



Practical Legal Tips that Every E- Commerce Should Consider



Agenda

Intellectual Property

Issues and Best Practices



Privacy and Security

Concerns and Best Practices



Contracts

Online Contract and Contract Formation



Terms & Conditions

Necessary Clauses



Sales Tax

How it Works with Ecommerce



INTELLECTUAL PROPERTY: OVERVIEW

- Definition: Creations of the mind, such as literary and artistic works, designs, and names, slogans, and logos used to identify a business
- Highlights:
 - ❑ Trademarks
 - ❑ Copyrights
 - ❑ Domain Names as IP
 - ❑ Meta Tags
 - ❑ Online Advertisements



TRADEMARKS

- Definition: a word, phrase, symbol, or design that identifies and distinguishes the source of goods or services of one party from others
 - ❑ Basically: a source identifier
- Examples:
 - ❑ Brand names
 - ❑ Slogans
 - ❑ Logos



COPYRIGHTS

- Protects original works that are fixed in a tangible medium
- Examples:
 - ❑ Novels, poems, plays, original instruction manuals or employee handbooks
 - ❑ Computer programs and software
 - ❑ Paintings, drawings, works of art, or graphic design displayed on your premises or website
 - ❑ Films, videos, music and sound recordings
 - ❑ A “character” (e.g., “Flo” from Progressive Insurance)



DOMAIN NAMES AS IP

- Definition: Domain names are used to identify your business and your products and/or services

- Key Points:

- ☐ An Arbitration Proceeding may be filed against an improper or erroneous registration under the Uniform Domain Name Dispute Resolution Policy (UDRP) to cancel a domain name
- ☐ Eliminate others from making derogatory references to your website by seeking to protect [yourname]stinks.com



META-TAGS

- Definition: Meta-tags are keywords that are relied upon by search engines to retrieve websites. Meta-tags can be embedded into the source code of your website.
- Choosing your Meta-tag:
 - ❑ Choose strategic keywords so your site or app will be at the top of relevant searches
 - ❑ Avoid including a third party's trademark as a meta-tag
 - ❑ Risk of trademark infringement, unfair competition, and interference with business relationships



ONLINE ADVERTISEMENTS

- An online advertisement should be legal, honest, and not misleading
- Respect the principles of fair competition generally accepted by business
- Do not use another company's intellectual property



PRIVACY AND SECURITY CONCERNS: OVERVIEW

- What are you required to protect?
- How to go about protecting it?



PRIVACY CONCERNS

- Currently, no single law protects Personally Identifiable Information (“PII”)
 - ❑ PII = information about a person that includes a unique identifier such that the identity of person can be determined
- Businesses are obligated to provide adequate notice to customers if client data is breached



PROTECTING CLIENT DATA



- Surprisingly, there is no requirement that websites refrain from selling PII, but this must be disclosed in the Privacy Policy
- Best Practices:
 - ❑ Set up a Privacy Policy
 - ❑ Link to it in your Terms & Conditions
 - ❑ Notify users of any subsequent changes to the Policy
 - ❑ Have users agree/acknowledge the changes upon sign-in
 - ❑ Ensure you have adequate cybersecurity insurance

PRIVACY POLICY MUST HAVES



Mandatory (CANES)

- **Choice**- Customers choose how data is used (i.e. ability to opt-in or out)
- **Access**-Must allow users to review their own data
- **Notice**-Inform users of the who/what/when/why/for whom data is being collected
- **Enforcement**-Businesses must seal programs
- **Security**- The policy requires providers to take reasonable steps to ensure data is protected

ONLINE CONTRACTS: OVERVIEW

- How online contracts are formed
- Types of online contracts
- Best practices



FORMATION OF ONLINE CONTRACTS

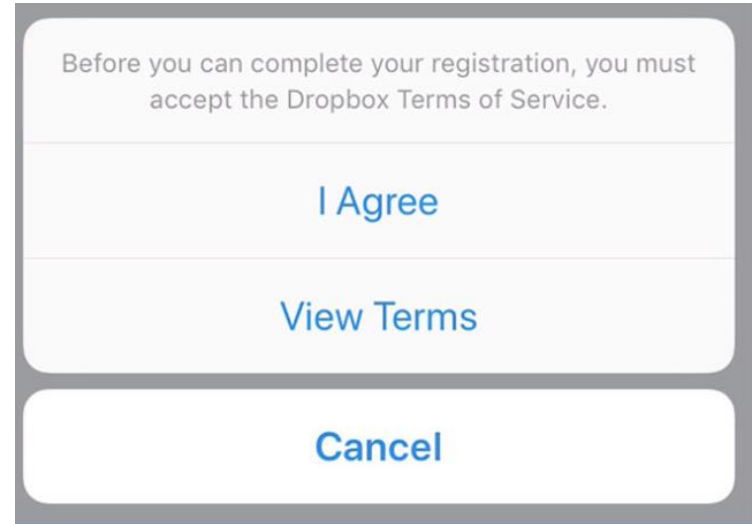
- Issue: How do we know that an online consumer agrees to the terms of the contract?
- Express vs. Implied consent
 - ❑ Express – The terms the parties agreed to are declared orally or in writing
 - ❑ Implied – The terms are inferred through the actions of the parties involved, but never spoken or written



TYPES OF ONLINE CONTRACTS

Click-Wrap Contracts

- An Express contract
- Requires clicking “I agree” to continue
- Pop up in front of user and require explicit agreement in order to receive product or service



Before you can complete your registration, you must accept the Dropbox Terms of Service.

I Agree

View Terms

Cancel

This image shows a typical Click-Wrap Contract interface. It is a modal dialog box with a light gray background and rounded corners. At the top, a message states: "Before you can complete your registration, you must accept the Dropbox Terms of Service." Below this message are three buttons: "I Agree", "View Terms", and "Cancel". The "I Agree" button is the primary action, while "View Terms" and "Cancel" provide secondary options for the user.

TYPES OF ONLINE CONTRACTS

Browse-Wrap Contracts

- An Implied Contract
- Terms and Conditions pages that govern use of a website without making consumers explicitly agree to them
- Often at the bottom of page or a separate page via hyperlink

*See offer details. Restrictions apply. Pricing, promotions and availability may vary by location and at Target.com.

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Expect More. Pay Less.

ENFORCEMENT OF ONLINE CONTRACTS

- Click-wrap: Enforceable as long as consumer had the opportunity to review the terms and click that they consent
- Browse-wrap: Enforceable as long as notice of terms is direct and unambiguous
 - ❑ Example: large font, brightly colored hyperlink displayed on every page of website

Virtually None of Your Consumers Will Read These Contracts

Terms and Conditions

- ☐ I agree
- ☒ I didn't read it
- ☐ I don't understand it



WHAT DOES THIS MEAN FOR YOU?



Best Practices

- Require users to review and accept Terms and Conditions to use your website or purchase your products
- Ensure that clicking “I accept” requires users to scroll and check a box
- If using Browse-wrap, make links to Terms and Conditions conspicuous, and condition all use of your website and sale of your products on acceptance of those terms

TERMS & CONDITIONS: OVERVIEW

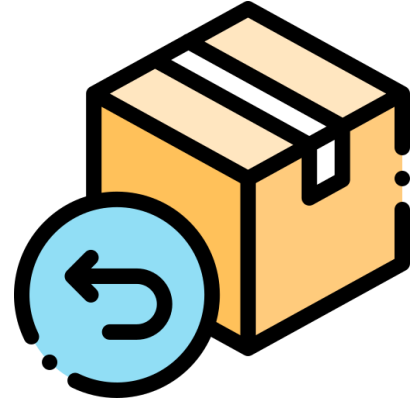
- Consumer Policies
- Liability Disclaimers
- Venue, Choice of Law, and Arbitration
- Attorneys' Fees and Costs



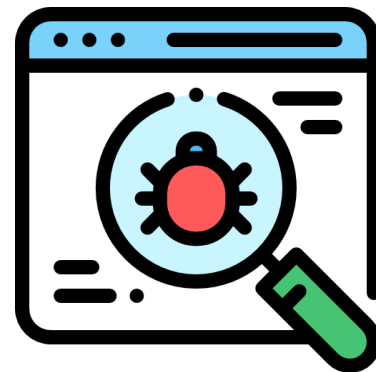
TERMS & CONDITIONS MUST HAVES

Consumer Policies

- MUST list consumer policies:
 - ❑ Shipping and Delivery policy
 - ❑ Return/Exchange Policy
 - ❑ Privacy Policy
- For maximum enforceability, these policies should be prominently displayed at the time of any purchase.



TERMS & CONDITIONS MUST HAVES



Disclaimers of Liability

- Security:

- ☐ The website owner (you) cannot guarantee any data or program available on your website or that any linked website is free from viruses or spyware. The website user assumes the risk of any damage from using the website.

- Third Party Content:

- ☐ You are not responsible for and do not endorse the content from any third party that has a link

TERMS & CONDITIONS MUST HAVES



Venue, Choice of Law, and Arbitration

- Venue and Choice of Law:
 - ❑ This gives you the ability to select where a lawsuit and what state's law will govern any disputes arising out of website activity
 - ❑ This avoids the risk of litigating in an unfamiliar and inconvenient location (such as where your customer lives)
- Arbitration:
 - ❑ This gives you the option to make arbitration mandatory, which would keep any disputes out of the (public) court system and avoid costly litigation. However, due to the expedited nature of arbitration proceedings, arbitrators decisions can seem random.

TERMS & CONDITIONS MUST HAVES



Attorneys Fees and Costs

- Prevailing Parties:
 - The prevailing party in any legal action brought by one party against the other that arises out of these Terms and Conditions shall be entitled to reimbursement for its expenses, including court costs and reasonable attorney's fees

TERMS & CONDITIONS MUST HAVES

Remember to include a provision that allows you to change terms at any time.

SITE POLICIES, MODIFICATION, AND SEVERABILITY

Please review our other policies, such as our [pricing policy](#), posted on this site. These policies also govern your use of Amazon Services. We reserve the right to make changes to our site, policies, Service Terms, and these Conditions of Use at any time. If any of these conditions shall be deemed invalid, void, or for any reason unenforceable, that condition shall be deemed severable and shall not affect the validity and enforceability of any remaining condition.

1. GENERAL RULES AND DEFINITIONS

1.1 If you choose to use NYTimes.com (the "Site"), NYT's mobile sites and applications, any of the features of this site, including but not limited to RSS, API, software and other downloads (collectively, the "Services"), you will be agreeing to abide by all of the terms and conditions of these Terms of Service between you and The New York Times Company ("NYT", "us" or "we").

1.2 We may change, add or remove portions of these Terms of Service at any time, which shall become effective immediately upon posting. It is your responsibility to review these Terms of Service prior to each use of the Site and by continuing to use this Site, you agree to any changes.

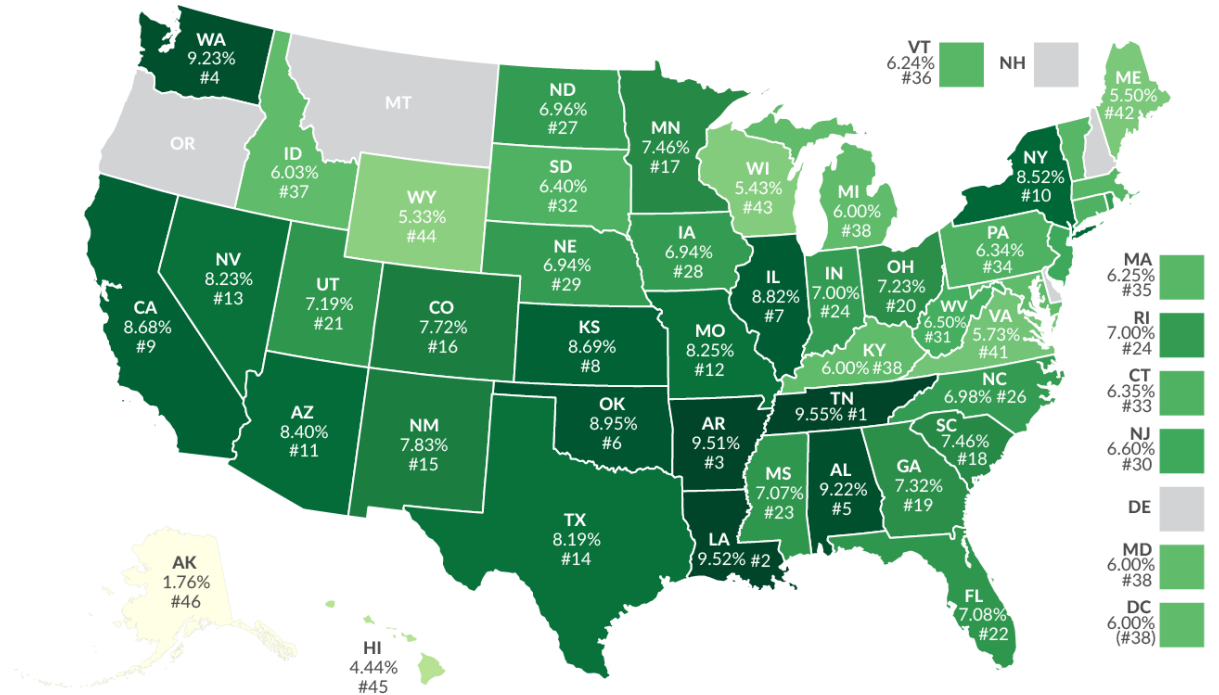
How High are Sales Taxes in Your State?

Combined State & Average Local Sales Tax Rates, January 2021

SALES TAX IN E-COMMERCE: OVERVIEW

How does it apply?

How to determine
tax rates?



City, county and municipal rates vary. These rates are weighted by population to compute an average local tax rate. The sales taxes in Hawaii, New Mexico, and South Dakota have broad bases that include many business-to-business services. D.C.'s rank does not affect states' ranks, but the figure in parentheses indicates where it would rank if included.

Sources: Sales Tax Clearinghouse; Tax Foundation calculations; State Revenue Department websites

Combined State & Average Local Sales Tax Rates



HOW IS SALES TAX APPLIED TO ECOMMERCE SELLERS

- Online sellers must collect sales tax in states and/or localities where they have a “Sales Tax Nexus”
- **Sales Tax Nexus** = “presence” in the state significant enough that the business has to comply with state tax law
 - ❑ If you have a Nexus in a state – you must collect sales tax from all buyers in that state, regardless of where product ships from
 - ❑ If you don’t have a Nexus in that state – you are not required to collect sales tax when you sell online to buyers in that state



SO YOU HAVE A SALES TAX NEXUS, NOW WHAT?

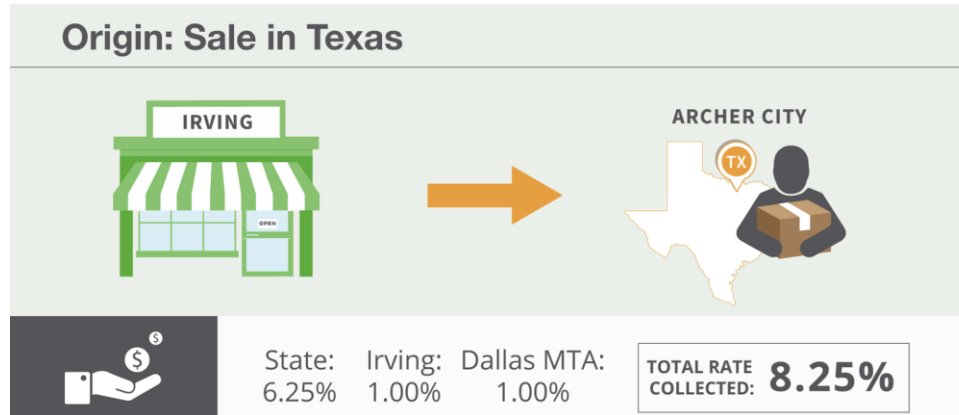
You must do three things:

1. Obtain a sales tax permit/license for those states (at Dept. of Rev.)
2. Begin collecting sales tax in that state
3. Pay what has been collected at the frequency specified on your permit (i.e., quarterly, monthly)

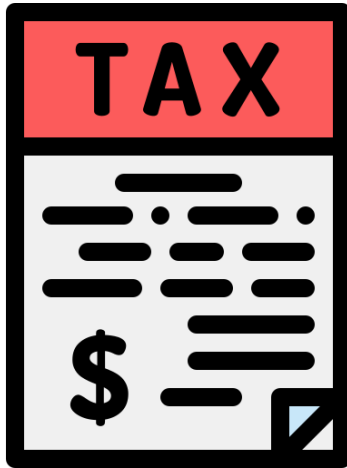


DETERMINING THE RATE OF SALES TAX

- States set their own tax rate, and different localities may add their own rates on top of those rates
 - ❑ Always check and double check the sales tax rates you are charging
- States differ on whether they require you to collect tax at the point of “origin” or the “destination”



SALES TAX RECAP



1. Determine in which states you have a Sales Tax Nexus
2. Register for a Sales Tax Permit in each Nexus state
3. Collect the correct amount from buyers, considering whether each state is an origin or destination state
4. File your Sales Tax Returns and remit payment to state and local taxing authorities at the times specified on each permit

QUESTIONS?

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