

# **SOCIAL MEDIA LAW SEMINAR**

## **ONLINE TERMS OF USE AGREEMENTS: KEY TERMS AND SUGGESTED PROVISIONS**

By

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Online Terms of Use Agreements (oftentimes called “Terms of Service” Agreements) for social websites are typically dictated by the website and not subject to any negotiation. Nonetheless, their terms may vary depending on the website business model, the “push back” from the user community, accepted practice in the industry, and the overall “vision” of the website founders. Despite subtle variations in terms, such agreements are usually consistent in how they address key issues governing use. The following presentation outlines the common key terms and suggested provisions in Online Terms of Use Agreement for social websites.

## **1. Acceptance**

How the social website user manifests acceptance to the Terms of Use Agreement may vary depending on a careful balancing of technical, legal and business factors and considerations. From a purely technical point of view, acceptance can take on a spectrum of possibilities, from (i) merely displaying a link to the terms of use with no or little explanation, to (ii) displaying a statement that use or access to the website and its services constitutes “acceptance” of the Terms

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of Use Agreement, with a hyperlink to the agreement (often called a “browse wrap” agreement), to (iii) an affirmative acceptance of the agreement by the user (referred to as a “click wrap” agreement).

An example of a browse wrap agreement is as follows:

By using or visiting the YouTube website or any YouTube products, software, data feeds, and services provided to you on, from, or through the YouTube website (collectively the "Service") you signify your agreement to (1) these terms and conditions (the "Terms of Service"), (2) YouTube's privacy notice, found at <http://www.youtube.com/t/privacy> and incorporated herein by reference, and (3) YouTube's Community Guidelines, found at [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) and also incorporated herein by reference. If you do not agree to any of these terms, the YouTube privacy notice, or the Community Guidelines, please do not use the Service.

By contrast, a typical “click wrap” agreement (from YouTube – Broadcast Yourself) is:

Please read the Google Terms of Service and YouTube Terms of Service below:  
. . . [Window allowing user to scroll through agreements] . . . By clicking “I accept below you are agreeing to the YouTube Terms of Use, Google Terms of Service and Privacy Policy. [I accept button]

The most “enforceable” agreement is clearly one in which the user affirmatively manifests consent – a “click wrap” agreement. From a business perspective, a website might conclude that a formal “click wrap” agreement is simply too cumbersome and intrusive and would detract from users using the service or registering with the social website. Under these circumstances, a “browse wrap” agreement would make the most sense. Such agreements have been upheld by most courts and are generally regarded as enforceable.

## **2. Eligibility**

Both Facebook and MySpace require users to be at least 13 years old. LinkedIn requires that users be 18 years of age or older. Additionally, other eligibility requirements may be imposed, again depending on the target audience of the social media website.

An example of the eligibility requirements from MySpace's Terms of Use Agreement is set forth below:

Use of the MySpace Services and registration to be a Member for the MySpace Services ("Membership") is void where prohibited. By using the MySpace Services, you represent and warrant that (a) all registration information you submit is truthful and accurate; (b) you will maintain the accuracy of such information; (c) you are 13 years of age or older; and (d) your use of the MySpace Services does not violate any Applicable Law. Your profile may be deleted and your Membership may be terminated without warning, if we believe that you are under 13 years of age, if we believe that you are under 18 years of age and you represent yourself as 18 or older, or if we believe you are over 18 and represent yourself as under 18.

LinkedIn's eligibility provisions are a bit more stringent:

To be eligible to use the Service, you must meet the following criteria and represent and warrant that you: (1) are 18 years of age or older; (2) are not currently restricted from the Services, or not otherwise prohibited from having a LinkedIn account, (3) are not a competitor of LinkedIn or are not using the Services for reasons that are in competition with LinkedIn; (4) will only maintain one LinkedIn account at any given time; (5) have full power and authority to enter into this Agreement and doing so will not violate any other agreement to which you are a party; (6) will not violate any rights of LinkedIn, including intellectual property rights such as copyright or trademark rights; and (7) agree to provide at your cost all equipment, software, and internet access necessary to use the Services.

### **3. Ownership of User Content**

Who owns user content posted on the social media website and what rights does the website have in that content? Originally, MySpace – like many other early social media sites – adopted a Draconian rule whereby the website received all the rights of ownership of user content without limitations:

You hereby grant to MySpace.com a non-exclusive, fully paid and royalty-free, worldwide license (with the right to sublicense through unlimited levels of sublicensees) to use, copy, modify, adapt, translate, publicly perform, publicly display, store, reproduce, transmit, and distribute such Content on and through the Services.

Under this provision, if a musician, for example, posted a song on MySpace, that musician essentially granted copyright ownership to MySpace. This type of “power grab” eventually proved unacceptable to the user community of MySpace – as well as other social media websites. Most Terms of Use Agreements now make clear that the user owns all user created content, but that the website is granted a royalty free license to use that content, as long as the content remains on the website.

MySpace currently adopts the following language governing ownership and MySpace’s use of user content:

MySpace does not claim any ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials (collectively, "Content") that you transmit, submit, display or publish (“post”) on, through or in connection with the MySpace Services. After posting your Content on, through or in connection with the MySpace Services, you continue to retain any such rights that you may have in your Content, subject to the limited license herein. By posting any Content on, through or in connection with the MySpace Services, you hereby grant to MySpace a limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce, and distribute such Content solely on, through or in connection with the MySpace Services, including, without limitation, through the MySpace Services to applications, widgets, websites or mobile, desktop or other services which are linked with your MySpace account (collectively, “Linked Services”), including, without limitation, distributing part or all of the MySpace Services and any Content included therein, in any media formats and through any media channels, except that Content marked “private” will not be distributed by MySpace outside the MySpace Services and Linked Services. This limited license does not grant MySpace the right to sell or otherwise distribute your Content outside of the MySpace Services or Linked Services. After you remove your Content from the MySpace Services we will cease distribution as soon as practicable, and at such time when distribution ceases, the license will terminate. If after we have distributed your Content outside of the MySpace Services, you change the Content’s privacy setting to “private,” we will cease distribution of such “private” Content outside of the MySpace Services as soon as practicable after you make the change. Notwithstanding the foregoing, you understand and agree that once Content is distributed to a Linked Service or incorporated into other aspects of the MySpace Services, MySpace is under no obligation to delete or ask other Users or a Linked Service to delete that Content, and therefore it may continue to appear and be used indefinitely.

The license you grant to MySpace is non-exclusive (meaning you are free to license your Content to anyone else in addition to MySpace), fully-paid and royalty-free (meaning that MySpace is not required to pay you or anyone else deriving rights from you for the use on the MySpace Services of the Content that you post), sublicensable (so that MySpace is able to use its affiliates, subcontractors and other partners such as Internet content delivery networks and wireless carriers to provide the MySpace Services), and worldwide (because the Internet and the MySpace Services are global in reach).

By way of comparison, the following is Facebook's User Content provision, somewhat similar to that of MySpace:

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.
2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).
3. When you use an application, your content and information is shared with the application. We require applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information. (To learn more about Platform, read our Privacy Policy and Platform Page.)
4. When you publish content or information using the "everyone" setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture).
5. We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

LinkedIn's User Content provision is less "user friendly" and puts the onus on the user to request that content be deleted; additionally, nothing is said as to whether LinkedIn's license to use the content ceases upon deletion of the content or termination of services:

You own the information you provide LinkedIn under this Agreement, and may request its deletion at any time, unless you have shared information or content with others and they have not deleted it, or it was copied or stored by other users. Additionally, you grant LinkedIn a nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sublicenseable, fully paid up and royalty-free right to us to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered, any information you provide, directly or indirectly to LinkedIn, including but not limited to any user generated content, ideas, concepts, techniques or data to the services, you submit to LinkedIn, without any further consent, notice and/or compensation to you or to any third parties.

#### **4. Use of Website Content**

Most social media websites provide content that may be used by users. In such cases, the Terms of Service Agreement generally makes clear that the website owns that content, but the user has a right to use the content for the user's personal (and not commercial) use. For example, MySpace's agreement states:

The MySpace Services contain Content of MySpace ("MySpace Content"). MySpace Content is protected by copyright, trademark, patent, trade secret and other laws, and MySpace owns and retains all rights in the MySpace Content and the MySpace Services. MySpace hereby grants you a limited, revocable, nonsublicensable license to reproduce and display the MySpace Content (excluding any software code) solely for your personal use in connection with viewing the MySpace Website and using the MySpace Services.

#### **5. Restrictions on Use of Website**

Perhaps the most important part of any social media website Terms of Use Agreement is the use restrictions and the prohibited activities. Such restrictions and prohibitions are similar across most social media sites, but differences exist depending on the website's business model

and target audience. Restrictions placed on the user will relate to the type of content that can be posted and the type of activities that are permitted – with the social media website retaining sole discretion in evaluating the content and the activities.

**a. Prohibited Content.** Content prohibitions typically will list “examples” of unacceptable content: “Prohibited Content includes, but is not limited to, the following Content that, in the sole discretion of [website operator].” Typical types of restricted content are content that:

- is patently offensive or promotes or otherwise incites racism, bigotry, hatred or physical harm of any kind against any group or individual
- harasses or advocates harassment of another person
- exploits people in a sexual or violent manner
- contains nudity, excessive violence, or offensive subject matter or contains a link to an adult website
- solicits or is designed to solicit personal information from anyone under 18
- publicly posts information that poses or creates a privacy or security risk to any person
- constitutes or promotes information that you know is false or misleading or promotes illegal activities or conduct that is abusive, threatening, obscene, defamatory or libelous
- constitutes or promotes an illegal or unauthorized copy of another person's copyrighted work, such as providing pirated computer programs or links to them, providing information to circumvent manufacturer-installed copy-protect devices, or providing pirated music or links to pirated music files
- involves the transmission of "junk mail," "chain letters," or unsolicited mass mailing, instant messaging, "spimming," or "spamming"

- contains restricted or password only access pages or hidden pages or images (those not linked to or from another accessible page)
- furthers or promotes any criminal activity or enterprise or provides instructional information about illegal activities including, but not limited to, making or buying illegal weapons, violating someone's privacy, or providing or creating computer viruses
- solicits or is designed to solicit passwords or personal identifying information for commercial or unlawful purposes from other Users
- involves commercial activities and/or sales without prior written consent from MySpace such as contests, sweepstakes, barter, advertising, or pyramid schemes
- includes a photograph or video of another person that you have posted without that person's consent
- for band, comedy, filmmaker and other profiles, uses sexually suggestive imagery or any unfair, misleading or deceptive Content intended to draw traffic to the profile
- violates or attempts to violate the privacy rights, publicity rights, copyrights, trademark rights, contract rights or any other rights of any person.

**b. Prohibited Activities.**

The following prohibited activities are taken from MySpace's Terms of Use Agreement:

The following are examples of the kind of activity that is illegal or prohibited on the MySpace Website and through your use of the MySpace Services. MySpace reserves the right to investigate and take appropriate legal action against anyone who, in MySpace's sole discretion, violates this provision, including, without limitation, terminating your Membership and/or reporting such activity or Content to law enforcement authorities. Prohibited activity includes, but is not limited to:

criminal or tortious activity, including, but not limited to, child pornography, fraud, trafficking in obscene material, drug dealing, gambling, harassment, defamation, stalking, spamming, spimming, sending of viruses or other

harmful files, copyright infringement, patent infringement, or theft of trade secrets;

advertising to, or solicitation of, any Member to buy or sell any products or services through the unauthorized or impermissible use of the MySpace Services. You may not transmit any chain letters or junk email to other Members. In order to protect our Members from such advertising or solicitation, MySpace reserves the right to restrict the number of emails which a Member may send to other Members in any 24-hour period to a number which MySpace deems appropriate in its sole discretion. If you breach this Agreement and send or cause to send (directly or indirectly) unsolicited bulk messages, status or mood updates, bulletins or other unauthorized commercial communications of any kind through the MySpace Services, you acknowledge that you will have caused substantial harm to MySpace, but that the amount of such harm would be extremely difficult to ascertain. As a reasonable estimation of such harm, you agree to pay MySpace \$50 for each actual or intended recipient of such unsolicited message, status or mood update, bulletin or other unauthorized commercial communication you send through the MySpace Services;

circumventing or modifying, attempting to circumvent or modify, or encouraging or assisting any other person in circumventing or modifying any security technology or software that is part of the MySpace Services;

activity that involves the use of viruses, bots, worms, or any other computer code, files or programs that interrupt, destroy or limit the functionality of any computer software or hardware, or otherwise permit the unauthorized use of or access to a computer or a computer network;

modifying, copying, distributing, downloading, scraping or transmitting in any form or by any means, in whole or in part, any Content from the MySpace Services other than your Content which you legally post on, through or in connection with the MySpace Services;

providing or using “tracking” or monitoring functionality in connection with the MySpace Services, including, without limitation, to identify other Users’ views, actions or other activities on the MySpace Services;

covering or obscuring the banner advertisements and/or safety features (e.g., report abuse button) on your personal profile page, or any MySpace page via HTML/CSS or any other means;

any automated use of the system, such as, but not limited to, using scripts to add friends or send comments, messages, status or mood updates, blogs or bulletins;

interfering with, disrupting, or creating an undue burden on the MySpace Services or the networks or services connected to the MySpace Services;

impersonating or attempting to impersonate MySpace or a MySpace employee, administrator or moderator, another Member, or person or entity (including, without limitation, the use of email addresses associated with or of any of the foregoing);

for band, comedy, filmmaker and other profiles containing a MySpace player, copying the code for your MySpace Player and embedding it (or directing others to embed it) anywhere other than in your band profile on MySpace;

using the account, username, or password of another Member at any time or disclosing your password to any third party or permitting any third party to access your account;

selling or otherwise transferring your profile, your email address or URL;

using or distributing any information obtained from the MySpace Services in order to harass, abuse, or harm another person or entity, or attempting to do the same;

displaying an unauthorized commercial advertisement on your profile, or accepting payment or anything of value from a third person in exchange for your performing any commercial activity through the unauthorized or impermissible use of the MySpace Services on behalf of that person, such as placing commercial content on your profile, links to e-commerce sites not authorized by MySpace, posting status or mood updates, blogs or bulletins with a commercial purpose, selecting a profile with a commercial purpose as one of your top friends, or sending messages with a commercial purpose;

relaying email from a third party's mail servers without the permission of that third party;

using invalid or forged headers to disguise the origin of any Content transmitted to or through MySpace's computer systems, or otherwise misrepresenting yourself or the source of any message or Content;

using any automated system, including, but not limited to, scripts or bots in order to harvest email addresses or other data from the MySpace Website for the purposes of sending unsolicited or unauthorized material;

engaging in, either directly or indirectly, or encouraging others to engage in, click-throughs generated through any manner that could be reasonably

interpreted as coercive, incentivized, misleading, malicious, or otherwise fraudulent; or

using the MySpace Services in a manner inconsistent with any and all Applicable Law.

Facebook goes to great pains to divide its prohibitions into three categories – Safety, Registration and Account Security, and Protecting Other People’s Rights. The following sets for the prohibitions on user activities:

### 3. Safety

We do our best to keep Facebook safe, but we cannot guarantee it. We need your help to do that, which includes the following commitments:

1. You will not send or otherwise post unauthorized commercial communications (such as spam) on Facebook.
2. You will not collect users' content or information, or otherwise access Facebook, using automated means (such as harvesting bots, robots, spiders, or scrapers) without our permission.
3. You will not engage in unlawful multi-level marketing, such as a pyramid scheme, on Facebook.
4. You will not upload viruses or other malicious code.
5. You will not solicit login information or access an account belonging to someone else.
6. You will not bully, intimidate, or harass any user.
7. You will not post content that: is hateful, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.
8. You will not develop or operate a third-party application containing alcohol-related or other mature content (including advertisements) without appropriate age-based restrictions.
9. You will not offer any contest, giveaway, or sweepstakes ("promotion") on Facebook without our prior written consent. If we consent, you take full responsibility for the promotion, and will follow our Promotions Guidelines and all applicable laws.
10. You will not use Facebook to do anything unlawful, misleading, malicious, or discriminatory.
11. You will not do anything that could disable, overburden, or impair the proper working of Facebook, such as a denial of service attack.
12. You will not facilitate or encourage any violations of this Statement.

### 4. Registration and Account Security

Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:

1. You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.
2. You will not create more than one personal profile.
3. If we disable your account, you will not create another one without our permission.
4. You will not use your personal profile for your own commercial gain (such as selling your status update to an advertiser).
5. You will not use Facebook if you are under 13.
6. You will not use Facebook if you are a convicted sex offender.
7. You will keep your contact information accurate and up-to-date.
8. You will not share your password, (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.
9. You will not transfer your account (including any page or application you administer) to anyone without first getting our written permission.
10. If you select a username for your account we reserve the right to remove or reclaim it if we believe appropriate (such as when a trademark owner complains about a username that does not closely relate to a user's actual name).

## 5. Protecting Other People's Rights

We respect other people's rights, and expect you to do the same.

1. You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.
2. We can remove any content or information you post on Facebook if we believe that it violates this Statement.
3. We will provide you with tools to help you protect your intellectual property rights. To learn more, visit our [How to Report Claims of Intellectual Property Infringement](#) page.

4. If we remove your content for infringing someone else's copyright, and you believe we removed it by mistake, we will provide you with an opportunity to appeal.
5. If you repeatedly infringe other people's intellectual property rights, we will disable your account when appropriate.
6. You will not use our copyrights or trademarks (including Facebook, the Facebook and F Logos, FB, Face, Poke, Wall and 32665), or any confusingly similar marks, without our written permission.
7. If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it.
8. You will not post anyone's identification documents or sensitive financial information on Facebook.
9. You will not tag users or send email invitations to non-users without their consent.

## **6. DMCA Procedures**

To take advantage of the safe harbor provisions of the DMCA, social media websites should ensure that they comply with the statutorily mandated requirements for notice and takedown procedures. These requirements can be included in the Terms of Service Agreement or in separate link. Some websites go further and outline “counter-notice” procedures by which a user can dispute allegations of infringement.

## **7. Third Party Links and Services**

As part of the social media experience, websites oftentimes provide “linked services” created and made available by third party developers. Under these circumstances, it is imperative for the social media website to insulate itself from liability to users who may be dissatisfied with, harmed by or otherwise have disputes with such third party developers. A

typical provision, taken from the MySpace Terms of Services Agreement, might provide as follows:

Linked Services created by third party developers may be available on, through or in connection with the MySpace Services. Linked Services include applications, websites, desktop, wireless, mobile and other services available from third parties which can be installed onto your MySpace profile or shared with other Users on the MySpace Services or which may link to your MySpace account from outside of the MySpace Services. Linked Services may use your MySpace profile information, friends and/or other profile content on the Linked Service and share activity events between MySpace and the Linked Service (depending on the features the Linked Service chooses to make available). When you engage with a third party Linked Service, you are interacting with the third party, not with MySpace. MySpace does not control the third party, and cannot dictate their actions. If you choose to use a third party Linked Service, the Linked Service may use and share your data in accordance with the privacy policy of and your privacy settings on such service. In addition, the third party providing the Linked Service may use other parties to provide portions of the application or service to you, such as technology, development or payment services. MySpace is not responsible for and makes no warranties, express or implied, as to the third party Linked Services or the providers of such Linked Services (including, but not limited to, the privacy practices thereof). MySpace encourages you not to provide any personally identifiable information to any third party Linked Service unless you know and are comfortable with the party with whom you are interacting.

LinkedIn includes similar language notifying the users of third party websites, but disclaiming any liability to its users:

LinkedIn may include links to third party web sites (“Third Party Sites”) on [www.linkedin.com](http://www.linkedin.com), [developer.linkedin.com](http://developer.linkedin.com), and elsewhere. LinkedIn also enables Platform Developers to create applications (“Platform Applications”) that provide features and functionality using data and developer tools made available by LinkedIn.

You are responsible for evaluating whether you want to access or use a Third Party Site or Platform Application. You should review any applicable terms and/or privacy policy of a Third Party Site or Platform Application before using it or sharing any information with it, because you may give the operator permission to use your information in ways we would not.

LinkedIn is not responsible for and does not endorse any features, content, advertising, products or other materials on or available from Third Party Sites. LinkedIn also does not screen, audit, or endorse Platform Applications. Accordingly, if you decide to access Third Party Sites or use Platform Applications, you do so at your own risk and agree that your use of any Platform Application is on an “as-is” basis without any warranty as to the Platform Developer’s actions, and that this Agreement does not apply to your use of any Third Party Site or Developer Application.

## **8. Privacy**

There is no greater “hot button” issue facing social media websites than privacy. Privacy will typically be addressed in a stand-alone “Privacy Policy.” Among the issues covered in a Privacy Policy are limitations on when personal information is shared with others, when personal information can be disclosed (e.g., when required by law or in situations involving threats to personal safety), when information may be shared by the website to facilitate services, whether privacy policies will be honored upon the sale of the website, etc. YouTube, for example, explains how it will use personal information as follows:

### **Personal Information**

**Browsing YouTube.** You can watch videos on YouTube without having a YouTube Account or a Google Account. You also can contact us through the YouTube Help Center or by emailing us directly without having to register for an account.

**Your YouTube Account.** For some activities on YouTube, like uploading videos, posting comments, flagging videos, or watching restricted videos, you need a YouTube or Google Account. We ask for some personal information when you create an account, including your email address and a password, which is used to protect your account from unauthorized access. A Google Account, additionally, allows you to access other Google services that require registration.

**Usage Information.** When you use YouTube, we may record information about your usage of the site, such as the channels, groups and favorites you subscribe to, which other users you communicate with, the videos you watch, the frequency and size of data transfers, and information you display about yourself as well as information you click on in YouTube (including UI elements, settings). If you are logged in, we may associate that information with your YouTube Account. In

order to ensure the quality of our service to you, we may place a tag (also called a "web beacon") in HTML-based customer support emails or other communications with you in order to confirm delivery.

**Content Uploaded to Site.** Any personal information or video content that you voluntarily disclose online (e.g., video comments, your profile page) may be collected and used by others. If you download the YouTube Uploader, your copy includes a unique application number. This number, and information about your installation of the Uploader (version number, language) will be sent to YouTube when the Uploader automatically checks for updates and will be used to update your version of the Uploader.

## Uses

If you submit personal information to YouTube, we may use that information to operate, maintain, and improve the features and functionality of YouTube, and to process any flagging activity or other communication you send to us.

We do not use your email address or other personal information to send commercial or marketing messages without your consent. We may use your email address without further consent for non-marketing or administrative purposes (such as notifying you of major YouTube changes or for customer service purposes). You also can choose how often YouTube sends you email updates in your YouTube Account settings page.

We use cookies, web beacons, and log file information to: (a) store information so that you will not have to re-enter it during your visit or the next time you visit YouTube; (b) provide custom, personalized content and information; (c) monitor the effectiveness of our marketing campaigns; (d) monitor aggregate metrics such as total number of visitors and pages viewed; and (e) track your entries, submissions, and status in promotions, sweepstakes, and contests.

By way of contrast, Facebook sets forth the following provision with respect to its use of information received from users:

### **Information you provide to us:**

**Information About Yourself.** When you sign up for Facebook you provide us with your name, email, gender, and birth date. During the registration process we give you the opportunity to connect with your friends, schools, and employers. You will also be able to add a picture of yourself. In some cases we may ask for additional information for security reasons or to provide specific services to you. Once you register you can provide other information about yourself by connecting with, for example, your current city, hometown, family, relationships,

networks, activities, interests, and places. You can also provide personal information about yourself, such as your political and religious views.

**Content.** One of the primary reasons people use Facebook is to share content with others. Examples include when you update your status, upload or take a photo, upload or record a video, share a link, create an event or a group, make a comment, write something on someone's Wall, write a note, or send someone a message. If you do not want us to store metadata associated with content you share on Facebook (such as photos), please remove the metadata before uploading the content.

**Transactional Information.** We may retain the details of transactions or payments you make on Facebook. If you do not want us to store your payment source account number, you can remove it using your payments [page](#).

**Friend Information.** We offer contact importer tools to help you upload your friends' addresses so that you can find your friends on Facebook, and invite your contacts who do not have Facebook accounts to join. If you do not want us to store this information, visit this [help page](#). If you give us your password to retrieve those contacts, we will not store your password after you have uploaded your contacts' information.

#### **Information we collect when you interact with Facebook:**

**Site activity information.** We keep track of some of the actions you take on Facebook, such as adding connections (including joining a group or adding a friend), creating a photo album, sending a gift, poking another user, indicating you "like" a post, attending an event, or connecting with an application. In some cases you are also taking an action when you provide information or content to us. For example, if you share a video, in addition to storing the actual content you uploaded, we might log the fact that you shared it.

**Access Device and Browser Information.** When you access Facebook from a computer, mobile phone, or other device, we may collect information from that device about your browser type, location, and IP address, as well as the pages you visit.

**Cookie Information.** We use "cookies" (small pieces of data we store for an extended period of time on your computer, mobile phone, or other device) to make Facebook easier to use, to make our advertising better, and to protect both you and Facebook. For example, we use them to store your login ID (but never your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets and Share buttons, and our advertisements. You can remove or block cookies using the settings in your browser, but in some cases

that may impact your ability to use Facebook.

**Information we receive from third parties:**

**Facebook Platform.** We do not own or operate the applications or websites that you use through Facebook Platform (such as games and utilities). Whenever you connect with a Platform application or website, we will receive information from them, including information about actions you take. In some cases, in order to personalize the process of connecting, we may receive a limited amount of information even before you connect with the application or website.

**Information from other websites.** We may institute programs with advertising partners and other websites in which they share information with us:

We may ask advertisers to tell us how our users responded to the ads we showed them (and for comparison purposes, how other users who didn't see the ads acted on their site). This data sharing, commonly known as "conversion tracking," helps us measure our advertising effectiveness and improve the quality of the advertisements you see.

- We may receive information about whether or not you've seen or interacted with certain ads on other sites in order to measure the effectiveness of those ads.

If in any of these cases we receive data that we do not already have, we will "anonymize" it within 180 days, meaning we will stop associating the information with any particular user. If we institute these programs, we will only use the information in the ways we explain in the "How We Use Your Information" section below.

**Information from other users.** We may collect information about you from other Facebook users, such as when a friend tags you in a photo, video, or place, provides friend details, or indicates a relationship with you.

Given the wide use of Facebook and the increased sensitivity to privacy protection for Facebook users, it is hardly surprising that Facebook's Privacy Policy with respect to its use of user provided information is robust and generally fair to users.

## 9. Termination Policies

Every social media website will retain absolute discretion to terminate users and otherwise deny services. LinkedIn, for example, provides for both mutual termination and unilateral termination:

### A. *Mutual rights of termination.*

You may terminate this Agreement, for any or no reason, at any time, with notice to LinkedIn. This notice will be effective upon LinkedIn processing your notice. LinkedIn may terminate the Agreement for any reason or no reason, at any time, with or without notice. This cancellation shall be effective immediately or as may be specified in the notice. For avoidance of doubt, only LinkedIn or the party paying for the services may terminate your access to any Premium Services. Termination of your LinkedIn account includes disabling your access to LinkedIn and may also bar you from any future use of LinkedIn.

### B. *Misuse of the Services.*

LinkedIn may restrict, suspend or terminate the account of any User who abuses or misuses the Services. Misuse of the Services includes inviting other Users with whom you do not know to connect; abusing the LinkedIn messaging services; creating multiple or false profiles; using the Services commercially without LinkedIn's authorization, infringing any intellectual property rights, or any other behavior that LinkedIn, in its sole discretion, deems contrary to its purpose. In addition, and without limiting the foregoing, LinkedIn has adopted a policy of terminating accounts of Users who, in LinkedIn's sole discretion, are deemed to be repeat infringers under the United States Copyright Act.

### C. *Effect of Termination.*

Upon the termination of your LinkedIn account, you lose access to the Services. In addition, LinkedIn may block access to the Services from an IP address or range of IP addresses associated with those of terminated Users. The terms of this Agreement shall survive any termination, except Sections 3 ("Your Rights") and 4.a-b, and d ("Our Rights and Obligations") hereof.

Facebook's termination policy makes clear that a violation of either the "letter or spirit" of the Terms of Use Agreement allows Facebook to terminate services:

If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account. You may also delete your account or disable your application at any time. In all such cases, this Statement shall terminate, but the following provisions will still apply: . . .

## 10. Disclaimers

Disclaimers come in many shades and colors, but essentially say the same thing, namely that the social media website will not be liable to its users for any warranties whatsoever.

**MySpace** is a good example of “Disclaimers Gone Wild”:

MySpace is not responsible for and makes no warranties, express or implied, as to the User Content or the accuracy and reliability of the User Content posted through or in connection with the MySpace Services or Linked Services, by Users of the MySpace Services or Linked Services, and such User Content does not necessarily reflect the opinions or policies of MySpace. In addition, MySpace is not responsible for any damage, injury or loss caused by Users of the MySpace Services or by any of the equipment or programming associated with or utilized in the MySpace Services or Linked Services. Profiles and Linked Services created and posted by Members on, though or in connection with the MySpace Services may contain links to other websites or services. MySpace is not responsible for the Content, accuracy or opinions expressed on such websites and services, and such websites and services are not necessarily investigated, monitored or checked for accuracy or completeness by MySpace. Inclusion of any linked website or service on the MySpace Services does not imply approval or endorsement of the linked website or service by MySpace. When you access these third party sites and services, you do so at your own risk. MySpace takes no responsibility for third party advertisements or Linked Services that are posted on, through or in connection with the MySpace Services or Linked Services, nor does it take any responsibility for the goods or services provided by these third parties. MySpace is not responsible for the conduct, whether online or offline, of any User of the MySpace Services or Linked Services. MySpace assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, any User or Member communication. MySpace is not responsible for any problems or technical malfunction of any telephone network or lines, computer online systems, servers or providers, computer equipment, software, failure of any email or players due to technical problems or traffic congestion on the Internet or on any of the MySpace Services or Linked Services or combination thereof, including, without limitation, any injury or damage to Users or to any person's computer related to or resulting

from participation or downloading materials in connection with the MySpace Services or Linked Services. Under no circumstances shall MySpace be responsible for any loss or damage, including, without limitation, personal injury or death, resulting from use of the MySpace Services or Linked Services, attendance at a MySpace event, from any User Content posted on or through the MySpace Services or Linked Services, or from the conduct of any Users of the MySpace Services, whether online or offline. The MySpace Services and Linked Services are provided "AS-IS" and as available and MySpace expressly disclaims any warranty of fitness for a particular purpose or non-infringement. MySpace cannot guarantee and does not promise any specific results from use of the MySpace Services or Linked Services.

**Facebook**, on the other hand, is more discreet:

WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK. WE ARE PROVIDING FACEBOOK "AS IS" WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. WE DO NOT GUARANTEE THAT FACEBOOK WILL BE SAFE OR SECURE. FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES.

**YouTube** provides the following warranty disclaimer:

YOU AGREE THAT YOUR USE OF THE SERVICES SHALL BE AT YOUR SOLE RISK. TO THE FULLEST EXTENT PERMITTED BY LAW, YOUTUBE, ITS OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THE SERVICES AND YOUR USE THEREOF. YOUTUBE MAKES NO WARRANTIES OR REPRESENTATIONS ABOUT THE ACCURACY OR COMPLETENESS OF THIS SITE'S CONTENT OR THE CONTENT OF ANY SITES LINKED TO THIS SITE AND ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT, (II) PERSONAL INJURY OR PROPERTY DAMAGE, OF ANY NATURE WHATSOEVER, RESULTING FROM YOUR ACCESS TO AND USE OF OUR SERVICES, (III) ANY UNAUTHORIZED ACCESS TO OR USE OF OUR SECURE SERVERS AND/OR ANY AND ALL PERSONAL INFORMATION AND/OR FINANCIAL INFORMATION STORED THEREIN, (IV) ANY INTERRUPTION OR CESSATION OF TRANSMISSION TO OR FROM OUR SERVICES, (IV) ANY BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE

WHICH MAY BE TRANSMITTED TO OR THROUGH OUR SERVICES BY ANY THIRD PARTY, AND/OR (V) ANY ERRORS OR OMISSIONS IN ANY CONTENT OR FOR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE SERVICES. YOUTUBE DOES NOT WARRANT, ENDORSE, GUARANTEE, OR ASSUME RESPONSIBILITY FOR ANY PRODUCT OR SERVICE ADVERTISED OR OFFERED BY A THIRD PARTY THROUGH THE SERVICES OR ANY HYPERLINKED SERVICES OR FEATURED IN ANY BANNER OR OTHER ADVERTISING, AND YOUTUBE WILL NOT BE A PARTY TO OR IN ANY WAY BE RESPONSIBLE FOR MONITORING ANY TRANSACTION BETWEEN YOU AND THIRD-PARTY PROVIDERS OF PRODUCTS OR SERVICES. AS WITH THE PURCHASE OF A PRODUCT OR SERVICE THROUGH ANY MEDIUM OR IN ANY ENVIRONMENT, YOU SHOULD USE YOUR BEST JUDGMENT AND EXERCISE CAUTION WHERE APPROPRIATE.

Finally, **LinkedIn**, sets forth the following disclaimer:

DO NOT RELY ON LINKEDIN, ANY INFORMATION THEREIN, OR ITS CONTINUATION. WE PROVIDE THE PLATFORM FOR LINKEDIN AND ALL INFORMATION AND SERVICES ON AN “AS IS” AND “AS AVAILABLE” BASIS. WE DO NOT PROVIDE ANY EXPRESS WARRANTIES OR REPRESENTATIONS.

TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW, WE DISCLAIM ANY AND ALL IMPLIED WARRANTIES AND REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NONINFRINGEMENT. IF YOU ARE DISSATISFIED OR HARMED BY LINKEDIN OR ANYTHING RELATED TO LINKEDIN, YOU MAY CLOSE YOUR LINKEDIN ACCOUNT AND TERMINATE THIS AGREEMENT IN ACCORDANCE WITH SECTION 7 (“TERMINATION”) AND SUCH TERMINATION SHALL BE YOUR SOLE AND EXCLUSIVE REMEDY.

LINKEDIN IS NOT RESPONSIBLE, AND MAKES NO REPRESENTATIONS OR WARRANTIES FOR THE DELIVERY OF ANY MESSAGES (SUCH AS INMAILS, POSTING OF ANSWERS OR TRANSMISSION OF ANY OTHER USER GENERATED CONTENT) SENT THROUGH LINKEDIN TO ANYONE. IN ADDITION, WE NEITHER WARRANT NOR REPRESENT THAT YOUR USE OF THE SERVICE WILL NOT INFRINGE THE RIGHTS OF THIRD PARTIES. ANY MATERIAL, SERVICE, OR TECHNOLOGY DESCRIBED OR USED ON THE WEBSITE MAY BE SUBJECT TO INTELLECTUAL PROPERTY RIGHTS OWNED BY THIRD PARTIES WHO

HAVE LICENSED SUCH MATERIAL TO US, SERVICE, OR TECHNOLOGY.

LINKEDIN DOES NOT HAVE ANY OBLIGATION TO VERIFY THE IDENTITY OF THE PERSONS SUBSCRIBING TO ITS SERVICES, NOR DOES IT HAVE ANY OBLIGATION TO MONITOR THE USE OF ITS SERVICES BY OTHER USERS OF THE COMMUNITY; THEREFORE, LINKEDIN DISCLAIMS ALL LIABILITY FOR IDENTITY THEFT OR ANY OTHER MISUSE OF YOUR IDENTITY OR INFORMATION.

LINKEDIN DOES NOT GUARANTEE THAT THE SERVICES IT PROVIDES WILL FUNCTION WITHOUT INTERRUPTION OR ERRORS IN FUNCTIONING. IN PARTICULAR, THE OPERATION OF THE SERVICES MAY BE INTERRUPTED DUE TO MAINTENANCE, UPDATES, OR SYSTEM OR NETWORK FAILURES. LINKEDIN DISCLAIMS ALL LIABILITY FOR DAMAGES CAUSED BY ANY SUCH INTERRUPTION OR ERRORS IN FUNCTIONING. FURTHERMORE, LINKEDIN DISCLAIMS ALL LIABILITY FOR ANY MALFUNCTIONING, IMPOSSIBILITY OF ACCESS, OR POOR USE CONDITIONS OF THE LINKEDIN SITE DUE TO INAPPROPRIATE EQUIPMENT, DISTURBANCES RELATED TO INTERNET SERVICE PROVIDERS, TO THE SATURATION OF THE INTERNET NETWORK, AND FOR ANY OTHER REASON.

## **11. Limitation of Liability**

Like Disclaimers, Limitations of Liability provisions basically say the same thing in an effort to insulate the social media website from liability to its users. Two examples are worth noting, one from Facebook and one from LinkedIn:

### **Facebook:**

WE WILL NOT BE LIABLE TO YOU FOR ANY LOST PROFITS OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS STATEMENT OR FACEBOOK, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH

CASES, FACEBOOK'S LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

**LinkedIn:**

Neither LinkedIn nor any of our subsidiaries, affiliated companies, employees, shareholders, or directors (“LinkedIn Affiliates”) shall be liable for (a) any damages in excess of five times the most recent monthly fee that you paid for a Premium Service, if any, or US \$100, whichever amount is greater, or (b) any special, incidental, indirect, punitive or consequential damages or loss of use, profit, revenue or data to you or any third person arising from your use of the Service, any platform applications or any of the content or other materials on, accessed through or downloaded from LinkedIn. This limitation of liability shall:

- A. Apply regardless of whether (1) you base your claim on contract, tort, statute or any other legal theory, (2) we knew or should have known about the possibility of such damages, or (3) the limited remedies provided in this section fail of their essential purpose; and
- B. Not apply to any damage that LinkedIn may cause you intentionally or knowingly in violation of this Agreement or applicable law, or as otherwise mandated by applicable law that cannot be disclaimed from in this Agreement.
- C. Not apply if you have entered into a separate agreement to purchase Premium Services with a separate Limitation of Liability provision that supersedes this section in relation to those Premium Services.

**12. Indemnification**

Not surprisingly, social media website Terms of Use Agreements will lay out strict indemnification obligations running from the user to the website. A single example, from MySpace’s agreement, will illustrate the breadth of indemnification obligations that users assume:

You agree to indemnify and hold MySpace, its subsidiaries, and affiliates, subcontractors and other partners, and their respective officers, agents, partners and employees, harmless from any loss, liability, claim, or demand, including, but not limited to, reasonable attorneys' fees, made by any third party due to or arising out of your use of the MySpace Services in violation of this Agreement and/or arising from a breach of this Agreement and/or any breach of your representations and warranties set forth in this Agreement and/or any Content that you post on, through or in connection with the MySpace Services.

### **13. Miscellaneous Provisions**

The social media website Terms of Use Agreement will have many other provisions beyond those encompassed by this summary. Such provisions are those typically found in any IT or licensing agreement, including: arbitration provisions, limitations on class action proceedings, limitations on jury trials and/or punitive damages, choice of law, choice of forum, and unique terms and conditions applicable to countries other than the United States.