

Internet Businesses: Pioneers Still Get Arrows in Their Backs

Understand the risks when you start an online venture

When I started my first ecommerce company in February 1994 all of my friends thought I was crazy to leave a successful law practice and pursue my vision of the future...the ability to conduct financial transactions in "cyberspace". There were less than 1,000 websites online worldwide and secure online payment processing was still three years away. The risk/reward analysis I went through before launching my first ecommerce business was thorough. I considered the rewards. Then I considered the risks.

Our country is built on risk. Our marketplace rewards risk when it leads to innovation and adds value. During the late 1990s the venture funds and investors gave great weight to the concept of a "first mover advantage", the belief that the first company into a marketplace had a unique opportunity for success and domination. On the other hand, others reminded us that "pioneers get arrows in their backs". Pioneering the future, whether starting a new business, implementing new technology, launching a new website or affiliate program, or implementing a new online marketing or sales technique, requires the use of a risk/reward analysis. How do you appreciate the risk of growing your business without understanding the laws that define your risks? The answer is that you can't.

This involves, as you might imagine, the careful calculation of potential implications to you personally. Assessing risk is not easy. Consider this guidance in evaluating the decisions you make:

1. *Having a corporation will not generally protect you personally from trademark or copyright infringement claims.* It concerns me that many small businesses think that the individual shareholders are not liable for "borrowing" an image or using a trademark protected term. Wrong. Not only will you likely be sued, either on a theory you are the manager in charge of the infringing conduct or actually did it yourself, but there is ample law providing a basis for holding you liable.

2. *Having a corporation will not offer much protection from other claims unless you follow certain corporate formalities and maintain it as a separate entity.* Don't be fooled into thinking that having a corporate registration on file with your state will offer you protection no matter what you do. You cannot treat the corporation as your own personal bank account, and you must maintain certain corporate formalities going forward, or you could be personally liable for every obligation of your company, from the contracts your company signs to personal injury claims (if you don't have business insurance).


3. *You can be sued anywhere, at any time, for just about any amount.* There is some confusion about lawsuits among small and mid-size businesses.

There is little to get in the way of someone suing you, regardless of the merits of the claims. Often it costs more in legal fees to defend the case than it would cost to settle out. Your risk assessment must take into consideration the likelihood of getting sued.

4. *The fact that one can't get blood from a turnip...or a rock... only applies when you are a turnip or a rock.* In assessing risk, your assets and future prospects for building assets are important considerations. Many times our analysis reveals exposure not appreciated or identified by a client. If a judgment is taken against you, there are many, many ways to collect, including seizing your domain name and website and selling them at a public auction, and attaching and seizing all funds owed you by companies such as payment processors, banks, and even your customers! Take it from a lawyer who in my younger days founded one of the largest debt collection law firms in the country; there are many, many ways to get to assets and collect a judgment. Putting everything in someone else's name is a delay tactic: sometimes it works and sometimes it does not work. Moving assets overseas sounds easy until you realize that the cost is very high (up to six figures) to do this in the countries where you really have the best protection, and lawyers won't do this for you after you get into trouble.

5. *You cannot file legal pleadings on behalf of your company.* No matter what your perception is from others, most courts, and all federal courts, will refuse to accept legal filings from a non-lawyer on behalf of a corporation, even if you are the sole owner.

6. *If you have been sued, and the lawyers need more money up front than you can afford, consider hiring a lawyer for settlement purposes only.* Litigation is expensive. If your lawyer appears in court, the firm is usually stuck on the case, so large retainers or fee deposits are the norm. If the other side anticipates having to spend a lot of money and get a judgment that cannot be collected, then a favorable settlement without the need to pay a big fee deposit and have a lawyer appear in court is possible. Be aware that most litigation lawyers are in the business of actual litigation, and will not suggest an alternative like quick settlement. You will need a lawyer committed to the concept of resolving the matter without the necessity of further litigation.

We all make risk assessments every day throughout our life. It is part of the decision making process we learned at a very early age, and developed over the course of our lives. In the world of online business, while the rewards are high, the risks are sometimes hard to see, and even harder to understand. The Internet is maturing, and online companies are learning by experience; while risk used to be acceptable in the minds of fledgling businesses in a fledgling industry, survival in the future will depend upon the ability of small businesses to mature in both judgment and practice. 



John Dozier

John Dozier is President of Dozier Internet Law, PC, a law firm representing small and mid-size online businesses.

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