

Electronic Rights and the Writer

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Gary enjoys working with creative people including entrepreneurs, small business owners, people who create new technology, and artists. His practice includes:

- Computer/Internet Law & Litigation
- Intellectual Property (copyright, trademark, trade secret & licensing)
- Art & Entertainment Law
- Corporate/Business Law
- Complex Business Litigation

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1. Electronic Rights and the Writer

This handout provides a guide to the ever changing world of electronic rights for writers. Like many other businesses, the publishing market is moving away from physical distribution and increasingly towards electronic distribution through the Internet to computers, e-Book Readers, cell phones, iPads and other types of mobile electronic devices. This is the new wild west for writers. Because it is a market that is expanding rapidly and changing all the time, the rules regarding electronic rights are also changing all the time.

2. Electronic Rights Defined

The term “electronic rights” is not well defined. As technology changes, the definition changes and expands. It covers the rights to reproduce works in any electronic form. Electronic form usually means in a computer file. It also covers the distribution of works through electronic media. This include portable digital storage devices such as CDs, DVDs, blu-ray discs, and flash drives. It also includes works displayed on computers and mobile electronic devices, including computers, tablets, and cell phones. It includes any work that is distributed through the Internet.

3. Determining if you have the right to sell your e-Book on the Internet

The author’s right to control distribution of his or her book is based on federal copyright law. Under copyright law you as the author have the exclusive right to make and distribute copies of your book for your lifetime plus 70 years.

You are free to sell or license the copyright rights in your work. Most authors enter into a book contract to license their work to publishers.

Copyright rights are infinitely divisible. You can license the hardcover rights to one party, and the movie rights to another, etc. In most book contracts, the copyright rights are divided into many pieces, and then most if not all of the pieces are licensed to the publisher.

If you have never licensed or sold the copyright rights in your book to anyone, then you retain the copyright rights, and you have the right to e-Publish your book.

If you have licensed your book to a publisher, then the book contract controls who owns the e-Publishing rights. If the contract is fairly recent, then it will probably say who owns the e-Publishing rights. But if the contract is not recent, it probably does not specifically cover e-Publishing rights. Since at least the early 1980s, most publishers have included a catch-all clause in their contacts that grants them all electronic rights. Here is an example of an older electronic rights clause:

Author grants Publisher the exclusive right to license publication of electronic versions of the Work using technology now existing or developed in the future. Electric versions include but are not limited to computer software programs, CD-ROM applications, and on-line database services.

Even though the publisher probably did not envision e-Books when this clause was written, the clause is written broadly enough that it covers e-Books. If you have an older contract, you

probably have a similar electronic rights clause. If you do, then that probably means that the publisher has the exclusive right to e-Publish your book.

You may be able to convince your publisher to e-Publish your book. If they do not want to do so, then they may be willing to let you e-Publish the book, especially if it has been out of print for a long time, although they may want a portion of the royalties.

If your contract does not specifically cover electronic rights, then the question is whether you gave the publisher all of the rights in your book, or you reserved all unspecified rights to you.

It really comes down to what does the book contract say?

4. Reversion Rights are limited

If your book was placed with a publisher and the rights have reverted to you, make sure you understand what rights have actually been granted back to you. The original text that you submitted to the publisher should belong to you. Any editing that was done on your text should belong to you, even if the publisher helped you edit the book. If the publisher developed a front and back cover for the book, then the publisher owns the rights to the cover. You should get permission before using a publisher-designed cover for your e-Book. You should also check with your publisher if you intend to scan the book as it was published and use that scanned file as your e-Book. The publisher can and may claim it owns the copyright rights to the particular way your text was laid out on the page of the printed book.

If there is any other material that is to be included with your e-Book, such as illustrations, maps, or photographs, make sure you have the right to use these materials in your e-Book.

5. Electronic Rights clauses in new publication contracts

The first draft of all new publication contracts will contain an electronic rights clause. The Publisher will usually ask the author to assign all electronic rights to the Publisher in return for a fixed percentage of revenue that the Publisher receives from electronic products. The problem with this is that there are so many different types of electronic products they might sell. Existing products and markets are changing all the time. During the life of the publication contract, there will be new products and new markets that were not foreseeable at the time the contract was executed. An author may or may not want their book to be marketed a certain way. It is impossible to ascertain a fair price for a product that does not exist. It is even difficult to assign a fair price to existing products because the market is changing so rapidly.

You should try not to grant the Publisher a single license to all electronic products related to your book. Ask them what they have in mind. Tell them that you will consider each electronic product on its own merits, but you will not grant them a license and agree on a price for a product that has not even been conceived yet. Try to have a clause that says that you will transfer specific electronic rights to the publisher upon request on terms and conditions to be negotiated when the publisher is actually ready to produce that particular electronic product.

Having said that, it is very hard for writers to get publishers to agree to limit the electronics rights clause to language that is reasonable for the author. Some Publishers see electronic rights as a potential windfall for them that they need in order to cover their costs of doing business. Other Publishers are just as nervous as most authors are about electronic rights and feel that they

need broad rights and fixed prices in order to protect themselves as they make their way through this non-traditional publishing field. Whatever the reason, publishers are very reluctant to alter their standard electronics rights clauses,

6. How to protect your works on the Internet

Protecting your works on the Internet is difficult. Anything you create is automatically protected by copyright. But enforcing your copyright rights is expensive and in most cases impractical. If you post something on-line, you should accept that it is going to be copied and distributed without your permission. You can take steps to minimize un-authorized uses. But these steps have limited success.

a. encryption

A posting on the Internet is a computer file. You can encrypt the file. If the file is encrypted, then it can not be copied by ordinary means. Do not be deceived. No encryption method is fool-proof. Tech-savvy computer users can find a way to copy anything. But encryption will stop casual copying. There is federal law, the Digital Millennium Copyright Act (DMCA), that prohibits circumvention of any technological measure that effectively controls access to a work protected under copyright law (17 U.S.C. 1201), and provides civil and criminal remedies. Still, enforcement is difficult.

Most e-Book publishers use some form of encryption with a fair amount of success. Even here though, software to strip the encryption from e-Books is readily available on the Internet.

b. copyright formalities – copyright notice and registration

There are two copyright formalities that can add some protection to your works on-line.

You can and should place a copyright notice on all works you post on the Internet. A copyright notice mainly acts as a somewhat effective deterrent. It says “I am claiming copyright rights in this work, do not mess with me.” Many years ago any work that did not have a copyright notice was not protected by copyright. This has not been true since 1989. But many people still think that if there is no copyright notice on a work, it is not copyright infringement to copy that work. A copyright notice will discourage copying.

You can and should register the copyright rights in your work with the U.S. Copyright office (<http://www.copyright.gov/>). This is a simple and inexpensive procedure that you can do on-line. If you register your work before someone commits copyright infringement, you have two remedies that are not available if you had not registered first. These remedies are that if you sue them, you are entitled to your attorneys fees and statutory damages of up to \$150,000 per infringement, regardless of the actual damages involved. It can easily cost over \$100,000 in legal fees to sue someone for copyright infringement and very often actual damages are small.

Damages are rarely the issue that motivates the author to object, it is the right to control his or her work. You may not want to actually sue someone. But there will come a time when you want to stop someone from using your works without your permission. A letter demanding that they stop using your work is far more effective if you can include a statement that your work is registered, and if they force you to sue them, in addition to your actual damages, you would be able to recover your attorneys fees and statutory damages of up to \$150,000 per infringement.

c. contract law

You can use contract law as a deterrent. You will notice that many sites have a terms of use document, which spells out under what conditions you can copy works from that website. It is questionable how enforceable these documents are. The current trend is for courts to enforce them in most cases. If your policy is reasonable, most people will follow it. For example, on my Technology Law Blog (www.marshall2law.com) I use this language:

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Links are encouraged as long as they do not operate in a deceptive manner.

These contracts are hard to enforce. Expect them to be a deterrent only in most cases, although they can be useful when trying to enforce your rights against major copyright infringement for commercial purposes.

7. What you can write on the Internet – use of famous names, people, places, and trademarks

a. copyright

You can not use someone else's copyright protected works without their permission. You can use a small amount of someone else's work in your work under certain circumstances. This is called "fair use." Fair use is a very complicated legal concept. Each situation is very fact based. There are no easy rules to follow. There are many easy rules that are repeated all the time, such as it is fair use to copy one chapter of a book or one verse of a poem, etc. These easy rules are all false.

As a rough rule of thumb, you should consider if the person whose work you are copying would likely be offended by your use of their work. If the answer is yes or maybe, do not copy. If the answer is no, then proceed at your own risk or consult a copyright attorney. Since there are no easy rules, do not expect a copyright attorney to be able to give you a definitive answer. Usually all they can say that it is or is not likely to be considered copyright infringement.

You usually can not copy famous pictures, cartoon characters, movie screen shots, and the like without permission.

b. trademark

A trademark is a particular mark that is associated with a particular product. One of the strongest marks is "Coca-cola." When anyone sees that mark, they think of a particular soft drink

sold by the Coca-cola Company. Even if you see a car that was called a coca-cola car, you would think that it must somehow be associated with the Coca-cola Company.

You can not use someone's trademark in any way that suggests that you or your work might be associated with them. If you do, that is trademark infringement and you can get sued under federal and state law.

There is a trademark term called dilution. It has been around for a long time, but was not in common use until recently, when the federal trademark law was amended to expand the cause of action for dilution. The law of dilution is not settled yet. You can not use a mark in any way that dilutes the owner's value of that mark, even if your use does not create customer confusion. For example, if you were to create a very evil company and call it the Coca-cola company, you might be diluting the actual Coca-cola mark even though not one would think your work is actually associated with the Coca-cola company.

You can use a mark to refer to the mark itself, as long as you are not creating confusion as to source or diluting the mark. The use of Coca-cola in this handout is an example of a permitted use. This is called fair use, although it is very different from copyright fair use.

There is often no clear distinction between fair use and trademark infringement or dilution. In many cases reasonable minds can differ as to which it is. As with any other legal issue, if you are in doubt do not use the mark or consult an attorney experienced in this area before you proceed.

c. defamation

Authors may be liable in a lawsuit for damages for defaming someone. Defamation is a false statement, maliciously or knowingly made to injure someone, usually through ridicule and damage to that person's reputation. Libel is written defamation. Slander is oral defamation.

Truth is a total defense. Statements that are opinion can not be true or false and are not defamation. "John is a stupid person" is a statement. "I think John is a stupid person" is an opinion. It is what I think. It can not be false. Fictional statements can not be true, unless it is reasonable to assume that someone would believe that the author was talking about a real person and making a false statement about them.

The law recognizes two categories of people: famous people and not famous people. For public officials and famous people it is only defamation if the statement was made with actual malice (actual knowledge that the statement is false or reckless disregard for the truth or falseness of the statement). For non-famous people, the statement must have been made with knowledge that it was false or with negligence as to whether it is true or false (beyond what a reasonably prudent person would do, acting under the same or similar circumstances).

d. right of privacy

Most states allow for a private action for invasion of privacy. There is a common law right of privacy in Washington. This right has been described as:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the

other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

The right to privacy is a general term that includes four separate actions that can infringe on someone's rights:

i) intrusion upon a person's seclusion or solitude, or into his private affairs (i.e. eavesdropping in a private place, using a ruse to obtain information, theft);

ii) public disclosure of private facts about the person;

iii) publicity which places a person in a false light in the public eye (publication of unprivileged information which is false, very similar to defamation); and

iv) appropriation of a person's name or likeness for personal advantage (this has grown in recent years into a separate cause of action referred to as the right of publicity)

As with defamation, the more public a person is, the less protection they have. In this case they have less expectation to privacy.

e. right of publicity

The right of publicity is the right to use someone's name or likeness for commercial, advertising or trade purposes. This right is based on state law and varies considerably from state to state. Some states recognize a common law right of publicity. Other states have specific laws creating a right of publicity. Some states do not recognize this right at all. In some states that recognize the right, this right expires with the death of the person. In other states it does not.

The trend has been towards more state laws protecting the right of publicity and to have the right survive after the death of the person.

In Washington, there is a right of publicity statute that went into effect in 1998, and was significantly expanded in scope in 2009, RCW 63.60. It creates a right of publicity: "Every individual or personality, as the case may be, has a property right in the use of his or her name, voice, signature, photograph, or likeness. . ." The rights lasts for ten years after the death of an individual, and 75 years after the death of a personality. A personality is defined as anyone whose publicity rights have commercial value at the time of their death.

For more information on defamation, right of privacy, and right of publicity, see this author's handout entitled "Dangerous Talk: Speech and the Law" available for free download at <http://www.marshallcomputer.com/resources.html>

f. public records

i. defamation

People who make public statements are generally protected from defamation. Authors who quote from these statements would be protected as well.

There is an absolute privilege for statements made by legislatures in debate, judges and attorneys in preparation or trial of cases, statements of witnesses or parties in judicial proceedings, and statements of executive or military personnel acting within the duties of their

offices. There is a qualified privilege for other statements made by public officials when there is a public policy justification.

ii. copyright

Some public records are protected by copyright and some are not. The law is not very clear in this area.

Documents prepared by the federal government are not protected by copyright.¹ They are in the public domain and anyone can do whatever they want with them. Around tax time you will often see private companies selling reprints of tax guides that are available for free from the IRS. That is perfectly legal. Documents prepared for the federal government by third parties can be protected by copyright, depending on the agreement between the government and the private contractor.

Documents prepared by state and local governments can be protected by copyright law. In most cases, state and local governments do not claim protection in their documents. But they are always free to do so. They may claim protection in private reports, private correspondence, and transcripts of private meetings. They will rarely if ever claim copyright protection in public reports, public correspondence, and transcripts of public meetings. The few court cases that exist tend to follow this reasoning as well – they will allow copyright protection for private matters but not for public records. There may be copyright protection for documents prepared for state and local governments by third parties.

Speeches by federal government officials in the course of government business are not protected by copyright. Most other public speeches by politicians and famous individuals are not protected by copyright. But there is no reason why they could not be. A presidential candidate could assert copyright protection in their campaign speeches even if they are the sitting U.S. president. But they never do.

Court records and court opinions are generally not protected by copyright. But documents submitted to a court file that are otherwise protected by copyright do not lose their copyright protection simply because they become part of the court file. If the case is about ownership of a book, and the text of the book is entered into a court record, the book does not lose its copyright protection simply because it becomes part of the court record.

Copies of most public documents can be obtained either online or through a freedom of information act request. The fact that you can obtain a single copy of a document does not by itself mean that it does not have copyright protection.

g. links

Generally it is permissible to link to any website page. There are some exceptions. You can not link to a page embedded in a website if doing so bypasses on-line ads or other information that the website owner wants people to see. Ticketmaster has successfully sued people who link directly to internal parts of its website. It wants everyone who uses its website to start at its main page. You can not link to a website page if doing so is misleading in some way. For example, it is

¹ 17 USC § 105. Subject matter of copyright: United States Government works

misleading if you talking about sex offenders, and link to the personal page of someone who is not a sex offender.

8. When you can use something you find on the Internet

Generally, you can not use something you find on the Internet without the copyright owner's permission. Works are automatically protected by copyright. You must assume that anything you want to copy is protected. You do not have permission to use a work until you actually have permission. If you can not find the author, you do not have permission. If you contact the author and the author does not respond, you do not have permission. You must have actual permission in order to be able to use a copyright protected work that you find on the Internet.

Sometimes a website will include the terms under which you can copy works from that website. If you comply with those terms, you may copy the work.

Copyright law is very strict. If you copy a copyright protected work without the permission of the author, you have committed copyright infringement and you may be sued.

On the other hand, common practice is much less strict than the letter of the law. For example, people often post videos that they have created on YouTube and include commercial music in the video without the copyright holder's permission. Technically that is copyright infringement and the author could sue. But no one has ever been sued for this practice.

Be aware that common practice and copyright law are often at odds with each other. The fact that you followed common practice is no defense to a copyright infringement lawsuit.

You can often use common sense as a rule of thumb. If you think the person or company whose work you are copying might be offended, then do not do it. If you think that they could not possibly care, you may be able to get away with using the work without being sued. But there is no guarantee. When in doubt, get permission.

9. Dealing with on-line e-Publishers – iUniverse, Kindle (Amazon), createspace (Amazon), epub3 (Amazon), iBook/iPad (Apple)

Each e-Publisher has its own contract that determines the relationship between the publisher and the author. These contracts are available on-line. This author's experience is that the contracts tend to be reasonable and the e-Publishers tend to follow them.

The biggest problem with publishing e-Books on-line is getting your book to look right on each individual site. Turning a book into an e-Book is not an easy task. An entire industry has been created of companies that will help you with the conversion, for a fee. Most e-Book publishers also offer their own conversion services in conjunction with their websites.

Most author complaints about e-Books have to do with a book not looking good in an e-Book format. This is not really a legal issue. It is the author's responsibility to see that the conversion is done to the author's liking.

e-Publication of your book is not entirely risk free. Most, if not all, e-Publisher contracts contain warranty and indemnification clauses. These are the same clauses that are in nearly all print publishing contracts. You assume all liability for claims made against your book. Claims can include but are not limited to copyright infringement, invasion of privacy, and defamation.

10. There are no special rules for writings on blogs, twitter, Facebook, and other social media

There are no special rules for writings on blogs, twitter, Facebook, and other social media. The same analysis applies as for other content. Usually the author of the work owns the copyright. The author does not surrender the copyright by posting the work in a public forum, such as a blog, a twitter tweet, or a Facebook page. Some websites contain terms of use contracts that state who owns the copyright in posts to that website and what people may and may not do with the posts.

There is a common perception that posts on social media sites are free for the taking. That is not true. Copyright law still applies. The custom of freely sharing material may favor a finding of fair use, but only if the other criteria of the fair use exception are mostly met.

11. e-Publishing versus Print on Demand (POD)

An e-Book is an electronic file that contains a book in electronic form. You download an e-Book into a display device such as a kindle or an iPad.

Print on Demand (POD) is also an electronic file that contains a book in electronic form. But a POD file is meant to be printed and read as one would read a traditional book.

Some book stores have special machines that can print a POD book in actual book form in very little time at a reasonable cost. This is a good way for bookstores to carry titles that do not sell in enough volume to justify having physical copies in stock. It also greatly expands the potential stock of a bookstore to nearly any book ever printed.

There is a caveat for authors. Many book contracts say that the rights to the book revert to the author if the book goes out of print. Authors should pay attention to how “out of print” is defined. Is a book that is available only as an e-Book still in print? Is a book that is only available as a Print on Demand still in print? If the contract does not say, then these issues are not clear. Make sure your contract says what you want it to say on these issues.

12. Google books

Google is a company that began by offering a very successful Internet search engine. They are now trying to create and own massive databases of information that would be useful to search. One example is that Google is trying to create a database that contains the text of every book that has ever been written. Google calls this database Google Books (It is also known as the Library Project.) Google has undertaken a massive effort to scan into its database as many books as it can find. It has made arrangements with several of the largest libraries in the world to scan all of their books.

For purposes of determining the legality of scanning, books fall into three categories:

1. in print and protected by copyright;
2. out of print and protected by copyright; and
3. not protected by copyright, usually because the book is old and the copyright has expired.

Google concedes that it needs the permission of the copyright owner to scan books that are in print and protected by copyright. It is attempting to obtain permission from publishers and the various other copyright owners. There is no question that Google can scan any book that is not protected by copyright.

A controversy has arisen because Google takes the position that it has the legal right to scan books that are out of print and protected by copyright. This author thinks the law is very clear and Google's actions are copyright infringement. But legal scholars do differ on the issue.

13. Update on the Authors Guild vs Google settlement for out of print books

The Authors Guild sued Google on behalf of all authors whose books are out of print and protected by copyright to stop Google from scanning these books.

Google and the Authors Guild agreed to a settlement of that lawsuit. The settlement would allow Google to scan any book that is out of print and protected by copyright unless the owner of the copyright contacts Google and opts out of the settlement. Google was going to pay a small fee for the right to scan these books. That fee would be distributed to authors who registered their books with the settlement fund.

In this author's opinion, that settlement would have been a terrible deal for authors and appeared to be an almost total capitulation by the Authors Guild. Many others objected as well, including the U.S. government and many other countries.

After several years of discussion, the judge in the case rejected the Google settlement. The case is now proceeding slowly through the courts.

14. ISBN numbers and Bar Codes

ISBN stands for International Standard Book Number. People often associate ISBN numbers with legal rights even though they have nothing to do with each other. An ISBN number does not confer any legal rights to a work. It is not required by law. It is required by most distributors simply as a convenience to them. Print books and e-Books should have ISBN numbers. Normally the publisher will arrange for the assignment of ISBN numbers. If you self-publish or publish through an on-line e-Book service, you will usually need to purchase your own ISBN number.

The 10-digit ISBN format was developed by the [International Organization for Standardization](#) (ISO), and was based on an earlier nine-digit format that had been privately developed. Currently new ISBN numbers are thirteen digits long.

An ISBN number is a unique number assigned to each version of a book that uniquely identifies books and book-like products. It helps distributors track their products. The ISBN identifies one title or edition of a title from one specific publisher and is unique to that edition. It is not unique to that book. A book will have multiple ISBN numbers if it has multiple editions and/or multiple publishers. Generally the publisher obtains the ISBN number and the number belongs to the publisher. If you take your book to a different publisher, or decide to self-publish, you will need to obtain a new ISBN number.

There are over 160 ISBN Agencies worldwide, and each ISBN Agency is appointed as the exclusive agent responsible for assigning ISBNs to publishers residing in their country or

geographic territory. It is hard to tell from doing a Google search, but there is only one U.S. Agency. The rest are resellers. It is best to deal directly with the official agency. It is easier to update your ISBN information if you deal directly with the source.

The official U.S. agency is Bowker. A good place to start is their 'my identifiers' page:

<https://www.myidentifiers.com/>

You can also reach them through <http://www.bowker.com> or www.isbn.org.

Every book, including e-Books, also should have a bar code. The bar code contains the ISBN number and the suggested list price for the book. You can purchase bar codes from the same place that you purchase your ISBN number. You do not have to purchase the bar code at the same time. You can wait to purchase the bar code until after you have determined the suggested list price for your book.

15. Other Publications by this Author

The following publications are available for free download at the Law Offices of Gary Marshall website on the resources page at <http://www.marshallcomputer.com/resources.html>.

Publications for Entrepreneurs

[*Top Ten Legal Mistakes Entrepreneurs Make \(and how to avoid them\)*](#) (pdf file): Advice on how to avoid the most common legal mistakes that entrepreneurs make when starting and growing a business.

[*Intellectual Property \(IP\) Licensing Agreements Top Ten*](#) (pdf file): The ten most important factors you should keep in mind when drafting licensing agreements.

[*Legal Issues for Online Sellers*](#) (pdf file): An overview of the legal issues you need to be aware of as an online seller.

[*Legal Issues for Online Publishers*](#) (pdf file): An overview of the legal issues you need to be aware of as an online publisher.

Publications for Artists

[*Copyright Basics*](#) (pdf file): A brief overview of Copyright law - the basic form of legal protection for most artistic works, including maximizing protection for your works, copying someone's else's works, recent changes in copyright law and the impact of the Internet.

[*Dangerous Talk: Speech and the Law*](#) (pdf file): A basic overview of speech law, including the ongoing battle between the constitutional protections of First Amendment Free Speech and Freedom of the Press versus restrictions on criminal and obscene speech, personal liability for harmful effects of speech, defamation (libel and slander), and rights of privacy and publicity, and how this balance is changing in the post September 11th world.

[Publication and other Literary Contracts](#) (pdf file): An overview of publication contracts and agent agreements, including what to ask for and what to look out for. Also covers the basics of simple contracts you should be writing in the course of the ordinary day-to-day business of being a writer.

[Electronic Rights and the Writer](#) (pdf file): A guide to the ever changing world of electronic rights for writers. The Publishing Market is increasingly turning to electronic distribution on the Internet, computers, E-books, cell phones, iPads and other types of mobile electronic devices. In a way this is the new wild west for writers. Because it is a market that is expanding rapidly and changing all the time, the rules regarding electronic rights are also changing all the time.

Publications of General Interest

[Top Ten Intellectual Property \(IP\) Law Traps](#) (pdf file) Intellectual property (IP) law is a deceptively complex area of law. IP law is very rules based, and the rules vary depending on the type of IP protection. Non-IP attorneys and individuals who attempt to practice IP law without the assistance of an IP attorney often run into trouble. This article presents ten common traps.

Also check out Gary Marshall's Technology Law Blog at <http://marshall2law.com/>.

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