to follow.

Don't be afraid to get away from legalese or academic language. As long as the meaning is clear, making policies, instructions or procedures as short and simple as possible means that they are most likely to be remembered and used.

So, have a think about what you want to protect and what your risks and opportunities are, then work out what steps you need to take.



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## Chapter 13

# Dispute Resolution for Online Business

*“Through the centuries, people of law have been persistently concerned with the resolution of disputes in ways that enable society to achieve its goals with a minimum of force and maximum of reason.”*

**Archibald Cox**

## Cover Your Arse Online

# Dispute Resolution for Online Business

Don't expect to go in to business and never end up in some form of dispute with a customer, supplier or another person in the business. The trick is working out what disputes are worth pursuing, and which are not.

Disputes consume more than money. Disputes take energy; they take staff time; they take people away from doing activities that will grow the business.

When looking at a dispute you need to consider:

- How much time will this dispute take out of your working day or days?
- What is the actual dispute worth in money?
- What might make the dispute go away?
- Does the dispute have any chance of impacting your personal or business reputation?
- How upset are you about the dispute?

When you answer the above questions, probably the most important one to think about is how you feel. It is very easy to get upset and react to a dispute, instead of thinking about how to actually resolve it and be able to move on.

# What to do When a Client Won't Pay

If a dispute is worth less than a day of revenue, then you are better to let it go.

If you have a strategy in place that quickly identifies what you will and won't worry about, it saves you a huge amount of time and stress.

It is often hard for small businesses to let go of even a small debt because you don't want to feel taken advantage of, or resent not being paid for your hard work. I know, I recall chasing up a \$97 invoice for six months, so I understand how difficult it can be. The best thing to do is have in place an automated follow up system for your billing. Whatever online bookkeeping system you use, set up automatic reminders. My system reminders are as follows:

## **7 days + 14 days overdue - Friendly Reminder**

Hi [Name],

Your invoice for [\$000] was due on [Date] and is now overdue. We understand that you may simply have overlooked this invoice and appreciate your prompt attention to it now.

If you've already paid it, thank you! Please disregard this email and sorry for bothering you.

To view your bill visit [invoice link].

## Cover Your Arse Online

If you've got any questions or want to arrange alternative payment please call us on ...

### **21 days overdue - Reminder**

Hi [Name],

Your invoice for [\$000] was due on [Date] and is now really overdue. We're a little worried you might have forgotten about us! We'd appreciate your prompt attention for payment now.

If you've already paid it, thank you! Please disregard this email and sorry for bothering you.

To view your bill visit [invoice link].

If you've got any questions or want to arrange alternative payment please call us on ...

### **30 days overdue - Final Reminder**

Hi [Name],

Our records show that your invoice for [\$000] was due on [Date] and hasn't been paid. You might not have noticed that we have a notice on all of our invoices that says interest will apply to overdue accounts, accruing from the date of invoice.

It is our policy to start calculating and invoicing interest on accounts that remain overdue for more than 30 days. We know this would be inconvenient for you and would rather avoid it. Please make payment now to avoid additional invoices.

If you are having difficulty in paying our account, for whatever reason, please do call us on ... with a proposed payment arrangement that works for you.

## Cover Your Arse Online

If you've already paid it, thank you! Please send us a copy of the receipt for payment so that we can update our system.

To view your bill visit [invoice link].

### **45 days overdue - Interest is Now Payable**

Hi [Name],

Our records show that your invoice for [\$000] was due on [Date] and still has not been paid.

We haven't heard from you to make arrangements for payment. We know it can be uncomfortable to have a conversation about an overdue account. If you are having difficulty paying our account (for whatever reason), we would rather receive smaller regular payments from you than to not hear from you at all. If you are ok to chat, please do call us on ... to talk about what will work for you.

Interest is now accruing on that account calculated at 8% per annum compounding monthly. Until the full amount of the invoice is received, interest will be invoiced to you separately.

If we don't hear from you or receive any payment, your account may be referred to a debt recovery firm for collection and will then be out of our hands.

If you've already paid your invoice, thank you. Please disregard this email.

To view your invoice visit [invoice link].

### **60 days overdue - Referral to Debt Recovery**

Hi [Name],

## Cover Your Arse Online

Your invoice for [\$000] was due on [Date] and has not been paid, nor have we heard from you.

Interest is now accruing on that account and it will be referred to a debt recovery firm this week for further action.

If you've already paid your invoice, please contact us urgently with a copy of the payment receipt so that we can update our records and ensure that you don't have debt recovery people calling. You can contact us by responding to this email or calling us on ....

To view your bill visit [invoice link].

### **Be disciplined**

You need to have the discipline to send outstanding debts promptly to a debt recovery expert if that is the system you put in place. Let the experts look after the debt and get on with building your business.

### **Other strategies**

Phone calls and face to face meetings can have a big impact if you are chasing payment. Always be polite and look for ways to make it easier for your client to pay, like by instalments.

Another strategy that works is to follow people up at the end of an accounting period, say the end of financial year, and let them know that you've got an outstanding amount in your system and they are the only customer who hasn't paid and you'd like to get it sorted out before the end of the financial year. People don't like to be the only delinquents in the room and this can sometimes work in your favour. Give it a try. The worst that can happen is that they don't pay, in which case your position hasn't changed.

## **Resolving Problems with a Supplier or Joint Venture Partner**

It would be so much easier if you put in writing your agreement at the beginning of a business relationship when everyone is sure things will work out well, rather than try and remember what was agreed on when things go wrong.

I've seen legal partnerships go bad where the parties didn't have a written agreement about how the business would be divided when they parted ways. The dispute took five years in court and cost all of the profits of the partnership before it was resolved. What a waste!

It is never too late to document your agreement and what will happen if the business is sold, or one of the parties wants out. Do it now!

If you do end up in dispute, emotions will get in the way. This makes it difficult to reach a resolution without help. Depending on how good or bad the relationship is, the following options may be available to you:

- Negotiation
- Mediation
- Arbitration
- Expert Determination

## **Negotiation**

There are books written about effective negotiation and courses you can do to improve your skills. Ultimately, it comes down to really understanding what you want, and anticipating what the other party wants, whether you know all the facts or not. Before you enter a negotiation, write down:

- Your best end result
- What you think the best end result for the other party might be
- Your worst end result
- Different possible results between your best and worst scenarios
- What facts you know
- What information you are missing

Quite often the information you are missing is what is in the other party's head. Don't be afraid to ask! Sometimes open, non-threatening questions can give you a completely different perspective on what is important to the other party, which can help you to reach an agreement.

Sometimes it is worth looking at how you can help the other party to improve their business so that they are in a position to either deliver on time or pay you monies owed or solve another issue. I've seen businesses work collaboratively together for the benefit of the party who was struggling to keep up their end of the deal, simply because they didn't have efficient systems in place. By lending a hand, both businesses benefited.

## **Mediation**

Mediation is about having someone to help each participant to do a reality check and test their position, and try and come to a resolution. In a recent mediation I was told that you know you've reached a fair resolution when it hurts for both sides. I'm not sure that is the best measure, but it is important to understand that a mediation won't always be a great experience.

## Cover Your Arse Online

The objective is to reach a documented agreement that both parties will abide by. The mediator won't decide who has a winning case, although they will ask questions to help you test your position.

Mediators need not be lawyers.

### **Arbitration**

In this day and age arbitration is a lot like court proceedings with similar cost involved. Arbitration can also take a significant amount of time involving clearly documenting the parties' positions and producing evidence. Most developed countries have specific legislation around the nature of disputes that can be arbitrated and rules that apply.

Arbitration is favoured in high value international contractual disputes and it is not uncommon for international deals to include a provision that the parties will arbitrate in a specific country, a specific language and according to a specific set of rules. Usually, an arbitrator will make a binding decision on the parties and that decision can be registered in a court for enforcement.

### **Expert Determinations**

Expert determinations only work if everyone agrees on the expert and to be bound by their determination; otherwise, you end up with competing expert views and no resolution to the problem.

Expert determinations can be particularly useful in technical disputes. An assessment of why a piece of machinery failed can quickly sort out who is liable to pay the costs of getting it fixed or replaced. As well as working out who is liable, expert determinations can also be used to identify how much, if any money is to be paid. An expert will usually be independent of each party and able to assess all of the evidence objectively.

# Online Dispute Resolution Systems

Different sets of rules for mediation, arbitration, and expert determination can all be found online quite easily, and are fairly standard.

Starting around the year 2000 a collection of online dispute resolution systems were launched; most of which are not around today. Either the market wasn't ready for them, wasn't prepared to pay for them, or simply didn't use them.

Part of the reason software hasn't been widely adopted for use in dispute resolution is that systems were originally set up only to help the parties reach a financial settlement. This was done by way of blind auction, where each party entered an amount they were prepared to pay or accept until an agreement was reached. Part of the problem in that process is that it pre-supposes that there is no dispute as to facts, and does not give the parties an opportunity to be heard.

The only remaining online system I have found (SmartSettle) uses a system much like mediation which involves a facilitator appointed by them, so it isn't a wholly online process, just more of a remote mediation process.

The main challenge in developing software for dispute resolution is the sheer number of variables that anyone dispute may involve. Without inputting all of the changing factors, and having a basis for determining which evidence should be given greater weight, it is more efficient to have a person hear the dispute and make a determination.

## Cover Your Arse Online

As artificial intelligence progresses, it may be possible in the future to have decision makers who are not human beings, but not with current technology.

In May 2016 a U.S. based firm entered an agreement to use a component of IBM's Watson AI computer, called Ross. Ross was designed to understand language, propose answers to questions, research and generate responses, with references and citations to support its conclusions. It also learns from experience. However, it is being used in the very restricted area of bankruptcy practice and not dispute resolution.

## Going to Court

Going to court should be your last resort, not your first. You need legal help or a very good understanding of the system and the rules that apply. Even then, don't bet on a better than 50/50 chance of winning. Everything is subject to interpretation, and if it wasn't, we wouldn't need lawyers and courts to argue over it. Even judges hearing the same case can come up with different decisions, and often do.

Everyone wants to go to court for different reasons. For some it is the principal of the thing and they just want to be proven right. For others it is a search for justice, and others just want someone else to make the decision for them. Whatever your reason, there is a lot of time, cost and stress involved in going to court. It's a big decision and one you should only make after careful consideration.

A court matter is a marathon, not a sprint. Even the more informal tribunals can have a delay of six months between first making your application, and the hearing. You have no guarantee that you will get a decision at the hearing and can wait months, or even years before the decision is handed down. Once you have a decision, the work of actually enforcing it starts.

Once you start a court proceeding, you may not be able to back out of it easily. This is particularly true if your opponent makes a counter-claim.

Going to court is nothing like what you see in television programs. There is a lot of preparation before you get there and it can be years before you get a decision after your days in court.

## Cover Your Arse Online

A good movie that highlights the risks of becoming obsessed with court proceedings is *Flash of Genius* (based on a true story) in which Bob Kearns takes on Detroit automakers who he claims stole his idea for the windshield wiper. His obsession consumes years of his life and destroys his family life. Don't let this happen to you.



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## Chapter 14

# Wrap Up

*“Well, I don’t know as I want a lawyer to tell me what I cannot do.  
I hire him to tell me how to do what I want to do.”*

**J. P. Morgan**

## Cover Your Arse Online

## Choosing a Lawyer

Looking for a lawyer is not that much different from looking for a mechanic.

You need someone who is going to understand how much your business means to you and look after it. You need someone you feel confident with, who you can ask the 'silly' questions about your legal issues. You need to feel comfortable just picking up the phone and knowing that if it isn't answered straight away, he or she will get back to you as soon as they can, and you need someone who understands and has experience in the area of law that applies.

Many general practice lawyers have a fair understanding of conveyancing, Wills and succession law and general commercial issues. If you want someone to look after a family law matter or personal injuries claim, then you usually see a specialist. If you want someone who understands business online, then check out their website and social media profiles first. If they are not active online, how will they understand what you do?

Ask people you know who have already been involved in a similar matter for a referral to their lawyer. Ask the other professionals you work with, like business brokers or accountants, who they would recommend.

## Cover Your Arse Online

Questions to ask a lawyer before retaining them are:

- What is the cost and how is it calculated?
- When do you have to pay? (many lawyers ask for money before they start)
- Do they provide fixed fees, and if not, why not?
- What information will they need from you?
- What experience do they have with similar cases?
- What will they do for you?
- How long will it take?
- Who will be looking after your case?
- What is the best way to communicate with them, and how often will they be in touch?

## Your Legal Costs Budget

How do you work out what might be a reasonable legal spend for your business?

Very few people like to spend money on lawyers or accountants, but like other professions, you won't think your costs are expensive if you've first hired an amateur.

How much can you afford to lose?

I've seen people invest more money than they can afford to lose into a business idea, buying a franchise or buying a share in someone else's business without wanting to spend money on legal fees to find out what the risks are before they start.

Legal advice should alert you to the risks that might arise, but leave the commercial decision as to whether or not it is a risk you are prepared to take, up to you.

For a comparatively small investment up front, you can save yourself all sorts of trouble.

### **Scenario 1**

Your business idea is so great an investor wants to give you some money for equity in your business, and they are offering you \$100,000 for a 20% stake. Yahoo!

## Cover Your Arse Online

But the whole thing is new, and you don't want to spend a lot of money and the investor is going to run it by their lawyers anyway, so you'd rather download a template for \$30 than pay \$3,000 for advice.

Six months later the investor sues you for their money back for failing to perform and there is nothing you can do about it except pay up because you didn't want to spend the money to protect your interests in the first place. Then you see a lawyer and they tell you it's going to cost you \$40,000 to defend the claim.

### **Scenario 2**

You've got someone really excited about selling your products, and they want a cut above the normal affiliate commission because they actively want to go out there and promote it.

They've given you an agreement and you just want a quick run through because it looks ok to you and you haven't really included legal fees in your budget. Development of the product was so much more important!

You end up with someone who is behaving like a competitor and who has hijacked your business and you can't stop them because the agreement they wrote that you didn't want thoroughly considered doesn't allow you to stop them.

Now you're upset at your lawyer and wanting to instruct another lawyer to have a go at both the first lawyer and your sales rep, and your new lawyer wants \$5,000 in trust up front before they even look at it.

Think about it!

If you want a business that works for you then you need to budget for legal fees with everything else. Legal fees don't need to be your first priority, but they do need to be in your budget before you get into situations where you could lose your business.

## Cover Your Arse Online

Where ever possible I provide fixed fees, no surprises. If you don't like the cost, we don't work together. But beware, if you only want to pay \$30 for a template, it might not be as comprehensive as you need to protect your business.



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## Cover Your Arse Online