

# How to draft terms of service online

What do Facebook, Microsoft and Pinterest get right, and wrong? **Michael Kasdan** and **Charles R Macedo** explain

**F**or social media companies, internet companies, and others that have an interactive web presence, drafting effective terms of service is not a mere formality. Controversies with sites such as Pinterest, Dropbox and Facebook have illustrated the dangers of getting the terms, or the way they are communicated, wrong.

Crafting terms that are suited to a website's business requires the legal team to balance the necessary legal protections with both the businesses objectives and customer expectations. And while website providers are often tempted to look to existing agreements for boilerplate provisions, terms of service should not blindly pull provisions used by others. The terms that govern the relationship between a business and its users are necessarily fact-specific and depend on the relevant user base, how users are expected to interact with the website, and the relevant business model. One size cannot fit all.

## Basic types of terms

Because every website should not necessarily have the same terms of service, it is useful to discuss the types of terms that should be considered rather than to suggest particular language. Accordingly, the following are some basic types of terms that should be considered:

### Rights to use posted or shared content

Many websites allow users to post, upload or otherwise share content with other users. This could be pictures, videos, music presentations, commentary, lectures or virtually any kind of information. Without proper governance, the host website can open itself up to potential liability based on improper use of this content.

One issue that should be addressed is whether the terms of service ensure that the website obtains from the user appropriate rights for the intended (or perhaps even potentially unintended) uses of the content by the website.

Typically, terms of service will want to include some sort of limited licence to use that content in order to provide the service. The key issue here is the scope of that licence and how broad or limited it should be. Is the licence indeed limited to allow only that required to provide a service? Or is it necessary to obtain broader rights to use the data for other purposes? As this is dependent on the site's business model and what the company intends to do with the information, this should be given careful consideration. Furthermore, as discussed below, if the scope of a licence is perceived to be too broad, it can upset the user base.

One example of a limited licence is Microsoft's SkyDrive, which provides online or so-called cloud storage. Its terms of service plainly explain that:

Except for material that we licence to you, we don't claim ownership of the content you provide on the service. Your content remains your content. We also don't control, verify, or endorse the content that you and others make available on the service.

It also very carefully limits the scope of Microsoft's content licence "solely to the extent necessary to provide the service":

You understand that Microsoft may need, and you hereby grant Microsoft the right, to use, modify, adapt, reproduce, distribute, and display content posted on the service solely to the extent necessary to provide the service.

## One-minute read



The terms of service for social media companies, indeed any company with an interactive website, are increasingly important.

They have to provide full legal protection for the company across a range of areas, including intellectual property, but also effectively and easily communicate those rights to users. As with any social media issues, a balance constantly has to be struck and several companies - such as Pinterest, Dropbox, No and Google Drive - have realised the business and PR costs of getting that balance wrong. Some have resorted to using plain language rather than legal terms. Others, such as Twitter, have taken a hybrid approach, which includes the full legal language but also prominently displays a plain English explanation.



## Seven tips on terms of service

- 1 Balance legal objectives with business objectives and user expectations
- 2 Tailor them to your business model; don't just use boilerplate terms
- 3 Right-to-use licenses for posted content should obtain sufficient rights for the business but not overreach
- 4 With provisions to address inappropriate content - including content that infringes third-party IP rights - always bear in mind what the user will tolerate
- 5 Minimise liability for third-party infringement by providing an appropriate notification procedure and internal response procedures in compliance with the DMCA
- 6 Set up a privacy and data-use policy that is both clear to users and tailored to your business
- 7 Clear communication of key terms to the user is paramount. Take the time to explain the meaning and rationale of terms

By way of comparison, Facebook's licence to user content in its 2009 terms of service raised controversy due to its breadth:

You hereby grant Facebook an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide licence (with the right to sublicense) to (a) use, copy, publish, stream, store, retain, publicly perform or display, transmit, scan, reformat, modify, edit, frame, transmit, excerpt, adapt, create derivative works and distribute . . . any User Content you . . . Post . . . and (b) to use your name, likeness, and image for any purpose, including commercial or advertising, each or (a) or (b) on or in connection with the Facebook Service or the promotion thereof.



Clearly, while Facebook may have thought this was appropriate for its business model, this approach may not work for others. Indeed, Facebook itself no longer includes such a broad licence grant in its terms of service.

In drafting a content licence provision, it is important to understand what scope of rights is required, desired and acceptable for the business. If a limited licence is sufficient, it may be good not to overreach. On the other hand, if the business depends on the use of user-generated content or information, it is important to define the licence so that it is broad enough to provide the necessary rights. A site which generates revenue by republishing user content needs to obtain a broad enough license to cover such republication.

In addition to obtaining a licence from the user providing the content, the terms of service may also want the user to confirm that he or she has the right to grant a licence or obtained permission to share the content.

One way that terms of services may address this type of concern is by including representations and warranties by the user. For example, ScholarOne Manuscripts, a website used by publishers to obtain and process submissions by authors, includes in its terms of service the following representation and warranty:

**b. User owns, or has obtained all necessary right, licences and permission (i) to submit, upload, post,**

**reproduce, distribute, and submit all User Submissions, including Manuscripts, via the Website utilizing the Software or the Services; and (ii) to grant ScholarOne, and Third-Party Users the licence and rights described below in this Section 6.**

### Content restrictions, prohibited uses, termination and removal

Another issue that platforms for user-generated content face is the posting of inappropriate content. For example, content may be disparaging, inflammatory, or perhaps infringe another's copyright, trade mark or other IP rights. This concern may be addressed in different ways.

First, as with the above example, the user can provide a representation and warranty that the content will not be inappropriate. ScholarOne includes a series of such representations and warranties:

- c. No User Submission, including any Manuscript, shall violate, misappropriate, or infringe the rights of any person or entity, including without limitation, any person or entity's trademark, patent, copyright, trade secret, intellectual property, statutory, proprietary, privacy, publicity, or contractual rights, or any other rights arising under the Laws of any applicable jurisdiction (collectively, "Third Party Rights").
- d. No User Submission, including any Manuscript, shall be unlawful, harmful, or threatening, or libelous or defamatory of any person or entity.
- e. All User Submissions, including any information concerning another person or entity, shall be true and accurate to the best of User's knowledge.

No doubt creative minds can come up with a laundry list of potential representations and warranties that could be included. Again, one should weigh this temptation against the business need for each term. Some users do not want to give up their first-born child just to submit a photo on a social network.

The site may also want to outline what content is inappropriate and expressly obtain the right to remove it. For this reason, terms of service often expressly set out content restrictions, prohibited uses, and provide rights for the site to remove



content or terminate use for violation. This may include, for example, a provision that prohibits the uploading or posting of content that is defamatory, obscene or otherwise unlawful.

Generally, this provision may also include a prohibition on posting anything that infringes IP rights. This may include copyrighted pictures, copyrighted text (such as news reports or blogs), trade mark infringement (including unauthorized fan pages) and postings of trade secrets.

In addition, terms of service may state that the user holds the site harmless and indemnifies it for any liability. Such provisions ensure that if content is suspected of being wrongfully provided it can be removed to limit exposure.

For example, the terms of service of Vimeo, a video sharing platform, provide:

**You may not upload, post, or transmit (collectively, “submit”) any video, image, text, audio recording, or other work (collectively, “content”) that: Infringes any third party’s copyrights or other rights (e.g., trademark, privacy rights, etc.); Contains sexually explicit content or pornography (provided, however, that non-sexual nudity is permitted); Contains hateful, defamatory, or discriminatory content or incites hatred against any individual or group; Exploits minors; Depicts unlawful acts or extreme violence; Depicts animal cruelty or extreme violence towards animals; Promotes fraudulent schemes, multi level marketing (MLM) schemes, get rich quick schemes, online gaming and gambling, cash gifting, work from home businesses, or any other dubious money-making ventures; or Violates any law.**

It also provides that “Vimeo may suspend, disable, or delete your account (or any part thereof) or block or remove any content you submitted if Vimeo determines that you have violated any provision of this Agreement or that your conduct or content would tend to damage Vimeo’s reputation and goodwill”. Again, it is important to consider not only what is needed and desirable from the website’s perspective, but also what is acceptable for users.

### DMCA and notice and takedown compliance

Another important consideration for websites that share content is minimising liability for infringement of third-party IP rights, defamation and harassment. For example, the Digital Millennium Copyright Act in the United States includes a safe harbour from copyright infringement claims for sites that host the content of others. To fall under the safe harbour, a service provider must implement notice and takedown procedures for infringing content.

In order to give rights holders an opportunity to address alleged copyright infringement, trade mark infringement and disparagement claims, the terms of service should provide a working notice system for third parties to contact the site to address concerns about specific posted content.



## Some users do not want to give up their first-born child just to submit a photo on a social network

pliance notice that essentially states “we comply with the DMCA”:

**It is the policy of [website] to promptly process and investigate notices of alleged copyright infringement, and take appropriate actions under the Digital Millennium Copyright Act, Title 17, United States Code, Section 512 (“DMCA”).**

The notice should also provide complainants with contact information and sets forth what information should be included in any complaint.

At the other end of the spectrum, Facebook’s terms of service include a detailed page entitled How to Report Claims of Intellectual Property Infringement, with separate instructions and forms for copyright infringement and other claims. Using detailed forms can ensure the prompt and consistent collection of all necessary information. For example, the Facebook forms collect contact information, information on the infringement or objectionable content, an explanation of how it infringes, and a certification that the infringement claim is based on a good faith belief.

### Privacy and use of data

Privacy and data security is another issue that is commonly addressed either in terms of service or a separate privacy policy that is referenced in the terms of service. There has been extensive litigation, threatened litigation and public criticism recently over how websites use, say they use, say they might use, or say they will not use data. This makes the issue not only a legal but a public relations issue as well.

The purpose of a privacy policy is to inform users how you collect and use their data. FTC guidelines require that websites that collect personal information have a “clear and concise” privacy policy that explains: what type of information the company or website collects, how the company or website uses that information, with whom the information is shared, and how the information is secured.

For example, the privacy policy of Wordpress.org, a popular blog, includes a section on the gathering of personally identifying information, which states that:



Certain visitors to WordPress.org's websites choose to interact with WordPress.org in ways that require WordPress.org to gather personally-identifying information. The amount and type of information that WordPress.org gathers depends on the nature of the interaction. For example, we ask visitors who use our forums to provide a username and email address. In each case, WordPress.org collects such information only insofar as is necessary or



## One avid Pinterest user who was a photographer and an attorney very publicly pressed the panic button

appropriate to fulfill the purpose of the visitor's interaction with WordPress.org. WordPress.org does not disclose personally-identifying information other than as described below. And visitors can always refuse to supply personally-identifying information, with the caveat that it may prevent them from engaging in certain website-related activities.

Other sections of the policy outline how this information is used, set forth the limitations on with whom this information may be shared, and address data security. As to data security, WordPress's policy states that "WordPress takes all measures reasonably necessary to protect against the unauthorized access, use, alteration, or destruction of potentially personally-identifying and personally-identifying information".

Like the rest of the terms of service, it is important to specifically tailor your privacy policy to your business and business model. Be transparent, and draft a policy that the business is prepared to implement and abide by.

### User controversies

Recent events have shown that once the terms of service have been drafted, it is also crucial to explain this set of rules to your users in an accessible way, whether in the terms themselves or elsewhere.

User controversy involving Pinterest and Google Drive illustrate this point. Both involved the inclusion of commonly used and important terms in their terms of service. Both highlight the importance of explaining these key terms to the user.

Pinterest.com is one of the fastest growing social media sites ever. Millions of users have joined its unique social media site, where users can share interests by virtually pinning images, videos, and other content to create online bulletin boards. If the pinned image or video originated on another website, that site may be accessed by clicking on the image or video.

Given that its business model relies on users posting content that often does not originate with them, minimising liability for potential copyright infringement claims is crucial.

Pinterest's terms of service stated that Pinterest's users are solely responsible for what they pin and that they must have express permission from the content owner to post any third-party content and included an indemnification and hold harmless clause. While these clauses are commonly found in the terms of service of most sites that allow users to post con-

tent (and for good reason), in the case of Pinterest it led to a blow-up. One avid Pinterest user who was a photographer and also an attorney very publicly pressed the panic button, concluding that the terms of service scared her so much that she shut down and deleted all of her Pinterest boards.

In the case of Google Drive, the user controversy involved the licence-grant provision in its terms of service that granted Google the rights to use and reproduce files stored by users in order to provide the service. The intent of the provision (also a common component of most terms of service) was to provide Google with only the rights necessary to provide its service. However, this provision was misunderstood by many users to mean that Google was obtaining unfettered rights in any and all of the content that is stored on Google Drive, which includes personal documents and photos, and that users no longer had ownership rights in that content.

The licence provision stated:

**When you upload or otherwise submit content to our Services, you give Google (and those we work with) a worldwide licence to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content. The rights you grant in this licence are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones.**

The terms of service also stated in another section that "Some of our Services allow you to submit content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours."

Taken together, these provisions provide a limited licence for the purpose of providing the service and make clear that the users retain ownership over content that is uploaded. Nonetheless, in looking at the licence provision or perhaps merely the first sentence of the licence provision in isolation, the user base was not so sure and feared that in uploading content, they were giving away their rights to Google.

### Plain English or legalese?

A lesson here is that there is value in explaining the rationale behind and meaning of key terms and conditions – including the content licence and IP infringement prohibitions.

Indeed, spurred by such controversies, many companies have begun to supplement – or in some cases replace – their terms of service with plain English summaries. At the very least, the use of non-legalese, where possible and practical, is becoming recognised as a best practice. This is intended to demystify legal language and to explain in easy terminology exactly what the terms of service are.

Facebook moved to plain English terms of service in 2009, in response to user protests against its earlier terms, which users said were overreaching and difficult to understand.



Facebook's current terms of service include a section entitled "How we use the information we receive," which explains, in part, that "[g]ranteeing us this permission [to use user-generated content and data] not only allows us to provide Facebook as it exists today, but it also allows us to provide you with innovative features and services we develop in the future that use the information we receive about you in new ways". This section also makes clear that "you always own all of your information."

In a more recent example, Dropbox, a competitor of Google Drive, had a similar controversy over its terms of service. Their users became upset over the licence language in the terms of service, which many feared provided Dropbox with IP rights in anything uploaded to the site. Dropbox's reaction was to explain, in plain English, that the licence was limited and that user's unquestionably "own their own stuff". They re-wrote the licence grant in plain English terms:

By using our Services you provide us with information, files, and folders that you submit to Dropbox (together, "your stuff"). You retain full ownership to your stuff. We don't claim any ownership to any of it. These Terms do not grant us any rights to your stuff or intellectual property except for the limited rights that are needed to run the Services, as explained below . . .



Dropbox's terms also plainly state that "we may need your permission to do things you ask us to do with your stuff, for example, hosting your files, or sharing them at your direction... You give us the permissions we need to do those things solely to provide the services."

Of course, in all cases, it is crucial to take care to ensure that the plain English is indeed readily understandable and, if used in the terms of service

## Twitter's terms of service use a hybrid approach

themselves (and not merely as a supplemental explanation) that it provides the intended rights and restrictions. If done properly, this practice can be useful in heading off controversy. Remember, however, that it is sometimes difficult to capture detailed legal concepts in plain English, and that if the dumbed-down version loses important concepts, this can result in liability, risk and exposure for the host.

Perhaps with such considerations in mind, Twitter's terms of service use a hybrid approach. They remain written in standard contractual language, but also include set-off boxes with explanatory plain English text. For example, the licence for Twitter to use user content states:



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 licence (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).

However, this is followed by a set-off box that explains: "This licence is you authorizing us to make your Tweets available to the rest of the world and to let others do the same."

A corollary to providing plain English explanations and non-legalese is the placement and visibility of terms of service. Where transparency is important, consideration should be given to placing them in an accessible location. For example, Pinterest.com includes a link to Terms and Privacy and Copyright and Trademark in a large menu on the left of its About Pinterest page. These links bring the user to tabbed pages that include its Terms of Service, Privacy Policy, Acceptable User Policy, and Copyright and Trademark Infringement Complaint Forms.



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