

PRACTICAL GUIDE to E-COMMERCE and INTERNET LAW

Eloïse Gratton • Elisa Henry



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PREFACE

1. Purpose and Scope

The rapid growth of electronic and mobile commerce (which we will generally refer to in this book as “e-commerce”) and its consequences on digital marketing and brand management is probably one of the most notable changes businesses encountered over the last decade. To embrace this (r)evolution, business owners have to ensure that all aspects of their activities properly advance their organization’s interests while respecting the rights of their potential and current clients and stakeholders. From a legal perspective, these requirements translate into online agreements such as terms of use and privacy policies, adequate levels of protection and sharing of intangible assets, online trademark use and enforcement strategies as well as digital advertising, e-mail and behavioural marketing requirements. Developments regarding the corporate, financing and tax dimensions of online activities are beyond the scope of this book.

The purpose of this book is to provide a practical guide to organizations that have an online presence or wish to understand and manage the legal risks associated with informational and transactional websites, the content and use of social media pages or accounts and the deployment of digital advertising or marketing campaigns. In addition to an overview of the legal framework applicable to electronic commerce, this book provides practical advice as well as template documents, which can usefully assist organizations and their advisors in implementing sound policies and agreements, in compliance with the applicable Canadian legal environment and best practices. Armed with this practical guide, organizations will be best positioned to identify the key legal challenges to be addressed in connection with their online presence and activities. Readers should keep in mind that this book is not intended to be a substitute for legal advice about specific issues of concern and that, for specific legal advice, organizations should contact their legal counsel.

Overview

This book is divided into 15 chapters, which each shed light on the legal requirements applicable to a particular angle of e-commerce, both federally and provincially. More specifically, the book is organized as follows:

- **Chapter 1 – E-Commerce Agreements** (includes E-Commerce Terms and Conditions Template): This Chapter provides a comprehensive overview of the key principles applicable to contracts entered into by online merchants, whether the counterparties are professional clients or consumers. It also includes an E-Commerce Terms and Conditions Template, which aims at regulating the sale of goods or services over a website.

- **Chapter 2 – Privacy and Cookie Policy** (includes Cookie Policy Template): This Chapter outlines the privacy legal framework applicable to online privacy in Canada and provides the reader with an overview of the information to be included in a website privacy policy and to be disclosed to users when a website uses cookies. Legal requirements pertaining to the use of cookies and similar tracking technologies will also be discussed.
- **Chapter 3 - Copyright** (includes Assignment of Copyright Template): This Chapter provides an overview of the essential principles of copyright law, explains the scope of copyright protection in the context of digital technologies and how copyright may be assigned or licensed. The concepts provided in this Chapter constitute a useful basis to understand the content of Chapters 7, 9 and 14. An Assignment of Copyright Template is included in this Chapter, whereby an individual author, such as an employee or consultant, transfers all rights in the work he or she created to another person.
- **Chapter 4 – Trade-Marks:** This Chapter outlines the Canadian trade-mark legal framework, including rules applicable to trade-mark infringement and remedies in the specific context of online marketing and advertising. Armed with the key concepts of this Chapter, readers will be better equipped to understand the requirements pertaining to online use of trade-marks and digital marketing discussed in Chapters 5 and 10.
- **Chapter 5 – Domain Names:** This Chapter provides a comprehensive guide to the domain name registration system and more generally, to the legal issues that may arise in connection with domain names. Brand protection and product messaging in the context of domain names are also discussed, providing readers with best practice tools. Finally, the chapter provides practical advice about the resolution of domain name disputes.
- **Chapter 6 – Patents:** This Chapter provides an overview of the scope of patent protection and the general requirements for obtaining a patent. It also provides readers with useful insights regarding the filing and prosecution of patent applications, situations where patent infringement may occur, as well as the type of remedies available. Finally, the chapter provides readers with useful insight regarding agreements related to patent rights, such as licensing and assignment agreements.
- **Chapter 7 – Website Development** (includes Website Development Agreement Template): Concepts of website development and key issues to consider when drafting and negotiating a website development agreement are discussed in detail in this Chapter, which also includes a Website Development Agreement Template.

- **Chapter 8 – Website Hosting** (includes Website Hosting Agreement Template): This Chapter provides readers with an overview of the concept of website hosting and the various types and levels of hosting services available. It also discusses the key legal issues to consider and includes a Website Hosting Agreement Template.
- **Chapter 9 – Terms of Use** (includes Website Terms of Use Agreement): The content of a website's terms of use depends on whether such site is transactional or not. This Chapter provides the readers with detailed advice and best practices regarding the various provisions of terms of use agreement and includes a Website Terms of Use Agreement Template.
- **Chapter 10 – Online Advertising, Linking and Framing** (includes Website Linking Agreement and Web Advertising Agreement Templates): Key principles applicable to online advertising of goods and services are described in this Chapter, which also describes the legal challenges - including liability of the various actors involved - pertaining to the linking, framing, indexing or scraping of third party's online content. The Chapter also includes two template agreements, namely a Website Linking Agreement and a Web Advertising Agreement) as well as commentary regarding their key provisions.
- **Chapter 11 – E-mail Marketing** (includes Anti-Spam Commitment Template): This Chapter provides a comprehensive overview of the Canadian anti-spam legislation, which came into force on July 1, 2014. In addition to clarifying the requirements of the "opt-in" model adopted by Canada, this Chapter provides practical tips and guidance as to how to manage the legal risks associated with this new legislation. It also includes an Anti-Spam Commitment Template.
- **Chapter 12 – Behavioural Marketing**: The legal issues triggered by online behavioural advertising are analyzed in this Chapter, which provides guidance and best practices aimed at ensuring that personal information collected and used by online merchants complies with the applicable legal framework and the expectation of online users.
- **Chapter 13 – Social Media** (includes Social Media Policy Template): The typology and use of social media platforms has grown and changed in recent years. This Chapter provides guidance to businesses and employers on the risks associated with social media and best practices regarding fraud protection, defamation occurring on social media and how privacy laws interact with social media issues in the workplace. It also includes useful discussions regarding social media policies adopted by organizations, accompanied by a Social Media Policy Template.
- **Chapter 14 – User Generated Content** (includes User Generated Content Policy Template): This Chapter provides an overview of the

legal issues arising in connection with online services which include user-generated content (for instance, social networks, blogs, rating systems, *etc.*), which may infringe rights of third parties, including the right to privacy and intellectual property rights. It also includes a User Generated Content Policy Template directed at users posting content on a website.

- **Chapter 15 – Promotional Contests** (includes Contest and Promotion Rules Template): The final Chapter offers an overview of the regulatory environment of promotional contests in Canada, including requirements set by the *Competition Act* as well as the specific requirements applicable to contests targeting Quebec residents. It includes a Contest and Promotion Rules Template.

Legislative Amendments

At the time of writing, there were several proposed amendments to the *Trade-marks Act* scheduled to come into force in late 2015, including the changing of the spelling from “trade-marks” to “trademarks”. For ease of reference, this book will use the current spelling.

CD-ROM INFORMATION

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Introduction

The enclosed CD-ROM contains 12 Annexes from *Practical Guide to E-commerce and Internet Law* and is designed to be used in conjunction with that text. The text is in Word 2010 format.

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The files on the enclosed CD-ROM have been designed for use on a personal computer with the following capabilities and configuration:

- IBM or IBM-compatible with a hard drive and CD-ROM drive

- Vista or higher operating system

- Microsoft Word for Windows 2007 or higher software

- At least 4.5 MB of hard disk space

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