Terms-of-Use Agreements Pose New Reputational Risks

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For years, terms-of-use agreements and privacy policies on Websites, software, and online apps and tools were a legal afterthought; users didn't look at them, and companies didn't care about them.
In fact, some companies clearly copied them from their competitors or elsewhere, say privacy lawyers.

Now, however, after dust-ups at companies like Instagram, Facebook, and Google and new regulations on data privacy, the fine print in terms-of-use agreements and privacy policies is becoming too important to ignore, and that can mean added responsibilities for legal counsel, compliance officers, and their staff.


Boyd

"You are going to see more scrutiny and more consumer protection," says Greg Boyd, partner and chairman of the Interactive Entertainment Group for the law firm Frankfurt Kurnit Klein & Selz. "You are going to have to be more thoughtful about it."

If your company Website has any interaction with the public—from e-commerce to comment boards and online messaging— then it needs to have a terms-of-use (TOU) agreement. These documents have traditionally been one-sided affairs, intended to protect the company's intellectual property, minimize unauthorized uses, or indemnify the company from the actions of users. For their part, users have always seemed more than happy to click past them without reading a word.

In recent months, however, court cases, state laws, federal regulations, and a public backlash against what were considered onerous terms of use at some companies have put a new spotlight on these agreements.

In December, when picture-sharing service Instagram quietly changed its TOU agreement, the public reaction was swift and boisterous. Thousands of its users defected over new wording of the terms. Among the language that caused uproar, and was later amended: “You hereby grant to Instagram a … worldwide license to use the content that you post on or through the Service.” The initial terms also seemed to suggest that other businesses could pay to use photos by Instagram's users without obtaining consent.

In November, after a data breach exposed customer information, some users of the shoe-shopping site Zappos.com, owned by Amazon, sued. That led a federal district court in Nevada to toss out an arbitration requirement detailed in its TOU, effectively leaving it without any contract to govern its relationship with its customers. The problem was two-fold: the TOU, buried at the very bottom of a page amid a variety of links, was deemed too hard to find. It was also a static “browserwrap agreement” that didn't require users to click on a button to accept the terms.

New Regulations

New regulations governing privacy and data collection methods have also caused companies to revisit their privacy policies and TOU agreements. In December, the Federal Trade Commission updated the Children's Online Privacy Protection Act (COPPA), which prohibits the collection of online information from children younger than 13 and expanded the definition of what constitutes personally identifiable information.

Also in December, California Attorney General Kamala Harris filed the first of what is expected to be a string of legal actions against companies with privacy policies that do not adhere to California's new law pertaining to them. Under California's online privacy statute, a Website

or online service that collects personally identifiable information must "conspicuously" post an accurate and "reasonably accessible" privacy policy. The AG's lawsuit against Delta Air Lines claims that its "Fly Delta" mobile app failed to include an adequate policy. The potential penalty could be up to $2,500 per download.

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Jamie Nafziger, a partner at Dorsey & Whitney who specializes in social media, sees a greater focus being placed on terms-of-use agreements by companies' legal and compliance personnel. For example, one of the new items under COPPA, which goes into effect on July 1, is that if you allow a third party to collect information from your users, you are strictly liable for the treatment of the children's' information they are getting. "A lot of people wouldn't even understand what those terms mean," says Nafziger. "Coming up with adequate disclosure and a privacy policy is definitely going to become more challenging … The FTC has started to come out with guidance, and I think we will begin to see more soon," she says.

Nafziger says an additional technical challenge is finding a way to ensure there are usable disclosures on mobile devices, given the small print necessitated by their lack of screen real estate.

First developed by software companies, "as more people started using things covered by terms-of-use agreements they have been tested more often," Boyd says. "Some of the things that have been pretty commonly done for 20-plus years in the software industry and on the Internet probably should not be done and will not be done in the future as we get

additional court scrutiny and, in some cases, Federal Trade Commission scrutiny."


Aaron

According to Tara Aaron, a partner at law firm Aaron Sanders, companies often take shortcuts on privacy policies and TOU agreements. "We often see that these terms have just been cut and pasted," she says. "One of the things the Zappos case shows is that even if you are going to one of the major players, like Amazon which owns Zappos, and thinking that you are going to be safe by using a big sophisticated company's terms, that's not always going to be the case. They make mistakes too. Sometimes people forget that just because something is online it doesn't mean that basic contract law doesn't apply."

The lack of requiring an affirmative click to accept terms is a mistake Zappos isn't alone in making. "The law is basically that it is your fault if you don't read a contract," she says, "but if you don't know that a contract even exists then that's the other side's problem."

As companies make the leap from traditional Websites to mobile apps and social media, new concerns arise that need to be addressed in a TOU or privacy policy, lest they attract regulatory scrutiny or legal challenges, Boyd says, The COPPA update, for example, includes geographic information its list of what constitutes personal information for users under the age of 13. Images and videos were also added under the new statute.

Aaron agrees that as privacy policy issues arise, it is increasingly likely that state officials or the FTC will be on the case. "If there is any indication that your privacy policy is not accurate as to what you do with customer data—how you use it, how you store it and share it—the FTC could initiate an action against you in the way that a court can't," she says.

A client advisory by online privacy consultant TRUSTe offered the following advice for privacy policies and TOU agreements:

· Review your privacy statement to make sure it's easy to read and understand.

· Make sure your privacy statement aligns with your terms-of-service statement by cross-referencing the two documents.

· Your posted privacy statement defines your entire privacy program. All the internal documentation of the processes and procedures you use to enforce privacy within your organization should be in lockstep with that statement. Make sure that internal documents and policies reflect what the outward-facing privacy statement says.

· Adding an effective date to privacy statements fulfills one of the requirements of the California Online Privacy Protection Act.

The Role of Compliance

John Tomaszewski, general counsel for TRUSTe, says legal departments customarily develop TOUs, as they are "functionally a contract." The compliance function will not typically get involved unless the site owner's clients are regulated.

"Then the client is usually trying to push their compliance obligations down to the vendor—and they do that by contract," he says. "While this is usually a negotiated thing, and not normally in standard terms, some legal teams may want to streamline the contracting process, so they will include terms they know their clients will want into the standard terms. This isn't common, but it can happen."


Aluotto

Christopher Aluotto, ethics and compliance counsel for Google, explains that at his company the compliance function has traditionally not been consulted on basic changes to its terms of service, but does get involved with a review when those changes apply to a privacy or trade compliance clause.

It isn't just consumers who rely on TOU agreements; the government also digs into the documents to ensure that social media sites fit their unique needs. For example, a site may ordinarily claim ownership of content or user names, something a federal agency could not abide to.
The U.S. General Services Administration coordinates negotiations on behalf of federal agencies looking to remove problematic clauses from standard TOU agreements, so that government employees can be free to use the online services. In January, for example, it added Pinterest to the list of approved social media tools government agencies can use to communicate with the public. Sixty-two other services—including Facebook, Flickr, Twitter, and Google+—have also attained that seal of approval.

Although Google's compliance team reviews all clauses that apply to federal customers, it stops short of tailoring its terms of service to satisfy government requirements. “We do, however, negotiate addendums with federal agencies to address language that an agency cannot accept because of legal restrictions,” Aluotto says. “Federal terms present unique compliance risk to contractors given that the inability to comply could result in a contract dispute, criminal sanctions, or suspension and debarment.”

Google also monitors the agreements in place with its partners, and resellers are responsible for ensuring that the end user agrees to its terms of service.

Aaron adds one final caution: Companies need to be careful if their customer base, and online outreach, extends overseas. “In general, consumer privacy laws are in a very nascent stage in the United States,

Aaron says. “They are far more sophisticated in other parts of the world, particularly in Europe. As clients expand their customer base outside the U.S. borders, they will need to comply with other nations' privacy laws.”

ZAPPOS RULING

The following is a selection from a District Court of Nevada ruling that found the Zappos.com Terms of Use agreement to be invalid as it relates to an included arbitration clause.

The Terms of Use gives Zappos the right to change the Terms of Use, including the Arbitration Clause, at any time without notice to the consumer.

On one side, the Terms of Use purportedly binds any user of the Zappos.com website to mandatory arbitration. However, if a consumer sought to invoke arbitration pursuant to the Terms of Use, nothing would prevent Zappos from unilaterally changing the Terms and making those changes applicable to that pending dispute if it determined that arbitration was no longer in its interest.

In effect, the agreement allows Zappos to hold its customers and users to the promise to arbitrate while reserving its own escape hatch. By the terms of the Terms of Use, Zappos is free at any time to require a consumer to arbitrate and/or litigate anywhere it sees fit, while consumers are required to submit to arbitration in Las Vegas, Nevada.

Because the Terms of Use binds consumers to arbitration while leaving Zappos free to litigate or arbitrate wherever it sees fit, there exists no mutuality of obligation. We join those other federal courts that find such arbitration agreements illusory and therefore unenforceable.

A court cannot compel a party to arbitrate where that party has not previously agreed to arbitrate. The arbitration provision found in the Zappos.com Terms of Use purportedly binds all users of the website by virtue of their browsing.

However, the advent of the Internet has not changed the basic requirements of a contract, and there is no agreement where there is no acceptance, no meeting of the minds, and no manifestation of assent.

A party cannot assent to terms of which it has no knowledge or constructive notice, and a highly inconspicuous hyper link buried among a sea of links does not provide such notice.

Because Plaintiffs did not assent to the terms, no contract exists, and they cannot be compelled to arbitrate. In any event, even if Plaintiffs could be said to have consented to the terms, the Terms of Use constitutes an illusory contract because it allows Zappos to avoid arbitration by unilaterally changing the Terms at any time, while binding any consumer to mandatory arbitration in Las Vegas, Nevada.

We therefore decline to enforce the arbitration provision on two grounds: there is no contract, and even if there was, it would be illusory and therefore unenforceable.
Source: In Re Zappos.com Inc.