

Aspen College Series

# Cyberlaw

## Management and Entrepreneurship

Margo E. K. Reder • Jonathan J. Darrow • Sean P. Melvin • Kabrina K. Chang



Wolters Kluwer

Aspen College Series

# Cyberlaw

Management and Entrepreneurship

Margo E. K. Reder  
Jonathan J. Darrow  
Sean P. Melvin  
Kabrina K. Chang



Wolters Kluwer

Copyright © 2015 CCH Incorporated.

Published by Wolters Kluwer in New York.

Wolters Kluwer serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. ([www.wolterskluwerlb.com](http://www.wolterskluwerlb.com))

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at [www.wolterskluwerlb.com](http://www.wolterskluwerlb.com), or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com), call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 9781454850458

#### **Library of Congress Cataloging-in-Publication Data**

Cyberlaw: management and entrepreneurship / Margo E. K. Reder, Jonathan J. Darrow, Sean P. Melvin, Kabrina K. Chang.  
pages cm. — (Aspen college series)

Includes bibliographical references and index.

ISBN 978-1-4548-5045-8 (alk. paper)

1. Internet—Law and legislation—United States. 2. Electronic commerce—Law and legislation—United States. 3. New business enterprises—Management. I. Reder, Margo E. K., author.

KF390.5.C6C935 2015

346.7307—dc23

2015022628



# Cyberlaw

Management and Entrepreneurship

## About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, ftwilliam.com and MediRegs family of products.

**CCH** products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

**Aspen Publishers** products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

**Kluwer Law International** products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleaves, books, and electronic products for comprehensive information in many areas of international legal practice.

**Loislaw** is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

**ftwilliam.com** offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

**MediRegs** products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

For my family whose love and interest inspire. Special thanks Rick.

Also to Caroline, Hillary and Jonathan; Mom and Dad;

my sister, brothers and in-laws, my nieces,

nephews and the greats, too.

**—M.E.K.R.**

To my parents, Marion and Roselyn, and my brother, Stephen,

for all their love and support.

**—J.J.D.**

For J.C. and K.E.C.

**—K.K.C.**

To Joanna, Sean, and Ally—always.

**—S.P.M.**

We are pleased to present a new edition of *Cyberlaw: Management and Entrepreneurship*—the fourth edition overall and the first with Wolters Kluwer—the first, and still leading, text on this subject. Written in response to the Internet’s remarkable, unprecedented, and myriad impacts on business law, the text continues to evolve as the Internet has developed into the default platform for new businesses, new business models, and more. This edition hones its focus further, most notably becoming the first text to address business and cyberlaw issues from the perspective of entrepreneurial, Internet-based startups.

The text takes a cohesive approach, addressing business and cyberlaw, entrepreneurship, and management issues in the order in which these challenges arise in typical Internet-based startups. This approach not only creates internal consistency, but also fosters students’ appreciation for the connectedness between and among the topics, thus deepening their meaningful comprehension of the subject.

*Cyberlaw* covers one of today’s most dynamic aspects of business: the legal challenges associated with entrepreneurial Internet-based startups. Characterized by high concentrations of intellectual property assets and talented, mobile, and international employees, the situations these Internet-based startups face are typically further complicated by being founded on difficult to value inventions for which even assigning ownership can be a challenge. These businesses are built out before a formalized entity is created or ownership clearly defined. They may make money from the start, or they may never make money—yet they may still have billion-dollar valuations . . . .

The text moves on from these initial issues to cover the topics that arise as these startups continue to build out. The authors address all the complex issues facing these Internet-based startups as they become operational, including entity formation, financing, contracts and licensing, human resource and employment, social media use, dispute resolution, regulatory and compliance, data privacy and management, and finally data security and crime.

By taking this lifecycle approach, *Cyberlaw* assures that students receive broad exposure to every business law topic encountered by typical startups. Achieving this familiarity enables students to create a platform from which they can develop further competencies in cyberbusiness and entrepreneurship and the means with which to effectively translate and adapt their academic and theoretical experience to the needs of their professional work environments.

Additional key features complementing the text’s notable approach and substantive content include international sections or cases, an ethical component, and a Managers’ Checklist in each chapter. Another core feature is a reference in each chapter to a thread case, focused on Twitter’s management of the main

substantive topic or issue addressed in the chapter. This thread case makes the topic vivid for students, enhancing their appreciation and understanding of how the individual issues relate to startups and how the topics interrelate. The focus on companies of interest to students makes the material interesting, current, and relatable. The text is further augmented with PowerPoint slides for use in the classroom that provide a complementary narrative to the text material. Also available is an Instructors' Manual, containing materials the authors have found useful in presenting the materials effectively.

*Cyberlaw: Management and Entrepreneurship* is an ideal choice for Business Law electives focusing on the Internet and the web in relation to startups and entrepreneurship. The comprehensive coverage, cohesive format, and many enriching features ensures this text will continue to be the leading and foundational text for business cyberlaw and entrepreneurship electives. We welcome instructors and students to this text and to the fascinating, engaging, and challenging material within.

—Margo E. K. Reder, Jonathan J. Darrow, Sean P. Melvin, and Kabrina K. Chang



## Acknowledgments

---

I am super excited that this project came together. This edition was only made possible because David Herzig took a bet on us. Susan Boulanger helped guide the process, and for this I am immensely grateful. Such a work can only be created through the dedication of wonderful colleagues, and thanks to my co-authors Jon, Sean, and Kabrina for signing on and producing this marvelous work. Boston College has consistently supported this work. Through the visionary efforts of then-Department Chair, Prof. Christine Neylon O'Brien, we developed a curriculum for this material, which has yielded incredible results. Department Chair Prof. Stephanie M. Greene continued the support and, in fact, expanded on this original mandate, all while demonstrating support and vital leadership. Thank you all.  
—**M.E.K.R.**

I gratefully acknowledge Avis Bohlen, Stefan Gruber, and Beth Newton of Harvard Law School for their able research assistance; Bill Slawski for generously sharing his knowledge of Google's patents; and the staff of the Harvard Law Library, especially Mindy Kent, for assistance in obtaining difficult-to-find research materials. The intellectual property chapters substantially benefitted and were transformed thanks to the insightful comments and suggestions of Dean P. Alderucci, Patrick J. Myers, Michael Risch, Ethan Schiffres, and Kenneth R. Shurtz. I am especially indebted to Stephen M. Darrow, who provided detailed comments for all four intellectual property chapters, and to Stephen D. Lichtenstein and Gerald R. Ferrera whose mentorship and support over the years has enabled me to develop as a legal writer. Finally, my contribution to this text would not have occurred at all if not for Christine Neylon O'Brien, who first inspired me to begin a career in law teaching and scholarship.—**J.J.D.**

Thanks are owed to Sean J. Melvin for his case research work on this book.—**S.P.M.**

Many thanks to Research Assistant Extraordinaire Julia Molinaro for her hard work, creative and intelligent research, and ability to read my mind.—**K.K.C.**

## About the Authors

---

**Margo E. K. Reder** is a Lecturer in Law and Researcher at Boston College, Carroll School of Management, currently on leave working in the private industry. The recipient of numerous honors and awards for excellence in research and writing, Professor Reder teaches undergraduates, as well as electives in the M.B.A. program covering e-commerce, entrepreneurship, technology, and intellectual property. Professor Reder consults with startups and judges Business Law competitions. A top-ranked author, Professor Reder has co-authored five previous texts and over 25 law review articles and is a member of the Academy of Legal Studies in Business. As a law student, Professor Reder received top honors and was a member of the Board of Editors. Professor Reder is admitted to practice in the Commonwealth of Massachusetts, United States District Court for the District of Massachusetts, the United States Court of Appeals for the First Circuit, and the United States Supreme Court.

**Dr. Jonathan J. Darrow** recently completed a postdoctoral fellowship in the Program on Regulation, Therapeutics, and Law (PORTAL) at Harvard Medical School/Brigham & Women's Hospital. He holds a BS in biological sciences from Cornell, a JD from Duke, an MBA from Boston College, and an SJD (a dissertation-based doctorate, the law discipline's highest degree) from Harvard, where he also completed the LLM program. After admission to the bar, Dr. Darrow practiced law in the Silicon Valley offices of Cooley Godward and later worked on patent litigation matters at Wiley Rein & Fielding in Washington, DC. He is admitted to practice before the U.S. Patent & Trademark Office, has served on the business law faculties of Boston College, Plymouth State, and Bentley, has clerked for the Honorable Evan J. Wallach of the U.S. Court of Appeals for the Federal Circuit, and has testified before the Massachusetts legislature on the ownership of email. His scholarship on technology and intellectual property has appeared in numerous publications, including the *New England Journal of Medicine*, the *Stanford Technology Law Review*, the *Minnesota Law Review*, and the *Harvard Journal of Law & Technology*, among many others. He is a co-author of two major textbooks: *Cyberlaw: Text and Cases* (the predecessor to this text) and *The Legal and Ethical Environment of Business*. Dr. Darrow previously explored the relationship between innovation policy and global health during stints at both the World Trade Organization and World Health Organization in Geneva, Switzerland.

**Sean P. Melvin** is an associate professor of business law at Elizabethtown College (PA), where he served as department chair for eight years, won the Delta Mu

Delta Outstanding Teacher of the Year award, and received several Faculty Merit awards for teaching and scholarship. Before his academic career, Professor Melvin was a corporate lawyer in a large Philadelphia-based law firm and went on to become vice president and general counsel at a publicly traded technology company. He is the author of seven books (including four textbooks), has contributed scholarly and professional articles and case studies to dozens of publications, and is a member of the Academy of Legal Studies in Business (ALSB). His article “Case Study of a Coffee War” was selected as Best International Case Study at the eighty-sixth annual ALSB conference.

**Kabrina Krebel Chang** is a Clinical Associate Professor of Law and Ethics at Boston University’s School of Management, where she has received numerous awards for teaching and service to the undergraduate program. Professor Chang teaches business ethics, business law, and employment law in the undergraduate program and business law in the MBA program. Her research focuses primarily on employment matters, looking at legal off-duty conduct, in particular, participation in social media, and how that impacts employment and management decisions. She is the author of several articles on the management implications of legal off-duty conduct, including participation in social media and use of medical marijuana, and, most recently, on a business’s obligations toward victims of domestic abuse. Before her academic career, Professor Chang was a trial lawyer in private practice.

# Cyberlaw

Management and Entrepreneurship

# Summary of Contents

---

Contents	xi
Preface	xxv
Acknowledgments	xxvii
About the Authors	xxix

## part one

---

### **Business Formation, Business Models, and Business Cycles** 1

- 1 Introduction to Cyberlaw: Management and Entrepreneurship 3
- 2 Inventions, Innovations and Business Models: Developing and Implementing the Ideas and Technology Fundamental to Startups 23
- 3 Forming, Financing, and Managing a New Venture 79

## part two

---

### **Intellectual Property: Business Assets in the Information Age** 117

- 4 Trademarks 119
- 5 Copyright 161
- 6 Patents 209
- 7 Trade Secrets 261

## part three

---

### **Transactional Law: Creating Wealth and Managing Risk** 299

- 8 Contracts and Licensing 301
- 9 The Employment Relationship 365
- 10 Social Media: Risk and Liability 399

# part four

---

## **Regulatory, Compliance, and Liability Issues**

**425****11** Dispute Resolution: Jurisdiction, Litigation, and ADR 427**12** Government Regulation 457**13** Data Privacy and Management 497**14** Security and Computer Crime 547

Glossary 593

Table of Cases 605

Index 609

Preface	xxv
Acknowledgments	xxvii
About the Authors	xxix

## Part I

## Business Formation, Business Models, and Business Cycles

### Chapter 1 Introduction to Cyberlaw: Management and Entrepreneurship 3

#### Overview 3

#### Overview of the Internet and World Wide Web 4

History of the Internet 5

Development of the World Wide Web 7

#### The Interaction of Technology, Business, and Law 8

Sample Case Studies 9

#### Conclusion 18

*Summary* 18

*Key Terms* 18

*Manager's Checklist* 19

*Ethical Consideration* 20

*Questions and Case Problems* 20

*Additional Resources* 21

### Chapter 2 Inventions, Innovations, and Business Models: Developing and Implementing the Ideas and Technology Fundamental to Startups 23

#### Overview 23

The Environment of Innovations and Inventions 24

Innovations and Inventions	25
Why Invent? Innovate?	25
Defining Innovation and Inventions	26
Categories of Innovation and Invention	29
Effect of Innovation and Invention	29
Incentives to Innovate and Invent: Market and Nonmarket Catalysts	30
Impediments to Incentives	32
Disruptive Effects of Innovations and Inventions	33
Legal Claims to Innovations and Inventions by Inventors, Founders, and/or Owners of the Business	34
<i>Iconix, Inc. v. Tokuda</i>	37
<i>Dana Farber v. Gatekeeper</i>	44
<i>Board of Trustees of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.</i>	48
Inventions of University Students	53
<i>The Facebook, Inc., v. ConnectU</i>	54
<b>Business Models for Startups Made Possible by the Internet and Other Disruptive Innovations</b>	<b>58</b>
How the Internet Changed the Possibilities for Business Models	58
Business Models Facilitated by the Internet	60
<i>Airbnb, Inc. v. Schneiderman</i>	63
<i>Boston Cab Dispatch, Inc. v. Uber Techs., Inc.</i>	68
<i>Pennsylvania Public Utility Comm'n v. Uber Techs., Inc.</i>	71
Summary	73
Key Terms	74
Manager's Checklist	75
Ethical Consideration	75
Questions and Case Problems	76
Additional Resources	77

## Chapter 3      **Forming, Financing, and Managing a New Venture    79**

<b>Overview: New Venture Planning</b>	<b>79</b>
<b>Formation of a Business Entity</b>	<b>80</b>
Factors in Choosing a Startup Business Entity	81
Comparing Business Entities	82
<b>Capitalizing a New Venture</b>	<b>86</b>



Sources and Categories of Capital	87
<b><i>Securities and Exchange Commission v. SG Ltd.</i></b>	<b>87</b>
Self-funding and Credit	90
Crowdfunding	91
Angel Investors	92
Venture Capital	93
Initial Public Offerings (IPOs) and Private Placement	94
Debt Instruments	94
<b>Pre-Fundraising Issues</b>	<b>94</b>
Structuring Ownership	95
Common Stock versus Preferred Stock	96
Dilution	96
Shareholders Agreements	96
<b><i>Purdum v. Wolfe</i></b>	<b>98</b>
<b>Raising Capital in Rounds</b>	<b>101</b>
Pre-seed Financing	101
Seed Financing	102
Series A Round	102
Series B (and Subsequent Rounds)	102
Pre-IPO or Bridge Financing	102
<b>Regulation of Securities</b>	<b>102</b>
Securities Offerings	103
'33 Act Exemptions	103
Trading Securities: Securities Exchange Act of 1934	105
<b>Corporate Management, Control, and Fiduciary Duties</b>	<b>105</b>
Board of Directors	105
Officers	106
Fiduciary Duties of Directors and Officers	107
<b><i>Thomas Weisel Partners, LLC v. BNP Paribas and Praveen Chakravarty</i></b>	<b>109</b>
Summary	112
Key Terms	112
Manager's Checklist	113
Questions and Case Problems	114
Additional Resources	115