

Website User Agreements

Balance risk while managing conversion, retention and attrition

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EBSITE user agreements establish the terms under which the relationship between a visitor and a site

is governed. A common practice for small websites is to “borrow” language and attempt to customize the terminology to fit their needs. The problem is that drafting a website-user agreement is complex legal work. It requires legal knowledge and expertise to craft a user agreement that is enforceable, contains necessary protections and is palatable to the valued visitors. Even the method and manner of presentation on a website is important. Weighing the importance of strong legal provisions on your site against the risk of losing potential revenue-producing visitors, and balancing the risk of attrition with the benefit of enhanced legal protections, is not a simple exercise.

Risk tolerance is the degree of risk you are willing to assume in return for higher revenue. This varies widely. If you have little to lose, then you may be willing to tolerate high risk. A “lightweight” user agreement, providing minimal protections for your site and maximum guarantees of performance and wide-reaching protections for your visitors, may be right for you. Since this user agreement is favorable to your visitors, you may also elect to provide particularly prominent access to it.

On the other hand, if you are risk averse, and not particularly concerned about the revenue impact, your user agreement will be loaded up with disclaimers, damages limitations and waivers of liability. You are going to have lower conversion rates and higher attrition rates for those who actually read through the terms. The key, of course, is how to draft the iron-clad language and position the agreement in such a way that its impact is minimized. Your attorney should understand the various techniques available and be able to give you guidance as to the likelihood of enforceability under the various options.

At a high level, the courts will view the enforceability of a website-user agreement in the context of fundamental fairness. The more one-sided an agreement, the more inclined a court will be in finding that it is unenforceable. A major factor is the actual or apparent knowledge of the user. While there are few court decisions on the issue, reference to a long line of “adhesion-contract” decisions relating to offline contracts and Federal Trade Commission opinions



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on adequate disclosures to consumers (individual and business) provide valuable guidance. Common sense, an appreciation for the legal nuances, an intimate knowledge of the web and an understanding of industry standards and visitor expectations within your industry sector should guide you and your lawyer.

Of course, most online businesses fall somewhere in between the two extremes. Companies generally want absolute protection, increased conversion and decreased attrition. Is there a way to write such an agreement? Not in absolute terms, to be sure. But with careful and creative drafting, this balancing act can often be achieved. Such a user agreement would be written in a conversational and friendly tone, explaining the need for certain provisions, simplifying the terminology and leaving your visitor (and potential customer) with a “warm and fuzzy” feeling. This is an endeavor best left to a creative intellectual property Internet contract lawyer. Contract lawyers aren’t trained to use creative language, and it takes plenty of self-confidence for a lawyer to draft a seemingly “un-lawyerlike” legal contract. But, it is possible, and this option may be the right one for you. ☛

The information in this article is not intended to be legal advice. Always consult your attorney when faced with legal issues.

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