

## **WHY DOES MY COMPANY NEED TERMS OF USE AND A PRIVACY POLICY FOR ITS WEB SITE?**

There are many reasons to own a web site. A web site enables you to promote your business and provide information to your customers. You may also wish to sell directly to the public or your customers using e-commerce and a public web site, or a secure portal on your existing web site may be the ideal place for orders to be made.

In setting up their web sites, many of our clients spend a lot of time creating a graphically appealing environment for their users, but some do not appreciate the significance of well-crafted "Terms of Use" ("TOU") and a Privacy Policy, and where applicable, click-through agreements for portals or other special site features whose access is limited to a segment of the public (perhaps customers on the company account). TOU govern the relationship between the user and the site owner. A Privacy Policy advises users how their personal information will, and will not, be used. In the case of a web site with global users whose country's laws may differ from those of the U.S., the Privacy Policy will take into account all applicable privacy laws.

Every site is not the same, and some make the mistake of a "one size fits all" approach to the company TOU and Privacy Policy. While, to be sure, these documents have terms in common across many web sites, it is a mistake to simply "cut and paste" terms from another site, even if that site seems to be similar to your company's. It is not possible to know the origin of the TOU and Privacy Policy you are "borrowing" from or whether it was prepared by someone knowledgeable, ideally an attorney with expertise in Internet Law. It is not expensive to hire counsel to prepare such agreements, and it is well worth doing so, as they will, with minor modifications, serve your company well for years to come.

That said, what are some common terms of a TOU and Privacy Policy? Turning first to the TOU, users should be advised that no express or implied warranties are being made with respect to any services or goods offered on your site and should release you, as the site owner, from compensatory, incidental, special, exemplary or other damages. The site owner's liability to users should be limited to a nominal amount (such as 100 dollars). The TOU should also set forth the proprietary rights contained in the site, such as copyrightable subject matter, your company's brand names, and/or any patentable inventions; and set forth permissible use of the site (e.g. it is permissible look at site content online, and download some pages for reading and/or personal use, but not permissible to engage in wholesale distribution or removal of copyright and other legal notices). The TOU may also address whether linking to the site is permitted. The TOU may also warn users that links to other sites may be provided but those other sites are not under the control of your company as the site owner and are governed by separate TOU. Additionally, the TOU may address whether framing or incorporation of the site onto third party sites is permitted.

Additionally, and particularly where users are submitting content to the site, or the site contains content contributed by any third parties (including site developers, site owner employees and/or independent contractors), the TOU should have additional terms. First, the Digital Millennium Copyright Act ("DMCA")



requires that the site owner designate an agent (who can be your company's employee) to receive complaints of copyright infringement. The TOU should contain this designation. It should also set forth the required legal elements of complaints of copyright infringement under the DMCA. The TOU should likewise address how trademark infringement complaints are handled. In the TOU, you, as the site owner, should secure users' agreement to assign copyright, or, at a minimum, have users acknowledge that they are granting a perpetual, royalty-free license to you for the reproduction and/or use of any user submissions/ideas.

The TOU should also limit the site's use to children who are at least 13 years old; set forth any registration procedures (the Privacy Policy will govern how user information is used by the site); set forth e-commerce/payment terms; and have the user indemnify the site owner. Governing law and the dispute resolution procedure (usually arbitration), should be set forth.

The foregoing is not an exhaustive list of terms, but an illustration of the kinds of content that may be found in TOU. Other terms may also be required, depending on the purpose and function of the web site. In particular, if your users enter a secure portal or other portion of a site to purchase goods or services or site content it may be appropriate to have a click-through agreement that the user accepts by clicking on an "I Agree" or similar icon. For example, if your company's site offers any content for a fee, the user can separately acknowledge what the purchase entitles the user to do (and not do) with the downloaded content. Alternatively, if the user submits specifications to your company via the site for the purpose of ordering goods or services, the user can represent and warrant the accuracy of the specifications and release your company from any liability resulting from inaccuracy. Sometimes payment terms appear at checkout, and the user will be asked to acknowledge these terms as a condition of purchase (e.g., if no refunds are permitted, simply exchanges).

Next, what terms can one expect in a well-crafted Privacy Policy? The privacy laws of various nations differ widely. The European Union (EU), for example, has adopted a very restrictive Data Protection Directive that limits how sites may collect and use personal data. Additionally, the EU has just issued another directive that requires user consent before a site owner can use cookies. Therefore, for a site who content is primarily directed to consumers in the U.S. and involves use of their data in this country it is important to specify that U.S. law governs. It is also important to require users to consent, via the Privacy Policy, to the transfer and processing of their data in the U.S. On the other hand, if your company's site will be used by consumers around the world, especially any of the European nations, it is important that foreign counsel review and comment on the terms of the Privacy Policy. This review can be arranged by good U.S. Internet Law counsel, who can filter the foreign counsel's feedback and make sure it is reflected in the version of the Privacy Policy that is ultimately posted on your company's web site. Sometimes, separate Privacy Policies are posted on the U.S. and foreign versions of a web site (e.g. a .com (U.S.) versus a .fr (France) domain name).

Once the issue of governing law is addressed, your company's site should explain to users what data it collects and how it uses the data. The Privacy Policy should cover any data the site intends to provide to third parties, and the use and protection of credit card information submitted to the site. The policy should also communicate that the site will share user information if it is reasonably necessary for the site to provide the user with services, if the user consents to use of such data, if required by governmental agencies, legally required (such as in responding to subpoena) or to prevent actual or potential fraud, among other things. Under the Children's Online Privacy Protection Act, a web site cannot collect user information from users under the age of 13, and this age limit, or a higher age limit, should be set forth as a prerequisite for use of the site. Users should be warned to think twice before posting personally identifiable information in any



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community forum on the site. Your company, as the site owner, can point out in its Privacy Policy that such information is accessible to search engines even if it is taken down by the site at the user's request.

The site's "cookie" policy should be set forth. As you may be aware, a cookie is a software program that helps sites recognize repeat visitors by assigning a random number to each desktop to track content preferences and traffic patterns. Cookies may be used to connect a user's computer to content stored elsewhere. Most sites use cookies. Some sites use cookies to direct targeted advertising to the user when the user is on other sites. These cookies can be refused, but sometimes that will interfere with operation of a site. Users may also disable cookies after using a site. Therefore, it is important for the Privacy Policy to set forth the site's deployment of cookies, if any, and explain how a user can stop such deployment.

Finally, under the CAN-SPAM Act, there must be a mechanism for users, even those who have signed up to receive promotional emails from the site owner, to opt out from any further promotional communications. Purchase order confirmations are excepted from the opt out.

In conclusion, the TOU and Privacy Policy are important documents that govern the relationship between you, as site owner, and your site's users and if they are well-crafted, you can avoid misunderstandings as well as liability to the user. Rather than giving these documents short shrift, you should invest some time and money into them. With minor updates, they will serve you well for many years to come.

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This *Internet Law Alert* was written by **Jeanne Hamburg**, Chair of the Internet Law Group and member of Norris McLaughlin & Marcus, P.A. If you have any questions regarding the information in this alert or any related matters, please feel free to contact Jeanne by email at [jhamburg@nmmlaw.com](mailto:jhamburg@nmmlaw.com).

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