Legal Issues for Online Publishers

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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:

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1. Introduction

This article contains an overview of the legal issues you need to be aware of as an online publisher. Your business touches upon many different areas of law. Many of them are technology related. The law is constantly changing as it tries to keep up with the changes in technology.

2. Avoid Litigation

Of paramount importance when running a business is to avoid ending up in litigation. Make all of your business decisions with this goal in mind. Litigation is a terrible way to resolve disputes. It is very expensive, and even more importantly, it takes away your mental energy. You may think that you are in the publishing business, but while you are in litigation, you are in the litigation business instead, and you will have difficulty focusing on work and on your home life. They will both suffer. You are better off turning down many good opportunities to avoid the one bad opportunity that ends up in court.

On the other hand, publishers who choose to publish controversial material will often consider the cost of litigation as one of the costs of doing business. Even if that is the case, it is still best to try to minimize the amount of litigation that you do end up in.

3. Use Common Sense

The law consists of many rules and precedents. But you can determine the correct outcome most of the time by simply applying common sense. If a deal feels to good to be true, it probably is. If a deal feels bad, it probably is.

In online publishing, consider the question “would an ordinary person be outraged that I am saying this or publishing this online?”

Most of the time when my clients get in trouble, they had a sense that they might, but they got greedy and decided to do something anyway. Apply the common sense rule and you will need lawyers less often.

4. A Mixture of Laws

The laws that affect online publishers are a mixture of federal and state laws. Some areas of law vary from state to state, making it very difficult to run a business that extends across the entire United States. (The variation of laws is even more varied from country to country, but this article will focus only on the United States.)

The supreme law of the Untied States is the United States Constitution. Every federal and state law must be in compliance with the U.S. Constitution. The most well known doctrines from the Constitution are contained in the first ten amendments, which are called the Bill of Rights. They include freedom of speech and the press (First Amendment), Protection from unreasonable search and seizure (Fourth Amendment), and the right to due process (Fifth Amendment). Another major right granted in the U.S. Constitution is copyright law (authorized by Article I, Section 8, Clause 8.). The Constitution also authorizes Congress to pass laws. In turn, some laws passed by Congress authorize federal agencies to create additional rules and regulations.

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The States are authorized to makes laws in the Tenth Amendment to the U.S. Constitution which states that powers not granted to the federal government by the Constitution, nor prohibited to the States, are reserved to the States or the people. Each state has a constitution, a set of laws, and rules and regulations which apply to that state.

For the most part, publishers who do business only in the United States are not affected by the laws of other countries. I can think of two exceptions. There may be more. By several international treaties (mainly the Berne Convention), any work that is protected by copyright in another country is automatically protected by copyright in the United States as well. Trademarks that are registered in foreign countries may obtain priority over trademarks used in the United States under certain conditions. *15 USC 1126 International conventions.* (This is a minor technical issue.)

5. First Amendment Freedom of Speech

Any discussion of the legal aspects of speech must start with the concept of freedom of speech.

1. Constitutional Provisions

The right of freedom of speech and the press derives from both the federal and state constitutions.

a) U.S. Constitution

The concept of freedom of speech and the press is so fundamental to American culture that it is guaranteed in the first amendment to the United States Constitution.

> **1st Amendment - Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances**
>
> Congress shall make no law ... abridging the freedom of speech, or of the press; ...

The provision was extended to the States by the 14th amendment to the constitution. The 14th amendment is interpreted to apply the bill of rights protections to state action.

> **14th Amendment - Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement**
>
> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b) Washington Constitution

Most states also guarantee freedom of speech and the press. The state of Washington has a constitutional provision that also guarantees the right of free speech.

> **Article 1, §5. Freedom of Speech**

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> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

2. Applies only to government action

These constitutional provisions limit the government's right to abridge free speech. The first amendment to the U.S. constitution applies to the federal government. The fourteenth amendment applies the first amendment to state and local governments as well.

But there is no provision requiring private citizens to grant freedom of speech. For example, a private theater can refuse to book the musical "hair", but a publicly owned theater can not.[1]

It used to be clear that the government could not condition giving a benefit to someone upon that person giving up his or her constitutional right of free speech.

For example, during the McCarthy era, California tried to prohibit anyone who advocated the overthrow of the United Sates government or supported a foreign government from claiming an exemption from any state tax. The U.S. Supreme Court held this to be unconstitutional restraint of free speech.

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty" its denial may not infringe speech. ... The denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is "frankly aimed at the suppression of dangerous ideas."

But lately the courts have appeared to back off from this position. Compare the more recent case of *Rust v. Sullivan*,[2] where the U.S. Supreme Court upheld a ban on private health facilities that received any federal funding from discussing abortion or giving abortion counseling. In fact there are now many regulations limiting what schools and private health facilities who receive federal funding can say about abortion and birth control.

3. Speech is broadly defined

The freedom applies to all forms of speech. For example, dancing, even nude dancing, is protected free speech.[3]

The right of expressive association is considered speech. People may associate with each other for expressive purposes. For example, the state of Alabama may not force the NAACP to reveal its

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[1] *Chattanooga Memorial Auditorium, Chattanooga, Tennessee, Southeastern Promotions Limited v. Conrad*, 420 U.S. 546 (1975).

[2] *Rust v. Sullivan*, 111 S.Ct. 1759, 500 US 173 (1991). See also *United States v. American Library Association* __ US __ (2003).

[3] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S.Ct. 2456, 2459-60, 115 L.Ed.2d 504 (1991, a 4-4-1 decision. See also *O'Day v. King Cy.*, 109 Wash.2d 796, 749 P.2d 142 (1988).

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membership list.[4] But consider, during the McCarthy era, whether Congress was permitted to force a person to answer "are you now or have you ever been a member of the Communist Party?" The United States Supreme Court answered yes.[5] What about questions concerning membership in political organizations favorable to terrorist groups, such as al Qaida?

4. But not all speech is protected

Certain categories of free speech are not protected by the courts. There is no specific provision in the constitution carving out any exceptions. There is simply overwhelming general public opinion in support of exempting certain types of speech.

a) Obscenity in general

Governments may prohibit speech that is obscene. Speech is obscene when

- The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, and
- The work depicts or describes in a patently offensive way (under contemporary community standards) sexual conduct specifically defined by the applicable state law, and
- The work taken as a whole lacks serious literary, artistic, political or scientific value.

But speech that is merely indecent may not be prohibited. Indecent speech is speech that is patently offensive by contemporary community standards and deals with sex and/or excretion, but does not qualify as obscene speech.

In Washington, there is state law, RCW 9.68 Obscenity and Pornography, that prohibits the distribution of obscene materials, and prohibits the public display of "Sexually explicit material", which the Act defines as

> any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals; Provided however, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

The concept of applying different standards in different communities is rapidly being eroded by changes in technology and the economy. It used to be that a local community could control what access its citizens had to pornographic material. If you wanted to access pornography, you went to the magazine rack at your local drug store, or to your local adult book store or your local adult movie theater. That was about it. A community that wanted to limit the types of materials that were available at these sources could easily do so. But today, varying levels of pornography are available everywhere. It is readily available on cable television and arguably on regular television as well as well as on nationally syndicated radio talk shows. Large national chain

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[4] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[5] *Barebblatt v. US.*, 360 U.S. 109 (1959).

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bookstores, such as Barnes and Noble, carry books that would be considered obscene not that long ago. You can rent dirty movies at your local video rental store or by mail-order and watch them in the privacy of your own home. Just about anything is available on your home computer through the Internet. Does it still make sense in today's environment to talk about local community standards?

It is also difficult to justify an exception for obscene materials at all. There is no evidence that possession or distribution of obscene material directly harms anyone. People who defend the law state that obscene material taken as a whole has a tendency to exert a corrupting and debasing impact leading to antisocial behavior. This type of influence is bad for society and justifies the ban. But there is a lot of speech that tends to lead to antisocial behavior that is not banned (i.e. violence on television).

As a practical matter, both of these problems are being dealt with by the courts by making rulings that are constantly narrowing the range of material that they will find obscene.

b) Child pornography

Governments may also ban child pornography. The test for whether speech is child pornography is less stringent than the test for obscenity in general. Speech is unprotected if It visually depicts children below the age of majority performing sexual acts or lewdly exhibiting their genitals.[6]

See also Washington law, RCW 9.68A Sexual Exploitation of Children, which, as its name suggests, limits speech related to the sexual exploitation of children.

Although all obscene material may be prohibited, there seems to be agreement that speech related to child pornography is entitled to even less protection that other forms of obscene speech. For example, the mere possession of obscene material may not be banned,[7] but the mere possession of child pornography can be banned.[8] The argument is that while obscene material merely leads to antisocial behavior, child pornography necessarily involves the victimizing of children in its production.

c) Criminal and other harmful activity

Speech that incites criminal activity or is directly harmful to others is not protected. There is no one universal list of prohibited speech. Here is one useful list.

- Speech that advocates crime, or furthers a criminal effort. Generally the speech must be 1) directed to inciting or producing 2) imminent lawless action 3) and is likely to incite or produce such action.[9]

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[6] *Ferber v. New York*, 458 U.S. 747 (1982).

[7] *Stanley v. Georgia*, 394 U.S. 557 (1969).

[8] *Osborne v. Ohio*, 495 U.S. 103 (1990).

[9] *Brandenbug v. Ohio*, 395 U.S. 444 (1969).

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- Speech that interferes with a war effort.
- Speech that threatens someone with violence or other illegal conduct.
- Speech that contributes to an illegal conspiracy (i.e., a communist conspiracy or a Osama bin Laden/al-Qaida conspiracy).

d) Speech owned by others

People can be prevented from using speech content that they do not own. You can not read a recent book or play a favorite record on the radio without getting permission or paying a royalty.

e) False statements of fact

You can not make false statements of fact. For more on this topic, see the defamation section below.

f) Speech that is merely offensive is protected

Speech can not be banned simply because it offends. For example flag burning is protected free speech.[10]

> A principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.
>
> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Another example of protected speech is cross-burning.[11]

5. Different types of speech are entitled to different degrees of protection

Some forms of speech are entitled to lesser levels of protection and can therefore be regulated. Commercial speech (especially commercial advertising) is deemed to have less protection.

On the other hand, religious speech and news reporting are usually granted a higher level of protection.

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[10] *Texas v. Johnson*, 491 U.S. __, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

[11] *RAV v. City of St. Paul*, 505 U.S. __, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

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6. Time, place, and manner restrictions

All forms of speech can be controlled as to time, place, and manner, i.e. banning loud music in residential neighborhoods after 11:00 pm., or making it a crime to yell “fire” in a crowded theater, unless there really is a fire.

The government can regulate conduct which incidentally impacts freedom of speech (no nude dancing or suggestive photographs in drinking establishments,[12] or within ten feet of customers[13]).

The government is permitted to limit the types of speech that can be broadcast on public television and radio. (The FCC may restrict radio airplay of George Carlin's routine “the seven dirty words”.[14])

6. Defamation, Libel, and Slander

1. Generally

The concept of defamation as a common law right to sue someone for damaging your reputation has been around since at least the 16th century. But it was not a well defined concept until recently. The first major U.S. federal case to enunciate this principle was *New York Times Co. v. Sullivan*[15] in 1964.

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.

2. The requirements of defamation

Defamation requires:

1) a false statement concerning another person.

2) an unprivileged communication to a third party

3) fault amounting to

> for public officials and figures - actual malice (actual knowledge that the statement is false or reckless disregard for the truth or falseness of the statement)
>
> for private figures - negligence (what a reasonably prudent person would do, acting under the same or similar circumstances)

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[12] *Geoff Manasse v. Washington State Liquor Board.*

[13] *DCR, Inc. v. Pierce County*, 92 Wn.App. 660. 964 P.2d 380 (1998).

[14] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[15] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This was followed by a series of important cases, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

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4) damages

3. Expanding on the concepts

True statements can not be defamatory, because they are not false. For the same reason, opinions are not defamatory. An opinion is just someone's personal opinion. By its very nature it cannot be true or false. If you think someone is ugly, that is what you think. You are not saying they are or are not ugly. You are saying that in your opinion they are ugly. That is not a true or false statement, it is your opinion.

But there are limits to how far opinion is protected. See for example, Chief Justice Rehnquist's statement in *Milkovich v. Lorain Journal*:

> If a speaker says, "In my opinion, John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if he states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as such damage to reputation as the statement, "Jones is a liar."[16]

There are various ways a person can be a public official or public figure. First, some people in high level government jobs are public officials by the nature of the position they hold. They are a public official the entire time that they hold that position, and if the position is high enough, they remain public officials even after they retire from that position. A former president of the United States is still a public figure until he or she dies, by the nature of the public office he or she held.

Second, people can be public figures for all purposes by the nature of their position in society. These are people who occupy positions of pervasive power and influence.

And third, people can be public figures for the purposes of specific issues. These are people who have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved.

Although damages must be shown, and the burden of proof is normally on the party asserting he has been harmed, most courts are willing to accept that defamatory remarks cause some amount of damage, even if the actual amount can not be proved.

7. Use of Allegedly and other Similar Words

a. Allege and Allegedly

It has become common practice for reporters to frequently use the word allege or allegedly, as in "John allegedly had an affair with Jane." The idea is to provide protection from a

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[16] *Milkovich v. Lorain Journal*, 497 U.S. 1, 18-19 (1990)

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defamation claim. However, this is a bad idea. In most cases it is best to state the claim in a different manner and avoid the use of the words allege or allegedly altogether.

What if you say “John allegedly had an affair with Jane” Who is making this allegation? Is the writer of this sentence making the allegation? It might be reasonable for a reader to think so. Simply adding the word allege or allegedly does not provide very much protection from a defamation claim.

A better strategy is to identify the source as in “TMZ claims that John had an affair with Jane.” Now it is clear who is making the claim. Truth is a complete defense to defamation. As long as TMZ made the claim, the statement that TMZ made the claim is true, whether the underlying claim is true or false.

Try to avoid statements like “John hit Jane in a nightclub.” It is better practice to say “According to a bartender, John hit Jane in a nightclub: Or “The police arrested John for hitting Jane in a nightclub,” provided you know that is why they arrested him.

The word “say” is a good neutral verb, as in “the police say that John hit Jane in a nightclub.” If you write that “the police claim that John hit Jane in a nightclub.” you may be implying that you do not believe their claim. Words like “the police state that” or “the police charge that” can also carry unwanted implications.

There will be times when it is not clear who is making the allegation or the reporter wishes to keep the source secret. In these cases the word “allegedly” may still be used.

b. Charge

The word “charge” has a specific technical meaning. It means that specific criminal allegations have been filed in a court of law against an individual. The police may say that John robbed a bank, but the prosecutor may only charge him with tax evasion. Try to only use the word “charge” to refer to specific formal criminal charges that have been filed in a court of law.

c. Guilty or Innocent

If a person is charged with a crime, they are still only being accused of the act. Until there has been a judicial decision, the person has not been proved guilty of the charges. Courts decide if a person is guilty or not guilty. Courts never determine if a person is innocent. A not guilty verdict only means that the prosecution was unable to prove that the person was guilty of the charges beyond a reasonable doubt. No one was asked to determine and no one in a court proceeding ever determines whether the person is in fact innocent of the chargers.

In a civil case, allegations contained in court filings are also only unproved allegations until there has been a court verdict. In a civil case the court ruling may choose to believe one side over the other. However, court rulings are often very unclear as to the details of what has been proven and what has not been proven. Often the courts will just arrive at a number. “John owes Jane $50,000” rather than a detailed finding of what facts were proven.

Even after a court verdict it is still best to say that “the court found that John hit Jane causing her $50,000 in damages,” rather than “John hit Jane.”

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8. Rights of Privacy and Publicity

1. Privacy

There are two types of rights of privacy: a public right to keep the government from interfering with your private life, and a private right to prevent other individuals from invading your privacy. Most of the attention in the press has been with preventing government action.

a) Government action

The concept of a right of privacy was probably first enunciated in an article in the Harvard Law Review in 1890 by Samuel Warren and Louis Brandeis, entitled "The Right to Privacy". The courts were very slow to adopt this concept. They finally did so in three major cases, first in 1965 acknowledging a married couple's right to obtain contraceptives,[17] then in 1969 finding a person had a right to posses pornography in his or her home,[18] and finally in a very well-known case, in 1973 affirming a woman's right to an abortion.[19]

These cases base their decisions on the U.S. Constitution. But there is no single section in the U.S. Constitution that mentions privacy. Rather, the courts find a privacy concept implied in the first fourteen amendments when read together (often referred to as a zone of privacy), and in certain sections of these amendments, such as the 14th amendment's due process clause, and the 4th amendment's limits on the rights of states to gather evidence.

The Washington State constitution has one provision that relates directly to privacy.

> Section 7. Invasion of Private Affairs or Home Prohibited
>
> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

b) Private Action

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.[20]

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[17] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[18] *Stanley v. Georgia*, 394 U.S. 557 (1969).

[19] *Roe v. Wade*, 410 U.S. 113 (1973).

[20] Restatement (2d) of Torts § 652B (1977) as cited in *Doe v. Gonzaga Univ.*, 99 Wn.App. 338, _992 P.2d 545_ (2000), affirm in part, reversed in part by *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 24 P.3d 390, 154 Ed. Law Rep. 963 (2001).

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

a) 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)

b) public disclosure of private facts about the person

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

I.e. a sexually suggestive caption in a men's magazine attributed to "Marion, taxi driver, New Albany, Mississippi" could be false light or libel when there was only one woman taxi driver in New Albany.

d) 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)

In Washington, there have not been many cases that address the right of privacy.[21] There is a state statute, RCW 9.73 Privacy, Violating Right of, but it deals entirely with illegal interception and recording of private communications. In Washington, as in many but not all states, it is illegal to audio record a conversation without the permission of everyone being recorded. Oddly, it is not illegal to record video only.

In 1998 a new statute was enacted to prevent voyeurism. RCW 9A.44.115 makes it illegal to take photographs of someone where they have a reasonable expectation of privacy, in public or in private, for the purpose of arousing or gratifying the sexual desire of any person.

There is a doctrine that there is no right of privacy for activities that are conducting in “open view”. The term “open view” is not well-defined. Clearly, conduct conducted in open sight is in “open view”. But if the conduct can only be seen by the use of advanced electronic equipment, is that still in “open view”? The answer is not clear. What if the activity can be seen through the lens of an ordinary camera? Then it is probably in plain view. There is no reasonable expectation of privacy. But what if the activity can only be seen by a camera with a professional high powered zoom lens? The answer is not so clear. Powerful zoom lenses are becoming more common on ordinary consumer cameras. Does that change our concept of what is private and what is not? What about the use of night vision equipment?

My favorite case on this subject comes from the Woodstock movie. For those of us old enough to remember, in the movie about the original Woodstock festival there is a scene where a man and a woman are running through a field of tall grass, peeling off all of their clothes, and falling down together presumably to make love. One of the stage cameras had been turned around and the operator used his high powered zoom to capture this scene which actually took place far from the stage in a field where no one else was around.

Well it turns out that a man had gone to the Woodstock festival but his wife could not make it. He came home and raved to her about how wonderful the festival was. When the movie about

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[21] See *Reid v. Pierce County*, 136 Wash. 2d 195, 204, 961 P.2d 333 (1998), *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 580 P.2d 246 (1978), *State v. Clark*, 129 Wn.2d 211 (1996), *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

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the festival came out he insisted that they go see it together. There they were sitting in the movie theater watching the movie when up popped the image of him running through the field with some other young woman. The wife divorced him. He sued the movie producers. The court held that he had no expectation of privacy.

In a more recent case, actress Jennifer Aniston was sunbathing topless in her own backyard surrounded by a fence. A photographer standing on the public sidewalk found that if he stood in one particular spot, using a high powered zoom lens, he was able to get a picture of her which he intended to sell to some off-beat magazine. She threatened to sue. I believe he backed down and withdrew the picture. But it would have made for an interesting case.

A very similar situation arose even more recently when someone took pictures of English Prince William's wife Kate Middleton sunbathing topless on a beach. The pictures are grainy and were clearly taken from far away with a very powerful telephoto lens. I am not aware of any legal action, but public outrage has caused most publishers to either not publish the photos or take them down if they have already been published.

Nowadays, satellite images are readily available on any personal computer. For example, many aerial details can be seen by using Google Maps. Does that change our reasonable expectation of privacy? An environmental group took a series of aerial photographs of the California coast, including the yard and house belonging to Barbra Streisand. She had chosen to live in a house set far back from the highway to maintain her privacy. She sued for invasion of privacy (and other claims) and lost. That type of photography is now readily available in Google Maps. Does that mean that we no longer have any right to privacy in our backyards?

Is there any privacy protection for garbage placed in garbage cans? The courts are not consistent in their treatment of this issue. Generally, if the garbage cans are on the person's property and placed in what seems like a private area, then they are private. If they are placed near or on a public way, they are not protected. See *California v. Greenwood*, 486 U.S. 35 (1988). But this is not true in every state. In Washington an individual has an expectation of a right of privacy even if the garbage can is placed on a public way, such as a sidewalk or an alley. See *State of Washington v. Boland*, 115 Wn.2d 571, 88 P.2d 1112 (1990).

2. 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, RCW 63.60, that went into effect in 1998, and was significantly expanded in scope in 2009. 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.

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The issue of whether there is a common law right of publicity in Washington has not been decided directly by the courts. The cases decided so far suggest that this right probably does not exist in Washington.[22] Since there is now an actual statute, this issue only matters for acts committed prior to the enactment of the statute.

In most states, this right does not extend to written works about that person. This exception is sometimes based on a claim that the first amendment right of free speech is more important than the right of publicity in individual cases or that a text about a person is not really exploiting that person's name or likeness.

9. Copyright Law and the Online Publisher

Copyright law protects creative expression, such as text, pictures, sound and video. It does not protect the underlying ideas and concepts. Copyright protection attaches automatically. Works do not need a copyright notice or registration with the U.S. copyright office to be protected.

Generally, you can not use something you find on the Internet without the copyright owner's permission. 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. It is not sufficient that you credit the source.

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.

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.

The law specifies that there are four factors that should be considered in every case.

(1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

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[22] See *Joplin Enterprises v. Allen*, 795 F.Supp. 349 (W.D. Wash. 1992).

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(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[23]

The analysis is not limited to these four factors. These four factors should be considered in every case, but all relevant factors should be considered in each case. The actual application of this test can be extremely complex. If you are unsure whether a particular use meets the fair use exception, this would be a good time to consult with a copyright attorney.

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. It is not a defense to a copyright lawsuit to say that everyone else is doing it too.

You can often use common sense to determine when you can copy a work. 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.

10. Copyright Law and Public Records

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.[24] 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

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[23] 17 USC § 107.

[24] 17 USC § 105. Subject matter of copyright: United States Government works

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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 case 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.

11. Copyright Infringement – a Safety Net for Online Publishers (DMCA)

There is a limited safety net from copyright infringement for online publishers. Title II of the federal Digital Millennium Copyright Act (DMCA) limits the copyright infringement liability of certain online service providers. The act protects on line service providers who store and post content online at the direction of their users. The act does not protect publishers who publish their own content. In order to qualify for the protection, a service provider must establish a system for accepting claims of copyright infringement on its web site and establish a procedure to remove materials from its website that infringes upon someone else's copyright. There is a very specific procedure that must be followed. The procedure must be posted on the website. Provided that a service provider posts the proper procedure and follows it, the service provider can not be held liable for copyright infringement committed by its users.

12. Copyright Registration

If you have valuable content on your website that you own, you should consider registering that material with the U.S. Copyright office.

A common misconception is that a work must be registered with the copyright office before it is protected by copyright. This is not true. Copyright protection exists as soon as the work is fixed in a tangible form. However, registration does offer certain advantages. Registration is required before a copyright infringement suit can be started.[25] If the work has been registered prior to the infringement[26], the owner of the work is entitled to statutory damages[27], even if there

[25] 17 USC § 411. This rule does not apply to works first published outside the United States.

[26] Or within three months of first publication, 17 USC § 412.

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are no significant actual damages, and is entitled to recover his or her costs and attorney's fees incurred in bringing the lawsuit.[28] Registration within five years of first publication also constitutes prima facie evidence of the validity of the copyright and the facts stated on the copyright certificate.[29]

In order to register one's copyright in a work, the copyright owner must register the work with the U.S. Copyright Office. You can reach the U.S. Copyright Office at http://www.copyright.gov/.

The Copyright Office's preferred method of registration is on-line. The Copyright Office has a form available on it's web site that you can fill in and submit on-line. The registration fee for filling out this form on-line is currently $35.00.

Yu can save some money by registering several works at once, provided that they are related to one another.[30] For example, you can register ten magazine articles on the same topic, or a series of prints of the same subject as a collection of articles for one registration fee.

There is a deposit requirement as well. Normally, the author must submit one copy of an unpublished work or two copies of a "published work" with the registration application. Copyright Law uses the word "publish" differently than it is commonly used. In copyright law, the word "publish" means the distribution of the work beyond the author and the author's immediate circle of friends.

You may submit your deposit as an electronic file on-line or mail it in in paper form or in a variety of other formats, depending on the nature of the work you are registering.

In order to maximize the copyright protection, the author should register the work anytime before or within three months after first publication.[31] If registration occurs within three months of publication, the author will be able to recover the full range of available remedies, including statutory damages and attorneys fees, against any infringement that took place from the time of

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[27] 17 USC § 412.

[28] 17 USC § 412.

[29] 17 USC § 410(c).

[30] 37 CFR 202.3(b)(3)(i) provides:

For purposes of registration on a single application and upon payment of a single registration fee, the following shall be considered a single work:

(A) In the case of published works: All copyrightable elements that are otherwise recognizable as self-contained works, that are included in a single unit of publication, and in which the copyright claimant is the same; and

(B) In the case of unpublished works: all copyrightable elements that are otherwise recognizable as self-contained works, and are combined in a single unpublished "collection". For such purposes, a combination of such elements shall be considered a "collection" if: (1) The elements are assembled in an orderly form; (2) the combined elements bear a single title identifying the collection as a whole; (3) the copyright claimant in all of the elements, and in the collection as a whole, is the same; and (4) all of the elements are by the same author, or, of they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.

[31] 17 USC §§ 407-412.

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publication. If the author registers later than three months after publication, the author loses the right to collect statutory damages and attorneys fees from infringements that take place prior to registration. If the work is unpublished, the author can only collect statutory damages and attorneys fees from infringements that take place after registration. The best advice is to register early.

When the work is a series of articles posted on a regular basis, it can be difficult to determine how and when to register the work. It is not practical to register each article as it is posted. The copyright office has several options for this. They are described in four publications available on the U. S. Copyright Office website.

- 66-PDF-Copyright Registration for Online Works
- 62-PDF-Copyright Registration for Single Serial Issues
- 62a-PDF-Group Registration of Newspapers and Newsletters on Form G/DN
- 62b-PDF-Copyright Registration for Group of Serial Issues

It is a good idea to register the content of a serial issue every three months. If you do that you can take advantage of the three month window of registration, and all of your works will be protected as if you registered them on the day that they were published.

13. Sending Unsolicited or Misleading Emails and the CAN-SPAM Act

The language of this section is taken from the FTC website. See http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business.

The CAN-SPAM Act ((15 U.S.C. 7701, et seq) is a federal law that sets the rules for commercial email, establishes requirements for commercial messages, gives recipients the right to have you stop emailing them, and spells out tough penalties for violations.

Despite its name, the CAN-SPAM Act doesn't apply just to bulk email. It covers all commercial messages, which the law defines as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service," including email that promotes content on commercial websites. The law makes no exception for business-to-business email. That means all email – for example, a message to former customers announcing a new product line – must comply with the law.

Each separate email in violation of the CAN-SPAM Act is subject to penalties of up to $16,000, so non-compliance can be costly. But following the law isn't complicated. Here's a rundown of CAN-SPAM's main requirements:

1. **Don't use false or misleading header information.** Your "From," "To," "Reply-To," and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message.

2. **Don't use deceptive subject lines.** The subject line must accurately reflect the content of the message.

3. **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an vertisement.

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4. **Tell recipients where you are located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you've registered with the U.S. Postal Service, or a private mailbox you've registered with a commercial mail receiving agency established under Postal Service regulations.

5. **Tell recipients how to opt out of receiving future email from you.** Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that's easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you. Make sure your spam filter doesn't block these opt-out requests.

6. **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request within 10 business days. You can't charge a fee, require the recipient to give you any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request. Once people have told you they don't want to receive more messages from you, you can't sell or transfer their email addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you've hired to help you comply with the CAN-SPAM Act.

7. **Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your email marketing, you can't contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

14. Trademark law

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

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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 article 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.

15. Linking

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 online ads or other information that the website owner wants people to see or pay for. 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 and work their way through many pages of ads. You can not link to a website page if doing so is misleading in some way. For example, it is misleading if you talking about sex offenders, and link to the personal page of someone who is not a sex offender.

16. Data Collection Issues (including marketing to children)

When you collect date from your customers, you are responsible for how you use that data. It is good policy to spell out in your online privacy policy exactly what information you collect, how you intend to use that information, under what circumstances you may share that information with others, and how customers may have that information changed or deleted.

If you collect personal information such as social security numbers or date of birth, you are required by federal law to take significant steps to protect that information from disclosure to third parties. You must delete all computer files and shred all papers files of sensitive information when you are done with it.

When you collect information from or about children, you are held to a higher standard of care for maintaining that data. Any time you collect data from or about individuals who are less than 18 years old, you should be very careful about what information you collect, how you use that information, and how you protect that information from discovery by others. Your online privacy policy should disclose how you intend to use that information and how people can have their information removed from your database.

This is especially true for dealing with children under 13 years old. There are very strict rules established in The Children's Online Privacy Protection Act of 1998 (COPPA): If you operate a commercial website or an online service directed to children under 13 that collects personal information from children or if you operate a general audience web site and have actual knowledge that you are collecting personal information from children, you must comply with COPPA. The Federal Trade Commission may and does bring enforcement actions and imposes civil penalties for violations of COPPA. (See http://www.ftc.gov/privacy/coppafaqs.shtm for more information.)

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Consider having a third party such as Amazon or PayPal handle the collection and protection of sensitive information for you.

If your website operates outside of the Untied States, keep in mind that some parts of the world, including Europe, have much stricter rules that the U.S. does about collection of customer information.

17. Liability Issues for Online Publishers

Generally, the person speaking is not liable for the effect of his or her speech on others. In the following cases, the speaker was held not liable.

Zamora v. Columbia Broadcasting System[32] (15 year old boy claimed CBS, NBC and ABC aired so much television violence that he became desensitized to real-life violence and therefore shot his 83 year-old neighbor.)

Olivia N. v. National Broadcasting Company[33] (mother of Olivia N claimed that NBC was negligent in airing a movie "Born Innocent" which portrayed the graphic rape of a young girl by several other young girls, and which apparently inspired four teenage girls to rape 9-year old Olivia with a beer bottle four days later.)

Bill v. Superior Court[34] (plaintiff who was shot after seeing a "gang movie" Boulevard Nights claimed that the movie producer was negligent in failing to warn her that the movie would attract viewers prone to violence.)

Vance and Roberson v. Judas Priest (Parents sued Judas Priest after two teenage boys attempted suicide after drinking beer, smoking marijuana and listening intensely to a Judas Priest album. One of the boys died, the other was seriously and permanently injured. The survivor claimed they were inspired to commit suicide by Judas Priest.)

But in very rare cases the speaker can be held liable when the consequences are foreseeable and the harm to society clearly outweighs the freedom of speech aspects of the case. There is no hard and fast rule that can be applied. A common rule of thumb is "would an ordinary person be greatly offended by the speaker's conduct.

But the cases are not consistent. In two nearly identical cases, Soldier of Fortune magazine printed adds in which mercenaries offered their services. In both cases the mercenary was hired by a magazine reader to kill someone. In both cases the intended victim survived and sued the magazine. In one case the magazine was held liable. In the other case there was no liability.[35]

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[32] *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979).

[33] *Olivia N. v. National Broadcasting Company*, 26 Cal.App.3d 488, 78 Cal.Rptr. 88 (1981).

[34] *Bill v. Superior Court*, 187 Cal.Rptr. 625 (1982).

[35] See *Norwood v. Soldier of Fortune Magazine*, 651 F.Supp. 1397 (E.D. Ark. 1987) and *Eimann et. al v. Soldier of Fortune Magazine*.

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18. Reporter and Source Privilege

There is a reporter privilege that protects a reporter from having to reveal his confidential information or sources. This privilege is based on the U.S. constitution. In addition, most but not all states have a reporter privilege statute. In Washington there is state law, RCW 5.68. – New Media Protection from compelled disclosure.

This privilege is not very strong. The law in this area is very complicated, but it basically provides that a reporter can only be compelled to disclose his sources if there is no other way to find out the same information and the disclosure of the information is really important to a criminal or civil court case.

19. When You Need Contracts

a) elements of a contract

There is no magic language that makes a contract a contract. Any agreement between two parties where they each agree to do something may be a legally binding contract.

A contract is legally binding when two or more parties intend that their agreement be legally binding. If you agree to go to the movies Friday night with a friend, you have not formed a contract. Neither of you expects to end up in court if one of you cancels at the last minute. But if a writer and a publisher agree that the writer will write a magazine article and the publisher will buy it, they have formed a contract. If the writer goes off and spends six months or more writing that article, the writer can reasonably expect that the publisher will pay for the article when it is finished. The parties have formed an agreement that they expect the law to enforce.

In order for a contract to be legally binding, it must be clear what the parties agreed to do. There cannot be an agreement unless certain basic elements of the contract are agreed upon. At a minimum, you must be in agreement on the following items in order to have an enforceable contract:

identity of the parties;

common objective (what you intend to accomplish);

"consideration" (what each side gives & what each side gets);

the time for performance (if not specified, often a 'reasonable' time period can be assumed)

acceptance of the contract by both sides

b) oral contracts

Most oral contracts are just as enforceable as written contracts. But they often lead to disputes over what was agreed to. It is extremely unlikely that two friends will remember a conversation they had a few days before exactly the same way. It is highly improbable that two parties who no longer get along will remember a conversation that took place a year ago or more the exact same way. To avoid confusion, put all contracts and understandings in writing. You do not need to put all agreements into fancy, lengthy contracts drafted by attorneys. Often, a simple letter will do:

Dear Joe:

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I really enjoyed our lunch conversation today. As I understand it, we have agreed that you will provide me with 500 widgets for $500. I will sell them online and pay you after I collect. If this is not your understanding, please let me know right away. I'm looking forward to working with you.

Sincerely,

Gary K. Marshall

c) know what you are signing

The courts treat written contracts seriously. You will be held to the wording of the fine print, whether you read and understand it or not. As one Washington court said:

> Defendants admit they did not read the instrument when they signed it. If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.[36]

You should try not to sign a contract without reading and understanding it first. Realistically, most people will not read everything they are asked to sign. But you should.

To see what you are missing, you may want to try an experiment some time. For one week in your life, be very careful to read every piece of paper that you come in contact with that could be considered part of a contract. Read every sales slip, every receipt, and every piece of paper you are asked to sign. Read the back of tickets to shows and sporting events that you attend. Read the notices on the walls of parking lots, stores, repair shops, dry cleaning outlets, etc. You may discover that you have agreed to all sorts of things that you were not aware of.

d) online contracts

When doing business online, you are often faced with many contracts that you are asked to agree to. Sometimes the user is asked to accept the agreement before using the website. Other times the agreement simply states that by using the website the user is agreeing to the terms of the website agreement. But there is no opportunity to negotiate. Most people do not read these contracts.

These contracts have various interesting sounding names.

A shrink-wrap license refers to the cellophane wrapping that seals boxes of mass marketed products. Manufacturers will include license agreements inside the packaging of their products, which bind the consumer to the terms of the agreement upon removal of the shrink-wrap.

A click-wrap license refers to a license or other contract that is presented to the user on his computer screen. He must click on a button that says "I agree" or "I accept" the terms of use of the contract in order to proceed beyond that screen. In this case the user actually has an

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[36] *Peoples Nat'l Bank v. Ostrander*, 6 Wn.App. 28, 33 (1971), quoting from *Washington Central Imp. Co. v. Newlands*, 11 Wn. 212, 214 (1895).

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opportunity to read the contract before proceeding, although it is often not easy to read or print the contract.

A browse-wrap agreement is a contract or series of contracts in which the terms of the contract are displayed on a website page. By using the website the user is presumed to agree to be bound to these contracts.

Are these agreements enforceable? For the most part yes. Normally an agreement has to be negotiated between two parties and they have to reach mutual agreement. A contract that is drafted unilaterally by a dominant party, and presented as a final offer to a party with very little bargaining power is called a contract of adhesion. The terms are generally presented as a preprinted form to the weaker party, who lacks any realistic ability to negotiate the terms. In some areas of the law these contracts are not enforceable.

It is impractical for a website that handles thousands or millions of users to negotiate terms with each user. Most judges accept the practicalities of the situation and will enforce the contracts, even though the user has no ability to negotiate and often has not affirmatively agreed to the contract.

20. Dealing with Dissatisfied People

What should you do when someone writes a bad review of your service, or an angry online post, or starts a flame war against you?

Realistically there is very little you can do. What you should do is respond in a public forum in a non-attacking non-defensive way. Say something like you have a disgruntled former customer. You do not know why they are dissatisfied. You go out of your way to provide excellent customer service. This person has made some very aggressive accusations that have no basis in fact. You wish that they would have contacted you directly if they had a problem with your company. Do not name the person or repeat their accusations. There is no sense in giving them free publicity. If you can get the website to take down his posting, you may want to do so. But he can always post elsewhere and he will know he has your attention and is getting to you, which is what he wants.

If the person sounds like they might be reasonable, you can try contacting them directly. Sometimes all they want is some attention.

Often this type of person has a lot of anger that he is misdirecting at you. If you attack him you will only provoke him to attack you more aggressively. If you largely ignore him, he will get bored with you and find someone else to attack. That is the best you can do.

You could file a lawsuit and spend tens of thousands of dollars identifying and suing him for defamation .You might eventually end up with a small money judgment that is much less than the attorneys fees that you spent and may very well not be collectable anyway. It will not provide you with a sense of satisfaction. You will provoke him to attack you further in the meantime. You will also give him free publicity for his accusations.

Some attorneys would disagree with this advice and recommend that you actively pursue the person by retaining a skilled and reputable private investigator who specializes in internet and cyber offenses to determine the identity of the poster. You could then engage legal counsel to seek a restraining order in court and to make certain aggressive moves against any assets of the

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poster. An assets assessment can be made before launching any sort prolonged or expensive damages action. I do not recommend this course of action but it is an option.

Most people understand that there is much "misinformation" on the Internet and you can not believe everything you read online. You will get points with potential customers for handling the situation in a mature fashion.

21. Jurisdiction, Where You Can Be Sued and Where You Can Sue

In order for you to be sued in a particular court, that court must have jurisdiction over you. Jurisdiction is the authority to exercise control over you and your property. When you sell products on the Internet, your potential customers can be anywhere in the world. Because your commercial activity is directed everywhere, potentially, you could be sued anywhere in the world.

Courts will not exercise jurisdiction over you simply because you might make a sale in a particular place. There must be a certain minimum contact with that location. In the Untied States the principle of minimal contact was established in a major U.S. Supreme Court case referred to as International Shoe. (*International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). The court ruled that due process requires that, in order to subject a defendant to the jurisdiction of a particular court, he does not need to be present within the territory of the forum, but he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

In the context of Internet commerce, the cases are not consistent, but generally they attempt to determine if the defendant had directed commerce toward a particular territory and had sufficient additional contact with that territory so as not to offend traditional notions of fair play and substantial justice. A certain amount of home towning does happen though, that is, local courts will tend to favor their own citizens over people from out of town.

22. 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.

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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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