

Website Terms of Use and Data Rights

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Overview

- IP Rights and Issues
- Terms of Use/Terms of Service
- Data Ownership and Use
- Conclusions



Types of Intellectual Property

- Patent
- Copyrights
- Trademarks/Logos
- Rights of Publicity
- Data (Trade Secret/Confidential Information)



Key Practical IP Considerations

- Provider Content and User Content
- Scope of Use of Website and Content
- Risks of Third Party Complaints
 - Third party copyrights, trademarks, logos, photos, data
 - Links to third party sites
 - Defamation
- Defamation/Linking/Misuse/Liability



Breadth of Website Terms of Use (TOU)

- Simple Website as Marketing Tool (e.g. Caterpillar)
- Free On-line Services (e.g. Facebook, Twitter, Youtube)
- Sale of Products and Services (e.g. Bose, Apple)
- Software as a Service or “SaaS” (e.g. Salesforce.com, Constant Contact)

There is a broad spectrum of complexity of the TOU depending on the purpose of the TOU and the relevant business.



Establishment of a Contract

- Link on a Web Page (aka “Browse-Wrap”)
 - e.g. “By Using this Website, You agree to these Terms of Use; If you do not agree, do not use this Website...”
- Click Through Agreement (aka “Click-Wrap”)
 - e.g. “By clicking “I AGREE” below, you hereby agree to the terms and conditions of these Terms of Service....”
- Signed Agreement



Overview of TOU Enforceability Factors

- Offer & Acceptance
- Context
 - Extracting value from another website; competing with website provider
 - Continued violation of TOU after notice
 - Consumer v. Business
- Mechanics of the Click-Wrap Agreement Process
 - Scroll box or Link
 - “Accept” or “Agree” button
 - Requirement to acknowledge “I have read and accept the TOU”
 - Bar on accessing services/website without agreement to TOU



Typical Clauses – Browse-Wraps

- Acceptance of Terms
 - “By using our website, you indicate your unconditional acceptance of the following Terms of Use....”
 - “BY USING THIS WEBSITE, YOU AGREE TO THESE TERMS OF USE; IF YOU DO NOT AGREE, DO NOT USE THIS WEBSITE OR ANY OF THE SERVICES AVAILABLE ON THIS WEBSITE”
- Scope of website or services
 - Define scope of the website covered by the Terms of Use
 - Reserve right to change website/contents [not TOU] at will



Typical Clauses – Browse-Wraps

- Ownership of Content on Website
 - “All text, graphics, user interfaces, photographs, trademarks, logos, sounds, music, artwork and computer code (collectively, “Content”), including but not limited to the design, structure, selection, coordination, expression, “look and feel” and arrangement of such Content, contained on the Site is owned, controlled or licensed by or to [Website provider] [and is protected by intellectual property and unfair competition laws].”
- Disclaimer of Warranties for Content
 - “The information in this publication, including text, images and links, are provided “AS IS” by [Website provider], solely as a convenience....and without warranty of any kind...”



Typical Clauses – Browse-Wraps

- Right to Use Content / Website
 - “You may use the Content solely for your personal, non-commercial purposes....”
 - “You may use information on [Retailer’s] products and services... purposely made available by [Retailer] for downloading from the Site, provided that you (1) [not remove proprietary notices], (2) use such information only for your personal, non-commercial informational purposes...., (3) make no modifications to any such information...”



Typical Clauses – Browse-Wraps

- Restrictions on Use
 - No deep linking, web scraping, robot or spidering (robots.txt)
 - No reverse engineering
 - No redistribution
 - No vulnerability testing
 - No use which places heavy demand on servers
 - Nothing illegal
- Prohibited Conduct on chat rooms, discussion boards
 - Laundry list of prohibited statements and conduct



Typical Clauses – Browse-Wraps

- User Content
 - Accuracy required?
 - User responsible for all liability arising from their content
 - Personal Information subject to Privacy Policy
- Monitoring by Website Operator?
- Communications Decency Act (47 USC § 230)
 - Protects providers of on-line “interactive computer service”
- User Feedback
 - Broad right to use without restriction



Typical Clauses – Browse-Wraps

- Disclaimer for Use of Linked Third Party Websites
- Copyright Infringement/DMCA Safe Harbor
 - Establishment of Copyright Agent
 - Compliance with DMCA Safe Harbor Requirements
 - Submission of DMCA Agent form to Copyright Office (see <http://www.copyright.gov/onlinesp/agent.pdf>)
 - Notice and Takedown Procedure



Typical Clauses – Browse-Wraps

- Arbitration/Dispute Resolution
 - Efforts to prevent class actions
 - Often require arbitration in lieu of court proceedings
 - Choice of law and venue
- General Contractual Provisions
 - Indemnification
 - Limits on Liability



Customized Clauses

- Terms and Conditions of Sale of Products or Services
- Login Credentials
- Subscription
- Payment terms
- More robust/customized contractual provisions
- Export; International Use

Infinite variety of services agreement terms may be implemented-
depends on the business model



International Considerations

- Enforceability
- Jurisdiction-specific Provisions
- Local Language
- Data Privacy/Transfer Requirements
- Dispute Resolution
- Practicality



Data Collection – From Third Party Sites

- Web scraping
 - Copyright
 - Often prohibited by Terms of Use
 - Data and Content
 - Purpose of Use? [e.g. Google]
- Data licenses/API



Data Collection- Regarding Users

- Privacy Policy for Personal Information
 - Collection: Cookies, Log Files, Submitted Information, Types of Data
 - Use and Disclosure: Specific description of use of personal information (marketing, internal, external)
 - Aggregated Data exception
 - International Requirements
 - State-specific requirements (CA “Shine the Light” Law)
- Customized terms in Privacy Policy and Terms of Use
 - Alignment of Privacy Policy with TOU and business model



Beware of Data Protection Regulation

Federal Sector-Specific Regulation

- Consumer/Financial
 - Federal Trade Commission (unfair or deceptive practices)
 - Fair Credit Reporting Act (consumer reports)
 - Gramm-Leach-Bliley (financial services)
 - Electronic Communication Privacy (recording communications)
 - CAN-SPAM (promotional email disclosure and opt-out)
- Health/Medical
 - HIPAA (identifiable health data)
 - Common Rule (clinical research)
- Government Records
 - Privacy Act
- Children Under 13
 - Children's Online Privacy Protection Act



Conclusions

- Websites/SaaS businesses must consider core IP, contractual and privacy issues when establishing their business model
- Terms of Use often are the core contract with customers and business partners; enforceability is a key issue
- Establish rights in data and a clear Privacy Policy
- Address these issues early, alongside financing and patent considerations, particularly where the business will operate through its website



Questions are welcome!

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