

Developing a Terms of Use Policy

By Eric Isaacson

“Possession is 9/10 of the law.” We’ve all heard this many times. Today, the laws of possession are becoming cloudy to the majority of the population. I-Pods have made music fair game to anyone. All one has to do is plug into a friend’s mp3 player and voila, “what’s yours is mine.” Movies are copied from VHS and DVD. There are several new internet sites where anybody can watch any movie free of charge. MySpace has made web “design” available to many on a very low grade scale, yet they learn to include content from other websites on their own page. Art placed on the internet is simply copied and pasted to the user’s computer without permission. Where is the legality in any of this? Do possession laws still exist? Many websites contain Terms of Use policies which give legal protection to their content and provide disclaimers for legal defense. Today, it is essential to have a well written Terms of Use policy to protect a web site’s content.

Terms of Use policies rest quietly at the bottom of many websites. Other websites hide them well. Occasionally, a user is required to check a box signifying that the Terms of Use are accepted before purchasing, downloading, or installing a product. A Terms of Use policy is legally binding and the agreement to such serves as an entry into a written contract. Because Terms of Use policies are legal binding, most larger companies hire attorneys or other legally qualified professionals to write them. That is probably why so few read them. Many of these policies can be fifteen pages or more full of legal jargon. It’s no wonder that so many check the box in agreement before journeying to the end of the scroll bar.

In contrast, many small businesses also feel a need to protect themselves and their users with legal terms of use. For many, the process is referred to as a “creative edit” or a “liberal review” (“How to Write Terms of Use?”) The ironic thing about what these people are doing is that it is often in direct violation to the Terms of Use they are “editing.”

The question is then, “How should one go about writing a Terms of Use policy?” Hiring a lawyer is one option. Ideally, the policy should be simple, concise, and legally binding. In my search, I didn’t find any that met all of these criteria. I have reviewed Terms of Use policies from four prominent web sites. While each greatly differed from the others, I did find some common threads. It is with these threads that I will propose a policy outline. Given the diversity and lack of guidelines here, my statements are largely opinion based. As far as making it legally binding, I’m not sure I have the credentials to be a fair judge. My suggestion would be to at least have the document reviewed by one with legal experience.

CNET, Gmail, YouTube, and NPR all have relatively concise policies. However, they are still incredibly hard to read. I, for one, resort to quickly skimming each paragraph due to the wordiness. My first suggestion would be to make your Terms of Use page meet the same accessibility criteria as any other page on the web site. If it is really meant to protect both the site owner and the user, both must be able to understand it.

The policy should begin with some sort of introduction. This generally includes some sort of compliance statement. It identifies what the Terms of Use are and states that users of the site are subject to it. This statement may also go on and define penalties for violations to the policy.

A Terms of Use policy goes hand in hand with a Privacy Policy. Thus, the Privacy Policy should be referenced within the Terms of Use along with a short summary. I should make

it clear that these two are different. The Privacy Policy is primarily to help the user gain trust in the website by identifying use of user information. The Terms of Use policy is primarily to give legal protection to the site owner.

A statement should be made regarding copyright. This may take up most of the policy or only a small paragraph. If there is anything dealing with someone's creativity that should not be reproduced, modified, sold, exploited, used, or anything else, that needs to be made clear. In most cases, this is the most important part of the policy. It should be divided into subsections if it is more than a small paragraph. This could include terms prohibiting use by other websites or even a statement giving permission to include links to the site. It might also detail how to receive permission if one desires the use of content from the site.

Almost all web sites have at least one thing on their page that either portrays something from a third party or displays a link to another website. While a site owner can maintain their site to a high standard, they cannot always guarantee the content that third parties may post. Third parties may include advertisers, bloggers, e-mailers, or simply owners of other sites. Some sort of third party disclaimer should be made to protect the site owner from legal action due to somebody else's content.

Many sites are now becoming very personalized and interactive. Users can add to or customize the content of a page within their account. However, many of these sites connect their users' accounts through networks such as MySpace and Facebook. With such interactivity, the users also have rights and responsibilities. These should be set forth in the Terms of Use policy as well. This section would also contain further explanation of penalties such as account termination.

Each site I reviewed contained a section on indemnity. In essence, it is a security section. It declares exemption from loss or damage, past or future. It also provides immunity from penalty or the punishment of past offenses.

Finally, if this is to be a legally binding document, the reader should know to what courts they might answer if they are found in violation of the terms. This is just a simple statement of the legal jurisdiction of the document. If it is only valid in the state of California, that should be explained.

There are several other items that can be added to a Terms of Use document to meet the custom needs of each individual website. However, I feel that with these basic guidelines I have set forth, one should be able to create a policy that will be clear, concise, and legally binding.

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