



Online Legal Issues

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Introduction

Going online can result in you becoming an “instant exporter” overnight. Your business has to decide where – if you can say such a thing in this context – you will do business. Will you accept orders from around the world, or just in your own city or town? Just because your website can be seen by anyone with Internet access, no matter where they are, does not mean you have to deal with them. If you do serve clients outside of Canada, however, you could find that you’ve become an instant exporter and need to deal with not only all the legal issues surrounding international business, but also the social and cultural aspects as well. This guide explores some key cyberlaw issues – the legal issues of e-business – that you need to consider.

Jurisdiction

Jurisdiction is basically the ability of a legal body, such as a court, to assume control and enforce its decisions over you. The Internet is international. Except for things like international treaties, legal systems are not. Therefore, you have to think about which laws may apply to you.

This is a complex area, but the fundamental concept to keep in mind is that foreign courts may take jurisdiction over you, generally on a sliding scale depending on how your website is set up, and how active you are in the other jurisdiction. When a court in another jurisdiction decides to exercise authority over you, that court’s decisions may be recognized by other jurisdictions, including your own.

If you are sued in a foreign jurisdiction, you may find that, if you ignore that lawsuit, it may become a judgment, which can then be registered in your jurisdiction and executed against you (seizing assets or garnishing money, etc.). Therefore, you should not ignore the laws of other jurisdictions or any lawsuits filed against you in such a jurisdiction.

So, how can you manage all this risk?

- Get good advice on which jurisdictions pose the greatest threat to you legally. Then, you can decide if the rewards of even dealing with individuals or businesses there are worth the risk.
- It is sometimes possible to enter into a contract by which you and the other parties agree on the law that will apply and the court system in which disputes must be decided. You should obtain legal advice on the details before proceeding.

Contracts

The requirements to form a valid contract vary from one jurisdiction to another, and there may be special rules for forming contracts online. It is important to consider those requirements when deciding where to do business online and with whom.

There is a lot of new legislation either in force, or coming into force, across Canada and the US. Online businesses need to be up to date on current regulations in the jurisdictions where they are doing business.

If you are trading internationally, there are many international conventions and treaties that may apply to you as well. The rules of international trade can become very complicated, so you may want to obtain expert advice.

Keep these suggestions in mind if you want to get paid. Granting credit to businesses or individuals in foreign jurisdictions is very risky. If they don't pay, you may have to go to the foreign jurisdiction to collect, and that may be expensive and difficult, or maybe even impossible.

Credit cards can be a convenient means of accepting payment, but they may not be treated the same as money up front. You should be aware that in many jurisdictions, the purchaser can deny the agreement and obligation unless the credit card is physically present at the time of sale. Of course, with e-commerce the card is not present, so "chargebacks" can be a problem. A chargeback results when a customer asks his or her credit card company to reverse the charges on a purchase.

Legal Regulation of Internet Activity

Consumer Protection

Most jurisdictions have laws designed to protect consumers from unethical business conduct, and these laws can be applicable online. There are numerous regulations surrounding product design and packaging that vary from one country to another. There are also regulations dealing with licenses required to sell, certifications needed to deliver a service, mandatory contractual terms (regardless of what you say in your website agreement), “cooling off” periods in which a customer can change their mind without liability, and so on. In addition, there are often voluntary standards that are ignored only at great risk. Businesses should be familiar with all applicable regulations and legislative requirements in the jurisdictions where they conduct business, as well as all applicable voluntary standards.

Fair Competition

In Canada, the most significant legislation in this regard is the Competition Act that regulates acceptable advertising and promotion. The Competition Act prohibits false or misleading advertising and this applies to websites as it does to other media.

Contests and Promotions

Contests and giveaways are subject to legal regulation. The Competition Act focuses on disclosure of such things as the value of prizes, odds of winning and geographic areas. Prizes must be distributed promptly, and winners must be chosen randomly or on the basis of skill. The Criminal Code of Canada may require a skill-testing question. A license from the province in which you are located may also be required.

Distribution and “Pyramid Schemes”

Multi-level marketing and distribution schemes are common in online business, but it is necessary to understand the legalities before proceeding with any plans in this area. Many online distribution arrangements may in fact be illegal pyramid schemes. You should obtain legal advice before setting up any such arrangement or

entering into one. If you are thinking of entering into such an arrangement, keep in mind the following: If it sounds too good to be true, it usually is.

Securities

Offering to sell investments in your business online, such as shares, will usually be illegal unless you have obtained the approval of a regulator, such as the Saskatchewan Securities Commission. And even then you will have to be careful that you are not offering securities for sale in another jurisdiction where you are not approved to do so. This may arise if someone outside of your province is interested in purchasing shares online.

Taxation

This is a very complex and technical area. For example, you may have legal obligations to collect or withhold taxes, such as PST and GST, or you may be subject to an exemption. Your customer may also have to withhold taxes on your bill. You should be sure to obtain good accounting, tax and legal advice, particularly if you are selling across provincial or international borders.

Intellectual Property

There are many kinds of intellectual property, but the ones most important to your online business are:

Copyright

Essentially copyright deals with the right to copy, and applies to digital material such as software and websites as well as books and music. Copyright may be registered, but it exists automatically upon creation without registration. The most important thing for you to understand in your business is that, if you hire a contractor to develop your website, and you want to own the copyrights, you must have a written agreement transferring the copyrights to you. Without an agreement in writing, you will not become the owner of the copyrights.

Trademarks

Trademarks are a combination of letters, numbers, or a design, that distinguishes your business from that of other businesses in the same marketplace. It is legally

difficult to make a descriptive word into a trademark, so you should pick something that does not just describe your business when choosing a name. An experienced trademark lawyer or agent can help you with this.

Rights in a trademark are obtained by use, but registration is also available in most countries, including Canada. The registration of a trademark provides protection across Canada. If you do not use your trademark, even if you have tried to register it, you either don't get any rights or you may lose what rights you have.

If a trademark is used simultaneously in Canada by two businesses, it cannot be said to be distinctive, and neither parties can register it. If this happens after registration, the registered mark can become invalid if nothing is done to enforce your rights. As a result, companies can be very aggressive in defending their trademarks to avoid losing protection, and that aggression extends to someone using their trademark in a domain name.

Domain Names

Domain names can be similar to trademarks, but you need to choose them carefully to obtain full protection. Again, they should not be merely descriptive, and while trademarks are protected nationally or regionally, domain names are international. Although each domain name is unique, full protection requires a strategy that you may want to discuss with a lawyer to be sure you are protecting your trademark and not infringing on the trademark of another business.

Other Intellectual Property

You should be aware that there are other types of intellectual property, such as patents and trade secrets, which are beyond the scope of this guide.

Internet Specific Issues

There are many issues that arise in e-business that do not exist in the "bricks-and-mortar" world. For example:

- **Can you link to another site without their consent?**

Generally, yes, as long as you are not linking deep inside the site and bypassing advertising or somehow engaging in other legally offensive conduct.

- **Can you frame another site inside yours?**

This will probably be copyright infringement, and possibly trademark infringement as well.

- **Can you use your competitor's trademark in your metatags?**

This could be trademark infringement.

- **Can you register someone else's trademark as a domain name and then try to sell it to them?**

This may be considered cybersquatting and could lead to legal issues you might prefer to avoid.

Internet Service Provider Issues

You should be sure to read any agreements with your ISP carefully. Will the server space and bandwidth be sufficient for your business? Will it scale up if your online business increases? Make sure you can live with all the ISP's rules, which are set out in their acceptable use policy. Is the service they provide secure enough for your business?

Conclusion

In addition to obtaining tax and legal advice, there is no substitution for educating yourself. Be sure to find and read the right resources for your online business, so that you can make more informed decisions for your e-business.

Resources

- Internet Sales Contract Regulations
www.macleoddixon.com/content/files/InternetSales.pdf
- Baker and McKenzie E-Commerce Legal Guide
www.bakerinfo.com/apec/canadaapec.htm
- Blaney McMurty: Canadian Cyber Law Links
www.e-commercecanada.net/links.htm#6
- Borden Ladner Gervais: Internet Law Handbook
www.e-future.ca/alberta/pdf/blg_internet_law_handbook.pdf
- Canadian Legal Information Institute
www.clii.org
- Electronic Transactions Act: Alberta
www.canlii.org/ab/laws/sta/e-5.5/index.html#enabled
- Library Resources: E-Commerce Legal, Privacy and Security Issues
www.unbsj.ca/library/subject/cyberlaw.htm
- MichaelGeist.ca
www.michaelgeist.ca
- Uniform Electronic Commerce Act
www.law.ualberta.ca/alri/ulc/current/euecafa.htm

Contact Us

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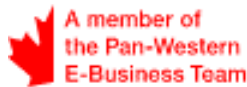
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