

Terms of use: when does my company need them?

These days it is unusual for a company in even its most early stages not to have an online presence. Sometimes that online presence may only consist of a few screens; often, the online presence includes rich content and information that is protectable as intellectual property. What should a company do to protect its rights in that content and lower the risk of claims being made against the company? That's where having an effective terms of use policy posted on your website will be helpful.

What are terms of use?

"Terms of use" typically refer to the online terms that govern the access and use of a website and its content. Where products or services are being provided through a website, those products may be sold through separate "terms of sale" and the services may be provided through "terms of service." The terms "terms of use" and "terms of service" are often used interchangeably but the terms of use for a passive marketing oriented site through which no services or goods are provided are very different from a terms of service where a service is being provided, even at no charge.

Terms of use for a website typically describes what a user can do while accessing the website, what the company provides through the website, a statement about the company's rights to the content on the site and the usual disclaimers of warranty and liability. Terms of service will do all of this as well as describe the services, may include software licenses, refer to third-party sites, incorporate an acceptable use policy, describe when the service may be terminated and include procedures on how to deal with possible infringement by user generated content.

Are terms of use for a website different from those for a mobile app?

Some terms of use will include terms applicable to a mobile app. Many mobile apps will include a short-form terms of use that refers back to the website terms of use. In any case, when drafting the terms of use for a website, you will want to consider to what extent those terms of use may be applicable to the company's other offerings.

Do I need to have users agree to the terms of use or is use of the site sufficient to indicate agreement to the terms?

The courts are increasingly reluctant to enforce contracts against consumers where there is no clear evidence that the consumer agreed to the terms of use/service and where the terms are material to the company/consumer relationship. Therefore, the most conservative approach would be for companies to require users to affirmatively agree (for example, through a checkbox) to the terms of use. While it's possible for a passive marketing website to have a terms of use structured so that use of the website evidences the user's agreement to the terms, companies should be cautious about taking this approach when goods or services are being provided from the website. Also, if a company is seeking to modify its terms in a material way, it is advisable to provide notice of the modified terms to users and require them to agree to the modified terms (rather than have the agreement evidenced through continued use of the service after the modification of the terms).

Are requirements for website terms of use different if my company has



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customers outside the US?

Some countries may require that the terms of use be translated into the local language to be enforceable.

Additionally, if goods or services are being sold online, there are "distance selling" regulations in force in the EU that are designed to provide consumers with information in order for them to make informed decisions. The required disclosure of information includes delivery and payment information and return, refund and cancellation procedures, among others. There are also requirements for confirming the order, all of which means that companies conducting business online with consumers must look at not just their website terms but also the structure and operation of their websites and operational practices.

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