

Module 2: The "Starting a Business" Decision (Part II)

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Module 2 Summary

This is the second of two modules for starting a business (note that all 7 modules are relevant to starting a business -- but Modules 1 & 2 cover the most common initial legal issues.

This module picks up where the last one left off. This time, Templeton decides to rebrand his business under the name 99 Designs. He later finds out that his new business name is already trademarked by another company. That company sues Templeton for trademark infringement, but (again) Templeton doesn't receive the court documents -- only this time, it's because his unreliable friend Floyd failed to pass them along.

When Templeton gets a second chance, his solution is to do a proactive trademark search, pick an available business name, and update his registered agent's address.

Legal Topics Covered

- Trademarks generally
- Trademark searches and infringement
- Protecting against "piercing the corporate veil"
- Fictitious name registration (someone known as "d/b/a")
- Registered agents

1. One Approach to Teaching Curriculum

The curriculum can be used in several different ways and depends on many factors like online, in-class, etc. But here's one possibility:

Step 1: Class gets module prompt overview (5 mins)

Step 2: Class watches Video 1 - Business Decision Video (5 mins)

Step 3: Class discusses (10-20 mins)

Step 4: Class watches Video 2 - Legal Consequences Video (5 mins)

Step 5: Class discusses (10-20 mins)

Step 6: Class given Quiz Assignment

Step 7: Once quiz is submitted by the students, class watches Video 3 - legal solution video and discusses the next time they meet.

2. Module 2 Teaching Prompt

The goal today is to get everyone thinking about the legal implications of starting a business. We'll start by watching a video about an entrepreneur named Templeton. The video ends with Templeton needing to make a decision.

At the end of the video, we'll have a discussion about the business and legal decisions Templeton will be about to make. And we'll determine whether Templeton made the right choices. We'll also consider the potential implications of each decision, right or wrong? And we'll try to predict what happens to Templeton after he makes his decisions.

Then we'll watch a second video in which Templeton makes his decision and see what consequences occur, if any.

We'll end the class by discussing the decisions Templeton made, the problems that occurred, and what Templeton could have done to avoid those problems.

3. Video Links & Summaries

[Ep. 3: I got 99 Packages and a Design is One \(Module 2's Legal Decision Video\) \(links to share videos with students\)](#)

Templeton decides to rebrand his business. He files a “d/b/a” or “doing business as” form in his home state of Florida so that Florida would recognize that he was doing business under the business name. Templeton starts to achieve more success and decides to move out of his parents' house.

[Ep. 4: Floyd!](#)

Templeton finds out his bank account assets are frozen (again). This time, he was sued for infringing on the 99 Designs trademark. However, he wasn't aware he'd been sued because his court papers were served to an unreliable friend who was temporarily living in his parents' home.

[Module 2 Solution Video](#)

Templeton's solution is to do a trademark search. He learns that 99 Designs is trademarked, so he chooses a different business name that's available. He files a d/b/a and decides that his company will “do business as” Lumogram. He also addresses his bank account and corporate formality problems.

4. Discussion Questions

After Video 1:

- If Templeton files that document, what business or legal decisions is he making (or, as a result, not making)?
- If Templeton decides to [list the decision], is that the right decision? Why? Why not? Is there a different decision he could make that could save him money? Or cost him more money? Is there anything he should do differently? Anything he's missing?
- Who wants to guess what happens next?
- Has anyone ever experienced a similar scenario? Or known someone who has?

After Video 2:

- What decisions should Templeton have done differently?
- What do you think Templeton should have done differently? Why?

5. Quiz Questions & Answers

- a. Which of these people would make the best choice for a registered agent for 99 Designs?
 - a. Templeton's cousin Poppleton, an attorney living in Alabama.
 - b. Templeton's ten-year old cousin, Eleanor, who lives next door to Templeton's parents.
 - c. Templeton's mom, who is retired and spends a lot of time traveling.
 - d. Templeton, as long as he updates his address with the Secretary of State.**
2. Assume that 99 Designs now operates in Alabama, Florida, and Mississippi. Which of the following makes the most sense for Templeton's company in terms of selecting registered agents?
 - a. List Templeton as the registered agent, reserve a post office box in each state, and check the boxes once a week in order to reduce costs (he wouldn't have to hire a third-party company).
 - b. No registered agent is needed in Alabama and Mississippi because the company was not formed in those states.
 - c. Hire a third-party company to act as registered agent in all three states.**
 - d. Buy property in each state and list the addresses as the registered agents.
3. Which of these statements about trademarks is not true?
 - a. They generally refer to words, phrases, symbols, or designs.
 - b. They include brand names, slogans, patents, and copyrights.**
 - c. They can be registered on the USPTO database.
 - d. They are a tool for protecting a brand.
4. When Templeton wanted to use the name "99 Designs," he searched the Florida Secretary of State website to see if the name was already in use. Why didn't that catch his trademark infringement?
 - a. The Secretary of state website search only shows business names that are registered in the state.
 - b. He should have also checked the USPTO database because it lists actual trademarks.
 - c. Both a and b.**
 - d. Neither a nor b.
5. Since 99 Designs is already trademarked by another company, assume Templeton needs to pick a new mark to represent his company. Which of these would have the best chance of getting approved for registration by the USPTO?
 - a. The name "Logo Designs" because it accurately describes what Templeton's business does.

- b. The name “Apple” because it’s creative and arbitrary.
- c. A logo that looks like a plain black square that Templeton doesn’t plan to ever use.
- d. **None of these have a good chance of being approved for registration.**

6. Which of the following is a reason someone would try to “pierce the corporate” veil?

- a. **The company owes them money but is insolvent.**
- b. The owners of the company are personally broke.
- c. They need to file a lawsuit against the company without the company knowing so they can get a default judgment.
- d. None of those reasons.

7. What could Templeton have done to prevent being held personally liable for the company’s trademark infringement?

- a. Adopted an operating agreement.
- b. Used a company bank account for the company’s operations.
- c. Conducted a trademark search and applied for a trademark of the name “99 Designs.”
- d. **Both a and b.**

6. Legal Topics in Module 2

Primary Topics

- A. **Trademarks & Choosing a Name for Your Business.** Templeton needs a name for his business. He chooses one (99 Designs) that's already trademarked. A trademark search would've helped him avoid infringement and having to rebrand.
- B. **Registered Agents.** Templeton (again) chose the right registered agent but forgot to update his address with his state.
- C. **Piercing the Corporate Veil.** Templeton did not follow corporate formalities and faced the risk of a plaintiff pursuing his personal assets in a lawsuit.

A. Trademarks & Choosing a Name for Your Business

Most common legal question: what do I need to know about trademarks when starting my business?

The simplest answer is -- make sure your business name isn't already trademarked and, if branding matters to your business, consider making your business name unique to increase likelihood you can register it as a trademark if necessary.

A common misconception is that searching the state's database and finding a name is available means you can use that name for your business. Technically, this is legal as a matter of state law. But if the name is similar enough that it could cause a likelihood of confusion with another business's name (or "mark"), then it could result in trademark infringement.

Think of it like how some rules might apply at your school that don't apply in your city. And vice versa. You could be following all rules your school has but still be "breaking the law" in your city. Different jurisdictions have different rules and laws.

Templeton's Choice

Templeton filed a d/b/a that indicated that his business would "do business as" 99 Designs. This was acceptable under the laws of the State of Florida, but it also violated the trademark rights of another company named 99 Designs. That company had a federally registered trademark. Templeton only searched his state's business database rather than conducting any type of trademark search.

Consequences

The consequences were that 99 Designs sued Templeton for trademark infringement. While the videos don't discuss this in detail, the reason for the lawsuit is simple -- when you infringe on someone's trademark, this causes several problems to the company being infringed upon, including:

1. The infringer could be profiting off of your goodwill and taking away from your profits;
2. The infringer might not have the same business standards as you. This could damage your goodwill and reputation.

Solution

Templeton could have avoided these problems by conducting a trademark search. There are several levels involved in a trademark search, but most people can conduct at least a preliminary search on their own. You'll want to do a standard Google search but most importantly, you'll want to search the USPTO's database. You can find this by Googling "TESS Search."

Besides just conducting the trademark search, Templeton also could have set himself up for success by choosing a distinctive mark that would allow him to register his trademark with the US Patent & Trademark Office.

Trademark Key Terms

Trademark

A trademark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others. A service mark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of a service rather than goods. Some examples include: brand names, slogans, and logos. The term "trademark" is often used in a general sense to refer to both trademarks and service marks.

Trademark Infringement

Trademark infringement is the unauthorized use of a trademark or service mark on or in connection with goods and/or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods and/or services.

If the trademark owner is able to prove infringement, available remedies may include injunctive relief (can stop defendant from using the mark) and other monetary relief.

D/B/A

a.k.a. "Doing Business As"; a.k.a. "Fictitious Name"

If you plan on operating your company under a different name than the one you originally filed, you need to file for a d/b/a. For example, if your business was an LLC or corporation that used the company name "Sales Management, Inc.," but you wish to operate as "Salesly," you would simply file a d/b/a in your state. The d/b/a would list "Sales Management, Inc." as the owner and Salesly as the name you're "doing business as."

If you operate under a different name without a d/b/a, your company could be subject to strict fines. And, if your company enters into contracts using the other name, without a d/b/a you might not be able to enforce those contracts.

The reason makes a lot of sense -- imagine someone used a random company name for all their contracts, then later when they breached a contract, they tried to argue that the random company name was actually a d/b/a for some entity that had no assets. Requiring registration of a d/b/a helps eliminate that ambiguity.

Distinctive Trademark

a.k.a. “Strong Trademark”; “Trademark Strength”

In this sense, a “distinctive trademark” is considered to be a strong trademark. It is in your best interest to select a mark that is considered “strong” in a legal or trademark sense, i.e., a mark that will most easily allow you to prevent third-party use of your mark. Some marks are easier to protect than others and these are considered “strong” marks.

On the other hand, if a mark is “weak,” it most likely is descriptive and others are already using it to describe their goods or services, making it difficult and costly to try to police and protect. Weak marks should be avoided; they simply do not have the same legal protections of a stronger and more distinctive mark.

The strongest and most easily protectable types of marks are fanciful marks and arbitrary marks, because they are inherently distinctive. Fanciful marks are invented words with no dictionary or other known meaning. Arbitrary marks are actual words with a known meaning that have no association/relationship with the goods protected. Fanciful and arbitrary marks are registrable and, indeed, are more likely to get registered than are descriptive marks. Moreover, because these types of marks are creative and unusual, it is less likely that others are using them.

An example of fanciful is “Google.” An example of arbitrary would be the company “Apple.”

Common Law Trademark

A common law trademark is a trademark right that a business owner has despite never registering their trademark with their state or the US Patent & Trademark Office (USPTO).

Common law rights are based solely on use of the mark in commerce within a particular geographic area. Common law rights may be stronger than those based on a registration, if the common law use is earlier than the use that supports the registration. Therefore, it is critical to

learn whether superior common law rights exist, by searching the Internet for websites and articles that reference similar marks that are related to your goods and services.

Trademark Registration

a.k.a. “Federal Registration”

Trademark registration occurs when you register your trademark with either the US Patent & Trademark Office (USPTO) or a state. It’s not always required, as you can establish “common law” rights in a mark based solely on use of the mark in commerce, without a registration. However, federal registration of a trademark with the USPTO has several advantages, including a notice to the public of the registrant's claim of ownership of the mark, a legal presumption of ownership nationwide, and the exclusive right to use the mark on or in connection with the goods or services set forth in the registration.

B. Registered Agents

Most common legal questions: What are registered agents? What do I need to know about them? Can I be my own registered agent?

A registered agent is the person or company that receives all official mailings and legal documents related to your company. Your business needs one for every state that you either formed your company in or in which you have registered as a foreign entity to do business in that state. (By “foreign,” we mean a different state, not a different country.) Registered agents are required by law.

You want your registered agent to be reliable since they receive all the company's official mailings, which include lawsuit-related documents. A worst-case scenario would be if your company was sued and you didn't know about it because your registered agent was unreliable and didn't notify you. While unlikely, this could lead to your losing the lawsuit.

You can appoint anyone with a physical address in the state you're registered in to be the registered agent. Many companies use themselves as the registered agent in their home state, and if registered in other states, hire a third party company to function as registered agent.

Also, you want to make sure you update your registered agent's address. If you don't, if someone serves you with papers, they might deliver it to the address the state has on file and then you'll never receive it. You can update your address by visiting your Secretary of State (or applicable agency) website, or Google “[Name of State] update registered agent physical address.”

Templeton's Choice

In the first module, Templeton chose his ex-girlfriend, who had a vacation home in the State of Delaware, as his registered agent. In the second module, he appointed someone he trusted (himself) as his agent and used his parents' address in Florida where he was living at the time.

Consequences

In this module, we find out that Templeton was served at his “registered agent's physical address” -- his parents' home. Except it was Floyd who accepted service.

Solution

Templeton needed to make sure he updated his registered agent's address. He could've done this in most states with a simple online filing or a form -- he wouldn't need to hire an attorney to do it.

C. Piercing the Corporate Veil

Most common legal questions: What does corporate formalities mean? How do I protect my personal assets?

One of the main purposes of creating an entity is to protect your “personal assets” (like your car, house, savings, etc.). However, if you’re sued and you didn’t follow certain “corporate formalities,” a plaintiff could do something called “piercing the corporate veil.” If you pierce the corporate veil, it means you can sue the company and if the company cannot pay its debts, then you can attempt to collect those debts from the company owner’s personal assets.

The reasoning for this can be murky, but the purpose is to prevent people from setting up sham entities that give the appearance of doing legitimate business when they are actually designed to help the owners avoid legal liability.

You can avoid all of this by following the proper corporate formalities.

Templeton’s Choice

Templeton followed no corporate formalities. He set up his LLC but didn’t separate his business finances from his personal finances, nor did he adopt any type of operating agreement.

Consequences

99 Designs was able to pierce the company’s corporate veil and collect on Templeton’s personal assets.

Solutions

First, Templeton should have adopted an operating agreement. Also, he should have kept his business and personal finances separate.

You also should consider using resolutions and business meetings to memorialize important decisions. While technically, as an LLC, this isn’t usually required (it is required for corporations), if you have more than one owner, it helps avoid future misunderstandings. Here’s a list of other items that show corporate formalities are being followed:

- Open a separate bank account for your business.
- Use the company’s debit card, credit card, checks when paying for company expenses.
- If you need to take money out or put it in to the company account, that’s fine. Just withdraw or deposit from other bank accounts rather than paying off personal credit cards or charges with a business card and vice versa.
- If you have business meetings, particularly if your operating agreement requires it, document the meetings with written minutes.
- Memorialize all major business decisions with resolutions.

Piercing the Corporate Veil Key Terms

Piercing the Corporate Veil

One of the biggest reasons for forming an LLC or corporation is asset protection. If the company is unable to pay its debts, individual members of an LLC or shareholders in a corporation are shielded from having to pay the company's debts from their personal assets. They are saved from creditors pursuing money from their individual bank accounts, homes, cars, etc.

But, in some cases, a court might hold individual LLC or corporate members liable for company debts. This is called piercing the corporate veil.

Piercing the corporate veil happens when a court finds that the owner has taken no actions to indicate that the business is separate from the owner's personal financial dealings. This can get confusing, but the best way to think of it is -- imagine someone sets up an LLC, and any possible problem the owner runs into, they say "oh, that was related to my business, not me. So you can't pursue action against me personally." Piercing the corporate veil helps prevent that type of fraud.

Three main factors come into play:

1. Lack of formalities: The company is registered but there's no operating agreement or bylaws that indicates the roles of the owners.
2. Insufficient capital: The company never had enough money to do what the business was supposed to do, and so could not pay its bills, salaries, or creditors.
3. Fraud or recklessness: The business ran up unreasonable debts, took crazy financial risks or cheated creditors.

The most important way to avoid your corporate veil being pierced is to conduct the right corporate formalities.

Formalities (especially for corporations) include:

1. Holding an Annual Shareholders' Meeting;
2. Using Resolutions to Memorialize Major Business Decisions;
3. Holding Board Meetings when necessary; and
4. Using Minutes to memorialize meetings.

Board Meeting

Your corporation is required by state law to hold at minimum an annual directors meeting. This is typically held immediately after your shareholders meeting. At this meeting, the directors approve major business decisions using resolutions.

Annual Shareholders' Meeting

Your corporation is required by state law to hold at minimum an annual shareholders meeting. When you're the only owner of your company, it can seem funny to hold a meeting with yourself, so you can get around that by having written consents that make it so that the meeting is on paper (rather than booking a conference room for an hour and talking to yourself). The primary purpose of the annual shareholders meeting is to elect the board of directors.

Corporate Resolutions

Each major business decision must be carried out in either a formal meeting consisting of directors and/or shareholders--or, an action by written consent. The decisions made in these meetings are referred to as "resolutions."

Major Business Decisions

A major business decision can best be described as one that would have a material impact on your company. It's something that can greatly affect it. Choosing what to buy for lunch isn't a major business decision. But here's a list of likely major business decisions: choose to sell shares of your company, expand, or lay off or hire 50% less or more staff.

When you have a major business decision, you should document it with a resolution.

Corporate Resolutions

Each major business decision must be carried out in either a formal meeting consisting of directors and/or shareholders--or, an action by written consent. The decisions made in these meetings are referred to as "resolutions."

Action by Written Consent

"Action by written consent" is the easiest way for corporations to make decisions without needing to have a formal meeting. It serves the same functionality as a meeting, except you must have unanimous approval.

Meeting Minutes

Minutes are simply the official recorded notes of either a board meeting or a shareholder's meeting. They capture all the material discussions and decisions made at the meeting. Then, once the meeting is complete, resolutions are completed that describe in detail any decisions made and make the decisions legally binding.

7. Additional Resources

Other Assignments

1. Learning about IP using Government Resources

Conduct some independent research through the [U.S. Patent and Trademark Office](#) (USPTO). You can also watch this [8-minute video](#) from the USPTO about the basics related to trademarks, patents, and copyrights.

Questions

- 1) What is the difference between a trademark, patent, and copyright?
- 2) What can someone do to protect themselves from trademark infringement?
- 3) What are your legal options, when you hold a trademark, and someone violates that trademark (i.e. uses your logo without permission)?
- 4) How do you secure a trademark?