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Guide to Preparing Website and App Terms of Use

GOT QUESTIONS ABOUT WEBSITE AND APP TERMS OF USE?

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GUIDE TO PREPARING WEBSITE AND APP TERMS OF USE

INTRODUCTION

Terms of Use serve both as the agreement that defines the legal relationship between a website or an app and its users and a non-legal marketing document that sets the tone of the ongoing relationship that the website or app seeks to establish with their users. Well prepared Terms of Use will achieve an effective balance between these often competing objectives.

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1. DOCUMENT PREPARATION

It is tempting for developers of new websites or apps to grab a Terms of Use document from a similar website or app and just modify it for their purposes. While this may seem economical in the short run, it may be short-sighted given the often modest fees that are charged to have Terms of Use professionally prepared.

Once Terms of Use are prepared and uploaded, modifying them to address issues that were initially either overlooked or misunderstood may not be a simple or inexpensive matter. What's more, missing or poorly drafted provisions might be able to be repaired prospectively, but might leave some damage in their wake. For instance, failure to include an arbitration clause which may act to block class actions will not be able to be retroactively applied for events occurring prior to adding the arbitration clause.

Early on, Twitter faced a problem when a user who was being harassed by another user wanted Twitter to take action against the harassing user for violating Twitter's terms of use. In that matter, a Twitter co-founder actually admitted that Twitter, as a young start up, just borrowed Flickr's terms of use, without considering them carefully, and would now have to revisit them.

2. SPECIFIC TERMS

Terms of Use contain many standard provisions. However, there are many additional or alternative provisions that may be used depending upon the website or app characteristics. Additionally, when a website and app operate in tandem, then often the same Terms of Use can be used for both.

Following is a discussion of certain provisions which will serve to highlight some of the main issues that need to be considered when preparing Terms of Use.

A. ESTABLISHING ENFORCEABILITY

It may seem obvious, but Terms of Use need to be enforceable against the users. Enforceability will often hinge on how users express their assent to the Terms of Use. On one end of the spectrum, Terms of Use

can just be posted on a website or within an app without requiring users to take any affirmative action to accept them. This method is often referred to as browse wrap and is considered the least enforceable.

On the other end would be where a user is compelled to view and affirmatively accept the Terms of Use before being allowed to access the website or app. This is the acceptance method used for most software licenses, but is not practical for most websites (but is for apps). However, for many websites and apps there are points when compelled acceptance can practically occur, like when opening an account or making a purchase, and this is when the user should affirmatively accept the Terms of Use.

You can use a check box (not to be pre-checked) where it says "I have read and agree to the Terms of Use" with the words hyperlinked to the Terms of Use. Alternatively, when clicking a button to open an account or make a purchase words such as "By clicking this button you accept our Terms of Use" can be near the account or purchase button. In this way, a single click can be used for the account/purchase and acceptance. However, make sure that the acceptance language is near the button and conspicuous.

Several factors need to be considered before selecting the right approach for binding the user to the Terms of Use, including balancing liability risks with the impact on the user experience.

It is important to note that the method by which users are notified of material modifications to Terms of Use may also determine whether such modifications are binding upon the users.

B. RULES APPLICABLE TO USER CONDUCT

The Terms of Use need to define acceptable and unacceptable behavior. For instance, the Terms of Use should:

- (i) define proper and acceptable interactions with other users,
- (ii) define the guidelines for content that users are permitted to upload,
- (iii) restrict users to personal use or also allow commercial use,
- (iv) prohibit data harvesting or data mining,
- (v) prohibit unsolicited emailing or marketing,

- (vi) prohibit unauthorized manipulation of the services, and
- (vii) prohibit impersonation or fictitious profiles, etc.

C. RULES APPLICABLE TO USER GENERATED CONTENT

When users can upload content to a website or app, the rights and ownership relating to such content must be defined. For instance, does the website or app have ownership or at least license rights to comments, discussions, images, videos?

License rights must be carefully drafted, because rights not specifically granted will be deemed retained by the user. So, if a website or app wants to be able allow video or other content to be posted on other related sites or otherwise transferred or used, the website or app will need these rights expressly granted by the users. Also, a website or app will want the right to remove content for any or no reason that it deems in appropriate.

Without this express removal right, a website or app could face liability from a user. If the website or app wants to expand its use rights after initial Terms of Use are uploaded, it may be difficult to have the expanded rights apply to user-generated content uploaded prior to the effective date of the version containing the expanded rights.

D. PRESERVE OWNERSHIP IN CONTENT

Content can come from two sources: (i) content provided by the operator of the website or app and (ii) user-generated content.

The Terms of Use should establish the ownership in content and limit how users are permitted to use that content. Depending upon the website or app, it might be appropriate for granting narrow or broad rights for users to use content.

E. STATUTORY IMMUNITIES AND COMPLIANCE WITH LEGAL REQUIREMENTS

Digital Millennium Copyright Act (DMCA)

Specific provisions are required to be in a Terms of Use or otherwise posted on the website or in the app in order to receive immunity for copyright infringement under the Digital Millennium Copyright Act (DMCA) arising from infringement claims based upon user-generated content. These special provisions must be posted and complied with to obtain DMCA immunity, and in addition, the owner of the website or app must register a Copyright Agent with the U.S. Copyright Office – this is critical, and failure to do so can subject the website or app to liability for copyright infringement for user-generated content.

CAN-SPAM Act

Terms of Use can include language providing that the users give affirmative consent to receiving direct marketing materials from the website, app or third parties. The use of contact information for marketing must be in compliance with the CAN-SPAM Act. All reputable third party mailing services require that consumers “opt in” to receive marketing materials, or else these mailing services will block your account. So appropriate authorization language is needed for this purpose.

Telephone Consumer Protection Act (TCPA)

Generally, in order mass market via text messaging or telemarketing, very specific express written consent is required under the Telephone Consumer Protection Act (TCPA). It is very important to note that this consent cannot be given through the terms of the Terms of Use and must be otherwise specifically obtained. Failure to properly obtain this consent can result in substantial liability.

Children’s Online Privacy Protection Act (COPPA)

Lastly, the law requires specific procedures for collecting personal information from children under the age of 13 in accordance with the Children’s Online Privacy Protection Act (COPPA). If your website or app

will be collecting this information, then you need to make sure you are in compliance with COPPA.

F. PROVISIONS DESIGNED TO POSITION WEBSITE OR APP TO INITIATE ENFORCEMENT ACTIONS

It is important that a website and app have broad discretion to terminate a user's right to access the website or app when violating the Terms of Service or otherwise behaving in a manner that might harm the website, app or other users.

There are also various laws that a website or app will be better positioned to take advantage of if appropriate provisions are contained in the Terms of Use. For instance, an express prohibition against data scraping, using the content for a competitive purpose, or against sending unauthorized emails to other users will improve the ability of the website or app being able to take immediate legal action for common law trespass and a violation of the Computer Fraud and Abuse Act, and other laws that require a showing of unauthorized access. Additionally, establishing and limiting rights to use copyrighted content will undercut an infringer's defense that there is an implied license for liberal use of the website or app content.

G. DISCLAIMER OF WARRANTIES

Users may come to rely on the performance or services offered by a website or app. It is therefore important that the Terms of Use clarify that the website or app makes no warranties as to performance, availability, quality, correction of errors or accuracy of information. Enforceability of such a provision may depend upon the jurisdiction.

H. LIMITATION OF LIABILITY

A failure in performance might result in users incurring some kind of a loss or damage. Therefore, it is critical that users agree that the website or app owners have only limited liability in terms of the types of damages (no indirect, consequential, loss of revenue, etc.) and the total amount of damages incurred by a user should be capped. Enforceability of such a provision may depend upon the jurisdiction.

I. CHOICE OF LAW/VENUE

If there is a dispute between a user and a website or app operator, the owner would want to be able to choose what laws apply and where any disputes will be conducted. Defending an action in a distant location could put a significant financial burden on the owner.

If the website or app provides a product or service that could be subject to a class action lawsuit, then providing for arbitration allows for prohibiting users from joining in a class action. This might be a very necessary precaution, depending upon the website or app involved.