Can I Use Dropbox?
Best Practices for Cloud Computing and Using Web-based Services

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WHAT MAKES SOMETHING A CONTRACT?

• Mutual assent of the parties – the manifestation of both parties of an intent to be bound (whether written or oral)
  • Offer, acceptance, and consideration

• Doesn’t have to be negotiated
  • Can be take-it-or-leave-it terms of service

• Doesn’t have to be signed
  • Click-through and Click-wrap agreements are binding

• Terms can be very one-sided
  • Courts will only strike terms so bad they shock the conscious
CLICK-THROUGH AND CLICK-WRAPS ARE CONTRACTS

- Most websites, apps, and software today require users to click “I agree” or “I accept” before creating an account or installing the app or software and the terms to which you are agreeing are closely linked in space.

- They are legally binding agreements and therefore must follow Board of Trustees Policy.
  - A person with a delegation of authority must enter into them on behalf of the college, university or system office (System Procedure 1A.2.2)
  - They must be reviewed by system legal counsel (System Procedure 5.14.5)
GENERAL CONTRACT PRINCIPLES

• Contracts are contracts even if they are entered into via computer

• A user’s failure to read the terms of a click-wrap agreement before accepting the terms, does not allow a user to get out of the contract.

• Browse-wrap agreements – a statement in a footer but not requiring an affirmative action - are less likely to be held valid by courts, but can still be valid.
EXAMPLES OF CLICK-THROUGH AGREEMENTS
• You want to host a ticketed event on campus
• A friend mentions their company uses Eventbrite so you check it out
• Is this a contract?
By continuing, I agree to Eventbrite’s terms of service, privacy policy, and community guidelines.
EVENTBRITE - WHAT HAVE YOU JUST AGREED TO?

- These Terms are a legally binding agreement between you and Eventbrite governing your access to and use of the Services.
- If you will be using the services on behalf of an entity (such as your employer) you agree to these Terms on behalf of that entity and its affiliates and you represent you have the authority to do so.
• You need to share large files with a coworker and keep them continuously updated.

• You use Dropbox to store your personal photos, so you create an account with your work address.
IS THIS A CONTRACT?

This page is protected by reCAPTCHA, and subject to the Google Privacy Policy and Terms of service.

- I agree to Dropbox terms
- Create an account

or

- Sign up with Google
DROPBOX – WHAT HAVE I AGREED TO?

- These terms of service cover your use and access to our services and websites.
- By using our Services you’re agreeing to be bound by these terms, our privacy policy, and acceptable use policy.
- If you’re using our services for an organization, you’re agreeing to these terms on behalf of that organization.
CONSTANT CONTACT

Powerful email marketing made easy.

See all the great things it can do for your business.

Email: sarah.mcgee@minnstate.edu
Password:
First Name: Last Name: Organization Name:
Phone Number:

By clicking "Get Started", you agree to the Terms & Conditions and Mail Terms of Service and acknowledge receipt of our Privacy Policy.
• By checking the box or clicking the button next to a link to these terms on any of our sign-up pages, by logging into your account, or by accessing the site, you accept this agreement on behalf of yourself and any business or organization you represent.
• FIRST THINGS FIRST
These “customer terms” form part of a binding “contract”

• These User Terms are a legally binding contract between you and us
By using or signing up for Mailchimp or signing up for an account, you’re agreeing to these Terms, which will result in a legal agreement between you and Mailchimp (“Agreement”)
JIRA, TRELLO AND THE REST OF ATLASSIAN CLOUD PRODUCTS

These terms are between you and the Atlassian entity that owns or operates the Cloud product that you are using or accessing.

If you are accepting on behalf of your employer, you represent that you have full legal authority to bind your employer or such entity to these terms.

PLEASE NOTE IF YOU SIGN UP FOR A CLOUD PRODUCT USING AN EMAIL FROM YOUR EMPLOYER THEN YOU WILL BE DEEMED TO REPRESENT SUCH PARTY ... (AND) YOUR CLICK TO ACCEPT WILL BIND YOUR EMPLOYER TO THESE TERMS.
OTHER EXAMPLES

- File Sharing – Google Drive, Box
- Social media sites – Facebook, YouTube, Instagram, Twitter, Snapchat
- Project Management – Wimi, Asana, Basecamp
- Online CRM – Zoho, Hubspot
- Payment apps – Paypal, Square
- Ticketing – Brown Paper Tickets, Eventzilla
- Cloud-based backup solutions – Crashplan, Carbonite, iCloud
- Classroom based apps – screencasting, grading, texting apps, scheduling apps, etc.
OK, SO CLICK-THROUGHS ARE CONTRACTS, WHAT’S THE PROBLEM?
ALL CONTRACTS, REGARDLESS OF DOLLAR VALUE, HAVE TO FOLLOW MINNESOTA STATE BOARD OF TRUSTEES POLICIES
CONTRACTS HAVE TO FOLLOW MINNESOTA STATE POLICIES

• Only those persons with delegated authority may enter into contracts on behalf of the system.
  – A “delegation of authority” is the formal conveyance from one person to another of the authority to bind Minnesota State Colleges and Universities, the system office or a college or university to a legally enforceable obligation. System Procedure 1A.2.2
  – The person “signing” the click-through needs to be the person with the delegation of authority.
OTHER MINNESOTA STATE POLICIES

• Contracts over $50,000 (including renewals) must be put out for bid
  – System Procedure 5.14.5

• Contracts of any value with a term in excess of five years requires approval by the Vice Chancellor-CFO.
  – System Procedure 5.14.2

• Any contract or other legally binding agreement ... that does not adhere to system approved contract templates must be approved in advance by the office of general counsel or attorney general’s office.
  – Board Policy 5.14
WHY DO CONTRACTS NEED LEGAL REVIEW?
PROBLEMATIC TERMS THAT LEGAL COUNSEL WILL REVISE

• Indemnification and Hold-Harmless Clauses
  – Prohibited by law and board policy
  – Employee may be personally liable and may be just cause for removal
• Attorneys fees or other uncapped financial obligations
• Agreements beyond 5 years
  – Automatic renewals
• Agreements beyond $50,000 (including renewals)
• Prepayment for services
• Choice of law and venue in other states and other countries
• Unfavorable arbitration or mediation clauses
• No warranties or poor service level agreements
• Privacy policies and data sharing clauses
CONTRACTUAL RESTRICTIONS ON THE USE OF PRIVATE DATA ARE REQUIRED BY LAW AND ARE IMPORTANT TO ALL OF US
PRIVATE DATA AND SOFTWARE CONTRACTS

- Mobile apps, web services, SaaS and cloud providers all store their data somewhere outside of Minnesota State’s servers.
- When we allow third parties to store, transmit, or access nonpublic data, by law we must have appropriate contractual provisions in place.
- FERPA and the Minnesota Government Data Practices Act place limits on what we can share with third parties.
WHAT CAN WE SHARE WITH CLOUD PROVIDERS?

- Public Data
  - For employees, what is listed in Minn. Stat. 13.43 subd. 2
    - Name, dates of employment, employee ID number, salary, education, training and background, work location, work telephone numbers, etc.
  - For students, what your institution lists as directory data or limited directory data
    - Directory data varies widely among our colleges and universities
    - Limited directory data only applies for the purpose listed in your annual FERPA notice
    - Some percentage of students suppress the sharing of data entirely
WHAT CAN WE SHARE WITH CLOUD PROVIDERS?

• Private Student Data May Be Shared
  – With Consent OR
  – Subject to the School Officials Exception in FERPA
    • Allows us to outsource functions we would normally provided, so long as the third party:
      – Has a legitimate interest in the education records;
      – Is under the direct control of the college or university with respect to the use and maintenance of education records; and
      – Is subject to the requirements governing the use and disclosure of personally identifiable information from education records.

• Notice to students must be provided in your annual FERPA notice that you may be outsourcing some functions under the school officials exception.
HOW DO WE MAINTAIN DIRECT CONTROL?

• We must be able to control the vendor’s maintenance, use, and re-disclosure of education records (e.g., no data mining or targeted ads, no privacy policies that change by the month)
• Best practice is a written contract stating those limits
• “Schools outsourcing information technology services, such as web-based and e-mail services, should make clear in their service agreements or contracts that the outside party may not use or allow access to personally identifiable information from education records, except in accordance with the requirements established by the educational agency or institution that discloses the information.”
IN PRACTICAL TERMS

• System Legal Counsel will edit the contract to add special clauses.
  – The vendor agrees to be bound by FERPA and to not use the data for their own purposes or to re-disclose the data
  – The vendor agrees we own the data and we can get it back at the end of the contract (without charge!)
  – The vendor will notify us of a data breach
  – The vendor will pay for us to notify individuals in the event of a data breach
  – The vendor will meet minimum security requirements for coding and encryption
  – The vendor will submit to security audits and share their results with us
WHAT IF THEY WON’T NEGOTIATE
OR, WHAT IF I NEED THIS TOMORROW?

• Is there an alternate solution on the market? A more flexible vendor? A campus that has already vetted a similar product? Can you put it out for RFP to have more control over the terms?

• If all else fails, the person with the delegation of authority can formally acknowledge the risks by signing a document that OGC has available.
  – “I am aware that the penalty for failure to secure an encumbrance is a misdemeanor and possible removal from my position.”
  – OGC will then send a “side-letter” to the vendor disclaiming the clauses we cannot agree to by law.
CREATING, Transmitting or storing education records using a third-party application or cloud service could trigger FERPA, as that act is may be a “release” of the student’s record to a third party.

Problematic consumer examples:
- Using Dropbox to send a graded paper back to a student
- Emailing through your Yahoo-mail about student participation
- Requiring students to submit data through a Google form
- Registering students for an activity through a third-party service like EventBrite
- Tracking grades using an iPad app
- Syncing non-directory student data stored on a smartphone address book with iCloud or Google contacts.

SHARING WITHOUT AN AGREEMENT MAY BE A DATA BREACH
WHY DOES COMPLIANCE MATTER?

• Violations of data privacy laws expose the school and individuals to liability. Improper FERPA policies could result in withdrawal of federal funds to the school.

• Under the Data Practices Act, institutions can be liable for money damages, or civil penalties, and individuals are subject to disciplinary action for willful violations, and potentially even criminal penalties.

• Moreover, it is important for the integrity of the system that we honor students’ rights to access and maintain privacy in the education records that are entrusted to us.
WHAT IF?

• If you’re aware of something that may rise to the level of a data breach, contact your supervisor or campus DPCO.

• Work with OGC and System Office IT Security to determine whether there has been a data breach and the extent of such a breach.
  – OGC will assist in determining whether notice is required and can assist in drafting notification letters.
BEST PRACTICES FOR APPS, SOFTWARE, WEBSITES, ETC.
CONSIDER YOUR CLICK

• Are you entering into a contract on behalf of yourself or on behalf of your college, university, or the system office?

• If you are entering into a click-through on behalf of your college, university or the system office, you must follow Board Policy on procurement (even if it is free).

• If you are entering into a click-through on your own personal behalf, you are accepting all risks yourself.
INVENTORY YOUR SOFTWARE USAGE

• Know what services are being used on campus
  – Conduct an inventory
  – Instruct employees on how to make full use of approved services
    • Microsoft Office, Adobe, etc.

• Consider centralizing the evaluation and approval of online products on campus
  – Ensure OGC/AGO review of all contracts, even click-throughs
  – Limit the authority of who can accept by policy
  – IT Security Vendor Questionnaire
  – Document approval (Print, date, and save the TOS)
USING CLOUD SERVICES IN THE CLASSROOM

• Are students required to use the cloud service provider to participate in a school function?
  – Taking a Quiz
  – Submitting Homework
• Is student directory information (StarID, email address, name) necessary for enrolling in the cloud service?
• Is any other student record information shared with the cloud service?
  – Grades or other evaluative information
BOTTOM LINE: CAN I USE DROPBOX?
NOT AT THIS TIME

• Not until there is a negotiated agreement in place with Dropbox.
• Student records protected by FERPA – and any other private data – may not be transmitted or stored using any app, software, or web service, without a Minnesota State contract with the vendor that outlines appropriate data protection measures.
• Do not place grades or evaluative comments on websites or third-party apps.
• Assume that any information stored or transmitted through a third-party service or app will become public.
Contact Information
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