



## MIKE SEGAL

BROAD AND CASSEL ATTORNEYS AT LAW

*Mike Segal is the Managing Partner in the Miami office of Broad and Cassel, and serves on the Executive Committee of the Firm. He is a member of the Firm's Health Law Practice Group and is also an experienced tax, estate planning, and transactional attorney. He can be reached at 305-373-9430 or by email at [msegal@broadandcassel.com](mailto:msegal@broadandcassel.com).*

# BASIC CORPORATE, E-COMMERCE, AND INTELLECTUAL PROPERTY CONSIDERATIONS FOR "START-UP" BUSINESSES

BY MIKE SEGAL, ESQ., AND TAMARA CARMICHAEL, ESQ.

*The following article outlines general issues one should consider when launching a new business venture. Use these questions and comments as a starting point, but be sure to consult legal counsel for advice specific to your individual situation.*

## PART I – GENERAL CONSIDERATIONS

### *Step One – Select a Business*

When selecting a business to launch, answer the questions about your competition:

- Who is my competition and where are they located?
- How does my product or service measure in comparison to competition?
- What sets us apart from our competition?

Also, answer these general market research questions:

- Is there a need for this product/service?
- Is the product/service needed in your area?
- Describe your target market. Include age, income, geographic area, sex, and occupation.

### *Step Two: Draft a Business Plan*

1. Form an entity, whether a Corporation (S or C), Limited Liability company, a partnership (general or limited), or another type of entity depending on your business.
2. Consider offshore possibilities.
3. Define your market and your customer – who will your clients

- be and where will they come from?
4. Define your product or service.
5. Select your initial office and market.
6. Develop a growth plan.
7. Research and project operating costs for your initial years.
8. Develop marketing strategy and ideas.
9. Develop a pricing plan.
10. Research, shop, and evaluate the competition.
11. Financial analysis.

### *Step Three: Explore the numerous Business and Financing Considerations of a Start-up Business*

1. Retain legal counsel and accountant(s).
  - Set up an accounting system.
  - Plan tax returns/tax issues.
  - Review legal and regulatory issues.
  - Review of business plan prior to submitting to investors.
2. Research and pursue financing alternatives.
  - How much money do you need? Think big and be thorough - most new businesses fail during their first year due to lack of initial working capital or poor planning.
  - Have a plan to present to financing sources – know how much money you need, how you will spend it, and how you will pay it back.
  - List sources of funds – personal savings, loans from family members, equity investments by family members, etc.
3. Look into the various types of financing, including:

PHONE: (305) 373-9430 FAX: (305) 995-6405

EMAIL: [MSEGAL@BROADANDCASSEL.COM](mailto:msegal@broadandcassel.com) WEB SITE: [HTTP://WWW.BROADANDCASSEL.COM](http://www.broadandcassel.com)

BOCA RATON • FORT LAUDERDALE • MIAMI • ORLANDO • TALLAHASSEE • TAMPA • WEST PALM BEACH

- Bank loans and Small Business Association Loans
- Savings – Borrow against life insurance, take out an equity-line on your home, sell investments
- Personal loans – Although banks do not usually lend to start-up businesses, they will lend to you based upon your personal assets and good credit. Consider a signature loan, or loan on an investment or other personal asset. If your credit is not that strong, consider asking a relative to personally guarantee a loan for you.
- Equity or debt investments by friends and others
- "Angels" (affluent individuals who provide entrepreneurs and their companies with much needed start-up funds), Private Placement, Venture Capitalists, Public Offering

4. Document all investments.

5. Make sure all investors can afford the loss of their entire investment – do not take retirement funds.

- If you accept money from private investors, make sure that an attorney reviews the transaction or you could end up having to return all the money (as if it was a loan).
- Investigate background of and conduct due diligence with regard to all private investors to verify their claimed resources. Call references and other persons with whom they invested.
- Private Placements – if you have a track record in your field and/or strong investor contacts.

6. Venture Capitalists ("VCs") and "Incubators"

- VCs are persons and companies who want to be part owners of companies as well as to provide them with financing. Historically, VCs do not usually invest in start-up companies but trend has clearly changed. VCs generally prefer businesses that will grow quickly. Usually their goal is to take the company public and use this as a partial exit strategy. VCs take bigger risks than banks, but demand a large percentage of the company in exchange for the use of their money. They usually get involved when businesses need \$1 million and more. It is rare to see them get involved in a business that requires less than \$250,000. Incubators entities (often VCs, sometimes educational or institutional) that grow start-up companies under consolidated, shared management.
- Private venture capitalists in your new industry. These are people or businesses who will be your future suppliers or customers. They are generally more "hands on" than traditional venture capitalists.
- Address confidentiality concerns.

7. Evaluate computer hardware and software needs and obtain sufficient licenses.

8. Identify insurance needs – director and officer; fidelity, property, general liability, advertising injury, life, disability, and health.

*Step Four: Identifying and Branding your Company – Intellectual Property.*

In order to protect the names and ideas of your company, investigate the following:

1. Trademark/Service mark versus Corporate name versus Domain Names.
2. Copyright.
3. Patents/Business Method Patents.
4. Trade dress for products/packaging.
5. Domain names – ICANN (Internet Corporation for Assigned Names and Members)/Network Solutions.
6. Search/clearance for mark.
7. Application for registration.
8. Licensing.

*Step Five: "E-Commerce"*

1. To determine the role e-commerce may have in your business, ask yourself:

- Will we advertise or conduct sales using the internet?
- Will we establish a company profile online?
- What does our competition have on-line, and how much do we want them to know about us?

2. When developing your website, consider the following:

- Ownership rights for your web site – are they yours or the web developers?
- How often will it be updated and who controls the content of the website?
- Are there any liability issues related to the content of your web site?
- Do you want links on your site to other companies, and is permission needed (including permission to use icons and logos)?

3. Clarify any confidentiality agreements and licensing considerations.

4. Determine alliances.

5. Distribution/Marketing/Advertising – sponsorships, promotions, referrals, fees.

6. Establish retail partners – sales over third-party's Website.
7. Explore co-branding Service Partner Agreements and opportunities – for an e-commerce vendor to provide web-based or web related services or software.
8. For information on Privacy Policy and Privacy Considerations, check out [www.truste.com](http://www.truste.com).
9. Consulting Agreements.
10. If your product is software, look into Clickwrap/Shrinkwrap agreements – unsigned licensed agreements included in packaging which state that the user who purchases the software accepts terms of license once the package is open.
11. Read about UETA – the Uniform Electronic Transactions Act, a newly enacted federal statute "Electronic Signatures in Global and National Commerce Act." In Florida, public law section 282.73 recognizes electronic signatures.
12. Enforce your rights.
  - Lanham Act/Unfair Competition.
  - Copyright Act – no statutory damages without registration.
  - Anti-Cybersquatting Consumer Protection Act.
  - ICANN – Dispute Resolution Process (requires bad faith use).
  - Demand letters/letters to cyber-squatters.
  - Jurisdictional issues in cyberspace.

## **Part II: Intellectual Property Facts and Resources**

### **Patents**

Patents are defined as "an exclusive property right to an invention. . . and gives the inventor the right to exclude others from making, using, or selling an invention in the United States, its territories, and possessions." A utility patent lasts 17 years; a design patent 14 years.

To apply for a patent, written documentation and drawings are needed. These will be examined for technical and legal merit. Filing fees for a utility application are \$690; for a design application, \$310.

Filing fees for small business owners are half the cost – \$345 for a utility application, \$155 for a design application.

*For general information concerning patents:*

- [www.uspto.gov](http://www.uspto.gov) – All information, including forms.
- U.S. Patent Office Publication discussing general patent issues.
- Cost per booklet - \$2.25 payable to Commissioner of Patents and Trademarks.
- To order by phone, call (202) 521-1888.

Call the U.S. Patent and Trademark Office for general information at (703) 557-4636, or write to the Commissioner of Patents and

Trademarks Patent and Trademark Office, Washington, DC 20231.

Trademarks/Service marks

Trademarks or Service marks are defined as "a word, name, symbol or device, or any combination of these, adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."

Federal trademark offers protection if used in interstate commerce or a bona fide intention to use in interstate commerce. State trademarks may be obtained in Florida.

If your business intends to continue use of the trade or service mark, you must file an affidavit of continued use of mark between the fifth and sixth years of registration. The fee is \$100 per class.

*To apply, go to [www.uspto.gov](http://www.uspto.gov).*

Clarify your business' intent to use versus actual use:

- Must use word, symbol, design before registration will be granted.
- If already in "present use," include three examples of actual use in connection with good or service within your application.
- Written document and drawing of mark must be submitted.
- The Filing Fee is \$325 per class.

*You can file online, or contact Patent and Trademark offices at:*

Patent and Trademark Offices via phone or by mail:

1. Federal trade or servicemarks – (703) 557-4636  
Commissioner of Patents and Trademarks, Patent and Trademark Office, Washington, DC 20231.
2. State trade or servicemarks: (904) 487-6051.  
Florida Department of State, Division of Corporations, Trademark Section, P.O. Box 6327, Tallahassee, Florida 32314.

### **Copyright**

A copyright is "A form of protection given by the law of the United States to the authors of literary, dramatic, musical, artistic, and other intellectual works. The owner is granted by law certain exclusive rights for his work such as the right to print, reprint, copy, sell, and distribute copies of the work."

Duration of a copyright varies depending on the year registered. Generally, if registered pre-1978, term was life plus 50 years. Post-1978, generally is 28 years, and can be re-registered in the 28th year for an additional 28.

To apply for a copyright, to go <http://lcweb.loc.gov/copyright/> or file a written form with the U.S. Copyright Office, Library of Congress, 101 Independence Avenue, S.E., Washington, D.C.

20559-6000. For general information, call 202-707-3000, or for forms, call 202-707-9100. The filing fees are \$30 per certificate of registration.

Network Solutions ("NSI")

Who is NSI? NSI defines itself as "The world's leading Register of Web addresses, helps businesses and individuals establish an identity, communicate with their customers, and conduct commerce all online. Through its Registry business, NSI plays a critical role in the infrastructure of the Internet acting as a wholesaler to all the Registrars of domain names ending in .com, .net, and .org. Network Solutions also provides Internet Technology Services that assist large commercial organizations in the evolution and management of their Internet technologies."

Products NSI helps companies and individuals establish their unique Internet identities to communicate and conduct business online with services such as:

- dot com mail, a personal portable e-mail service
- idNames, a country-specific Web address (domain names ending in .jp, .fr, .de, etc.)
- Image Café, Web design service which offers [professionally designed Website templates for budget conscious small businesses
- dot com biz card, a customized page on the Internet for businesses
- dot com directory, one of the largest "find engines" on the Net for businesses.

Contact them at [www.networksolutions.com](http://www.networksolutions.com) , call (703) 742-0400, or by mail at Network Solutions, Inc., 505 Huntmar Park Drive, Herndon, Va. 20170.

The Cost to register a domain name (web address) is approximately \$35 per year (no cost to search for a domain name). There are also inclusive packages available to register name, build Website, and secure a listing in the Dot Com Directory from \$9.95 per month.

NSI is located in Charlotte, Atlanta, New York, London, and Hong Kong. • BC