

E-Commerce: A Brief Primer¹

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South Florida is becoming a hub for e-commerce and Internet activity particularly as it relates to the Americas. Every day, more and more businesses are hopping on the e-commerce bandwagon. However, every day, new lawsuits are being filed arising from these actions.

Here are 10 basic things every business should know before doing business on the Web:

1. **Choose a domain name and clear the trademark rights.** Today, just about any common name in the .com, .net and .org domains is already taken. New domains are being introduced such as .biz and .info. Some country code domains are being marketed as generic domains (i.e., .tv, .nu, .cc) You can check out names and your creativity at various sites, one of the most popular being www.networksolutions.com. Once you find a name that is available, you can register it. However, the availability of the name from the Internet registrars does NOT necessarily mean that you may legally use the name. Unless you have found an available "generic" name (highly unlikely), you must still make sure the name does not infringe another's trademark rights. To determine this, a full trademark search will likely need to be conducted. If you adopt a name that infringes someone else's rights, you will likely not only incur the expense and public relations "black eye" of having to change names, but may be liable for significant damages and attorney's fees.
2. **Register your domain name.** Register your domain name using at least the three main suffixes of .com, .net and .org. The suffixes are not legally restricted to "commercial," "network," and "organization," respectively. They have become generic, each interchangeable as a Website address. You may also want to consider .biz if you are a commercial, for profit venture, and .info, which is fully generic. If you only register in one of the domains, someone else might register the exact same name in the other domains. The base cost for registration has dropped to the low teens for each domain for one year's protection. New "top level domains" (i.e., .cc, .nu, etc.) are being considered and released from time to time and this should be monitored. Also remember that the Internet is international and that the various countries have their own domain suffixes. If you plan to do business internationally, consider registering with the registrars of the various countries to avoid having your name "hijacked" where U.S. law or treaties might not protect you, but be careful not to expose yourself unwittingly to foreign taxation, regulation and jurisdiction.
3. **Register your name as a trademark.** After you have confirmed that the domain name does not infringe another's trademark, you should consider taking the next step and registering the name as your own trademark or service mark with the federal Patent and Trademark Office. This provides you with national (and under some treaties, potentially international) protection for the domain name as a "mark" provided you use the mark to identify goods or services and not just as a "trade name." Having a registered trademark also gives you greater protection from others who might try to register confusingly similar domain names or trade on the goodwill of your mark. Registration typically takes up to 18 months. Again, if you plan on marketing internationally, consider also registering the trademarks in the appropriate countries.
4. **Select a reputable and capable ISP.** Unless you will have your own servers and IT staff, you need to find a place on the Internet to house your new site. This can be done with an Internet Service Provider (ISP). Make sure your agreement lets you change providers and that you have control over what is posted on your site. You also want to be sure you own all the intellectual property rights, such as

¹ This article should not be construed or relied upon as legal advice. Legal advice can only be rendered with full knowledge of all relevant facts in each unique case and in light of rapidly changing legal precedent, if any, applicable at the time.

the copyrights. There are lots of ISPs springing up every day. Avoid fly-by-nights; ensure that adequate standards are spelled out for sufficient bandwidth to be available for your needs at all necessary times, both initially and as you grow ("scalability"). Don't assume that because a contract appears to be a "form" that it is not negotiable.

5. **Design and Create your Website.** If you don't have a competent, in house, hypertext markup language (HTML) and other similar programmers, you will need to select a Website designer who can develop the Website for you. Some ISPs will provide "packaged" web designs that are great for individual "home pages" but not very unique or effective for e-commerce. An effective, complex e-commerce Website can cost hundreds of thousands of dollars to design and program. Of course, a basic "home page" on the Web that merely serves as an electronic brochure, will cost much, much less. In any case, you should check out the web designer's prior work and reputation. Once you settle on a designer, make sure you get a written agreement stating that you own all intellectual property, including copyrights, on your Website once it's created, despite the designer being an independent contractor. This is known as "work-for-hire" provision. Further, especially if you will engage in e-commerce using the Website, you should consider the risk that the site might infringe valid patents (such as the new "business methods" patents that Amazon.com and Priceline have popularized) and you should seek appropriate indemnification from the designer that the work it renders will not infringe others' rights. Also ensure that the designer will procure for you all necessary third party licenses.

6. **Register Copyrights.** Once a creative work is affixed to a tangible medium of expression, it becomes subject to copyright. However, to take advantage of full copyright law protection, you need to register your copyrights with the U.S. Copyright office and deposit copies of the "works" with the Library of Congress. Not only might the layout of the Website be copyrightable, any graphics, sounds, videos, databases and other components may themselves be entitled to protection. Because of the changing nature of the content on all but the most static "home page" type Websites, you may need to register updated copyrights periodically.

7. **Hyperlinks, Framing and Banners.** In addition to ensuring that you have necessary licenses for all the non-proprietary content that will be available on your site, be careful to know where your hyperlinks lead. If you link to someone else's site, you want to link to their main, "home," page unless you obtain express permission to link to a specific internal page. Otherwise you might get sued. It is probably the better practice to seek permission to link from owners of all linked sites. Sometimes a cross-linking agreement may be made. Also, if your link leads to a site where infringing or illegal activity is promoted or conducted, you may find yourself the target of aggressive enforcement actions. Framing also requires attention. Available technology allows you to configure your Web page so that the end user can view other sites without ever leaving your site. The others' content is thus "framed" by your site. If you do this, especially if you block out banner advertising that might appear on the other sites while your site has its own advertisers, you may find yourself in legal hot water. Speaking of banner ads, contracting to have an ad pop up when someone else's trademark is typed into a search engine may lead to suits against both the search engine provider and the contracting advertiser.

8. **Jurisdiction, Warranties and Disclaimers.** Because the Internet crosses state and even national lines, if you have anything more than a merely passive "home page" site you may find yourself being haled into court in remote jurisdictions (even foreign countries) in lawsuits that relate to your Website. This could include suits for intellectual property infringements as well as consumer and commercial claims arising from products or services downloaded, contracted through, or indirectly obtained via, your Website. The risk is greatest if you conduct full e-commerce using the Website. You should thus consider including on your site appropriate "clickwrap" agreements and disclaimers to attempt to mitigate these exposures. In this regard, the laws and regulations of the various jurisdictions where you will "do business" must be considered.

9. **Other Risks and Insurance.** As the Internet has grown, so have the bodies of laws and regulations. A myriad of "alphabet soup" laws have been enacted that impact Web-related business, such as HIPPA (Health Insurance Protection and Portability Act) affecting patient records, GLB (the Gramm-Leach-Bliley Act), affecting financial services, COPPA (the Children's Online Privacy Protection

Act) protecting children under 13 years of age, the post September 11 "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" (the "U.S.A. Patriot Act), etc. These laws and regulations must be carefully considered. In light of the multiple risks, Insurance coverage should be considered. Insurance companies are beginning to write policies that cover e-commerce, intellectual property and electronic media. These policies may provide you protection from expensive litigation costs if you are sued for the many things that can go wrong in the brave new world of cyberspace. Some potential exposures include: liability if your site is hacked and customers' credit card numbers or private information is stolen, infringement suits arising from an ever-growing series of patents on "methods of doing business" and computer programs (such as a "one-click" method of shopping, use of a reverse auction, or of a virtual "shopping cart"); advertising injury claims from trademark use and unfair competition assertions, and defamation liability. You should carefully compare policy provisions and exclusions and the reputation and financial strengths of the insurers in selecting an adequate policy.

10. **Consultants and multidisciplinary teams.** Most businesses entering the world of the Internet, and especially electronic commerce, will need to rely on good consultants to guide them. One of the first consultants that should be selected are the legal and tax consultants. With the Internet explosion, many lawyers and other professionals are now expanding into this area. However, especially because many of the issues involved are novel, cutting edge issues with little guiding precedent, special care should be exercised to select professionals who are truly experienced in this area. As you can see from the above non-exhaustive list, there are many issues that require expert legal guidance. Similarly, "systems integrators," value added resellers, e-commerce advisors and other consultants in this area should be carefully chosen only after conducting proper due diligence.

Jose Rojas concentrates his practice in e-commerce, intellectual property and technology matters as well as in complex business litigation. Rojas has practiced in the area of computer related law since 1981 and is one of the first members of The Florida Bar Computer Law Committee, which he chaired from 1995 to 1997. He speaks nationally on issues of Computer and Internet law. Rojas can be reached at 305-446-4000 or by e-mail at jrojas@concepcionrojas.com

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