



Privacy Policy

Terms of Service and Privacy Policies *Best Practices*

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Agenda: Topics We Will Discuss Today

- Creating an Overall Legal Framework through your TOS
- Privacy Policy Fundamentals
- Privacy Policies: Why, When, and What
- IP Ownership and Rights
- Payment Considerations for Paid Services
- Legal Issues Related to User Interactions
- Privacy Policies and the GDPR & CCPA
- Other Legal Considerations with Privacy Policies
- Practical Advice to Make Your TOS and Privacy Policy Work for You



TOS offer a service provider the opportunity to set the rules unilaterally



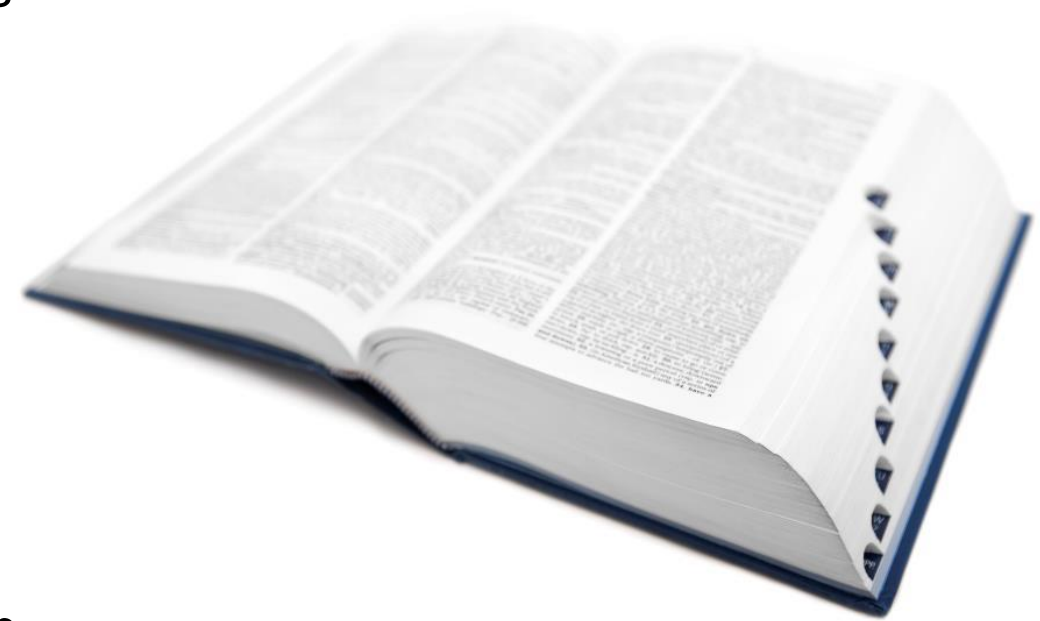
- Important caveat is enforceability.
- To increase likelihood of enforceability:
 - Require affirmative assent.
 - Make your terms clear and conspicuous.
 - Avoid unexpected or difficult to understand terms.
 - Consider users' status as consumers versus more sophisticated organizations.

Drafting Tips to Consider

- Dispute resolution considerations.
 - Choice of law, venue, arbitration, class action waiver.
- Draft limitation of liability provisions carefully, with liability cap and exclusion on certain types of damages.
 - Note that enforceability may be an issue here.
- Consider whether indemnification is appropriate for user or both parties.
- Include disclaimers if users may perceive your service as offering the following types of specialist advice:
 - Legal
 - Medical
 - Tax
 - Investment



- A privacy policy is a statement of your organization's practices relating to the personal information of consumers, employees, or others who provide their information to the organization.
- Privacy policies can be outward-facing, such as website privacy policies, or inward-facing, such as privacy policies relating to employees.
- Privacy policies can also sometimes be articulated in notices of privacy practices required under certain statutes or regulations (such as under the Gramm-Leach-Bliley Act).



Privacy policies can accomplish the following:



- Articulate an organization's privacy practices
- Create enforceable obligations
- Shield an organization from liability
- Comply with applicable laws
- Create implied contracts with consumers

When You Need a Privacy Policy

- **Legal necessity:** policies might be required by statute or regulation.
- **Contractual necessity:** policies might be referenced in contracts or terms of use.
- **Risk mitigation:** even if a policy is not otherwise required, providing a policy can help mitigate against risk.
- **Market need:** failure to have a policy can present a competitive disadvantage.



Typically, privacy policies need to articulate:



- What information is being collected.
- How the information is being collected.
- What is done with the information.
- Who the information is shared with.
- Whether information is collected from children.
- What rights consumers might have.
- When the policy is updated.
- Who to contact.
- **Certain laws carry specific additional requirements.**
- **Privacy policies should be readable.**

Protecting Your IP Rights as a Service Provider Through Your TOS

- Delineation of user and service provider rights is one of the most important functions of your TOS.
- Your service includes valuable IP, even if not protected by registration.
- State your ownership rights.
- Grant users a carefully crafted license to your service.
 - Limited, non-exclusive, during the term, for user's internal/personal use.
 - Are sublicense rights appropriate?
- Include appropriate restrictions on user rights.
 - Prohibit reverse engineering, scraping, framing, etc.
 - Consider a broader prohibition against any use of service to benefit user commercially.



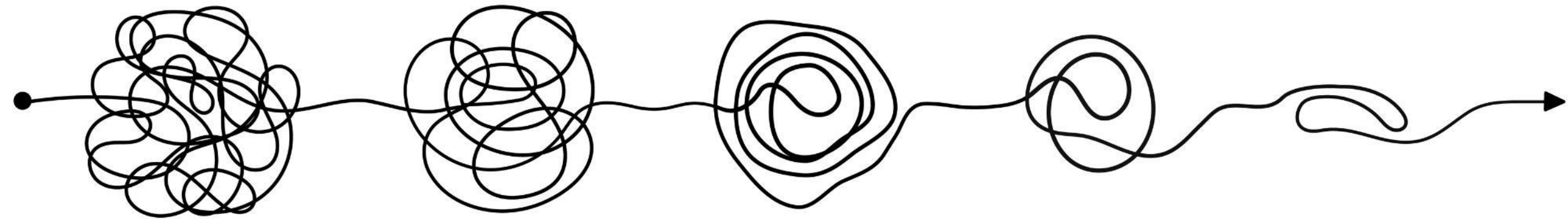
- Address user rights in user generated content.
- For consumer services, typically consumers own user content and service gets a broad license to use content.
- Include disclaimers for unlawfulness or inappropriateness of user content.

Consider DMCA registration for safe harbor protection if users can contribute content to service:

- Compliance requires adhering to DMCA's complaint and takedown procedures.
- DMCA protection is limited to copyright claims.

Addressing More Complex Issues of IP Ownership and Rights Through Your TOS

- TOS can perform a very important function in addressing ownership and license rights when it comes to less predictable scenarios where content or data is generated.
- If users can develop new works through the service, who owns the IP rights in those works?
 - If the service connects users with creators who develop works for them through the service, is that considered a work for hire relationship?
 - If the service generates results in the form of data rather than works, should the data be treated like traditional IP?
- If the user obtains ownership rights in IP generated through a service, include a license that gives you the rights you need as service provider to use this IP.



- For paid services, TOS can set out pricing as well as payment terms and consequences of late payment or non-payment.

For a recurring subscription service, these terms can be extremely important in instructing users on terms of the subscription and cancellation process:

- Automatic Renewal Law (ARL), Cal. Bus. & Prof. Code § 17600 et seq.
- Applies to service providers who provide services to users in CA.
- If you allow initiation of subscriptions online, you must allow users to cancel entirely online.
- Cancellation must be easy to do, preformatted cancellation e-mail is suggested.
- If you offer a free trial, free gift or promotional pricing with subscription purchase, you must provide clear and conspicuous notice of end of free trial or discounted pricing and allow cancellation prior to standard pricing taking effect.

Addressing Interactions between Users in Your TOS

- IP rights are not the sole legal consideration when users can contribute content through your service.
- User interactions through online service can occur in a variety of ways which present a variety of legal challenges.
 - Matching of users seeking services with other users providing those services.
 - Promotion of products and services.
 - FTC developed guidelines in 2017, expanded in 2019, to address disclosure of paid sponsorship relationships online.
 - Key is clear and conspicuous disclosure of the financial relationship.
 - Reviews
 - Ensure integrity of reviews by vetting users who may publish reviews
 - Commentary, chat, photo sharing
 - Your TOS can be a shield to protect your users, not a sword to wield against them, as you can designate acceptable uses of user content.
 - Recent media coverage of Clearview AI demonstrates this function of social media TOS.

- Privacy policies under the European GDPR have a different legal import than privacy policies in the U.S.
- Policies must list the specific rights individuals have.
- Policies should state what restrictions there might be on transfer.
- Having a policy is not sufficient for consent.



The California Consumer Privacy Act has specific requirements for consumer privacy policies



- The requirements are still in flux.
- Organizations must provide the categories of personal information being collected and disclose what is done with each category of information.
- Consumers must have specific rights disclosed to them and instructions about how to effectuate those rights.

- Laws such as HIPAA or the GLBA define and regulate personal information idiosyncratically and have specific requirements for privacy notices.
- Policies may or may not create contracts.
- Obligations in contracts are enforceable by government agencies charged with enforcing consumer protection laws, such as the FTC.
- Changing privacy policies retroactively carries risks.



- *How important is it to customize these documents versus just using something off the shelf?*
 - Importance depends on which legal considerations apply to your service.
 - Do users publish content? Generating content or data through the platform?
 - Do you operate a recurring subscription service?
 - Will users have certain expectations about other users they encounter through the service (i.e., that other users provide unbiased assessments or have certain expertise)?
- *How frequently should you update?*
 - If a new law goes into effect that applies to you.
 - If a new law does not apply to you when it is first enacted, your business may change so that it does apply later. CCPA can apply when revenues increase or user base grows.
 - If you change your business model or your data processing activities in any way (e.g., you start to collect medical information from users, you start to collect information from users in Europe, you start selling information that you have collected).
 - If nothing changes, it is still a good idea to review these documents annually.
- *Can you just copy what a competitor is using?*
 - These documents are protected by copyright.
 - Rarely will your competitor be situated exactly as you are.

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