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RISK MANAGEMENT FOR WEBSITE OWNERS

PROTECTION AGAINST FRIVOLOUS LAW SUITS AND CLASS ACTIONS

I. *Why a Website Needs "Terms of Service.[1]"*

Websites may be broken down into two basic types: (1) static and (2) interactive. Static websites are those where "users" can browse the website for information, but have no other interaction with the website or its owner. However, interactive websites enable users to interact with the website in various ways such as buying products (Amazon), exchanging information (Wikipedia), connecting with other users (Facebook), conducting surveys (Survey Act), and the like.

Operating any website can give rise to legal rights and obligations, which, in turn, may lead to legal claims. Operating an interactive website increases the owner's risk for legal exposure. For example:

- When a user buys products or services on line, a sales contract arises.
- When a user provides credit card information, the owner may be liable for failure to safeguard that credit card information.
- When a website owner or a user posts information about a third person, the possibility of a defamation claim arises.
- When a website enables users to gather information from third parties (e.g. a survey site) it also enables the user to misuse that information, giving rise to potential claims by the third parties against both the misuser and the website owner.
- When a user provides other confidential information, the owner may be liable for intentionally or even unintentionally disseminating that information.

The Terms of Service on a website are analogous to the fine print on the back side of an order or confirmation form, and to the "boiler plate" language found near the end of any contract. Similarly, Terms of Service are included in a website to protect the owner's legal rights and to minimize potential liability.

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[1] Terms of Service are sometimes referred to as "Terms of Use."

II. *Some Terms that May Protect a Website Owner.*

Let's start with the example where an individual in California buys a consumer product from a New York manufacturer's website. If the buyer determines that the product is defective, he or she can sue the seller in the California state or federal courts and can claim a violation of California consumer protection law.[2] Faced with such a claim, the New York manufacturer would have to engage California lawyers and incur the expense of litigating in a state 2,000 miles from home, and face the very consumer friendly California consumer protection laws.

To avoid this, the New York manufacturer can include "venue" and "choice of law" clauses in its Terms of Service. A "Venue" clause can provide that all claims or disputes arising from business transacted on the site must be litigated in the New York courts (or before a New York arbitration panel). A "choice of law" clause could provide that all claims must be construed under New York law. A California individual might be far less likely to pursue a law suit on the other side of the country -- especially without the protection of California consumer protection laws (New York law is generally not as consumer friendly as California's).

Another example might be a "B to B" transaction where a machine fabricator purchases machine parts on line, intending to incorporate them into machines that it fabricates for its own customers. The fabricator/purchaser can file a law suit claiming that: (1) the machine parts were defective; (2) the defective machine parts prevented it from timely delivering the completed machinery to its customer; and (3) the buyer lost substantial projected profits.

To avoid this, the New York machine parts manufacturer can also include a "limitation of liability" clause in its Terms of Service. These clauses typically limit buyers' claims monetarily (often limited to the amount of the purchase) and usually prohibit claims for loss of profits and/or for other "consequential" damages.

III. *Other Terms to Include.*

The preceding section reviews "venue", "choice of law" and "limitation of liability" clauses. In fact, there are many other areas where legal risks can be effectively limited and managed by properly worded Terms of Service. To help exemplify this, a sample Table of Contents for a typical Terms of Service is attached as an appendix at the end of this Newsletter.

IV. *Making sure the Terms of Service are Enforceable.*

In the last decade or so, Courts have struggled with the issue of when to enforce Terms of Service employed by website owners. While different Courts have come to different conclusions, it is becoming clear that Courts will often not enforce them unless it is clear that the user should have been aware that the owner was attempting to impose Terms of Service.

[2] Most states have a so-called "long arm statute" which gives its Courts jurisdiction over non-resident persons or companies when the transaction at issue has sufficient relationship to the state and/or the non-resident transacts sufficient unrelated business in the state in question.

In 2007 a owner friendly decision was issued in a class action brought on behalf of consumers that purchased tickets for a Rolling Stones concert from the Ticketmaster website[3]. In that case, the federal district court in Manhattan held that references to the Terms of Service displayed on the website were sufficient to bind the user. The opinion states:

> To purchase her tickets from Ticketmaster, the plaintiff was required to click on a "Look for Tickets" button, immediately above which appears the statement "By clicking on the 'Look for Tickets' button or otherwise using this website, you agree to the Terms of Use."…Clicking on the "Terms of Use" link presents the full Terms of Use….Ticketmaster's Terms of Use are sufficiently conspicuous to be binding on the plaintiff as a matter of law.

However, in 2009 a higher federal Court rules against the website owner in a class action suit against Overstock.com[4]. The Court first noted that in order for Terms of Service to be enforceable, the judge or arbitrator must find that the user has actually agreed to be bound by the terms stated in the Terms of Service. The Court recognized that:

> "It is a basic tenet of contract law that in order to be binding, a contract requires a "meeting of the minds" and "a manifestation of mutual assent…The making of contracts over the internet "has not fundamentally changed the principles of contract."

The Court refused to apply the Terms of Service because the users could not see the link to the Terms of Service without scrolling down to the bottom of the screen; and the users were able to effectuate purchases without ever seeing the Terms of Service. In other words, the Court presumably would have applied the Terms of Service if the site were constructed in a way that required the user to check a box agreeing with the terms, or if the Terms of Service were displayed in a way that the user necessarily had to see them to make a purchase.[5]

We read the Overstock opinion as making it clear that a preferable method for website owners to obtain users' agreement to the Terms of Service, is to employ the "clickwrap" method, stating:

> "On the internet, the primary means of forming a contract are the so-called "clickwrap" (or "click-through") agreements, in which website users typically click an "I agree" box after being presented with a list of terms and conditions of use, and the "browsewrap" agreements, where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen….

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[3] Druyan v. Jagger, 508 F.Supp.2d 228 (SDNY 2007)

[4] Hines v. Overstock.com, Inc., 668 F.Supp.2d 362 (EDNY 2009)

[5] See also Specht v. Netscape Communications Corporation, 306 F.3d 17 (2nd Cir. 2002) a class action where the defendant website owner unsuccessfully sought to refer the case to an arbitration panel. The same New York federal appeals court ruled that the users' download of free software from the site did not constitute sufficient assent to bind users to the Terms of Service in which the arbitration clause was found.

The Court distinguished the "browsewrap" method from the preferred "clickwrap" method, stating:

> Unlike a clickwrap agreement, a browsewrap agreement "does not require the user to manifest assent to the terms and conditions expressly ... [a] party instead gives his assent simply by using the website."…In ruling upon the validity of a browsewrap agreement, courts consider primarily "whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site."

In other words, the enforceability of Terms of Service obtained through "browsewrap" will depend on the surrounding circumstance; while it appears that Terms of Service obtained through "clickwrap" will be assured.

V. *Conclusion.*

Adding Terms of Service to a company's website can go a long way in managing the risk of lawsuits by disgruntled users, so long as: (1) the Terms of Service are carefully tailored to the subject matter and construct of the site and (2) the Terms of Service are presented in a way that reduces, if not eliminates, any doubt that the user agreed to the Terms of Service.

Richard H. Waxman, P.C. will answer your questions about Terms of Service and other website ownership issues, and how they might apply to your business. We will help you prepare appropriate Terms of Service and related documents tailored for your website and will guide you on how to present them within your site in a way that helps ensure enforceability.

Please call or e-mail if you have any questions.

Very truly yours,

Richard H. Waxman

If you wish to learn more about our Business Law practice, visit the Corporate and Business Law section of our website at: www.waxmanlaw.com.

We encourage you to forward this Newsletter or the link to it to people within your organization, and to your clients and friends.

Appendix

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