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qLegal Online Publication

WHAT TO CONSIDER WHEN SELLING YOUR PRODUCT /SERVICE ONLINE

This online publication provides an overview of the legal tools that you need to keep in mind when selling products and/or services online. It provides a deeper understanding of data protection and privacy laws enabling online sellers to enter into relevant contracts such as terms of use, privacy policies and other related conditions.

SELLING A PRODUCT/SERVICE ONLINE: LEGAL PARAMETERS

In today's world, one of the first and most important features a company should think about is their online presence and their website. These features gain further importance for retail focused companies or companies engaged in the distribution of services.

Broadly speaking, a product/service may be sold online via:

- (i) Third-party portal/intermediary websites such as Amazon, Etsy, eBay, Uber Eats etc.
- (ii) Social media platforms such as on Facebook; and/or
- (iii) A company's website.

Regardless of the method of sale, data protection and privacy law are crucial. This document provides an overview of laws and outline contractual terms sellers must include to protect intellectual property rights and offer consumer protection.

DATA PROTECTION IN LIGHT OF GDPR: WHAT IS THE GDPR?

The General Data Protection Regulations 2016/679 (commonly known as "GDPR") came into force throughout the European Union ("EU" and including the United Kingdom) on 25 May 2018. GDPR was incorporated into English Law under the Data Protection Act 2018 (replacing the Data Protection Act 1998).

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PURPOSE OF GDPR

- Unify and standardize fragmented data protection laws across the EU, thereby increasing certainty in their application, interpretation and enforcement.
- Provide a broad and modern framework to data protection in order to account for advances in technology. GDPR introduces 6 principles that an organisation must comply with. These are guiding principles that anyone handling personal data should bear in mind: lawfulness, fairness and transparency; purpose limitation; adequacy and necessity; accuracy; storage limitation; and integrity and confidentiality.
- Encourage greater compliance with wider extra-territorial application and heavier penalties for breaches.
- Impose direct liability on processors (rather than just on controllers) -
 - Controllers are responsible for determining the purposes and means of processing personal data.
 - Processors, in contrast, merely process personal data on behalf of controllers.
- Provide data subjects with greater assurance that their personal data is stored safely.

You might be thinking, *'what does EU law have to do with me if my business is based in the United States, Canada, Australia, or New Zealand?'* or *'it does not matter where my business is based.'* However, if you have customers located anywhere in the EU, or if your business is made available to people in the EU via your website – you must comply with GDPR.

GDPR is focused on personal data: the information relating to an identified or identifiable natural person. This can be any information that allows a specific person to be identified, such as their name, email address, telephone number or personal opinion. It does not include data that has been anonymized or redacted. However, data that is not personal (for example postcodes) needs to be treated carefully, because if it is combined with information such as a person's dates of birth this information could identify an individual. There are also special categories of data that need to be treated with particular care as loss of that data could cause a significant risk to a person's fundamental rights and freedoms. This includes information about a person's race, ethnic origin, religious or political beliefs, trade union membership, health, sexual orientation, sex life, genetic and biometric information.

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IS GDPR APPLICABLE TO ONLINE SALES?

As a business owner, you fall within the definition of a “data controller” under GDPR (a person, organisation or corporation that either alone or with others decides what data is to be collected or processed, and for what purpose). All of the web tools, including the web host, apps, and extensions you use (Mailchimp, Shopify, Salesforce etc.) are data processors. The latter includes any natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

As a data controller, you are ultimately responsible for the protection of personal data collected and stored by these data processors. When deciding what data to collect, you should consider what the purpose for processing the data is and bear in mind that if you collect any sensitive information, you may need explicit consent to collect that sensitive data. GDPR gives 6 lawful bases to use, process and collect personal data: (1) a person gave consent; (2) to fulfil or prepare a contract with the data subject; (3) legal obligation (excluding a contract); (4) to save someone’s life; (5) to carry out a public function; and (6) some other legitimate interest. As data controller, you need to ensure that you meet the lawful basis for collecting and using information.

If you make changes to how you collect, store and manage personal data you must communicate these changes to your customers. This could involve updating your privacy policy.

PRACTICAL STEPS TO CONSIDER

- I. Update your privacy policy to reflect how your company applies data protection principles
 - Include a line that states you comply with your obligations under the GDPR. List all of the information you collect and store from visitors. This might include IP addresses, device information, credit card details, cookies, mouse and swipe actions, email, name etc.
 - Specify how, why and where you process this personal data. This may include marketing, accounting, user-experience research etc.
 - Specify who has access to this personal data, including third-party applications and plugins (e.g., Mailchimp, QuickBooks, Shopify).
 - Include contact details for the Data Protection Officer in your organization. (The Data Protection Officer ensures, in an independent manner, that an organization applies the laws protecting individuals' personal data) If you are a small online store, that responsibility probably falls on you.

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- Tell people how to lodge a Data Subject Access request. This enables users to access the information you have on them.
- Specify for how long you will store personal information.
- II. Have a breach procedure for any possible data protection breaches that you may encounter. All breaches must be reported within 72 hours.
- III. Have an option for “right have personal data erased” access. This option is specifically required under Article 17 of the GDPR and will be actionable if the data subject tells you to erase their personal data from your system.
- IV. Set up a system where the all-automatic opt-ins can be removed.
- V. Ensure that personal data is easily available upon request (whether it be website users or customers).
- VI. Update employment contracts for your staff so that they are GDPR compliant.
- VII. Avoid sending unsolicited emails to your customers (some customers may not have given consent to receive these emails).
- VIII. Have a system in place so that the customers/viewers can revoke consent to process their data.
- IX. Only collect the information that is required for a specific purpose. Delete information that is not required.

CONTRACTUAL OBLIGATIONS: TERMS AND CONDITIONS

As discussed above, GDPR provides a strong privacy policy and requires terms, which a seller must consider when selling their product/service online. Apart from this, it is important to consider other payment and website terms. These terms are usually drafted in the light of intellectual property and consumer protection laws; and are dependent on other details such as the company structure, type of product/service, advertising regulations etc.

In the following sections, we will be focusing on practical aspects of the law discussed above and critical points to include in your Terms and Conditions.

WHAT ARE “TERMS AND CONDITIONS”?

Terms and Conditions underpin successful business relationships between sellers and customers. Terms and Conditions allow both parties to set the legally binding framework in which a seller’s product, service or content may be used. Terms and Conditions are applied when supplying goods, services or online content to customers to determine the conditions of supply of goods or services.

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WHY USE TERMS AND CONDITIONS?

Terms and Conditions regulate the contractual relationship between providers and customers. If there is no agreement on the Terms and Conditions, there is no legally binding relationship. That is why, it is important to come to an agreement and record what you have agreed upon. Terms and Conditions also limit both sides' liability by defining the contract and sets out the general procedures.

WHEN TO USE TERMS AND CONDITIONS?

Terms and Conditions should be agreed before the contract is made. However, some websites draft the contract before the payment is made, presenting the terms to the customer only at the point of payment.

This may create disputes later on because it can be very difficult to impose terms that are not included in the contract with the customer. Customers may take contrary action and cancel the agreement with demand of a full refund.

HOW TO WRITE TERMS AND CONDITIONS?

Terms and Conditions must be transparent and easy to read. Overly legalistic language should be avoided. The contract terms and conditions should cover more than the basics and be tailored for each relationship between provider and the customer.

The following provisions should be included:

- Definition of both sides' liabilities;
- Pricing and payments;
- Collection or delivery;
- Withdrawals;
- Cancellation policy and refunds; and
- Data privacy regulations under GDPR as detailed above.

Terms and Conditions must be fair to be legally binding on your customer and they must be made in good faith. The seller and customer must have equal bargaining positions in respect of interests and responsibilities.

Terms and Conditions do not necessarily need to be physically signed on paper. If both parties are aware of what they agree upon in a demonstrable way, then an unwritten agreement is acceptable. However, written evidence of what was agreed between the parties is always preferable because this will enable you to prove your claim more convincingly in the event of a dispute.

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Using 'fair' terms have long-term cost benefits because this can help prevent disputes and is good for business reputation and credibility.

WEBSITE TERMS AND CONDITIONS

Website Terms and Conditions are governed by the Electronic Commerce Regulations 2002 ("E-commerce Regulation"), which is based on the European Union Electronic Commerce Directive 2000/31/EC. These Regulations primarily regulate the online sales process and provide the reference point for the practical requirements for an online business.

Under the E-Commerce Regulations, all commercial web sites must provide the following information in an accessible manner to the potential customer:

- Name of the company and its registered mailing address;
- Company's registration number;
- the company's VAT number; and
- Associations or memberships the company is affiliated with.

The E-Commerce Regulations state that, any document titled as "Legal Terms" or "Terms of Use" or "Terms and Conditions" shall only constitute a legally binding contract if 'accepted' by the customer. The 'acceptance' process is technically covered during registration/log-in of the customer to the website. Some of the important elements to include in this document are set out below:

- I. **General information about the company (party to contract):** General information shall include details of the company party to the contract. These details may comprise of the points mentioned above such as registration number, name and address of the company etc. The seller may also include any other viable company related information it deems fit to communicate to the customer at this point.
- II. **Intellectual Property (IP) Rights:** An IP clause or disclaimer is usually included to establish that the website content is original in addition to the products, trademarks and other artistic elements and that the ownership of the same vests with the seller. This clause is important to communicate that nothing in the course of the sale of product/service shall transfer the intellectual property rights therein.
- III. **Contact information:** The seller must provide information which a customer can use to contact the seller in case of queries pertaining to the product/service and/or payments, deliveries, personal data etc.

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- IV. **Indemnification:** Indemnity clauses relating to compensation must be read alongside limitation of liability clauses. Generally, the customer is obliged to compensate the seller in respect of legal claims, costs and expenses, which are the customer's fault.
- V. **Limitation of liability:** This clause protects the sellers from any liability beyond the transaction. Generally speaking, this is where you mention that post a certain time frame or transaction, sellers are not responsible and/or liable. Please note, this is a rather complex provision and aspects such as exclusion of consequential damages, cap on liabilities, time frame as well as certain other exceptions must be discussed with a legal professional.
- VI. **Governing law and jurisdiction:** This clause outlines how legal disputes between the parties will be dealt with and resolved. You can state which country you want any court cases to be heard in and what national legal system you want to apply. For example, if you want English law to apply to any disputes with your customers and for the dispute to be heard in English courts you should state this in your governing law and jurisdiction clause.
- VII. **Disclaimers:** Disclaimers serve to release the seller from any legal liability such as that for product failures or defects.
- VIII. **Links to any relevant Codes of Conduct** to which the retailer subscribes.
- IX. **Cookies:** Cookies are text files which are used by data processors online to store the customer data. The data protection laws strictly require a proper cookie policy to set out clearly the types of cookies used and to request the consent of the customer to such cookies.

It is critical for all e-commerce businesses to warrant that the legal documents uploaded on their websites as detailed above are legally accurate. This shall include but not be limited to procuring the consent of the customer (as also detailed above) on all of the said legal documents.

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