



## What Your Terms and Conditions Tell Your Customers

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*(Editor's note: One in an occasional series of articles on how knee-jerk boilerplate Web sites terms and conditions can hurt e-commerce enterprises. )*

What businessperson hasn't complained about how lawyers ruin deals? The simple handshake and bar-napkin agreement too often turns into hundreds of pages of fine print, with hourly billing to match. Yet neither party really knows whether it all actually states the deal as each understood it over handshakes.

Sometimes the fallout begins because the contracts are unintelligible to the layman — not good. Other times, the lawyer may have taken far longer than the deal allowed to write a contract, or simply blew the budget — also not good. Whatever the cause, these problems lead many businesspeople to wonder whether their lawyers are for them, or against them.

While that sentiment may simply be a way of finding a scapegoat for a deal that a businessperson couldn't get closed, it's also unfortunate that the sentiment rings too true for e-commerce firms, and far too often. And, of course, that's definitely not good.

As briefly mentioned in "[DIY-ing to e-Plan](#)" (*see, e-Commerce Law & Strategy*, August 2008), one has to wonder whether e-commerce lawyers (or their clients) actually took the time to read the "terms and conditions" on the Web site they own or are adorning — that is, the formal contract that governs doing business with the site — before the site went live.

Curiously, those legal rules often appear to contradict the business goals and concept of the site. In the estate-planning article, for example, I pointed out how e-commerce firms, selling trust and assurance that post-mortem messages and instructions would be honored, used boilerplate disclaiming any responsibility for doing any of those things. In "[I Signed WHAT?!](#)" (*see, e-Commerce Law & Strategy*, July 2008), I pointed out how many online sites of bricks-and-mortar retailers known for their customer friendliness had all the allure of bayonets and barbed wire, at least according to their legal terms of use. Ouch, and, maybe — no thanks!

Unfortunately, that paradox of legal boilerplate that undermines the Web site's e-business doesn't stop with the

retailers I pointed out in July. Consider just a few examples of other types of e-commerce sites whose legal rules seem to contradict the business image that their owners are trying to create online.

## A Peek at Potential

### Customer Pique

At Accuweather.com, a site many of us use to quickly determine how to dress and plan based on the weather, the firm's lawyers warn us that we really shouldn't trust its meteorologists. Indeed, Accuweather.com, which aspires to be "the World's Weather Authority," based on its values (among others) of "quality and accuracy," follows those boasts up with the typical denials of responsibility and liability if its predictions are wrong:

AccuWeather makes no express or implied warranties, guarantees or affirmations that weather information will occur or has occurred as the reports, forecasts, graphics, data, briefings or information comprising the Site, products or services state, represent or depict and AccuWeather shall have no responsibility or liability whatsoever to Subscriber or any other person or entity, parties and nonparties alike, for any inconsistency, inaccuracy or omission for weather or events predicted or depicted, reported, occurring or occurred. ... SUBSCRIBER IS ADVISED AND INFORMED THAT THE GOVERNMENT ISSUES OFFICIAL WATCHES, WARNINGS, AND ADVISORIES, BULLETINS AND OTHER COMMUNICATIONS. SUBSCRIBER SHOULD KEEP ADVISED OF SAME. SUBSCRIBER AND THIRD PARTIES ARE SOLELY RESPONSIBLE FOR ACTION OR LACK OF ACTION TAKEN TO PRESERVE LIFE OR PROPERTY. (See, [www.accuweather.com/termsusage.asp?partner=accuweather&traveler=0](http://www.accuweather.com/termsusage.asp?partner=accuweather&traveler=0).)

Because we all know that the weather is ultimately unpredictable, perhaps we should not be alarmed when an online forecasting service simply states what many would consider obvious: that it cannot be held legally responsible when the weather doesn't have the courtesy to follow its predictions.

But many of the other familiar sites to which we turn around the clock, for routine and extraordinary information alike, do no better at (mis)matching their legal and business messages. For example, who hasn't used (or been linked to) [www.mapquest.com](http://www.mapquest.com) to get directions and a map? Certainly, a site in the business of giving directions should try to get them right — until the lawyers chime in (and loudly, in all capital letters):

THIS WEBSITE AND THE MATERIALS ARE PROVIDED WITH ALL FAULTS ON AN "AS IS" AND "AS AVAILABLE" BASIS. MAPQUEST, ITS LICENSORS AND OTHER SUPPLIERS DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE WARRANTIES THAT THE WEBSITE AND MATERIALS ARE FREE OF DEFECTS, VIRUS FREE, AND ABLE TO OPERATE ON AN UNINTERRUPTED BASIS, THAT THEY WILL MEET YOUR REQUIREMENTS, OR THAT ERRORS WILL BE CORRECTED, AND THE IMPLIED WARRANTIES THAT THE WEBSITE AND MATERIALS ARE MERCHANTABLE, OF SATISFACTORY QUALITY, ACCURATE, FIT FOR A PARTICULAR PURPOSE OR NEED, OR NON-INFRINGEMENT, UNLESS SUCH IMPLIED WARRANTIES ARE LEGALLY INCAPABLE OF EXCLUSION. NO ADVICE OR INFORMATION GIVEN BY MAPQUEST, ITS AFFILIATES OR THEIR RESPECTIVE EMPLOYEES OR AUTHORIZED AGENTS SHALL CREATE A WARRANTY OR EXPAND THE SCOPE OF ANY WARRANTY THAT CANNOT BE DISCLAIMED UNDER

APPLICABLE LAW. YOUR USE OF THIS WEBSITE AND THE MATERIALS IS SOLELY AT YOUR OWN RISK.

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Your use of the website and Materials is at YOUR OWN RISK and MapQuest is under no obligation to provide you with any support, error corrections, updates, upgrades, bug fixes and/or enhancements of the website and Materials.

*Please note that the Materials may include technical inaccuracies or typographical errors. In addition, you may find that weather, construction projects, traffic conditions, or other events may cause road conditions to differ from the listed results. Please obey the rules of the road at all times and comply with all posted signage. (Emphasis added.) (See, [http://cdn.mapquest.com/mq\\_legal/termsfuse.html](http://cdn.mapquest.com/mq_legal/termsfuse.html).)*

Google's mapping service is no better:

Information provided through Google is intended for planning purposes only. You may find that weather, construction projects, traffic conditions or other events may cause road conditions to differ from the map results. (See, [www.google.com/intl/en\\_us/help/terms\\_maps.html](http://www.google.com/intl/en_us/help/terms_maps.html).)

Just as with the weather, none of us would reasonably expect online mapping services to track every temporary delay, or even recent road changes — but we routinely rely on these services as though they did. And why not? Since paper maps and atlases have long used the ubiquitous *current as of the date of publication* disclaimer, their online counterparts are simply following the model of their paper-and-ink predecessors or peers, just as the law in segments of the e-commerce market has drawn from the real-world analogs to which the law applies.

## Isn't This the News?

When it comes to news, the rules can become even more complex. Consider how many different warnings we need just to read what is happening in the world, according to *The New York Times*.

The "Times Reader Terms of Use ([www.nytimes.com/ref/membercenter/help/tragree.html](http://www.nytimes.com/ref/membercenter/help/tragree.html)), the "Times Reader End Use License Agreement" ([www.nytimes.com/ref/membercenter/help/treula.html](http://www.nytimes.com/ref/membercenter/help/treula.html)) and the Times' "Member Agreement" ([www.nytimes.com/ref/membercenter/help/agree.html](http://www.nytimes.com/ref/membercenter/help/agree.html)) are rife with examples of complex elements that certainly seem to contradict the paper's goals of informing the public. Even a source that values its reputation for trustworthiness as much as *The Times* still can't overcome its lawyers' insistence (or dependence) on saying nothing:

Neither NYT nor NYTimes.com represent or endorse the accuracy or reliability of any advice, opinion, statement, or other information displayed, uploaded, or distributed through the Service by any user, information provider or any other person or entity. You acknowledge that any reliance upon any such opinion, advice, statement, memorandum, or information shall be at your sole risk. (See, [www.nytimes.com/ref/membercenter/help/agree.html](http://www.nytimes.com/ref/membercenter/help/agree.html).)

A strange notice from a newspaper, indeed. One definition of *news*, after all, is *change* — that a change worth noting for some reason is news. And even though news organizations strive for accuracy, no editor would claim

that all content appearing in his or her publication or broadcast of whatever technological type is absolutely free of error or that it should be taken as advice to follow. And the disclaimer above comes from the Web site of one of the most known, trusted and authoritative news sources on earth. (*Note:* This newsletter is no exception; see our disclaimer in the masthead on page 2 of the PDF of this issue.)

Even traditional authorities, such as encyclopedias, also have to qualify the accuracy of their online information. *The HighBeam Encyclopedia* ([www.encyclopedia.com](http://www.encyclopedia.com)), for example, promotes its reliability by citing where it got its information: "published reference sources like Oxford University Press, Britannica, and Columbia Encyclopedia" (emphasis added). Its marketers advertise it as the place to go online for "reliable sources, pictures (and) topic summaries" and "credible answers" from "the best in online reference." Yet even after all that emphasis, its lawyers include a standard boilerplate "disclaimer of warranties and limitation of liability," including "with respect to 'ANY CONTENT, INFORMATION, MATERIAL, POSTINGS, OR POSTING RESPONSES FOUND ON THE SERVICE,' all of which are provided "AS IS." (See, [www.encyclopedia.com/terms.aspx](http://www.encyclopedia.com/terms.aspx).)

## Isn't This an Encyclopedia?

Similarly, the creators of Wikipedia, the Internet effort to redefine the encyclopedia for the digital age ([http://en.wikipedia.org/wiki/Wikipedia:Wikipedia\\_is\\_an\\_encyclopedia](http://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_an_encyclopedia)), nonetheless felt compelled to include many pages of disclaimers, on a wide variety of topics, that seem at odds with the common-sense notion that an encyclopedia should "get it right" (see, [http://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer)). [In fact, Wikipedia's own defense of its reliability ([http://en.wikipedia.org/wiki/Reliability\\_of\\_Wikipedia](http://en.wikipedia.org/wiki/Reliability_of_Wikipedia)) specifically discusses that question in the context of the traditionally paper-based *Encyclopedia Britannica*'s "reputation as a reliable research tool" ([http://en.wikipedia.org/wiki/Encyclop%C3%A6dia\\_Britannica](http://en.wikipedia.org/wiki/Encyclop%C3%A6dia_Britannica))]. In addition to the "General Disclaimer" ("Wikipedia makes no guarantee of validity"), it also includes specific disclaimers for:

- Risk;
- Medical matters;
- Legal matters; and
- Content.

Even more, Wikipedia has many pages explaining what it "is not" ([http://en.wikipedia.org/wiki/Wikipedia:What\\_Wikipedia\\_is\\_not](http://en.wikipedia.org/wiki/Wikipedia:What_Wikipedia_is_not)), including, paradoxically, "a paper encyclopedia" ([http://meta.wikimedia.org/wiki/Wiki\\_is\\_not\\_paper](http://meta.wikimedia.org/wiki/Wiki_is_not_paper)). While these explanations clarify why its founders believe its collaborative, real-time model provides better and more timely information than a traditional reference work limited by the traditional *current as of date of publication* disclaimer ([http://en.wikipedia.org/wiki/Wikipedia:About#Strengths.2C\\_weaknesses.2C\\_and\\_article\\_quality\\_in\\_Wikipedia](http://en.wikipedia.org/wiki/Wikipedia:About#Strengths.2C_weaknesses.2C_and_article_quality_in_Wikipedia) and [http://en.wikipedia.org/wiki/Reliability\\_of\\_Wikipedia](http://en.wikipedia.org/wiki/Reliability_of_Wikipedia)), Wikipedia's creators nonetheless (somewhat ironically) felt compelled to adhere to the e-commerce model of disclaiming reliability — even to the point of explaining why they felt such disclaimers

should generally be unnecessary ([http://en.wikipedia.org/wiki/Wikipedia:No\\_disclaimers\\_in\\_articles#Why\\_they\\_should\\_not\\_be\\_used](http://en.wikipedia.org/wiki/Wikipedia:No_disclaimers_in_articles#Why_they_should_not_be_used)).

## What the Virtual World Has Come To

Without belaboring the obvious, then, it appears that many, if not all, sites to which we now turn as a matter of course to get information we need in daily life, from the map and weather sites mentioned previously to news and general information sites, contain the same basic disclaimers and limitation of liability — just as do most products in any store. The lawyer language in them is, not surprisingly, almost identical. Once lawyers convince courts to uphold an important clause, they don't like to change the words.

But this repetition of the same terms and conditions, at Web sites of all types, begs an important question. Historically, liability disclaimers arose from cases involving makers of dangerous products, or hosts of dangerous activities. In contrast, Web surfing doesn't quite pose the threats to users faced by, for example, miners, machinists or railroad workers (other than carpal tunnel syndrome, anxiety from drinking too much at Starbucks and becoming an Internet version of the couch potato). But apparently we lawyers can't distinguish among those differences, judging by the terms and conditions we write for our clients' Web-site usage.

Yet is everything in modern life that requires going online to get information as dangerous as it once was to use industrial machinery, or to ride early railroads, and thus justifies the explanation of the need for all these warnings? Indeed, why is getting information online often subject to disclaimers that aren't needed — likely wouldn't even be thought of — when one seeks the same information from other mediums? One certainly doesn't expect to get the same level of broad warnings in a printed newspaper, a television or radio weather report, or on a printed map. Certainly, the change in medium to an easily copied electronic format justifies the need for copyright- and intellectual-property protection notices (beyond the basic statutorily required format) — but what expense to, and with what effect on, business? Why should anyone do business with an e-commerce firm whose terms and conditions seem to reject everything about the brand image and business model that the marketing department has spent so much time and money to create?

## Don't Reinvent the Wheel

Perhaps the reason we see so many Web-site disclaimers with virtually identical language is nothing more than draftsman's inertia — and this is certainly not unique to e-commerce. It has always been much easier to retype a prior paper form from a file, without thinking too hard about the business terms of the new deal, than to draft a contract from scratch — and actually think about what may be in the form for *general* use that actually makes sense for this particular deal. In e-commerce, and indeed any business deal today documented electronically, that shortcut can be even easier — simply save the new agreement as a new document, use the "search and replace" function to change the names of the parties, and hit "send." If there are incorrect business terms, surely the parties will point them out on their own review.

In fact, in today's cost-conscious business environment, perhaps many firms would prefer an incorrect but erroneous first draft of an agreement, generated inexpensively, to the absolute certainty of an immediate bill for a polished product (especially when further extensive and expensive additional changes are expected). This is especially true because in most cases, it will simply be too expensive to litigate over any Web site terms and conditions agreement. Moreover, the alternative could be even worse — further delays and costs imposed by

professionals' fine-tuning boilerplate that will usually be read only by other lawyers in a dispute.

If customers or clients don't read the terms of use, much less have any reason to sue over them (most of the time), then what could be wrong with simply adding or re-using standard terms to try to protect the site owner (regardless of whether it is appropriate)? After all, in all the examples cited in this article, the boilerplate tries to block a potential lawsuit that could theoretically be brought, but which actually could be expensive to defeat in the absence of such disclaimers.

Yet, there may be a cost. For those careful committed customers who go to the trouble to locate and read the terms of use (often found only through a small-font link buried on the site, and sometimes only by using a "search-within-the-site" function) that seems to disavow the very purpose for using the site may drive them to another site — in theory. But if everyone blindly relies on her lawyers, and parrots the same disingenuous language, the online "market" may simply (from this limited perspective) contain only many bad choices.

But some customers may object, and the Internet makes it easy, quick and cheap to allow their objections to be heard far beyond the "contact us" complaint form usually found on Web sites. For example, consider the firestorm that met Adobe's unilateral change to the terms and conditions for its online Photoshop Express product, which purported to grant Adobe rights to photographs that users uploaded. The new contract added a standard term that business attorneys routinely use: If a business gives you a free benefit, the corporate provider gets free legal rights to the resulting product. But some users did object — and Adobe backed down (*see*, [www.macworld.com/article/132855/2008/04/expresstou.html](http://www.macworld.com/article/132855/2008/04/expresstou.html) and <http://arstechnica.com/news.ars/post/20080329-adobe-joins-list-of-companies-not-reading-own-eulas.html>), especially since there are at least serviceable alternatives, such as Google's free Picasa service (<http://picasa.google.com>). Apart from the out-of-pocket cost of making Web site changes on the fly, Adobe certainly suffered a hit to its reputation — for which no lawyer would want to have to account to a client.

## Criminal Implications

At an entirely different level, a recent widely publicized MySpace criminal prosecution illustrated an extreme misuse of potentially unnecessary boilerplate. In that matter, a woman impersonated a teen in an offensive case of cyberbullying a teenage girl that allegedly led to the target's suicide. A local grand jury in the target's jurisdiction indicted the woman, on the theory that violation of a site's terms of service was also a criminal violation of the federal Computer Fraud and Abuse Act (18 USC Section 1030). Certainly, a Web site contract term prohibiting use of a site for bullying would not be silly. But based on the apparent low level of business and legal review given to such forms, as I have described, trying to criminalize language in documents that are often carelessly drafted would be a poor way to make any law, much less a criminal law that could lead to imprisonment.

"The use of the anti-hacking law to charge Drew was criticized by experts who said it set a dangerous precedent that could potentially make a felon out of anyone who violated the terms of service of any Web site — a prospect that is particularly troubling, they said, because terms-of-service agreements sometimes contain onerous provisions, are often arbitrarily and unilaterally changed by companies, *and are rarely read by users.*" (Emphasis added.) (*See*, <http://blog.wired.com/27bstroke6/2008/09/judge-so-far-re.html>.) In other words, it won't matter whether or not the e-commerce firm that originally posted a badly written disclaimer in its terms and conditions really meant what it said — the prosecutor will decide that question. We all may agree that the MySpace case

represented a prosecutor "gone (legally) wild," in an effort to do justice, and in a tragic case with bad facts. But nonetheless, as a result, the predictability of law governing online business conduct could depend on the whim of someone who cut and pasted language from an inapplicable or inappropriate source.

As a final example of the costs to online business of blindly following legal advice, even when doing so strains common sense, consider the efforts of established bricks-and-mortar sellers to shift sales-tax responsibility to their new online customers in the late 1990s by creating the legal fiction of selling through affiliates located in jurisdictions with low or no sales tax. While that strategy based on a legal technicality is still being fought in the courts by purely online sellers (see, "[Taxes and the Internet — Haven't We Heard This Before?](#)", in the August 2007 edition of *e-Commerce Law and Strategy*) and is being challenged by the Streamlined Sales Tax Project, in my opinion, it foolishly ignored one of the major competitive tools of the online sales arms of traditional brick-and-mortar retailers: the ability to accept returns. I know that I value the ability to return or exchange a purchase at a familiar, local establishment, rather than incur a second shipping cost to "try again," and suspect that others do as well (especially when buying a gift that may not fit, or may be a duplicate, or may just be for someone who is hard to please).

## Conclusion

By relying on an artificial corporate separation of the online stores from their well-established bricks-and-mortar locations, retailers tried to avoid having the burden of collecting sales tax — all because their lawyers advised them that allowing returns (and pleasing customers) would have created sufficient nexus to require sales-tax collection. While the matter is far from decided, several courts have rejected the separate-entity theory. As a practical matter, most traditional retailers now collect sales tax online, because they have establishments in so many states (regardless of whether a separate entity or not). However, they also now have online competitors that they might have more easily kept out of the market had they relied on their business instincts, rather than their legal advice. In the early days of e-commerce, as brand images were developing, established stores could have marketed their Web sites based on the well-known reputation and convenience of their physical stores, regardless how much sales tax they may have had to collect on online sales, and created real-world barriers to deter Web-only sellers from entering the game.

These examples (and there are certainly many more) all illustrate how misplaced or unthought-out reliance on boilerplate in creating online forms can adversely affect a lawyer's own client. If a site's business model depends on trust, or reliability, or some other obligation that lawyers routinely ignore when writing contracts — if it is even on their drafting checklist in the first place — the penalty could be severe: hard earned Web site customers, acquired at great marketing cost, may take their business elsewhere (and with it the profit that allows the e-commerce seller to pay the fees of the attorney who drafted the nonsensical boilerplate).

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