

What About that Fine Print? Website "Terms of Use" and "Privacy Policy"

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Whether your business has always been internet based or your traditional brick and mortar business has evolved to a click and mortar business, you have a website. It's likely that you know that you need the fine print - "terms of use" and a "privacy policy." While you have many options when creating these policies, these are the most common approaches:

- Let your web developer deal with it
- Copy and paste terms of use and a privacy policy from a similar website
- Buy forms from a service
- Hire an attorney to draft terms of use and a privacy policy

If you think that we have listed these in order of initial expense, you are correct. However, as a long-term expense, they are likely listed from most expensive to least expensive. We recognize that our advice here is not unbiased, but it is based on actual experiences of businesses that paid far more legal fees than they wanted to because they elected to save money up front.

What is the purpose?

"Terms of use" is your contract with users of your website. At a minimum, they should address the following:

- Rules that you expect your visitors to follow
- Requirements for submitting or posting content or orders on your website
- Rules about comment posting, if your website permits comments
- Membership information
- Jurisdiction over any disputes, and
- Provisions to protect you and your company from claims

For example, if users post content on your website, how do you know they have the rights to post that content? The user might steal someone else's photograph, video, song, poem or story and share it with the world by posting it on your website. It is very important that you have a policy in your "terms of use" that lets the true owner know how to reach you if they request removal of that content.

This policy may make the difference between being liable for copyright infringement or not.

Even if you don't permit users to post content or comments on your website, "terms of use" are important. If you provide a service or sell goods from your website, you could be subjecting your company to a lawsuit in any state. Let's say you ship a widget to Mississippi and the purchaser gets hurt because of a defect in the widget. Or maybe your customer in Europe is unhappy with your widget. Having a statement in your "terms of use" that any disputes will be decided in Arizona courts can make the difference in whether you end up in court in Arizona, another state, or even another county.

A "privacy policy" may be even more important than "terms of use". It is your disclosure to your website users about how you are collecting and using their personal information. Some states, such as California, require that you make this disclosure. Their Online Privacy Protection Act requires all operators of websites that collect "personally identifiable information" to post a privacy policy on their websites. Although your business may not be based or located in California, unless you block all California users from your website, it is highly likely to be visited by California residents and therefore subject to "privacy policy" requirements.

Why Have Your Own Privacy Policy and Terms of Use?

While your web developer can supply your website with standard terms of use or a standard privacy policy, they are drafting contracts with your site users and it is unlikely that they will be tailored to the needs of your business. More importantly, your web developer may simply copy terms of use and a privacy policy from another website.

If the privacy policy states that you do not share personally identifiable information with anyone else, but your business model includes a joint venture with another company with whom you share your database, then you have violated your own privacy policy and could be subject to a breach of contract or misrepresentation claim. Similarly, you might use a privacy policy that states that your website collects cookies (a piece of information about the user) when your website does not collect cookies, which may discourage some users from using your website.

The dangers and legal consequences of copying another website's terms of use and privacy policy expand beyond the likelihood that the terms will not fill your business needs. Terms of use and privacy policies are copyright-protected documents. In other words, it is illegal to copy them without permission. If your agent - web developer, employee, or web service - copies the policies, you are still legally responsible for their acts.

We have actually seen this practice of "lifting" the fine print from similar websites lead to big trouble for a website owner. We wrote custom terms of use and a privacy policy for one of our clients. Last year, our client learned that another website had copied those terms and used them on their website. That, coupled with the copying of other content, led to a lawsuit and a large judgment in our client's favor.

Like any other contract, your best bet is to tailor the terms of use and privacy policy to your specific needs and consult with an attorney experienced in internet law. After all, the purpose of terms of use and a privacy policy is to limit your risk, not to increase it. Jaburg Wilk recognizes the need to keep legal costs low while still providing this valuable service. That's why we offer reasonable flat fee rates on these services.

About the author: [Maria Speth](#) is a lawyer at Jaburg Wilk and also the [Intellectual Property](#) Law Department Chair. She is a frequent speaker on intellectual property law, internet law, trademark and tradename law and is the author of the book, [Protect Your Writings: A Legal Guide for Authors](#). She can be reached at 602.248.1089 or mcs@jaburgwilk.com.

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