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# Extranets - Getting Inside Your Website

by Mark A. Kirsch\*

The Internet is no longer only a research and communications medium for a select group of users at universities and in the government, but is a forceful and multifaceted engine of the “new economy.” And, as the Internet has come to the masses (at least, to a large degree, in this country and in many other developed countries), the Internet is utilized for many purposes – from entertainment and consumer transactions to sophisticated data exchanges and commercial transactions. All sorts of enterprises, even those not engaged in “e-commerce” (e.g., in the sale of products or services over or from the Internet), continue to explore how they can exploit the Internet for their advantage.

Many businesses have recognized the need for specialized interactive communications, services, and transactions with their customers, suppliers, vendors, licensees, and other third

parties. When the operations, marketing, finance, and personnel departments of a company utilize the Internet, and the company’s website and internal computer network, the company’s lawyers (in-house or outside counsel) need to understand how to help the company reach its goals while managing the risks inherent in developing and utilizing new technologies.

This article will provide an overview of one such technology – extranets – that permits third parties access to, and interactivity with, an enterprise’s privileged, secure and confidential information, and will discuss practice tips for drafting agreements for the operations of extranets. But first, what is an “extranet”?

## Extranets

Many businesses, of all shapes, sizes, and commercial interests, have one or more websites on the

Internet. Also, many companies have developed an internal computer network (for communications, data transfer, intra-organization transactions, etc.) available only to company employees or to other insiders. If this network is inaccessible to outsiders, and if the network uses Internet standards, protocols, and World Wide Web technology, it is often referred to as an “intranet.” When a company establishes a website on the Internet, or creates an intranet, and then allows certain third parties (e.g., suppliers or vendors, licensees, customers, or members of an organization) to access all or portions of the website or the intranet through some secure method, then that portion of the website, or intranet, is called an “extranet.”

Extranets can be used for a myriad of services and applications. A company that develops or aggregates information, and offers certain information over its

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website for free, but wishes to provide other more detailed information or data applications to particular organization members, or to subscribers, may develop an extranet for these special users. Franchise companies may develop extranets as a means to conduct on-line training for franchised outlets and update confidential operating manuals, supply new promotional materials for local use, collect and disseminate system-wide or regional sales figures and financial summaries, or provide secure “chat rooms” for franchisees and outlet managers to share ideas. Manufacturers and distribution companies (including franchisors), can open their extranet to third parties, such as suppliers or vendors of products or services, to permit them to sell their products to the company’s outlets or franchisees. Many interactive websites that engage in auction or bidding services, group purchasing, and business-to-business (or B2B) transactions utilize extranets.

Why create an extranet? As noted above, some websites are designed mainly for informational or educational purposes, and exist primarily to promote basic communications between the company that owns the website and the guest or visitor to the website. Some businesses, however, view their website or intranet as a means to enhance efficiency and productivity, improve the quality, quantity and speed of information transferred, and/or to reduce transaction costs. An extranet, if properly designed, operated, and maintained, can achieve these objectives. For example, a potential extranet application could arise in connection with a company that provides employee and health benefits administration assistance to other businesses and

organizations. The extranet of the benefits company may permit its clients (that is, the organizations that use its services) to communicate with the company about changes in personnel or benefits, and to pay fees. Also, each employee of the client organizations may have access to certain of the confidential data regarding his/her benefits, and the benefits company may wish to allow the employees to adjust their plans and benefits. By allowing clients and their employees to engage in these transactions on-line, the benefits company is likely to reduce its transaction costs. It may also reduce communications times, and transaction errors and delays. Today, those services and transactions are labor and paper intensive, and are accomplished via mail, fax, and telephone. Tomorrow, these transactions may occur over the Internet. And, an extranet is likely to be a tool used by the benefits company.

There are many strategic and technological steps to creating an extranet. The company must decide the purpose or purposes for which its website or extranet will (and will not) be used, and parties who may have access to it. Also, the company must create an extranet that does the things it hopes it will do (and that it promises to third parties that it will do). Assuming these can be accomplished, the company needs to “invite” third parties to enter and use the website and the extranet.

### **Terms of Use Agreements**

When a person or company invites a third party to its office or plant, or engages in a commercial transaction, the company will confront certain issues and risks that

arise out of those actions or transactions. The same is true for communications and transactions over an extranet. The lawyer’s job is to help manage those risks. One method to address and manage risks is to create a contract for each user of the website, or extranet, that spells out the parties’ respective obligations (i.e., the rules of the game, and the penalties for violating the rules). While a public Internet website might allow anyone in without wanting to slow the relationship with a required registration process, providers typically limit extranet access to particular invitees and maintain the extranet as a relatively secure environment. Therefore, access is generally granted only pursuant to a password to provide secure access. An extranet site typically requires users to register and be qualified to gain access. The registration gateway provides the ideal opportunity for the site provider to present an agreement to its users and document affirmative acceptance of that agreement.

Generally speaking, agreements concerning access to and use of an extranet (and websites generally) are referred to as “Terms of Use” (“TOU”) Agreements. (Another term is “Terms of Service,” or TOS, Agreements.) Simply speaking, a TOU Agreement is an agreement that governs each party’s use of the extranet and the information exchanged on the extranet.

Companies may create TOU Agreements the old fashioned way – on paper – and require the parties’ execution of the TOU Agreement before granting authorization to access the extranet. This may work in some systems where the website users have a pre-existing relationship

with the company, and there is a routine exchange of contracts and other information. Another way to implement a TOU Agreement, particularly if new users of the extranet are communicating only via the Internet, is a “click-wrap” agreement. Click-wrap agreements are typically used to specify the terms and conditions applicable to the use of a website and/or an extranet. The full click-wrap agreement is available on the website, and a user may not enter the extranet unless and until the user assents to the terms of the click-wrap agreement by clicking on a button stating “I AGREE” or “I ACCEPT,” or similar words of assent. Of course, the user must have had the opportunity to read its terms. It is important, when designing a website, to determine where, when, and how often a TOU Agreement in the form of a click-wrap agreement will appear on the user’s screen. Recent case law has found the click-wrap agreements to be valid and enforceable.

Companies may have different forms or types of extranet agreements or TOU Agreements, depending upon the relationship of the third party invitee to the extranet, the various levels of access to secured communications that may be granted, or the nature of the transactions in which different users may engage. For example, sellers of products, services, or information on a website may have a different contract than buyers of those products, services, or information. Or, franchise systems may have one form of agreement for franchisees (that may be related to, cross-referenced in, or cross-defaulted to, the conditions and obligations in each franchisee’s franchise agreement), and another form of agree-

ment for vendors who are offering their products or services on-line, via the extranet, to the franchisees. Even without variations in users, TOU Agreements will likely vary from extranet to extranet depending on the nature of the website and the transactions in which users will be engaged. In this field, one size will not fit all. Nonetheless, there are certain terms and policies that are likely to be in many TOU Agreements. The following is a brief description of many such provisions:

1. *Introduction.* Many TOU Agreements, particularly those that first appear as a click-wrap agreement, will begin with an introductory and/or explanatory statement describing generally the services available on the website or extranet. The introduction may also state that the use of the website or extranet is subject to the terms and conditions of the TOU Agreement and other policies referred to in, or attached or linked to, the TOU Agreement. The introduction may contain a warning or notice advising the user that it may not continue to proceed to other areas of the website or extranet before reading the TOU Agreement, and explaining that by accepting or clicking on the “I Agree” button, the reader indicates that s/he has read and agrees to all of the terms and conditions of the TOU Agreement.

2. *Authority; Permitted Activities.* In addition to, or sometimes as a part of, the introduction, the TOU Agreement will describe the general and specific purposes for the extranet, the expected activities of users (e.g., exchange of e-mail, transmission of financial data, exchange of purchase orders and confirmation of same between the

user and the company, etc.), and the range and limits of permitted activities. (See item 5 below for discussion of prohibited activities.)

3. *Persons Permitted to Access Extranet.* Access to an extranet may be granted to an individual, a company, and/or designated individuals in the company’s organization. The TOU Agreement should identify the user or make clear that the password or other means of access is specific to a single user. If other employees or members of the user’s organization desire access to the extranet, the TOU Agreement should describe the procedure to identify these individuals and should include a method to authorize these persons to access the extranet (e.g., a supplemental “designated employee registration form”).

4. *Restrictions on Usage.* In addition to certain permitted, and prohibited, activities of a user, the TOU Agreement may need to specify limitations or restrictions on a user’s access to the extranet. The user should always be required to agree to provide only truthful, accurate, and complete information in its registration to use the website, to use its password(s) appropriately and protect the confidentiality of its passwords, and to follow the company’s policies regarding passwords and access (see Item 7, “Security,” below). Some TOU Agreements, for example, specify that due to bandwidth limitations, excessive use of, or access to, the extranet may cause a termination of a session in excess of the limits.

5. *Prohibited Conduct.* Even though many companies may monitor or police activities on their extranet on an infrequent or random

basis, most do not want to, nor do many companies have the resources to do so. Therefore, the TOU Agreement should state that the company may (but is not obligated to) review content and postings, and that the company reserves the right to edit or remove content from the extranet that the company deems to be in violation of the TOU Agreement, or is or may be viewed as harmful or offensive. In addition, the following topics, or prohibitions, among others, may be included in the TOU Agreement:

- the user may not attempt to gain unauthorized access, or interfere with a functioning of the extranet.

- the user may not engage in “spamming” or “mailbombing,” which is the transmission of large volumes of unsolicited e-mails.

- the user may not engage in “spoofing” or fraud, which are attempts to send e-mail messages using the name or address of someone other than the user, or otherwise fraudulently conceal or forge the user’s identity.

- the user may not use e-mail relay, which is using another party’s e-mail server to relay e-mail without permission.

- the user may not engage in illegal activity – that is, the extranet may be used for lawful purposes only. The TOU Agreement may provide an illustrative list of potential illegal activities (such as copyright violations, trademark violations, or violations of laws, treaties, or regulations). The TOU Agreement should also prohibit transmission of com-

puter viruses, worms, “Trojan horses,” or other programs designed to corrupt or disable the extranet.

- the user is often prohibited from engaging in “objectionable conduct,” generally defined as transmissions involving pornography, indecent or obscene material, harassing or potentially harassing material (e.g., regarding race, sexual preference, religion, gender), or other inappropriate content and the provider of the site is generally given broad discretion to determine what constitutes objectionable material.

6. *Technical Compatibility with the Extranet.* A user, or potential user, or the extranet must have the necessary hardware and software to communicate and interact with the extranet. For users who enter the extranet via the Internet, maintaining technical compatibility is likely to be a prerequisite to using the extranet. However, some companies may wish to have certain users participate in the extranet, and these users may not be technologically compatible. Therefore, some TOU Agreements require that the user install and maintain computer systems, hardware, software, World Wide Web access, etc., that will enable the user to communicate and interact with the extranet. Further, the TOU Agreement may state that the user must agree to pay all fees and costs of purchasing and maintaining all necessary equipment and access services.

7. *Security.* To preserve the confidentiality of the communications on the extranet, the company and the users must agree to implement and abide by certain security measures (e.g., encryption, firewalls, user

passwords, physical security, and procedures to limit access by unauthorized persons). In the TOU Agreement, or in policies distributed to users, the company may specify that only the security measures designated by the company will be acceptable. The company may also wish to specify whether passwords and login IDs will be granted to each user (such as an entity or organization), or to each designated employee (or authorized individual in the user’s organization); whether the company will assign each user a password or whether the user selects one; and whether or how often passwords are changed..

8. *Confidentiality.* Confidentiality goes hand in hand with security. Extranets, as a tool utilized by related parties or parties in business with one another, often provide access to the valuable trade secrets of the provider and often the users as well. In order for information to maintain its status and value as trade secrets, such information must be maintained in a confidential manner. Under the TOU Agreement, the user will agree to maintain the confidentiality of the information it receives on the extranet. The TOU Agreement may specify particular measures that each user must employ to preserve confidentiality.

9. *Privacy.* The TOU should also refer to, and may incorporate by reference, the company’s “privacy policy” or privacy statement. While there is no federal law mandating a privacy policy, many websites have a privacy statement that specifies how information that is received from third party users at the website or extranet may or may not be used by the company.

10. *Trademarks and Copyrights: Copying.* The TOU Agreement should clearly delineate the company's copyright, patent, trademark, and other intellectual property interests and rights, and the user's acknowledgment of the company's rights. Every individual file on the website is the copyright property of the site provider, or has been licensed to the provider for certain limited uses (e.g., on the site). Further, to the extent the website contains a "compilation" of content (meaning the collective arrangement and assembly of a variety of content), the company should specify that it owns the copyright in that compilation. To the extent users post information on a websites, the user must warrant that it has the right to the content and the right to post the information, and that the company will have the right to use the content as prescribed in the TOU Agreement. Such posting by users can include material which infringes or is alleged to infringe the copyrights of third parties. As the provider has no knowledge or control of material posted by its users, some extranets include a copyright complaint form, which is a separate document by which a user can notify the company if the user believes that its work has been copied by others in a manner that constitutes copyright infringement. This helps provide protection for the provider of the extranet under the safe harbor provision of the new Digital Millennium Copyright Act. The TOU Agreement will state that copying information from the extranet is permitted only for the internal use of the user or its employees, and may limit the number and nature of such copies. Restrictions on copying are essential to preserve the confidential and secure nature of an extranet, as well

as the value and licenses to copyright material posted there.

11. *Waivers and Disclaimers.* As noted above, the TOU Agreement, like many contracts, can help a company manage risks. One risk is that the extranet will not do what the company says it will do. Another risk is that users may do things, or post information, or use information, in a manner that is not authorized. In short, many extranets are designed for the benefit of users, but the company will not guarantee that the extranet will always function as originally planned, or that other issues may not arise. Several recommended and typical disclaimers include:

- information provided on the extranet is "as is" and without any warranty of any kind, and the company does not guarantee the information is error-free.

- to the extent the information is provided by third parties (e.g., auction or bid sites, vendor or supplier quotes, etc.), the company makes no representation as to the accuracy of the third party's content, and the company has no obligation to verify the information. Similarly, the company may state that it has no obligation or responsibility to screen communications or information in advance, and any opinions, advice, statements, or services displayed on the extranet are those of the respective author, supplier, user, etc. Further, to the extent portions of the site, or goods or services, are operated or provided by third parties, users should be notified that a separate TOU Agreement and privacy policy may govern those areas, goods, and services.

- the company should disclaim any liability for any damages suffered by the user.

- risk of loss – to the extent the extranet enables two parties to enter into a contact (e.g., ship products at agreed-upon price), the TOU Agreement may state that the company has no liability to either party with respect to their contract, and the risk of loss is governed by the contract between the purchaser and seller, and not the company.

- many websites include links to other sites, and the TOU Agreement will disclaim any responsibility or liability for the content, advertising, products, or material available from such linked sites.

12. *Indemnification.* The flip side to the waivers and disclaimers is the indemnification. The TOU Agreement should include an indemnification of the company, by the user, of any violation of the TOU Agreement or any of the company's policies, by the user.

13. *Modifications to TOU.* If technology in general, and the Internet in particular, have taught us anything, it is the need to be flexible and ready to adapt to changing circumstances. For that reason, as well as the need to protect against risks that may not even be contemplated at the inception of an extranet, the TOU Agreement (and any accompanying policies) must be a dynamic set of rules that allows the company to modify the extranet. The TOU Agreement should state that the TOU and any rules or policies may be changed by the company from time to time, and amendments automatically become effective once posted

on the website. This allows the company to react to business, financial, legal, and marketing issues as they arise. A user's use of the extranet after the posting of new rules will be an affirmation of the new rules, and an agreement to abide by the rules as amended. As a further precaution, the company may design the website so that pre-existing users (who have agreed to the click-wrap agreement) must agree or assent to the amended click-wrap agreement each time the TOU Agreement is revised.

14. Modification of Service. In addition to desiring flexibility in its TOU Agreement, a company is likely to want to have the right to modify or discontinue certain (or all) services on the extranet generally, or to any individual user or class of users. If so, the TOU Agreement should include this right, along with a disclaimer of liability for any modification, suspension, or discontinuance of service.

15. Site-Specific Rules. The TOU Agreement may also include site-specific rules for the users. For example, extranets that involve transactions such as requesting a quote and providing a product or service in response to the quote, may include transaction procedures. Those transaction procedures may include requirements for electronic signatures or digital certificates. (This is likely to become increasingly more common since the "E-Sign" bill (the federal "Electronic Signature in Global and National Commerce Act") signed on June 30, 2000, became effective on October 1, 2000.) Also, extranets that include chat rooms may include limitations on the content of those chat rooms.

16. Termination. The TOU Agreement also may specify, and the extranet should implement, rules for temporarily or permanently terminating service or access to a user, particularly as a result of violations of any terms of the TOU Agreement by the user.

17. Choice of Law, Forum, Dispute Resolution. The lawyer, in consultation with his/her client, should consider whether the TOU Agreement should specify a choice of law and/or choice of forum provisions for dispute resolution. These provisions can be particularly helpful where the company may have users in every state in the U.S. and in many countries. Further, plaintiffs have sought to use the reach of a website into the plaintiff's home state as grounds to assert personal jurisdiction over the company that owns the website. If these types of claims to personal jurisdiction become more successful, a choice of law and choice of forum clause may be used to defeat such a claim or to keep the case in the company's home state. Companies may wish to consider specifying arbitration as the dispute resolution method, particularly for users who are not based in the U.S., and as a method to avoid class actions. Case law has generally supported choice of law and choice of forum clauses in arbitration provisions, even in the face of state statutes that provide that contracts that specify jurisdiction and venue outside of the state to be void (due to the preemption of the Federal Arbitration Act).

## **Conclusion**

An extranet can be a valuable tool – particularly in B2B transactions, and in distribution networks – for communications, exchanging data, and facilitating online transactions for a select group of users for whom the company wishes to permit access to specialized information. A company that creates an extranet, and invites third parties to participate with respect to certain secure and confidential websites activities, must protect its interests. Therefore, the Terms of Use Agreement, along with privacy policies, security policies, and other rules regarding the extranet, is critical in establishing the rights and responsibilities of the company, of the company's internal network of users, and of the external third party users who will be permitted to log on to the extranet. Counsel should carefully consider the proposed uses of the extranet, and prepare a TOU Agreement that reflects the intended purpose of the extranet, protects the company from liability (to the greatest extent practical), and is flexible to react to the rapidly changing times.