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Chapter 2:

Product counsel's value to a business

This chapter discusses product counseling as a discipline, unabashedly taking the view that product counsel can make a business and its products more compelling to its customers and less worrisome to regulators. While we will explore a product counseling framework in more detail below, we will highlight some of the skills associated with business growth.

This section intends to answer these questions:

- If I'm already a practicing lawyer, why do I want to expand my practice to include product counseling?
- If I own a small but growing start-up, why do I need a product counsel?
- As the dean of academics at a law school, how can a product counseling course help the next generation of lawyers?
- If I'm a law school student, why might I want to take a class on product counseling?
- If I'm the managing director of a law firm, how might we serve our clients by developing product counseling expertise?

Drive the business

Product counsel can and should focus on growing the business. You may think this is the job of the customer-savvy marketing department or the monetization team. However, a strong product counsel can boost the brand, expand its customer base, develop revenue, and contribute to overall customer satisfaction. How? As table stakes, product counsel can ensure that a product complies with applicable laws and regulations. For example, if your company is launching a new personal finance mobile app, you will confirm the app complies with applicable standards, laws, and regulations such as the Payment Card Industry Data Security Standard (PCI DSS),¹ Regulation E of the US Electronic Funds Transfer Act (1978),² and the EU's Payment Services Directive (2015/2366).³

Above and beyond meeting legal minimums, product counsel can make a product better for the customer, not just because it is "legally" safe or "in compliance", but because it delights and solves problems for the customer.

You can work with product managers and designers to walk through the user experience to ease customer confusion and promote transparency. For example, a simple user-facing disclosure such as “total price”, if true, can be very compelling for a customer. In product manager lingo, ask the designer to present the “happy path” – what does the customer experience look like if all works as per the plan? Additionally, look at the “unhappy path” – what happens if something goes wrong? For example, if your product is an online app, what happens if the customer tries to register with a nonconforming address? What happens if the customer must pause during registration? Can she “save” the information provided so far? Your coaching advice can address legal basics and encourage and inspire innovation.

Similarly, you can advise the business on opportunities to expand product market share and manage regulator concerns, which strengthens the business. Ongoing business-facing training helps your clients feel more confident in ideating what is possible, not just running the same old plays. For example, a product lawyer can identify and deliver a patentable asset not obvious to a founder or developer. They can increase sales by recommending the product be re-labelled to allow for sales in another country. Our framework below outlines the mindset and skills helpful to refine the playbook and inspire the team.

Think bottom line. Product lawyers also drive strong rates of return on product investments, especially if they are involved early in the development process. Whether it be tech or hard goods manufacturing, the most expensive part of a product's development is usually the actual “build” – software developers have to code, prototypes must be engineered, assembly lines must be built, medicines must be formulated, and products must be tested. Managing these costs is critical to a product's success. Needless to say, no one wants to stop production to redesign the product. Start with a good agile design. Similarly, by “looking around corners”, a product lawyer is well-equipped to consider the long-term viability of a product, so it doesn't need to be removed from the market in a year or two. A product lawyer's early involvement is a (relatively) inexpensive way to minimize unexpected and unfortunate hiccups in the product's development and launch. It's like having a winning coach on your side from the start of the season.

Growing through risk-taking

Often, a lawyer is seen as someone who just says: “No” or “No, there's too much risk.” We will discuss risk analysis in more detail below, but the key for

a good product lawyer (any lawyer, really) is to drive strong business outcomes by embracing risk. To be clear, we are not talking about *stupid* risks. We are not advocating a business plan built on “act now and ask for forgiveness later” – and we are certainly not encouraging actions that are deemed criminal. Instead, we encourage you to understand the industry, product strategy, business, and regulations, so you can enable the business to take *smart* risks.

For those of us lawyers who live and breathe “risk”, many of us promote and practice the art of a “start with yes” philosophy, as in:

Product/Business team: “Can we distribute our gadgets in France?”

Product counsel: “Yes, this seems like a great opportunity if we properly label the packaging. Let me get those requirements to you. I will also double-check to see if we have geographic limitations in our contracts with other partners.”

or:

Marketing team: “We really need to hit our quarterly revenue goals next month, so we will motivate our customers to buy our gadget by using a side-by-side price comparison with our competitor’s gadget. Not only will we show that our gadget is cheaper, but we will also feature our competitor’s logo with a bloated price tag.”

Product counsel: “Yes, I can see why we want to emphasize our budget-friendly prices, especially compared to our competitors! Let’s connect to chat through the most effective way to do that. For example, which products are we comparing, and when were the prices compared? Let’s also discuss the proposed design to see if there’s a way that we can present the price comparison without worrying about claims of trademark infringement.”

(Note to present and future product lawyers, this is also a great opportunity to refine your visual IQ, as discussed in chapter five.)

To enable smart risk-taking with a “start with yes” philosophy, focus on identifying risk, sizing its impact, and offering mitigation options. For example, you can help a product get to market by implementing robust safety protocols, developing appropriate warning labels, and establishing

quality control measures. For example, if your company produces the perfect vegetable knife, you may advise that the knife edge may cut Dad as he unwraps his birthday gift. The likelihood is small, but the impact would be big. One way to mitigate that impact is to include a warning on the website; an even better fix is to ship the knife in a cardboard sheath. However, you don't tell the company to forfeit the match by discontinuing the knife. By addressing potential risks early on, you better your team's ability to win over the customer, thereby winning the match.

Although not intuitive to business clients, counsel can also drive a more compelling product by identifying areas where a business can lean into risk. For example, say your product team has shied away from expanding the product to a new country based on the belief that the country restricted functionality key to the product. You can unpack this assumption as counsel, advising that the restrictions can be managed through transparent policies and registration. Help the team understand what is possible. Inspire.

Additionally, products (and their risk profile) change over time. For example, in the early days of internet sales, buyers were often confused by online payments, so they needed "heavy" user-facing explanations and legal disclosures. Today, with the heightened sophistication of online buyers, a product lawyer may suggest simplifying or removing unnecessary disclosures.

Businesses need strong lawyers who can take smart risks.

Business regulatory compliance

Regulations are everywhere. Often, the most successful businesses are those that offer products in the face of extensive regulations. They don't just make a better gadget. They take the time to understand a daunting, complex regulatory landscape, the regulatory policy goals, and specific requirements to craft and offer a totally new product that is ground-breaking, smile-inducing, and legally-compliant. They find a way to move money digitally or stream songs. Engineers create a wireless doorbell that shows you who is at the door. Entrepreneurs develop a service that allows a patient to "see" their doctor remotely. They launch a platform that re-invents personal transportation. They stretch beyond the "tried and true" plays to innovate.

Product lawyers provide valuable coaching to help businesses exploit these opportunities. They develop deep expertise in legal requirements and policy goals, work with the business's research team to identify product options, and advise the development teams on various features. Compliance

considerations can be expansive. The analysis may include product safety regulations, labeling requirements, environmental obligations, and consumer protection laws. Founders and visionaries are often surprised by the complexity of laws applicable to their product: an established US biotech company probably understands the need to clear the Food and Drug Administration (FDA) processes, but may not appreciate an import restriction on a key ingredient. A California-based retailer may understand US truth-in-advertising laws, but may not appreciate a European buyer's statutory rights to return an item.

Product counsel can work to understand the regulatory landscape in all applicable jurisdictions and navigating the product to launch. You will be able to explain a law, not as a show-stopper, but as a guardrail in developing the product. For example, in the biotech scenario mentioned above, a product counsel can explain that the key ingredient cannot be imported in liquid form due to import regulations. They may suggest considering whether the product could be reformulated as a tablet instead of a liquid.

With seasoned product counsel on the team, a company can design and launch innovative products that meet regulatory or compliance challenges.

Looking around regulatory corners

Product lawyer Kevin Keller shared with us his approach to reviewing a proposed product for his company where he identified a possible privacy issue. He did not limit his review to a checklist. Instead, by “looking around the corner”, he expected that the product would confuse, if not concern, privacy advocates and policymakers, he explained. Exercising his proactive product mindset, Keller worked with the product team to add a technical solve to manage the issue on the back-end. As an exercise, he drafted questions that might be raised in a regulatory inquiry on the product and crafted “ready-to-go” answers. He consulted industry experts, like the Electronic Frontier Foundation, for their input. Keller and the team were ready when the product launched; when Congress had questions they were ready with Keller's readiness plan, the product was successful, and the legal team was recognized for its proactive mindset.

Valuable intellectual property assets

Most businesses need a good product and strong customer demand to win the market and be successful. For many products, its value is based on its underlying IP: the soda's formula may be a trade secret; the sensor sprinkler

system's design may be patented; the company's brand name and logo may be trademarked. Product counsel can protect and sometimes grow this IP. Product counsel can also help a business work with third parties and their products to avoid infringing on third parties' IP rights. Even if an entrepreneur believes it's easier to ask for forgiveness later than getting permission now, she usually understands and appreciates the value of protecting ideas. That's where a savvy product lawyer can help.

Growth through business partnerships

Your company's product is its star player. It has the potential to be a game-changer. However, to win, the star needs a team of strong supporting players. For example, the product may be composed of component parts or reflect professional services from third parties; it may rely on a distribution arrangement to get it to market. Structuring and implementing this "team" can be quite complex. Welcome the product lawyer.

A product lawyer is a valuable partner in structuring, negotiating, and drafting the appropriate contracts to reflect these business partnerships. These include manufacturing agreements, distribution contracts, and licensing agreements. At a minimum, a well-drafted contractual agreement can minimize the risk of misunderstandings, disputes, and potential legal conflicts. In many cases, the contract is much more, serving as the backbone of an entire business plan. For example, if your product is to collect and distribute third-party content (say, a movie review app), do you have the rights to distribute and sub-license those reviews? Does that license include worldwide locations? In all media? What if the reviewer includes a narrative comment – "loved the cinematography" – but also uploads a film clip? What if your movie review app is sponsored by one movie studio with certain specifications? By understanding the product and its needs and capabilities, product counsel can ensure that the business is supported by the right relationships with the right partners, allowing for a company's product to thrive as envisioned.

For example, if your business offers a business-to-business (B2B) product, it is not unusual for product counsel to participate in sales with potential customers, hearing first-hand what they want. In this scenario, product counsel (fluent in the business goals and product capabilities) can develop a strategy to win that customer.

If your business is online, the company will also want appropriate "terms of use" or "user agreements" with its customers. Product counsel will help to

prepare the appropriate terms and conditions that reflect your business' needs, and work to ensure that your customers appropriately consent.

Below, we discuss our recommended framework for approaching commercial contracts in a product setting in more detail.

Coaches deliver wins

In conclusion, product counsel is instrumental in ensuring that businesses successfully navigate the legal complexities associated with product development, manufacturing, marketing, and sales. Even the best sports teams need a good coach to win. Embracing product legal counseling as a strategic tool empowers businesses to proactively address legal challenges, mitigate risks, and operate within legal boundaries, thereby positioning themselves for growth and sustainability in a competitive marketplace.

As you continue reading this book, we will explore the core skills, legal frameworks, and practical strategies that empower product counsel to deliver this value and win the game, if not the championship.

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