

## A Guide of Legal Considerations for eCommerce Companies – Part I

### Starting your eCommerce Business: Company Structure, Entity Choice, and Intellectual Property Protection

Starting and growing an eCommerce business can make for hectic times, and it can be easy to put off eCommerce legal matters to deal with other issues. Domain names. Server space. Content management. Inventory. Shipping. Marketing. Product testing. Quickly enough, talking to a good Columbus, Ohio eCommerce attorney can fall somewhere on your priority list between reviewing that new memo on TPS reports and cover sheets and Shop-Vac-ing your car out.

For those of you too busy to consult a Columbus eCommerce lawyer, we present our semi-exhaustive guide to some of the standard eCommerce legal issues you'll come across. In this Part I, we'll cover structuring considerations, which entity type might be best, trademarks, and trade secrets.

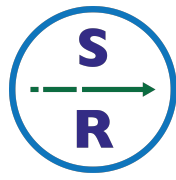
#### Starting an eCommerce Company

There is no one-size-fits-all approach to forming and structuring your eCommerce

company. While certain states or countries of domicile and certain legal entities do offer particular advantages, be sure that your company can actually make use of such advantages. Prior to representation, we have had clients form particular entities in specific states only to discover that the cost and logistics of maintaining a specific entity type were more than anticipated in the long run.

Practically speaking, your choice of entity will depend on a number of factors specific to you, your co-founders, and your goals for your business. Will you and your co-founders be funding your business? Do you see your business bringing on outside investment, either initially or in the future? How will the tax treatment of your chosen entity impact your business taxes and your personal taxes?

How you want your company to be ran will also impact your choice and structure of your entity. How do you see the business being ran? Will all co-founders have authority to approve



day-to-day decisions? What about major company decisions—will those require the approval of shareholders or a board of directors?

Other considerations include hiring. Will you hire employees or independent contractors? If you plan to issue equity in the form of stock or units to your employees or others, how will you structure such equity? Will you have vesting requirements?



### **Best Business Entity for Online Business**

Generally, your two main choices for starting an eCommerce business are going to come down to forming an LLC or forming a corporation. Both legal entities offer particular advantages and disadvantages.

At a high level, corporations can offer more structure, may offer favorable tax treatment on certain benefits, and may be more attractive legal entities for outside investors. However, compared to an LLC, corporations can involve more legal requirements and can cost more to operate and maintain.

LLCs are not without their pros and cons for eCommerce. If you're the sole owner of your

eCommerce company, with very limited exceptions, you'll generally want to form as a single member limited liability company. A single member limited liability company can be one of the easiest legal entities to form and maintain.

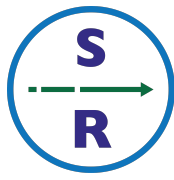
Even if you have co-founders, an LLC can still be a great choice. Multi member LLCs can be very flexible, but can also be structured similar to a corporation, in terms of operations and distributions of powers. However, the tax treatment of a standard multi member LLC can be an issue for co-founders who don't want to pay self-employment taxes.

### **eCommerce Intellectual Property and Trademarks**

Of the four key areas of intellectual property – patents, copyrights, trademarks, and trade secrets, the latter two may be the most important for eCommerce companies. A trademark is a word, phrase of words, design, or symbol that identifies your company's goods or services. A trade secret, generally, means information that derives value from being confidential and not generally known and is information that you take steps to protect. Examples of trade secrets include procedures, formulas, programs, methods, business information, and financial information.

### **Why Register a Trademark**

If you are building your eCommerce company around a brand or set of brands, you need to file trademarks. Imagine pouring thousands of dollars into building your company and your brand names. However, one day, you receive a cease and desist letter from another



company who began using your brand name and registered the trademark for the brand before you. Your investment in your branding is most likely now worthless.

There are a number of benefits to registering trademarks with the U.S. Patent and Trademark Office. One of the biggest advantages is determent. Having a trademark registered with the USPTO deters the vast majority of people from filing for a mark confusingly similar to your own.

Further, enforcement of your intellectual property rights can be much easier with a registered trademark. If you're having an infringement issue on a major internet, tech, or social media platform, having a registered trademark can greatly aid the platform in putting a stop to the infringement. For example, at the time of publication, Shopify, Facebook, and Instagram had forms for reporting potential infringement of your trademark.

### **Why Your eCommerce Company Needs Trademarks**

If you've looked at the Amazon Brand Registry requirements and are considering enrolling in Brand Registry, you'll see that you need to have a validly registered trademark. However, not all trademarks are the same for Amazon's purposes. To register, you must have one of the following trademarks:

- 1 - Typeset Word(s)/ Letter(s)/ Number(s)
- 4 - Standard Character Mark

- 3 - An Illustration Drawing which includes Word(s)/Letter(s)/ Number(s)

- 5 - Words, Letters, or Numbers in a Stylized Form



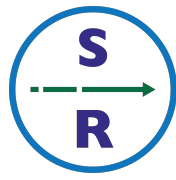
### **Protecting eCommerce Trade Secrets**

When trade secrets come to mind, you may be quick to think of KFC's recipe or the formula for Coca-Cola. If you own an eCommerce company, you may think that you don't have any trade secrets as nothing you own is as valuable as the above popular examples. You would be wrong.

For an eCommerce company, typical trade secrets can include a list of your customers, sales records and financials forecasts, product designs, and pricing information. These are things that you can protect if a co-founder departs or a key employee leaves, and they attempt to use your trade secrets.

The key for something to be a trade secret, though, is that you have to take active steps to protect your trade secrets. If you don't actually take steps to protect your trade secrets, you run the very real risk of a court finding that you don't actually have trade





secrets. Well, what does protecting trade secrets actually look like?

For one, you need to show that you've taken action to keep your trade secrets confidential. Anyone at your company who has access to trade secrets, be it co-founders, employees, or contractors, should have signed a contract at some point that includes information regarding the company's rights concerning confidential information. If you don't actually have employment agreements or even independent contractor agreements for your contractors (you should), the bare minimum is to have everyone sign non-disclosure agreements that define what constitutes confidential information at your company.

Further, you should take actual physical and electronic steps. For trade secrets stored in the cloud or on physical hard drives, you should be using logins and passwords, and restricting access to only need-to-know individuals. For hard copies, you should be marking documents as "confidential", and as rudimentary as it sounds, securing such files in storage with locks and keys.

### **Coming Up**

In Part II of our eCommerce Guide, Protecting your eCommerce Business, we'll cover privacy policies, terms of use, eCommerce marketing, COPPA, and shipping and return policies.

### **About the Author**



Based in Columbus, Drew Stevens is a technology and corporate attorney licensed in Ohio and Washington. Drew works with a number of software and technology companies, including eCommerce, SaaS, InfoSec, IoT, telecom, manufacturing, and software development businesses.

Drew focuses his practice on technology transactions, mergers and acquisitions, intellectual property, and business law. Drew works closely with growing companies, to help protect intellectual property assets, structure business and M&A ventures, assist with transactional and business needs, and advise on data security regulations and breaches.

Drew can be reached at:

[dstevens@stevensrandol.com](mailto:dstevens@stevensrandol.com)

Phone: 614-826-3100