Best Practices In Understanding And Drafting Social Media Terms Of Use

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Agenda

- What You Should Know About Terms of Use
- Reading Between the Lines
- Presentation of Terms of Use to the User
- Ownership of Data in Social Media
- Arbitration Clauses and Recent Rulings
- Best Practices in Drafting Terms of Use
What You Should Know About TOU

- They do not exist to protect the user’s rights
- User gives away a lot
- They should be read & understood – always changing
- They create a binding & enforceable contract
- When you “ACCEPT” you agree to be bound
- More and more courts are upholding them
It’s a Binding & Enforceable Contract

“… Your access to and use of [Twitter’s] Services is conditioned on your acceptance of and compliance with these Terms. **By accessing or using the Services you agree to be bound by these Terms....**

“**You may use the Services only if you can form a binding contract** with Twitter and are not a person barred from receiving services under the laws of the United States or other applicable jurisdiction. ...”
Sharing Your Content and Information.
You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.”

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“… Sharing Your Content and Information.

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

4. When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture).”
“… Your Rights

You retain your rights to any Content you submit, post or display on or through the Services. **By submitting, posting or displaying Content** on or through the Services, you grant us a **worldwide, non-exclusive, royalty-free license** (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed)….***
“... Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.

We may modify or adapt your Content in order to transmit, display or distribute it over computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt that Content to any requirements or limitations of any networks, devices, services or media....”
Contributions to LinkedIn.
By submitting ideas, suggestions, documents, and/or proposals ... you acknowledge and agree that: (a) your Contributions do not contain confidential or proprietary information; (b) LinkedIn is not under any obligation of confidentiality, express or implied, with respect to the Contributions; (c) LinkedIn shall be entitled to use or disclose (or choose not to use or disclose) such Contributions for any purpose, in any way, in any media worldwide; ... (e) you irrevocably assign to LinkedIn all rights to your Contributions; and (f) you are not entitled to any compensation or reimbursement of any kind from LinkedIn under any circumstances. ..."
LinkedIn Terms of Use

http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag

“YOUR RIGHTS.

On the condition that you comply with all your obligations under this Agreement, ..., we grant you a limited, revocable, nonexclusive, nonassignable, nonsublicenseable license and right to access the Services, ...”
“7.1 You retain any and all Intellectual Property Rights…

… you already hold under applicable law in Content you upload, publish, and submit to or through the Servers, …. In connection with Content you upload, publish, or submit …, you affirm, represent, and warrant that you own or have all necessary Intellectual Property Rights, … Because the law may or may not recognize certain Intellectual Property Rights in any particular Content, you should consult a lawyer if you want legal advice regarding your legal rights in a specific situation. You acknowledge and agree that you are responsible for knowing, protecting, and enforcing any Intellectual Property Rights you hold, and that Linden Lab cannot do so on your behalf…”
“7.4 You also grant Linden Lab and other users …. 

You agree that by uploading, publishing, or submitting any Content to or through the Servers for display . . ., you hereby grant each user and Linden Lab a non-exclusive, worldwide, royalty-free, sublicenseable and transferable license to photograph, capture an image of, film, and record a video of the Content, and to use, reproduce, distribute, prepare derivative works of, display, and perform the resulting photograph, image, film, or video in any current or future media . . .”
Presentation of Terms of Use

- Users must be *aware* of the terms of use to be bound by them.
  - The best terms of use presentation is a *mandatory, non-leaky click-through*. Make sure your users cannot bypass it.
- The use of a website alone *can* form a binding agreement, but *only if* the user has actual knowledge that the site's Terms and Conditions provide for such a binding contract.
  - Terms of Use *must* be displayed on the website in a way in which a reasonable user could be expected to notice them to be enforceable.
Modification of Terms of Use

- Courts repeatedly reject unilateral contract amendments.
  - “Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side. Indeed, a party can’t unilaterally change the terms of a contract; it must obtain the other party’s consent before doing so.”

- Language in terms of use purporting to allow one side to change a policy at any time with or without notice is dangerous.

- It risks invalidating the entire modified contract, which may include important provisions.
Ownership of Data on Social Media

- **Crispin v. Christian Audigier, Inc.**
  - Do individuals have ownership rights in the data they upload to social media sites?

- **Europe v. Facebook**
  - Do social media providers have ownership rights in the data users post?

- **Agence France Presse v. Morel**
  - Do third parties have any ownership or use rights in the data others post on social media sites?
Individual Ownership Rights on Social Media Sites

- Courts have held that “an individual has a personal right in information in his or her profile and inbox on a social networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and bank records.”

- Courts may view public data, such as wall postings, differently from private data, such as individual messages.
Access Does Not Equal Ownership

- **Europe v. Facebook**
  - In Europe, law students lodged privacy complaints against Facebook based on Facebook’s persistent storage of data the users had deleted.
  - In December 2011, the Irish Data Protection Commission held that Facebook must delete personal data when the purpose for its collection has ceased.

- **Mobile apps and data collection**
  - Recently, several mobile application companies have come under fire for copying users’ entire address book — names, email addresses and phone numbers — to their servers.
Photojournalist Daniel Morel took some of the first pictures of the Haiti earthquake; posted them on Twitpic, a Twitter affiliate.

Another user reposted the pictures under his name.

AFP picked up the reposted images and licensed them.

AFP claimed that it had a license to use the photos because Twitter had a license to use Twitpic’s content, and Twitter encourages reuse.
Arbitration Clauses In Terms Of Use: A Little History

- Arbitration clauses in most states, until last year:
  - Looked on with a skeptical eye and a willingness to find unconscionability
  - Prohibited arbitration agreements that contain provisions barring class actions
- In Discover Bank, the California Supreme Court held that arbitration agreements prohibiting class actions are generally unconscionable under California law and therefore unenforceable.
  - Strict test to determine whether a class-action waiver is unenforceable.
AT&T Mobility LLC v. Concepcion (2011)

- The Supreme Court overturned the *Discover Bank* test, and other state laws prohibiting contracts from disallowing class action lawsuits, as preempted by the Federal Arbitration Act.

- Since *Concepcion*, the Second and Eleventh Circuits have overturned lower court rulings which held an arbitration clauses unconscionable, and enforced arbitration.

- More importantly, *Concepcion* has been applied to online terms of use in Swift v. Zynga.
Right now, many lawsuits are trying to find the limits and weaknesses of *Concepcion*.

Regardless, after *Concepcion*, social media terms of use should incorporate **well-drafted, reasonably limited class arbitration waivers** or similar provisions.

- Consider whether or not the terms of your contract may be substantively unconscionable.
Best Practices in Drafting TOU

1. **THINK** before you Draft (about the business, its services, potential liabilities, greatest asset to be protected).

2. **REVIEW** samples to start (no need to reinvent the wheel).

3. **CUSTOMIZE** sample document. (boilerplate language is only a starting point. Know your client’s issues)
Best Practices in Drafting TOU

4. **UGC POLICY.** Include language that addresses. At a minimum, avoid assignment or other ownership language.

5. **DISPUTE RESOLUTION.** How is it handled—arbitration?

6. **TOU & OTHER POLICIES.** Contradictions could render both invalid.

7. **MODIFICATIONS.** Give appropriate notice.

8. **INTERNATIONAL ISSUES.** For global businesses, consider adapting your TOU for each country.
Questions?

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