

## WHAT STARTUPS NEED TO KNOW ABOUT TERMS OF USE AGREEMENTS

*The information below was originally written by Emily Harris for the Start-Up Launchpad Blog. The Start-Up Launchpad was designed to give 24-hour access to the online resources emerging companies need to establish and grow their business. These resources are often available at a flat-fee and include customized legal documents, checklists and educational materials that are reviewed by a Davis Brown attorney.*

I just spent part of the past weekend mentoring teams at Startup Weekend Des Moines, one of the best startup events that we're involved with. It is amazing to see what people were able to accomplish in 54 hours. The local entrepreneur community has tremendous talent and dedication. It was also fun to follow Des Moines Register reporter Marco Santana's blog posts relating his take on his first Startup Weekend.

Mentoring teams is a ton of fun and is very inspiring. I had several memorable (and often amusing) discussions with the 15 or so groups. There is always a huge variety of teams at Startup Weekend events, and this one was no different. From the winning team of Doodle Cloud (a cute app for kids) to a site dedicated to expressing your road rage to the world and another for creating recipes from the food you have in your cupboards, creativity and quirkiness abound.

As is expected from a very tight 54-hour schedule to take the concept from the abstract to a fine-tuned pitch, most if not all of the startups born this weekend were web or mobile-app based. Therefore, I thought it might be helpful to provide some general comments about one of the key legal concepts for web-based startups: the Terms of Use of a website.

One key consideration for a startup with a web presence is the content of the site's Terms of Use (TOU). A website's TOU define the legal relationship between the site and the site's users and are extremely important in protecting the website owners from liability stemming from the user's use of the site. The TOU should be tailored to the website's particular situation and will vary depending on the types of services or products offered on the website and the ways that users are able to interact with the site. A website's TOU should:

- Define how users can interact with the website. If your users can upload or post outside content (like Flickr, Facebook or YouTube allow their users to do), it is critical that your TOU require users to affirm that they either own the content they are posting or have permission to use it. You (the website) especially want to protect yourself from claims that the content posted by your users on your site was the intellectual property of someone else. For example, if you allow your users to upload videos, you want legal protections in place if the user uploaded a video created by someone else and the user didn't have permission to upload it. You need to limit your liability to the owner of that video in the event that a copyright infringement lawsuit is brought by the owner against your website for showing a video uploaded by your user.
- Designate an agent to deal with complaints under the Digital Millennium Copyright Act (DMCA) if your site allows users to post content. You will also need to comply with the DMCA's takedown provisions if you receive complaints from a copyright owner. • Affirmatively state that the website owns all content that was originated by the website (including the appearance of the website, the content, and the website's trademarks).
- Your TOU should include a user's code of conduct if the site's users will have the ability to interact with each other.
- If you will be offering your product or services for a fee, your TOU may need to include pricing information and payment details.
- Depending on the field that you operate in, you may need specific disclaimers. For example, if you operate in the health care field, you may need disclaimers stating that you are not providing medical advice.
- Your TOU should include limitations on your liability in terms of the type and amount of damages you could be responsible for. It is also common to shift responsibility for damages resulting from the user's breach of the TOU to the user (usually using indemnification provisions).
- There are many boilerplate provisions in TOU, including language to prevent the unauthorized manipulation of the website, data harvesting and other similar actions, and identification of a state where disputes about the use of the website will be determined.  
To get an idea of what types of provisions should go into TOU agreements, it can be helpful to look at what others have done who are operating in the same space as you. While you should not copy others' TOU for many reasons, reviewing examples can help you determine what you may need in yours.

If you have downloadable software or a mobile application, you will need an end user license agreement (EULA) that will similarly govern the downloader's use of the app. EULA's often look very similar to a website's TOU.



Another legal agreement that websites usually need is a privacy policy, which tells the site's users what you will be able to do with the information (including name, email address, and other content) that they upload to your site.

Because terms of use agreements, privacy policies and end user licenses are legal contracts, it is usually best to get assistance from an attorney who can help tailor an agreement based on your particular situation.

As part of the software and cyberlaw services available through the Start-Up Launchpad, clients have access to a flat-fee Website Terms of Use and Privacy Policy that can be customized to meet their business needs.

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