Legal Essentials of Doing Business Online

Presented by Chris Chynoweth, Cooley LLP
Using Zoom Webinar – Interacting with us
SBDC Helps Business with...

- Capital
- Research
- Marketing
- Certification
- Growth
- Continuity

Thrive
GOAL OF SBDC: ECONOMIC IMPACT

• We help, because it’s in the best interest of the community at large to help businesses grow and thrive.

• Our measurements
  – Business Started
  – Jobs Created & Saved
  – Sales Increased
  – Capital Obtained
Agenda

• Introductions & Course Overview
• User Agreements & Privacy Policies
• Privacy Policies & Email Marketing
• Protecting Your Website’s Content &
• Avoiding Trademark/Copyright Infringement
• Wrap-up
Introduction to Start Small Think Big
What We Do

Legal Assistance
• Provide clients access to legal assistance by referring our clients to firms for pro bono counsel
• Volunteer attorneys address various issues including forming an appropriate legal structure for the business, contract review and drafting, and commercial lease review

Financial Assistance
• Provide access to in-house staff as well as pro bono financial advisors through a referral program to assist with small business financial management

Marketing Assistance
• Provide access to pro bono marketing advisors through a referral program and hands-on workshops
• Connect clients to vending opportunities such as tastings, Pop Up shops, street markets/fairs, and business-to-business sales
Eligibility Criteria

1. Business stage
   - We serve applicants who are currently selling goods and/or services (defined as having sales over the past 3 months of $500) OR have a legal need that is keeping them from selling
   - Certain businesses up to $1M in annual business revenue

2. Under-resourced Business Owners
   - Generally, Household income must be less than 500% of the Federal Poverty Guidelines. Client’s household must have less than $100,000 in eligible assets,
   - Or, certain businesses with less than $1 million in revenue, where the owners qualify as under resourced as part of traditionally disadvantaged groups (i.e.: woman-owned businesses, entrepreneurs of color, veterans, disability and others).
What are we doing about COVID-19?
1. Understanding Grants and Loans Available
   • Our financial program is running a series of **office hours** to help understand the funding options available. SSTB entrepreneurs can also receive 1-1 assistance **costs of pivoting to a new channel/product, general cash flow planning.**

2. Addressing Legal Concerns
   • Our legal program is offering **webinars** to help with risks and mitigation. These include labor and employment, **contract reviewing**, and doing business online; &,
   • **Direct 1 to 1 assistance for any small business owners with legal or loan/grant assistance questions stemming from the Covid-19 crise.**

3. Planning for New Marketing and Sales Channels
   • **Weekly sessions** on messaging and marketing. Eligible entrepreneurs can receive **assistance 1-1** exploring new sales channels and products, and marketing their existing services.
Next Steps

If you want to become a client, you can follow the below links:

If you want to apply to our Rapid Response Program:
[https://covid19.startsmallthinkbig.org/request/esp](https://covid19.startsmallthinkbig.org/request/esp) - **Spanish**

Free webinars that we are offering: [https://bit.ly/sstbwebinars](https://bit.ly/sstbwebinars)
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Presenting this slide deck as a non-lawyer may be considered practicing law without a license, a felony.
Chris Chynoweth assists and advises clients in a wide range of industries, and at all stages of their life cycles with their commercial, technology and IP strategy and transactions. Chris advises on drafts and negotiates complex intellectual property license agreements, agreements associated with technology and IP acquisitions and agreements with key customers, developers, manufacturers, suppliers and channel partners.
User Agreements
&
Privacy Policies
What is a User Agreement?

If used properly, a User Agreement is a legally enforceable contract.

To the extent legally permissible, users of your website are bound to all of the terms and conditions of use and other provisions set forth therein.
Do I Need a Website User Agreement?

If you have anything more than a small, information-only site, you probably do need a User Agreement to cover topics like:

- Terms of Sale (Delivery Terms, Refund Policy, Return Policy, Cancellation Policy, Appointment Policy, etc.)
- Dispute resolution procedures and forum selection
- Copyright & Trademark notices
- Limit your liability from offensive, libelous, or infringing third-party posts
- Limit your liability if someone is hurt by relying on incorrect information on your website
Common Provisions:
Terms & Conditions of Use

• Introduction & Visitor’s Guide

• Establishing rules:
  • Prohibit users from copying data that appears on your site
  • Forbid the use of robots or spiders
  • Forbid unauthorized linking to your site
Common Provisions: Intellectual Property

- Establish Intellectual Property Notice & Ownership
  - Trademarks (i.e. brand names, logos, slogans)
  - Copyright (i.e. creative content)
  - Patent (i.e. technology)
- Disclaim User’s Infringement
Common Provisions: Limitation of Liability & Disclaimer of Warranty

1. Site / service / content is provided “As-Is”
2. “Use at Your Own Risk”
Common Provisions: Dispute Resolution

- Forum selection

- Dispute Resolution
  - Litigation
  - Arbitration (binding)
  - Mediation (non-binding)

- Choice of law

- Goal is to be able to control the dispute resolution process.
Common Provisions: Return Policy

- Select the number of days a buyer has to notify you that they wish to return an item
- Specify the type of refund you’ll give (i.e. credit or replacement)
- Specify who will pay for return shipping
- Amount of time it will take to process returns and refunds
- Provide a return address
Common Pitfalls

1. Using a boilerplate User Agreement that is not personalized or relevant to your business or needs

2. Failing to ensure customer acceptance to Terms & Conditions

3. For changes, customers must be notified and agree again.
User Consent: Browse-Wrap

- Owner insists that the consumer’s use of the website itself implies an agreement to their terms
  - These “agreements” attempt to bind users through passive conduct
  - More likely to be enforceable against sophisticated users

Terms of Service

Last updated: November 1, 2011

If you're looking for the terms for the User Experience Research program, you can find them here.

These Terms of Service (“Terms”) govern your access to and use of Asana (“Asana”, “we” or “our”) websites, services, and applications (collectively the “Service”). Your access to and use of the Service is conditioned on your acceptance of and compliance with these Terms. These Terms apply to all visitors, users and others who access or use the Service.

YOUR USE OF THE SERVICE

By accessing or using the Service you agree to be bound by these Terms. If you are using the Services on behalf of an organization or entity (“Organization”), then you are agreeing to these Terms on behalf of that Organization and you represent and warrant that you have the authority to bind the Organization to these Terms. In that case, “you” and “your” refers to you and that Organization.
User Consent: Click-wrap

• Owner is seeking an agreement with the consumer by asking the consumer to click “I Agree”

• Generally enforceable
User Consent: Scroll-wrap

- The consumer usually scrolls through an entire screen of terms and conditions, which gives them an opportunity to read through them.
- Generally enforceable.
User Consent: Sign In-wrap

- The consumer is notified of the website’s terms when they attempt to register/create a new membership or login to a website

- Sometimes enforceable; more fact-specific inquiry

By clicking Sign Up, you agree to our Terms and that you have read our Data Use Policy, including our Cookie Use.
User Agreement Takeaways

• The more you can show that the customer was given ample opportunity and notice to review the terms and affirmatively indicate consent the more likely a court will rule to uphold the terms of the agreement

• Click-wrap and scroll-wrap most likely to be found enforceable

• Any “unexpected” terms should be conspicuously and prominently disclosed

• Provide users with opportunity to print or download agreement
Privacy Policies and Email Marketing
Collecting Personal Information

- Businesses that collect personally identifiable information from customers (including name, email address, shipping address, phone number, email address, payment information) and employees must take steps to properly handle and secure it.
What is a **Privacy Policy**?

- Privacy Policies explain how Personally Identifiable Information ("PII") and other personal information is used and why it is needed
Collecting Personal Information

• US Privacy Law is sector-specific
  • Federal Trade Commission (FTC) regulates and oversees businesses
  • States have individual privacy laws and data breach notification laws
  • Children’s Online Privacy Protection Act

• If customers live outside of the US, certain regional laws may apply
  • EU Data Protection Directive
  • Canadian Anti-Spam Law (CASL)/ Personal Information Protection and Electronic Documents Act (PIPEDA)
Do I Need a Privacy Policy?

- If you collect any information, you should have one
- Privacy policies generally are required in certain states (e.g., CA, CT, DE)

According to the law in CA anyone who is:
- An operator of a commercial website or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial website shall conspicuously post its privacy policy on its website. (Cal Bus. Prof Code 22575-22579)

What does an effective Privacy Policy do?
- Provides consumers and users notice of how data will be collected and used
- Provides information about opt-outs
- Clearly and in plain language describes Company’s data collection practices
- Provides contact information for company representatives
What type of information is covered?

Personally Identifiable Information “PII”

- PII is defined as any individually identifying information that allows a person to be contacted physically or online.
  - This includes a person’s:
    - First and last name
    - Physical street address
    - E-mail address
    - Telephone number
    - Social security number
Steps to Take - Know Your data

• Identify all data sources
  • Personally Identifiable Data
  • Automatically Collected Data
  • Data from Third Party Sources
  • Data about Employees

• Who Are You Sharing With?
  • Vendors and Service Providers
  • Third Party affiliates
  • Advertisers
  • Aggregate Data
  • Social Media

• How Are You Using Data?
  • How long are you storing the data?
  • Where are you transferring data to?
  • What are you creating with the data?
Privacy Policy Terms

• How you collect information
• The kind of information you collect
• How you use and/or share the information
• How you will notify customers of changes to your privacy policy
• Your privacy policy’s effective date
Are you working with Third Parties?

• Many businesses take advantage of third party services for certain business functions including:
  • Cloud storage
  • Payment processing
  • Payroll processing
  • Email marketing
  • Advertising
  • Shipping/Postage

• When providing vendors or service providers access to personal information:
  • Ensure that they are only provided information necessary to provide the services
  • Seek assurances that personally identifiable information will be protected
  • Disclose generally that Company may share personally identifiable information with third parties.
Is Children’s Privacy Involved?

• If your website targets children under the age of 13, you will need to comply with the Children’s Online Privacy Protection Act (COPPA).

• The FTC considers several factors when determining whether or not a website targets children including: the site’s visual content, the use of animated characters, or whether advertising promoting or appearing on the website is directed at children.
Specific Regulations

• COPPA: Children’s Online Privacy Protection Act
  • Applies to you if you own a commercial website and other online service
directed at children under 13, or which collects information regarding users’
age. You must:
    • Display a clear and prominent link to your privacy policy to provide parents notice
of your information practices;
    • Obtain parental consent prior to the collection of personal information from
children; and
    • Provide parents with the ability to review and correct information about their
children collected by such services.

• HIPAA: Health Insurance Portability and Accountability Act

• GLBA: Gramm-Leach Bliley Act (Financial Services)
Specific Regulations

If you create a privacy statement for your website it is subject to FTC and State consumer protection laws

• Federal Trade Commission Act
  • Unfair or deceptive acts and practices
  • Best Practice guidelines

• A quick word on the new US/EU Privacy Shield
  • Additional required disclosures to users
  • No over-collection of information
  • Compliance reporting to FTC, if required
  • Accept arbitration
Using Consumer Information - Marketing Emails and Calls

CAN-SPAM, TCPA, etc.
Mass Email Regulations

- CAN-SPAM Act (Federal Law)
  - Covers all commercial messages with the primary purpose is to advertise or promote commercial products & services
  - Particularly addresses spam (unsolicited commercial email messages)
  - Even email announcements to former clients must comply with CAN-SPAM
  - Unsolicited email must be labeled as such, and include the sender's physical address as well as instructions about how recipients of the message can opt-out from future mailings.
  - Violating CAN-SPAM can lead to fines
CAN-SPAM

- Covers all “commercial messages”

- Key requirements:
  - Accurately identify the sender.
    - Don’t use false or misleading “From,” “To,” or routing info.
  - Don’t use deceptive subject lines.
  - Identify the message as an advertisement.
  - Include your valid physical postal address.
CAN-SPAM

• Key requirements (cont’d):
  ▪ Include functioning, clearly displayed opt-out.
    ▪ 1 reply email or 1 web page visit
    ▪ Make sure your spam filter doesn’t block opt-out requests.
  ▪ Honor opt-out within 10 business days.
  ▪ Monitor what others are doing on your behalf.
International Regulations

Canada’s Anti-Spam Law (requires express consent from recipients for all electronic messages (i.e. email, texts) organizations send in connection with a “commercial activity”)

http://www.startsmallthinkbig.org/
What Are the Risks Involved?

• If you are considering a mass targeted email list, keep in mind:
  • Identify the email as an advertisement
  • All recipients need to opt-in to list (often at POS)
  • After 6 months re-confirm with customers if they would still like to be included
  • Include an unsubscribe/opt-out link

In essence, you can send targeted emails, but only to customers that have requested it
Protecting Your Website’s Content and Avoiding Trademark/Copyright Infringement
Trademark Basics

Any word, name, symbol or device (or combination of these) that identifies and distinguishes a good or service from someone else’s good or service

• Marks must be unique, and used in commerce

• Trademarks are limited to certain classes of goods and services
  • Apple Computer / Apple Records
  • Delta Faucets / Delta Airlines

• Words, designs, and logos are most common
  • Example: Coca-Cola®
Trademark ≠ Domain Name

Just because you have a trademark, does not mean that domain name is available.

Just because a domain name is available, does not mean that the same name or words are available for use or registration as a trademark.

- Owners of registered marks must monitor use of the same or confusingly similar marks by others in order to keep their trademark, so they may pursue...
Trademark Protection

A trademark owner is entitled to both state and federal law protection

• Fanciful (Xerox), Arbitrary (Apple computers), or Suggestive (Coppertone) marks get stronger protection than descriptive (Apple for applesauce) or generic (Apple for apples) marks
Trademark Registration

Registration with the United States Patent and Trademark Office is not required

- Gives significant benefits (including right to sue in federal court and seek monetary remedies)
- But requires paying maintenance fees and filing declarations of continued use and renewal applications
- Trademarks may be renewed for unlimited consecutive 10 year terms if maintenance requirements are met and forms are filed on time

A detailed presentation on Trademark law is beyond the scope of this presentation, but you are encouraged to seek legal advice when deciding on using a trademark. For more information, visit USPTO.gov
Copyright Basics

Copyright protects “original works of authorship fixed in any tangible medium of expression.”

Even if you wouldn’t call yourself an artist or writer, your personal or business website may have original works of creative expression:

- Written content,
- Photographs,
- Graphics,
- Code elements, or
- Design elements
Copyright Basics

• Owner of a copyright has the exclusive right to:
  • Publicly display or perform the work
  • Make and distribute copies
  • Create or authorize adaptations (e.g. the motion picture version)

• Registration with the Copyright Office is not required
  • Content is protected as soon as it is created and fixed in tangible form (e.g., saved on your computer, posted on your website, etc.)
  • This is true even if you do not add the © symbol to your website.

• But registration is required to sue an infringer.
  • Registration prior to infringement entitles the owner to stronger remedies
Copyright Basics

• Protection lasts for life of author + 70 years
  • Work created for corporations may last 120 years after creation or 95 years after publication (whichever is less)
  • Why so long?

Best practices

• Mark your website material with “All Rights Reserved”
• Display the Copyright symbol “©” or the word Copyright on your website, with the year of publication
• Include the name of the copyright owner
  • Example: © 2015 The New York Times Company
Licensing Agreements

- Copyright protection provides a “bundle of rights” that can be used or licensed in whole or in part
- A license agreement is a contract which permits a person to use works owned by someone else
  - The distribution of content is exchanged for a fee, or for web traffic and referrals
  - Specific terms of agreement determine how the content (e.g., text, images, audio files, or data) may be used
Creative Commons

- Creative Commons provides free copyright licenses to enable the public to share and use creative work depending upon the author’s conditions.

**License Features**

Your choices on this panel will update the other panels on this page.

Allow adaptations of your work to be shared?

- Yes  
- No  
- Yes, as long as others share alike

Allow commercial uses of your work?

- Yes  
- No
Copyright Infringement

- No uniform test throughout the country

- California is in the Ninth Circuit, which requires a plaintiff to
  - Show Defendant had access to copyrighted work
  - Show “substantial similarity” between works: a two-part test
    - Extrinsic test
      - Objective comparison of specific expressive elements
    - Intrinsic test
      - Subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works

- Consequences of Infringement
  - Injunctions
  - Monetary damages
  - Criminal sanctions
Avoiding Copyright Liability

Don’t use someone else’s work without permission
  - Don’t assume that it’s okay to use clipart, movies, songs or copy images that you find online
  - Don’t assume that giving credit is enough to avoid infringement
  - Don’t assume that editing/modifying the work, or only using part of it, is enough to avoid infringement

Look for Creative Commons or public domain sources
  - Creative Commons - https://creativecommons.org
  - Wikipedia list of public domain resources
    (crowdsourced list- use at your own discretion)
Avoiding Copyright Liability

• Make sure that you own or have the right to use any text or images that you don’t create yourself
  • If you have someone else write or design something for you, get an agreement in writing that you own it or have permission to use it
  • If you use images of real people, get their permission first
Copyright Infringement

Exceptions

- First Amendment (e.g., parody, newsworthiness, gripe sites)
- “Fair Use”
  - The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
  - The nature of the copyrighted work
  - The amount and substantiality of the portion used in relation to the copyrighted work as a whole
  - The effect of the use upon the potential market for, or value of, the copyrighted work
Third Party Posts on Your Site

• The DMCA Safe Harbor Provision protects service providers from liability from third party user’s infringement

• The website owner is protected from liability when:
  • They have no knowledge of the infringement
  • They receive no financial benefit as a result of the infringing activity
  • They have a copyright policy and notify users

• Upon being notified of the infringement, the owner must quickly remove or disable access to the material

• The Communications Decency Act protects websites that provide interactivity for users
User Content on Social Media

Internet users that post copyrighted content to a company’s Facebook, Twitter, or Instagram page retain ownership of the post.

- Companies cannot use a user’s picture of their own product (this often arises with celebrities)

*But, Terms of Service can change this relationship*
Conclusions

User Agreements and Privacy Policies
- Use to limit your liability and favorably define the scope of your rights

Protecting Online Content and Avoiding Infringement
- Never too early to start thinking about protecting intellectual property
- Contribute to the public domain
- Respect the rights of third parties
Any Questions?

Welcome
Feel free to ask the host and panelists questions

Will there be a recording of this Webinar?

Send anonymously

Cancel Send
Thank you.