

BUSINESS LAW

**ETHICAL,
INTERNATIONAL,
&
E-COMMERCE
ENVIRONMENT**

FOURTH EDITION

HENRY R. CHEESEMAN

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Like oceans, we have spent
this time together before.
In galley slave pits you fed me
water and removed my slivers.
Riding Ch'u dynasty chariots
we perished on Mongol swords.
We toiled rocks in chains
and built Stonehenge,
drank with King Arthur
and danced with Black Elk.
We fled, hand-in-hand, dodging
Hitler's bullets, and
I carried you over the border
to have our baby in freedom.
During past full moons, the sun set
the seas in orbit
and as driftwood we tumbled
onto the shores of Los Angeles.
Another life together, my love?

Henry Cheeseman

Preface

— TO THE STUDENTS —

Each semester, as I stand up in front of a new group of business majors in my business law class I am struck by the thought that, cases and statutes aside, I know two very important things that they have yet to learn. The first is that I draw as much from them as they do from me. Their youth, enthusiasm, questions, and even the doubts a few of them hold about the relevance of law to their futures, fuel my teaching. They don't know that every time they open their minds to look at a point from a new perspective or critically question something they have taken for granted, I get a wonderful reward for the work that I do.

The other thing I know is that both teaching and learning the law are all about stories. The stories I tell provide the framework on which students will hang everything they learn about the law in my class. It is my hope that long after the facts about the specific language of the statutes have faded, they will retain that framework. Several years from now, "unintentional torts" may draw only a glimmer of recognition with business managers who learn about them as students in my class this year. However, they will likely recall the story of the man who sued Pepsi as a result of impotence caused by a vending machine. The story sticks and gives students the hook on which to hang the concepts.

I remind myself of these two facts every time I sit down to work on writing and revising *Business Law*, as well. My goal is to present the law in a way that will spur students to ask questions, to go beyond rote memorization. Business law is an evolving outgrowth of its environment, and that environment keeps changing. In addition to the social, ethical, and international contexts I have incorporated in previous editions of *Business Law*, this edition adds coverage and emphasis on the Internet and entrepreneurship as two vital catalysts to the law and a key part of its environment.

It is my wish that my commitment to these goals shines through in this labor of love, and I hope you have as much pleasure in using it as I have had in creating it for you.



Henry Cheeseman

Making the Most of the Fourth Edition

These boxes focus on the business challenges and legal issues businesses face as they either launch new Internet ventures or rise to the challenge of incorporating on-line technologies into their existing business models.

The Internet and the Law

UNIT IV INTELLECTUAL PROPERTY, INTERNET LAW, AND ELECTRONIC COMMERCE

17 Intellectual Property and Internet Law

In all well-tempered governments there is nothing which should be more jealously maintained than the spirit of obedience to laws, more especially in small matters, for transgression creeps in unperceived, and at last ruins the state, just as the constant recurrence of small expenses in time eat up a fortune.

ARISTOTLE Politics, Bk. 5, Ch. 8
(From *trans.*)

Chapter Objectives

E-Commerce and Internet Law

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

STEFFENS, JUSTICE Revis. American Civil Liberties Union, 521 U.S. 844 (1997)

Chapter Objectives

After studying this chapter, you should be able to

Two chapters dedicated to coverage of the Internet and the Law.

- **Chapter 17** Intellectual Property and Internet Law
- **Chapter 18** E-Commerce and Internet Law

Over 60 **E-Commerce and Internet Law Boxes** focus on the legal issues businesses face as they either launch new Internet ventures or rise to the challenge of incorporating on-line technologies into their existing business models.

E-Commerce & Internet Law

CYBER BUSINESS PLANS ARE PATENTABLE

Federal patent law recognizes four categories of innovation: (1) machines, (2) articles of manufacture, (3) compositions, and (4) processes. For centuries most patents involved tangible inventions, such as the telephone and the light bulb. But the computer and Internet have changed the traditional view of what can be patented. Consider the case of *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998).

Signature Financial Group, Inc. (Signature), filed for and was granted a patent for a computerized accounting system that determines share prices through a series of mathematical calculations and is then used to manage mutual funds (U.S. Patent No. 5,193,056). State Street Bank, another financial institution that wanted to offer a similar mutual fund investment program to clients, sued to have Signature's patent declared invalid. Signature defended, arguing that its intangible financial business model was a "process" that was protected under federal patent law. The U.S. Court of Appeals, Federal Circuit, upheld the patent as a "practical application of a mathematical algorithm, formula, or calculation, because it produces a useful, concrete and tangible result."

Taking the lead from the *State Street* case, many persons and businesses have filed for and received patents for business and financial models that are used over the Internet. Critics contend that Congress did not intend to grant patents for intangible processes when it enacted federal patent law. Business plan patent holders counter that the trend reflects a necessary evolution in patent law and claim that business plan patents are to the Internet Age what machine patents were to the Industrial Age. These proponents argue that critics had the same complaints when chemicals, polymers, and biotech patents were first granted. One thing is certain: The exponential growth in computer and Internet business plan patents will lead to an avalanche of patent litigation.

Copyright Revision Act of 1976

Federal statute that (1) establishes the requirements for obtaining a copyright and (2) protects copyrighted works from infringement.

Berne Convention

An international copyright treaty. The United States and

COPYRIGHTS

Congress enacted a federal copyright law pursuant to an express grant of authority in the U.S. Constitution.¹ This law protects the work of authors and other creative persons from the unauthorized use of their copyrighted materials and provides a financial incentive for authors to write, thereby increasing the number of creative works available in society. The Copyright Revision Act of 1976 governs copyright law.² Effective March 1, 1989, the United States became a member of the Berne Convention, an

Chapter 32 Law for Entrepreneurs, recognizes the explosion of entrepreneurial ventures as an important factor in contemporary American business and investigates the legal issues unique to them.

Law for Entrepreneurs

32

Commerce never really flourishes so much, as when it is delivered from the guardianship of legislators and ministers.
WILLIAM OF OXFORD'S Epigrams
Concerning Political Justice (1758)

Chapter Objectives

After studying this chapter, you should be able to

1. Describe the role of entrepreneurs in starting and operating businesses.
2. List and describe the forms of conducting domestic business.
3. Describe sole proprietorships and the liability of sole proprietors.
4. Distinguish between general and limited partnerships.
5. Describe limited liability partnerships.
6. Describe limited liability companies.
7. Describe corporations.
8. Describe the taxation of the major forms of conducting business.
9. Describe the use of agents, representatives, and distributors in conducting international business.
10. Explain the difference between using a branch and a subsidiary to conduct international business.

Chapter Contents

- Entrepreneurial Forms of Conducting Business
- Entrepreneur and the Law: The Entrepreneurial Spirit: The Creation of Amazon.com
- Entrepreneur and the Law: VA Lines IPO Stars
- International Perspective: Conducting International Business Through a Branch Office or a Subsidiary Corporation
- Entrepreneur and the Law: AGU Acquires Time-Warner in Merger
- Amazon.com: The

Entrepreneur and the Law



THE ENTREPRENEURIAL SPIRIT: THE CREATION OF AMAZON.COM

In 1994, Jeff Bezos, the son of a Cuban immigrant to the United States, had made it big. After graduating from Princeton University, he had gone on to Wall Street where he worked for a hedge fund. But Bezos saw an even greater opportunity: on-line commerce. So he quit his job, jumped in the car with his wife, MacKenzie, and headed west. While she drove, he typed on his laptop computer. Bezos drew up a list of 20 products that he figured he could sell on-line but then narrowed it to two—books and music. Bezos settled on books for two reasons. First, there are more to sell (about 1.3 million books in print versus 300,000 music titles). Second, the difficulty of publishing seemed less imposing than the six record companies that dominated music; there were thousands of bookstores, the largest being Barnes & Noble with 12 percent of the industry's \$23 billion annual sales.

After checking out Colorado and Oregon, Bezos and his wife settled in Seattle, Washington. They rented a house, hired four employees, and started Amazon.com out of their garage. Bezos and his family incorporated the business, sold some stock to friends and other investors, and kept the rest of the stock for themselves. Bezos took a traditional business—bookselling—on-line. He reasoned that books were fungible—everyone sold the same product—and that a portion of a traditional bookseller's cost represented the real estate on which the store sat. So Bezos lined up a distribution center in Oregon and began taking orders in cyberspace. Amazon.com sold its first book in July 1995.

Amazon.com became a success, at least at selling books. However, it was not a success at making a profit, losing

customers and getting the Amazon.com brand name to be recognized by over one-quarter of the population. Like most start-ups, Amazon.com needed more seed money. Underwritten by the company's unprofitability, the venture capitalist firm Kleiner Perkins Caufield & Byers put up \$10 million for preferred stock, which represented a 15 percent stake in Amazon.com.

Following on the heels of its book-selling success, Amazon.com began selling other products over the Internet, including CDs, videos, gifts, greeting cards, and thousands of other items. Amazon.com entered the world of on-line auctions, linked with other companies selling pet supplies, drugstore goods, and more; and agreed to pay fees of 4 to 8 percent to other Web site owners who linked a purchaser to Amazon.com. Purchasers pay Amazon.com by credit card, submitted over the telephone or the Web, and the transaction is guaranteed by encryption. Amazon.com offers one-click ordering, which lets buyers store credit cards and addresses after their first purchase.

After several years of operation and quick growth, Amazon.com needed more money to reach its goals. In May 1997, Amazon.com went public, raising over \$40 million by selling stock for \$18 per share. The price of Amazon.com doubled on the first day of trading and reached \$200 per share over the next year before retreating. Bezos became a billionaire before the age of 34. Bezos and his family own about 40 percent of Amazon.com. In the span of less than five years, Bezos had taken his business plan and created the largest, most recognized e-commerce company in the world. This entrepreneur's dream became



Over 40 Entrepreneur and the Law boxes examine the legal implications of entrepreneurial successes and failures.

International Law

Chapter 4 Comparative and International Law, is devoted exclusively to coverage of international laws, courts, organizations, dispute resolution, and regional trade agreements.

Comparative and International Law

4

International law, or the laws that govern between nations, has at times, been like the common law within states, a twilight existence, during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its legal quality.

JUSTICE CARDOZO
New Jersey v. Delaware, 291 U.S. 361,
54 S.Ct. 407, 78 L.Ed. 847 (1934)

Chapter Objectives

After studying this chapter, you should be able to

1. Explain the U.S. government's role in foreign affairs.
2. List and describe the sources of international law.
3. Explain the principle of comity.
4. List and describe the major international organizations.
5. List and describe the major international courts.
6. Describe the forum-selection and choice of law clauses.
7. Describe the act of state doctrine.
8. Describe the doctrine of sovereign immunity.
9. Describe the arbitration of international disputes.
10. Describe criminal prosecutions in the international arena.

Chapter Contents

International Perspective



CHINA AND THE UNITED STATES REACH LANDMARK TRADE PACT

For the past 50 years, China and the United States have pursued divergent paths. China became the world's largest communist country and the United States the leading democracy. China maintained its agricultural base, while the United States pursued industrialization. China's businesses were state-owned, while those in the United States were privately owned under a capitalist system. So what do these countries have in common? A new landmark trade pact. For over a decade, these two countries engaged in on-again, off-again trade negotiations. Then in November 1999 the two countries reached a compromise.

Prior to the agreement, the United States annually granted China "most favored nation" status which permitted China to import most goods and services into the United States. The new trade pact eliminates the need for this annual ritual. In exchange for being granted the right to import most goods and services into the United States, China, which had substantially restricted imports into its country, agreed to open its markets to foreign goods and services in the following ways:

- **Telecommunications:** Foreign telephone companies may own up to 50 percent of Chinese telephone companies.
- **Entertainment:** China will double the number of U.S.

- **Services:** Foreigners may establish their own repair and maintenance of foreign businesses in China.
- **Vehicle sales:** China will permit foreign automobile manufacturers to sell and finance cars to Chinese customers.
- **Farm products:** China will eliminate subsidies on Chinese exports.
- **Internet:** Foreign investors may own up to 50 percent of Chinese Internet businesses.

The China-U.S. trade agreement was a prelude to China's application to join the World Trade Organization (WTO). China's entry into the WTO makes China a full partner in the world's trading system. The integration of China into the global economy sets the stage for the eventual entry of the other 16 non-market economies into the WTO, from Russia to Vietnam.

The China-U.S. trade agreement is not without its critics. In the United States, labor unions criticize the agreement for its potential to ship U.S. manufacturing jobs to China, while environmentalists complain that little is being done to protect the environment from an industrialized economy the size of China. In China, workers at state-owned enterprises might lose their jobs to foreign capitalist companies that can produce goods and services more efficiently, and China's already impoverished farmers may be



More than 40 International Perspective boxes provide students the opportunity to draw comparisons between the American system of justice and various other systems abroad.

Ethics and the Law

Chapter 8 Ethics and Social Responsibility, is just the beginning of the ethics coverage in the fourth edition.

8

Ethics and Social Responsibility of Business

Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the trial law from his room and live.

JOHN F. DILLON *Laws and Jurisprudence of England and America* (1894)

Chapter Objectives

After studying this chapter, you should be able to:

1. Describe ethical fundamentalism.
2. Describe utilitarianism as a moral theory.
3. Describe Kantian ethics.
4. Describe Rawls's social justice theory.
5. Describe ethical relativism.
6. Describe maximizing profits as a theory of social responsibility.
7. Describe the moral minimum theory of social responsibility.
8. Describe the stakeholder interest theory of social responsibility.
9. Describe the corporate citizenship theory of social responsibility.
10. Describe corporate social audits.

Consider This Example Suppose a professional football team enters into a five-year employment contract with a "superstar" quarterback. The quarterback breaches the contract and enters into a contract to play for a competing team. Hence, the first team asks a injunction to prevent the quarterback from playing for the other team.

Ethical Perspective

STATE FARM: NOT SUCH A GOOD NEIGHBOR

Most car drivers purchase automobile insurance to cover themselves from liability for accidents. Many drivers also purchase collision insurance, which means that the insurance covers the cost of repairing an insured's damaged automobile. Collision insurance policies normally provide that replacement parts be of "like kind and quality" to the original damaged parts. But what if the replacement parts are "after-market" parts, the parts manufactured by companies other than the automobile manufacturer. Do these generic parts up "like kind and quality"? Many insureds (and their lawyers) did not think so and sued their insurance company, State Farm Mutual Automobile Insurance Company, the largest insurance company in the United States, for breach of contract for including replacement parts in their vehicles without telling them.

The plaintiffs' class-action lawsuit on behalf of all policyholders insured by State Farm included all the cars that had their automobiles repaired by State Farm over the last 10 years. The plaintiffs presented evidence that State Farm required body shops to use replacement parts made by

aftermarket manufacturers and not by the automobile's original manufacturer. State Farm said it did this to save costs. For example, a replacement hood for a 1995 Pontiac Grand Am cost \$307 from General Motors but only \$154 from an after-market manufacturer.

The plaintiffs argued that the replacement parts were inferior to original parts, were less safe and had not been tested, breaking three of his ribs and his costarbone and severely bruising his lungs. Bryan's parents sued the Club for negligence to recover damages for injuries suffered by Bryan and the loss of consortium for themselves. The Club moved for summary judgment, asserting that the escrowary agreement signed by Bryan's mother barred the claims. The trial court agreed and granted the Club's summary judgment motion. The court of appeals affirmed. The plaintiffs appealed to the Supreme Court of Ohio.

ISSUE

Did the escrowary agreement signed by Mrs. Zivich on behalf of her son release the Club from liability for the child's claims and the parents' claims?

IN THE LANGUAGE OF THE COURT

Sovereign Justice With respect to adult participants, the general rule is that release from liability for injuries caused by negligent activities arising in the context of recreational activities are enforceable. Here, however, the escrowary agreement was executed by a parent on behalf of the minor child.

It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities are an important feature of our society and are a valuable asset to it.

Therefore, we conclude that although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these escrowary agreements. Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation. Bryan's parents agreed to shoulder the risk. Public policy does not justify such an agreement. In fact, public policy supports it.

DECISION AND REMEDY

A parent's signature on an escrowary agreement on behalf of his or her child releases the other party from liability to the child, the parent who signed the agreement, and the other parent. Affirmed.

Case Questions

Critical Legal Thinking Do escrowary agreements serve any valid purpose? Should escrowary agreements be enforceable?

Ethics Was it ethical for Mrs. Zivich to sign the escrowary agreement and thus bring this lawsuit?

Business Application What would have been the consequences if the court had found the escrowary agreement to be invalid in this case?

More than 40 **Ethical Perspectives** boxes use ethical issues from real companies to highlight the importance of ethics in making business decisions.

Every case in the text ends with an ethics question for discussion

ETHICS CASES

18.11 BluePeace.org is a new environmental group that has decided that expanding its environmental causes on the Internet is the best and most efficient way to spend its time and money to advance its environmental causes. To draw attention to its Web site, BluePeace.org comes up with "catchy" Internet domain names. One is "macyweez.org," another is "sexonvaldezceals.org," and another is "generalmotorscrashdummies.org." The "macyweez.org" Web site first shows beautiful women dressed in milk fat coats sold by Macy's Department Stores and then goes into graphic photos of minks being slaughtered and skinned and made into coats. The "sexonvaldezceals.org" Web site first shows a beautiful pristine bay in Alaska with the Exxon Valdez oil tanker quietly sailing through the waters and then shows photos of the ship breaking open and spewing forth oil and then seals who are gored with oil suffocating and dying on the shoreline. The Web site "generalmotorscrashdummies.org" shows a General Motors automobile involved in normal crash tests with dummies followed by photographs of automobile accident scenes where people and children lay bleeding and dying after an accident involving General Motors automobiles. Macy's Department Stores, the Exxon Oil Company,

Act, Who wins? Has BluePeace.org acted unethically in this case?

18.12 Aptricot.com is a major software developer that licenses software to be used over the Internet. One of its programs called "Match" is a search engine that searches personal ads on the Internet and provides a "match" service for potential dates and possible marriage partners. Natalia Bates subscribes to the Match software program from Aptricot.com. The license agreement is five years at \$200 per month license fee. For each subscriber, Aptricot.com produces a separate Web page that shows photos of the subscriber and personal data. Bates places a photo of herself with her mother with the caption, "Mama, 30 years old, lives with mother, likes quiet nights at home." Bates licenses the Aptricot.com "Match" software and uses it 12 hours each day searching for Internet matches. Bates does not pay Aptricot.com the required monthly licensing fee for any of the three months he uses the software. After using the Match software but refusing to pay Aptricot.com its licensing fee, Aptricot.com activates the disabling bug in the software and disables the Match software on Bates's computer. Aptricot.com did this with no warning to Bates. It then sends a letter to Bates

(1712-1778) proposed a social contract is presumed to have entered into moral rules that are necessary for people states, "I will keep the rules if everyone else does." Rawls's theory of justice theory, fairness is

Rawls's social contract A moral theory that says each person is presumed to have entered into a social contract with all others in society to obey moral rules that are necessary for people to live in peace and harmony.

Each chapter ends with additional ethics cases.

Contemporary Business Applications

The 40-plus **Contemporary Business Applications** boxes recognize that not all of the modern challenges facing businesses are Internet-related. These boxes explore other types of legal issues currently confronting businesses.

Contemporary Business Application

SOMETIMES VIAGRA STIRS THE HEART TOO QUICKLY

The anti-impotency drug Viagra, introduced in 1997, was heralded as the most important drug to hit the market since the birth control pill. Viagra is prescribed by doctors to male patients who cannot have or have trouble getting erections and helps such men have intercourse. It became wildly successful and is now used by millions of men worldwide. In the United States, the Food and Drug Administration (FDA) approved the drug for use by the general public. A black market for Viagra has developed in countries where the drug has not been given government approval. Pfizer, the manufacturer of the drug, is receiving a financial bounty from its now-famous drug.

It seems that Viagra not only gets men's hearts stirring again, but it may also cause their hearts to explode, literally. After hundreds of deaths of men taking the drug were reported, the FDA investigated and found that men with certain health predispositions may be at risk of death if they take Viagra. Therefore, the FDA now requires Viagra labels to warn individuals with

the following conditions to be careful when taking the drug:

- Men who have had a heart attack or an irregular heartbeat in the past six months
- Men who have a history of cardiac failure or coronary artery disease that caused angina
- Men who have significant high or low blood pressure

Viagra causes visual disturbances—particularly the ability to distinguish between blue and green—in about 5 percent of the men who use it. And Viagra sometimes works too well, causing priapism, or painful erections that last up to four hours. Doctors and consumers must also be warned against these conditions.

Pfizer asserts that its explosively popular drug was not the culprit in the reported deaths, but that the drug was taken by men with health problems who should have not used the drug. By requiring the new warnings, the FDA wants men with the noted risk factors to first ask, "Is sex a good idea for me?" before taking Viagra.

Each chapter includes 3 to 5 interesting and lively cases presented in an edited format, retaining the language of the court. The format of each case is: Fact, Issue, Language of the Court, Decision. Three questions follow each case to promote active learning.

Fact

the purported sender in a false light in the eyes of the receiver. Falsely attributing beliefs or acts to another can also form the basis of a lawsuit.

Misappropriation of the Right to Publicity

Each person has the exclusive legal right to control and profit from the commercial use of his or her name and personality during his or her lifetime. This is a valuable right, particularly to well-known persons such as sports figures and movie stars. Any attempt by another person to appropriate a living person's name or identity for commercial purposes is actionable. The wrongdoer is liable for the **tort of misappropriation of the right to publicity** (also called the **tort of appropriation**). In such cases, the plaintiff can (1) recover the unauthorized profits made by the offending party and (2) obtain an injunction against further unauthorized use of his or her name or identity. Many states provide that the right to publicity survives a person's death and may be enforced by the deceased's heirs.

In the following case, the court found that there had been a misappropriation of the right to publicity.



Hoffman v. Los Angeles Magazine, Inc.
33 F.Supp.2d 867 (1999)
United States District Court, C.D. California

FACTS

Dustin Hoffman is one of the most successful and recognizable motion picture actors. He has appeared in such movie classics as *The Graduate* and *Rainman* and has won two Academy Awards, a Golden Globe Award, and an Emmy Award for his work. In 1982, Hoffman appeared as the main character in the movie *Tootsie*, where he played a male actor who dressed as a woman to get acting jobs as an actress. In the movie, Hoffman appeared in a woman's bright red dress posing in front of the American flag, which was used as a still shot in advertising for the movie. The movie was a great commercial success.

In 1997, the Los Angeles Magazine, a glitzy regional magazine, decided to rev up sales by including more celebrity photos in the magazine. The March 1997 issue included a feature called "Grand Illusions" where celebrity figures were dressed in clothes, shoes, and accessories of fashion designers who advertised in the magazine. One photo was the full-length shot of Dustin Hoffman from *Tootsie* that had been digitally altered to remove the red dress and heels and replace them with a silk gown designed by Richard Tyler and high-heeled shoes designed by Ralph Lauren. *Los Angeles Magazine* did not ask Mr. Hoffman for permission to use his name and likeness. After the magazine was published, Mr. Hoffman sued *Los Angeles Magazine, Inc.* in federal court to protect his name from commercial exploitation and recover damages.

ISSUE

Did *Los Angeles Magazine, Inc.* misappropriate Dustin Hoffman's right to publicity?

IN THE LANGUAGE OF THE COURT

Travisian, District Judge: The right to use Plaintiff Dustin Hoffman's name and likeness is an extremely valuable commodity and privilege not only because of Mr. Hoffman's stature as an actor, but because he does not knowingly permit commercial use of his identity. Since appearing in the film The Graduate, Mr. Hoffman has scrupulously guarded the manner in which he has been shown to the public. Mr. Hoffman maintains a strict policy of not endorsing commercial products for fear that he will be perceived in a negative light by his peers and motion picture industry executives, suggesting that his career is in decline and that he no longer has the business opportunities or the box office draw as before.

Defendant, Los Angeles Magazine, Inc., did not seek or obtain permission from Mr. Hoffman to use his name or likeness in the March 1997 issue of Los Angeles Magazine and, in particular, did not obtain Mr. Hoffman's consent to commercially endorse or "bill" for any fashion designer or advertiser in the magazine. The reason permission was not sought is because Los Angeles Magazine knew, or should have known, that the celebrities either would not consent or, alternatively, would demand payment for the fair market value for their right to utilize their names and likenesses in this manner for commercial (see continues)



Creative Resource Management, Inc. v. Soskin
1998 WL 813420 (1998)
Court of Appeals of Tennessee

CASE 35.2

FACTS

Nashville Pro Hockey, LLC, was a limited liability company organized under the laws of Tennessee. The LLC owned and operated the Nashville Nighthawks, a minor league professional hockey team. On September 4, 1996, Nashville Pro Hockey, LLC, contracted with Creative Resource Management, Inc. (CRM), whereby CRM, for fees and other consideration, would provide employee leasing services to Nashville Pro Hockey, LLC. The contract was signed by Barry Soskin, the president of Nashville Pro Hockey, LLC. A paragraph in the contract provided:

By affixing my hand and seal to this agreement, I personally guarantee any and all payments payable as represented and contained in this agreement.

Nashville Pro Hockey, LLC, failed, owing CRM \$29,626. CRM sued Nashville Pro Hockey, LLC, and Barry Soskin to recover the unpaid compensation. Soskin defended, alleging that his signature on the contract was in

his representative capacity only and not in his individual capacity as a guarantor. The trial court agreed and granted summary judgment to Soskin. CRM appealed.

ISSUE

Did Soskin's signature on the contract constitute a personal guarantee for the payment of the debt of Nashville Pro Hockey, LLC, to CRM?

IN THE LANGUAGE OF THE COURT

Cain, Judge: The well settled precedent in Tennessee suggests that a corporate officer's signature provided by a corporation's name and followed by a designation of the signer's corporate capacity is evidence that the signer was acting as an agent of the corporation rather than individually.

This rule, however, must yield where the language of the contract compels a different conclusion. The language of the contract involved in the case at bar distinguishes this case from the general rule. This case concerns a contract which contains personal guarantee language in the body of the contract.

tort of misappropriation of the right to publicity. An attempt by another person to appropriate a living person's name or identity for commercial purposes.

Decision

Issue

Cases



M.A. Mortenson Company, Inc. v. Timberline Software Corporation
970 P.2d 803 (1999)
Court of Appeals of Washington

CASE 18.1

FACTS

The Timberline Software Corporation (Timberline) produces software programs that are used by contractors to prepare bids to do work on construction projects. The M.A. Mortenson Company (Mortenson), a contractor, had been using Timberline software for some time without any problem. In 1993, Timberline introduced an advanced version of its bidding software program called "Precision." Mortenson, as the licensee, entered into a license agreement with Timberline, the licensee, to license the use of the Precision software. Timberline delivered the software to Mortenson and a Timberline representative installed the software on Mortenson's computer. The software license agreement contained the following terms, which were printed on the outside of the envelope in which the software disks were packaged and on the inside cover of the user's manual, and they also appear on the introductory computer screen each time the software program is executed:

CAREFULLY READ THE FOLLOWING TERMS AND CONDITIONS BEFORE USING THE PROGRAMS. USE OF THE PROGRAMS INDICATES YOUR ACKNOWLEDGEMENT THAT YOU HAVE READ THIS LICENSE, UNDERSTAND IT, AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, PROMPTLY RETURN THE PROGRAMS AND USER MANUALS TO THE

BERLINE'S LIABILITY FOR DAMAGES IN NO EVENT SHALL EXCEED THE LICENSE FEE PAID FOR THE RIGHT TO USE THE PROGRAMS.

On December 2, 1993, Mortenson used the Precision software and prepared a bid to do contracting work for the Harborview Hospital project. While preparing the bid, the program alerted at least five times before Mortenson's employees finished the bid. Subsequently, Mortenson claimed that its bid was \$2 million under what it should have been had the Precision software program worked correctly. Mortenson sued Timberline to recover consequential damages, arguing that the Precision software calculated an inaccurate bid. Timberline defended, alleging that the limitation of remedies clause in the software license prevented Mortenson's lawsuit. Mortenson countered that the limitations of remedies clause was unconscionable and therefore unenforceable. The trial court granted summary judgment to Timberline and dismissed the lawsuit. Mortenson appealed.

ISSUE

Was the limitation of remedies clause in the Timberline software license unconscionable?

IN THE LANGUAGE OF THE COURT

Webster, Judge: Mortenson makes much of the fact that Timberline never mentioned the license agreement or any of its terms during the negotiations. But the negotiations between the

Additional Support for Student Success

Exhibits help clarify legal formats and documents that may be foreign to students.

Margin notes include a running glossary of terms, Business Briefs, and relevant historical quotes

Concept Summaries appear periodically within each chapter to give students a chance to pause and be sure they have mastered the preceding material.

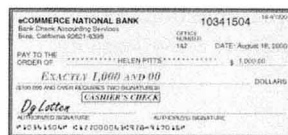
At the end of each chapter, Working the Web exercises require students to work through interactive web-based activities; Critical Legal Thinking Cases encourage the application of students' analytical skills; and Critical Legal Thinking Writing Assignments give students experience in briefing cases.

the bank the amount of the check and a fee. The bank guarantees the payment of the check.

cellible negotiable instrument upon issue.

A cashier's check is a two-party check for which (1) the issuing bank serves as both the drawer and the drawee and (2) the holder serves as payee [UCC 3-104(g)]. The bank, which has been paid for the check, guarantees its payment. When the check is presented for payment, the bank debits its own account [UCC 3-412] (See Exhibit 26.2.)

EXHIBIT 26.2 A Cashier's Check



Business Brief

Many businesses require payment by certified or cashier's checks because these are "as good as cash." By doing so, businesses avoid the problem of being paid by normal checks that may "bounce." A form of check sold by banks and other issuers. They are issued without a named payee. The purchaser fills in the payee's name when he or she uses the check to purchase goods or services.

An obligated bank that wrongfully refuses to pay a cashier's check is liable to the person asserting the right to enforce the check for expenses and loss of interest resulting from nonpayment and consequential damages [UCC 3-411].

Traveler's Checks

Traveler's checks derive their name from the fact that travelers often purchase them to use as a safe substitute for cash while on vacations or other trips. They may be issued by banks or by companies other than banks (e.g., American Express). A traveler's check is a two-party instrument drawn by the bank upon itself, where the issuing bank serves as both the drawer and the drawee.

Traveler's checks may be purchased in many denominations. Unlike cashier's checks, traveler's checks are issued without a named payee (see Exhibit 26.3). The checks have

of corn that is fit for human consumption. Ordinarily, usage of trade would be the first source of interpretation of the word *corn*. If the parties had prior dealings, though, the usage of the terms in their prior dealings would become the primary source of interpretation.

CONCEPT SUMMARY COMPARISON OF CONTRACT LAW AND THE LAW OF SALES

Topic	Common Law of Contracts	UCC Law of Sales
Definiteness	Contract must contain all of the material terms of the parties' agreement.	UCC gap-filling rules permit terms to be implied if the parties intended to make a contract [UCC 2-204].
Irrevocable offers	Option contracts.	Option contracts. Firm offers by merchants to keep an offer open are binding up to three months without any consideration [UCC 2-205].
Counteroffers	Acceptance must be a mirror image of the offer. A counteroffer rejects and terminates the offer.	Additional terms of an acceptance become part of the contract if (1) they do not materially alter the terms of the offer and (2) the offeror does not object within a reasonable time after reviewing the acceptance [UCC 2-207].
Statute of Frauds	Writing must be signed by the party against whom enforcement is sought.	Writing may be enforced against a party who has not signed it if (1) both parties are merchants, (2) one party

CONCEPT SUMMARY TYPES OF INDORSEMENTS

Type of Indorsement	Description
Blank	Does not specify a particular indorsee (e.g., <i>/s/ Mary Jones</i>). This indorsement creates bearer paper.
Special	Specifies the person to whom the indorser intends the instrument to be payable (e.g., "Pay to the order of John Smith" <i>/s/ Mary Jones</i>). This indorsement creates order paper. [If it is not payable to order (e.g., "Pay to John Smith" <i>/s/ Mary Jones</i>), it can be converted to order paper (e.g., "Pay to the order of Fred Roe" <i>/s/ John Smith</i> .)]
Unqualified	Does not disclaim or limit liability. The indorsee is liable on the instrument if it is not paid by the maker, acceptor, or drawer.
Qualified	Disclaims or limits the liability of the indorser. There are two types: 1. Special qualified indorsement (e.g., "Pay to the order of John Smith, without recourse" <i>/s/ Mary Jones</i>). 2. Blank-qualified indorsement (e.g., "Without recourse" <i>/s/ Mary Jones</i>).
Nonrestrictive	No instructions or conditions attached to the payment of funds (e.g., "Pay to John Smith or order" <i>/s/ Mary Jones</i>).
Restrictive	Conditions of instructions restrict the indorser's rights. There are four types: 1. Conditional indorsement (e.g., "Pay to John Smith if he completes construction of

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Working the Web

U.S. Library of Congress The Library of Congress Web site contains a database of copyright records from 1978 to the present.

Visit at lcweb.loc.gov

U.S. Patent and Trademark Office The U.S. Patent and Trademark Office has a Web site where you can download forms, order copies, link to legal materials, and find statistical information.

Visit at www.uspto.gov

U.S. Federal Communications Commission The U.S. Federal Communications Commission Web site links to economic information, industry statistics, consumer information, and a host of other resources.

Visit at www.fcc.gov

U.S. Copyright Office Information about copyright basics, copyright law, copyright forms, copyright records, and other copyright materials can be found at this Web site.

Visit at www.loc.gov/copyright

International Trademark Association The International Trademark Association is an association of trademark owners and advisors worldwide. It is dedicated to the support and advancement of trademarks and related intellectual property concepts as essential elements of effective national and international commerce.

Visit at www.inta.org

CYBER EXERCISES

- Using the Library of Congress Web site, find the home page for the U.S. Copyright Office Records.
- Using the Patent and Trademark Office Web site, find out about jobs at the U.S. Patent and Trademark Office.
- Use the U.S. Federal Communications Commission Web site to find information about the v-chip.
- Using the U.S. Copyright Office Web site, find the materials on copyright registration.
- Using the International Trademark Association Web site, visit the Brand Names Education Foundation.

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CRITICAL LEGAL THINKING WRITING ASSIGNMENT

Read Case A.17 in the Case Appendix (*Fruit Publications, Inc. v. Rural Telephone Service Company, Inc.*). This case is excerpted from the U.S. Supreme Court opinion. Review and brief the case. In your brief, be sure to answer the following questions.

- Who was the plaintiff? Who was the defendant?
- What had the defendant done that caused the plaintiff to sue?
- What is the issue in this case?
- What was the decision of the U.S. Supreme Court?

NOTES

- 15 U.S.C. § 1125(d).
- Article I, Section 8, clause 8 of the U.S. Constitution provides: "The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for Limited Times . . . the right of Inventors to the exclusive right of their Discoveries and Inventions."
- Article I, Section 8, clause 8 of the U.S. Constitution.
- 17 U.S.C. §§ 101 et seq.
- 15 U.S.C. §§ 1114 et seq.
- Senate Bill 1883, effective November 16, 1989.

An Integrated Supplements Package

To ensure consistency of style, approach, and coverage among the key print supplements, these critical pieces were created by a single author team working in conjunction with Henry Cheeseman.

The *Instructor's Manual* provides bulleted chapter outlines, answers to text questions and cases, as well as lecture suggestions linked directly to PowerPoint slides.

PowerPoint slides provide complete lecture support.

The *Study Guide* includes the same bulleted outline found in the *Instructor's Manual* along with a variety of objective questions and critical thinking legal essays to effectively reinforce the concepts introduced in the corresponding text chapter.

The *Test Item File* contains over 30 percent new questions to this edition and closely mirrors the content stressed in the *Instructor's Manual* and *Study Guide*.

Other Valuable Supplements and Technology Options:

The *Surfing for Success in Legal Studies* Internet guide covers frequently asked questions and offers concrete discipline-specific advice on navigating the Internet. It is available free to your students and is updated annually.

The **Business Law Custom Video Series** provides ten 5-10 minute segments designed to foster discussion on key business law topics. Each segment revolves around the activities of a single company and its employees, suppliers, customers, and other associates.

The **TotalLaw CD-ROM** is available free with the purchase of each student text and includes the complete text of 30 acts that are important and relevant to business. A built-in feature allows users to search by keyword. This extensive resource is easy to load, convenient to use, and includes the U.S. Constitution, the United Nations Charter, the Uniform Commercial Code, and much more.

Prentice Hall's Learning on the Internet Partnership (PHLIP) Companion Web Site (www.prenhall.com/cheeseman) lets students log on to have a dialogue with their peers, talk to a tutor, take a quiz with immediate feedback, and read articles about current events—all with the click of a mouse.

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Prentice Hall offers **WebCT**, an on-line course to provide you with a learning option in legal studies. The content has been preloaded into the popular WebCT course management software. Contact your Prentice Hall sales representative for more information.

Acknowledgments

When I first began writing this book, I was a solitary figure researching cases in the law library and writing text at my desk. As time passed, others entered upon the scene—editors, research assistants, reviewers, production personnel—and touched the project and made it better. Although my name appears on the cover of this book, it is no longer mine alone. I humbly thank the following persons for their contributions to this project.

THE PROFESSIONALS AT PRENTICE HALL

For this fourth edition of *Business Law* a special group of people from Prentice Hall have come together: Linda Schreiber, acquisitions editor, who brought wonderful new ideas to revision who was the guiding light during the entire production, and whose imprint is everywhere in the new edition; Cindy Spreder, production editor, whose design suggestions I accepted wholeheartedly, and who was a joy to work with through the patient task of shepherding the manuscript from first manuscript pages to the final bound book; Deb Clare, senior marketing manager, who is the most creative marketing person in the industry and who has more energy than anyone I know; Jim Boyd, vice president/editorial director, who authorized all the resources necessary to make this fourth edition possible; Sandy Steiner, president of Prentice Hall Business Publishing, who was the marketing manager on the first edition of *Business Law* and whose influence is still part of this revision.

THE SUPPLEMENTS TEAM

Jennifer Surich, supplements editor, is in charge of producing the extensive supplements that support this fourth edition of *Business Law*. The supplements themselves have been produced by a remarkable team of authors: Rhonda Carlson, lecturer, University of Denver School of Law; Ed Gac, professor of business law, School of Business, University of Colorado; and Jay Ballentine, professor of business law, School of Business, University of Colorado. I have worked closely with this team in producing the *Instructors Manual*, *Student Guide*, *Test Bank*, and PowerPoint slides to support this edition. Michele Faranda, media project manager, has been in charge of putting together the Prentice Hall Web Site to support this edition, as well as the *Totalaw* CD-ROM that accompanies the book.

The Prentice Hall “family” has come together and produced a book and supplements package that I believe is the best available. My success is theirs, and theirs’ mine. They are my friends.

The reviewers. I would like to particularly thank the following reviewers, who have spent considerable time and effort reviewing the manuscript, and whose comments, suggestions, and criticisms are seen in the final project.

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The students at the Marshall School of Business at the University of Southern California. Their spirit, energy, and joy is contagious, and I love teaching them (and as important, they teaching me).

While writing this Preface, I have thought about the thousands of hours I have spent researching, writing, and preparing this manuscript. I loved every minute, and the knowledge gained has been sufficient reward for the endeavor.

I hope this book and its supplementary materials will serve you as well as they have served me.

*With joy and sadness,
emptiness and Fullness,
honor and humility,
I surrender the fruits of this labor*

Henry R. Cheeseman

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