



# Limiting Legal Exposure for Online Platforms with a Preliminary Legal Audit

Any online operation should periodically assess its legal exposure to better calibrate its contractual, technological, insurance, compliance and other liability minimizing measures. The following is a multidimensional checklist in plain English designed to help these operations assess their exposure by identifying the major sources of liability.

## Online Platform Legal Audit Checklist

### Content

#### 1) Is there defamatory content on the platform?

A statement is generally defamatory when it is: 1) false, 2) published or made to a third party, and 3) injures the reputation of a third party. Defamation is not always the result of a direct statement and can instead be inferred or insinuated, while a joke or statement of opinion may be the basis for defamation, if it is not clear that the statement was in fact meant to be taken as a joke or opinion. Generally, only statements that are made as facts that are untrue can be defamatory, whereas opinions or the truth generally cannot.

#### 2) Does the platform infringe upon anyone's "Right of Publicity"?

Generally, everyone has the right to control the use of one's name, nickname, voice, picture, likeness, performance style, signature phrase and other identifying characteristics. This is often referred to as the "right of publicity". Many states allow one to generally prevent the unauthorized commercial exploitation of one's identity. Hence, as a general matter, no one's identity should be used for the platform's commercial benefit (*unless that person is being referred to for newsworthy or journalistic purposes*) without that person's written permission.

#### 3) Does the platform invade anyone's privacy?

Online platform operators should avoid disclosing private information about third parties without their consent. Many states allow third parties to sue for claims such as intrusion upon seclusion, public disclosure of private facts, and false light.

#### 4) Do you modify user submitted / generated content?

Section 230 of the Communications Decency Act provides that an online service provider will not be treated as the "publisher" of information submitted by another content provider. This protects providers from claims such as defamation, intentional infliction of emotional distress, and other actions based on objectionable content, but only if the platform owner does not contribute to or could not be considered the creator of the content. While generally user created content may be deleted without incurring liability, more intensive editing may destroy the protections Section 230.

#### 5) Additional Questions:

- a) Does the platform contain obscene materials?
- b) Are disclaimers used when appropriate, especially if there are legal, business, or tax discussions?
- c) Are there policies in place governing user comments, message boards, and other messaging systems?
- d) What are the penalties for users who violate platform policies?
- e) Must users indemnify the platform for any damage or liability arising from the user's conduct?



## Trademark

### 1) Are third party trademarks used in an infringing manner?

A trademark is a word, name, symbol, image, or slogan that identifies and distinguishes a person's goods or services from those of others. Trademark infringement occurs when a third party's use of the mark creates a "likelihood of confusion" or deceives consumers, such as by causing the public to believe that the third party's product is made by or affiliated with the trademark owner. The domain name itself can be considered infringing if the owner has no legitimate interest in the name and it is being used in bad faith (for example, if the owner bought the domain name for the purpose of selling it to the trademark holder). This does not bar a third party from using the trademark in a non-confusing manner, such as by referring to the actual product.

### 2) Are trademarks used in the platform's code?

Trademark infringement doesn't have to happen on the face of the platform – it can also happen below the surface. Platform owners should make sure that they or their developers do not use third party trademarks in the platform's meta-tags or other underlying code, as the courts have found that this use is also infringing.

### 3) Additional Questions:

- a) Is the platform's logo or slogan confusingly similar to a third party's logo or slogan?
- b) Has the platform's logo or slogan been registered as a trademark with the federal government?

## Copyright

### 1) Does the platform infringe on any third party copyrights?

A copyright owner has five exclusive rights: the right to *reproduce* the work, the right to *distribute* the work, the right to *publicly perform* the work, the right to *publicly display* the work, and the right to *create derivative works* (another work that incorporates all or a portion of the original work) from the work. Platform owners must take care to not infringe on third party copyrights by reproducing, distributing, performing, displaying, or creating derivative works from copyrighted materials that they do not own the rights to or have permission to use. This could include using a photograph from another platform, "framing" a third party website within the platform, or using any content submitted by users or independent contractors without permission (see below).

### 2) Who owns the content available on the platform?

Do individual content providers own the materials they post or does it become property of the platform? If content providers are employees of the platform owner, the content they post will be considered a "work for hire" and will automatically become the property of the platform owner. If content providers are users or independent contractors, the copyright will remain with the posters unless there is an agreement stating otherwise. Platform owners should make sure that they have a license to use any content that is not owned by them.

### 3) If the platform contains user generated content, is it following the DMCA safe harbor provisions?

Section 512 of the Digital Millennium Copyright Act creates a safe harbor for platform owners and online service providers so that they will not be held liable for copyright infringement committed by their users. To avail itself of this safe harbor, a platform cannot have actual knowledge of infringement, cannot receive a direct economic benefit when it has the right and ability to control the activity, and must quickly remove or disable access to infringing material once it has actual knowledge or notice of the infringing content. It must also have a system in place to process take down notices as detailed in the statute, and it may not induce its users to commit copyright infringement or hold itself out as a service meant to be used for copyright infringement.



4) Additional Questions:

- a) Does the use of any copyrighted material that is not owned or licensed qualify as a fair use?
- b) Does the platform link to infringing content?
- c) Are proper copyright notices used?
- d) May users copy or post platform content elsewhere?
- e) Are there policies for the uploading of media or software to the platform?
- f) Can the platform exploit user submitted content and how?

## Privacy

1) What information are you collecting from your users and what are you doing with it?

Users should be made aware of what information is being collected about them, how it is used, and to whom it is disclosed. Although there is currently no federal law governing online privacy in general, platform owners should make sure that they are complying with any applicable state or foreign online privacy acts.

2) Is the platform directed at and collecting information from children under thirteen?

The Children's Online Privacy Protection Act bars platforms from collecting personal information from someone under thirteen years old without verified parental consent if the platform is directed at children under thirteen or if it has actual knowledge that children under thirteen are providing it with personal information. Personal information can include names, phone numbers, email addresses, and any other information from which the child's identity can be determined. Verified parental consent must be obtained through certain accepted processes and is revocable (in which case all gathered information, including information shared with third parties, must be deleted). For platforms willing to obtain parental consent, a privacy notice must be clearly posted.

3) Additional Questions:

- a) Does the platform or advertisers use cookies or behavioral data?
- b) Does the platform monitor and collect web traffic data?
- c) Who has access to cookie and/or web traffic data?
- d) If the platform collects sensitive information such as medical or financial information, social security numbers, or criminal histories, are any applicable state/federal laws or regulations being followed for the collection and storage of this information?
- e) Is there a way for users to opt out of having their information being collected and/or shared?

## Revenue

1) What is the platform's advertising policy?

Platform owners need to make sure that any advertising is not false or misleading. Agreements with all advertisers or advertising companies should require the advertiser to comply with all state and federal advertising laws and indemnify the platform owner from any claims relating to false or misleading advertising.

2) Additional Questions:

- a) If a third party has sponsored a post to promote its product, is that fact disclosed?
- b) Is it easy for readers to tell editorial from advertising content?
- c) Do any sweepstakes, contests, or promotions comply with state and federal laws?
- d) If the platform is selling goods or services, is credit card and other information kept secure?
- e) Are any applicable sales taxes being collected?
- f) Are any laws regulating the sale of products available for purchase on the platform being followed?



## Technical Matters

1) What is in the platform's service provider agreement(s)?

A service provider agreement should include:

- a) A full description of the services
- b) Any technical requirements
- c) Rates and how they will be calculated
- d) The term and when it may be terminated
- e) Any security measures the provider will have in place
- f) How confidential matters and proprietary materials will be protected
- g) Indemnification from the service provider's conduct

2) What is in the platform's developer agreement?

A developer agreement should include:

- a) A full description of the services
- b) Rates and how they will be calculated
- c) Who will own the materials developed and the final product
- d) How the developer's performance will be monitored
- e) The term and when it may be terminated
- f) Whether the developer will be responsible for regular updates or ongoing maintenance
- g) Indemnification from the developer's conduct

3) Additional Questions:

- a) Who owns the domain name?
- b) Who is the domain name's registrar?
- c) Is the platform able to be accessed internationally?
- d) Is there a companion mobile application?
  - i) Are there user agreements in place for such mobile apps?
  - ii) Have many of the above items in this checklist been addressed in connection with that mobile app?

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