



VENABLE

Top Ten Tips for Nonprofits When Procuring Technology Solutions

Wednesday, October 4, 2017, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.

Partner and Chair, Nonprofit Organizations Practice,
Venable LLP

Speakers

A. J. Zottola, Esq.

Partner, Intellectual Property Transactions Practice, Venable LLP

Christopher J. Kim, Esq.

Associate, Intellectual Property Transactions Practice, Venable LLP

Allison L. Laubach, Esq.

Associate, Intellectual Property Transactions Practice, Venable LLP



Presentation



VENABLE

Top Ten Tips for Nonprofits When Procuring Technology Solutions

Wednesday, October 4, 2017, 12:30 pm – 2:00 pm ET
Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.

Partner and Chair, Nonprofit Organizations Practice,
Venable LLP

Speakers

A. J. Zottola, Esq.

Partner, Intellectual Property Transactions Practice, Venable LLP

Christopher J. Kim, Esq.

Associate, Intellectual Property Transactions Practice, Venable LLP

Allison L. Laubach, Esq.

Associate, Intellectual Property Transactions Practice, Venable LLP

© 2017 Venable LLP



CAE Credit Information

***Please note that CAE credit is available only to registered participants in the live program.**

As a CAE Approved Provider educational program related to the CAE exam content outline, this program may be applied for **1.5 credits** toward your CAE application or renewal professional development requirements.

Venable LLP is a CAE Approved Provider. This program meets the requirements for fulfilling the professional development requirements to earn or maintain the Certified Association Executive credential. Every program we offer that qualifies for CAE credit will clearly identify the number of CAE credits granted for full, live participation, and we will maintain records of your participation in accordance with CAE policies. For more information about the CAE credential or Approved Provider program, please visit www.whatiscaee.org.

Note: This program is not endorsed by, accredited by, or affiliated with ASAE or the CAE Program. Applicants may use any program that meets eligibility requirements in the specific time frame toward the exam application or renewal. There are no specific individual courses required as part of the applications—selection of eligible education is up to the applicant based on his/her needs.

© 2017 Venable LLP

VENABLE

2

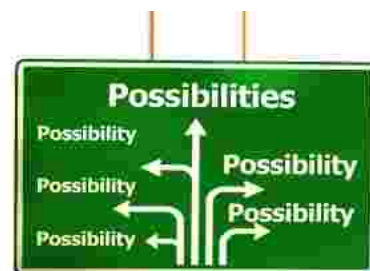
Upcoming Venable Nonprofit Events

Register Now

- **November 15, 2017:** [Key Safety and Security \(both Physical and Financial\) Risk Management Strategies for U.S.-Based Nonprofits Operating Overseas](#)
- **December 5, 2017:** [Performance Management: Getting the Best Out of Your Nonprofit's Workforce](#)
- **January 18, 2018:** The Top Privacy and Data Security Trends and Issues for Nonprofits in 2018 (*details and registration available soon*)
- **February 15, 2018:** Nonprofit Mergers, Alliances, and Joint Ventures: Options, Best Practices, and Practical Tips (*details and registration available soon*)

IT Procurement Scenarios

- M&A transactions
- "Bare" licenses for existing IT products
- License for existing IT, plus services
- IT service arrangements
- Development arrangements
- Outsourcing arrangements
- "Software as a service" and cloud computing
- Some combination of the above



Difference Between Traditional Software Development and License-Based IT Services



Traditional Software Development:

- Software developed primarily for installation and hosting on client hardware
- May involve full or partial transfer of ownership to client
- Escrow

License-Based IT Services:

- Ex: “Software as a Service,” cloud-based services
- Externally hosted, accessed by client
- Software exclusively owned by vendor, license to access/use only

Forget the Standard

- No such thing as a true standard contract
- The “industry standard contract” is actually a strongly pro-vendor arrangement
- Vague commitment descriptions, delivery obligations, or product specifications will leave the client with little recourse





What You Should Consider When Entering Into a Transaction to Procure Information Technology Products and Services

Term	Recipient	Service Description	Service Commitments	Assets
Proprietary Rights	Maintenance	Consents	Service Levels	Customer Responsibilities
Service Locations	Human Resources	Acceptance	Management & Control	Reports
Data	Confidentiality	Audits	Pricing	Taxes
Disaster Recovery	Technology	Reps & Warranties	Indemnities	Dispute Resolution
Damages	Insurance	Assignment	Termination	Miscellaneous

THIS PRESENTATION FOCUSES ON A FEW KEY AREAS
(BUT OTHER ISSUES NOTED ABOVE MAY ALSO BE IMPORTANT)



Procurement Strategy

- Preparation is key
- Create a multidisciplinary team
- Competition will lead to a faster and better result
- Don't choose a vendor until the contract is fully negotiated
- Best price does not equal best vendor
- Focus on meeting your requirements



Pre-Contract Considerations

- Screen and assess the vendor (e.g., financial stability and experience)
- For any IT engagement, it is essential to determine the scheduling priorities (i.e., mission-critical vs. routine, short-term vs. long-term)
- **Bargaining power may vary, but most vendors are willing to make at least some concessions**
- Work toward maintaining or creating a good customer/vendor relationship
- Use a term sheet only if it will help clarify initial positions



Understanding Electronic Contracts

- Weighing pre-contract considerations
- Forming and executing contracts online
- Managing changes through ancillary documentation
- “Clickwrap” end user agreements vs. fully negotiated contracts



Term and Termination

- Duration of agreement vs. duration of services
- Renewal options, notice requirements, survival
- Will there be a transition period (e.g., moving to a new platform, location)?
 - What needs to be transitioned?
 - Will vendor return your data?
- Long-term contracts are more cost effective, but short-term contracts offer more flexibility and opportunity for future negotiation

Service Description

- Think about what to include in and exclude from definition of "Services"
- Statement of work or order form
- Categories of services
 - Data analysis, storage, security
 - IT services and support
 - Network access and cloud computing
 - Application development and customization
- Schedules, milestones, and timetables
- Review cycles and acceptance criteria
- Fees, expenses, invoicing, payment





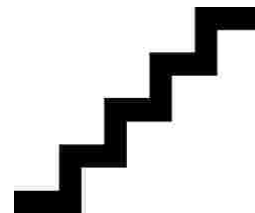
Proprietary Rights

- Pre-existing proprietary software or materials
- License to software vs. license to access vs. assignment
- Ownership of developed software
- Data, usage metrics, financial information
- Trademarks and marketing/publicity
- Confidentiality and non-disclosure
- Third-party materials



Service Levels, Business Continuity, and Disaster Recovery

- How are service levels and availability measured?
 - 99% vs. 99.9999%
 - Monitoring? Reporting? Remedies?
- Is a data recovery plan in place?
 - Redundancy from multiple locations
 - Alternative methods of access
 - Incident reporting systems, access and usage reports
 - Scheduled downtime notices





Staffing and Subcontracting

- Assignment of project manager or other business rep for both customer and vendor
- Staff continuity – restrictions on reassignment, right to remove
- Non-compete or non-solicitation
- U.S./local vs. off-shore personnel
- Subcontractors
 - Vendor’s right to subcontract – prior approval or notice
 - Which services may be subcontracted?
 - Right to restrict or remove subcontractors
 - Liability for subcontractor performance, breach



Confidentiality

- Defining “confidential information”
 - Marking requirements vs. context of disclosure
 - Exceptions
- License to use confidential information
- Permitted disclosures – personnel, government order
- Return of confidential information upon termination/request
- Injunctive relief
- Survival
- Entity-specific confidentiality issues – health insurance, education, sovereign immunity
- Overlap with data provisions and proprietary rights



Data and Data Security

- Consider the role that data plays in the agreement
 - Data services, i.e., marketing analytics, cloud storage – data as the product
 - Data *about* the services, i.e., usage metrics, anonymized statistics – data as a by-product
- Data hosting, storage, maintenance, access, and processing
- Storage location – know where your data is stored and where it travels, and make sure you are notified if it changes
- Vendor’s security procedures (especially important in cloud computing)
- Proprietary rights and license to use
- Rights and access post-termination
- Hosting or processing by subcontractors



Privacy and Data Breach

- Include language in contract that vendor will comply with data/privacy laws, rules, and regulations
- Personally Identifiable Information has special rules and higher stakes – particularly in Europe
- The laws on this vary widely by jurisdiction, and are constantly changing
- Reporting obligations and remedies in event of security breach
- Have a plan for how a security breach will be handled
- Security breach vs. breach of contract and indemnification
- Consider cyber liability insurance

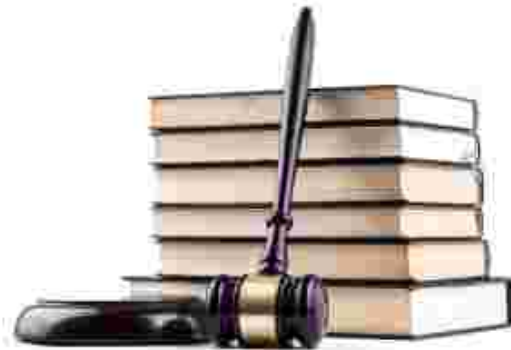
Insurance

- Nature of exposure and category of insurance
- Worker's compensation
- Employer's liability
- General commercial liability
- Professional liability or E&O
- Umbrella
- Cyber liability insurance
 - Protection from costs arising from data security breaches
 - Third-party claims, costs of remediation, breach notification, regulatory investigation, and damage to data
- Documentation and named additional insureds
- Practically relevant to indemnification and breach — \$\$\$
- Coordinate with risk management department, broker, or insurance consultant



Dispute Resolution

- Informal dispute resolution
 - Alleged breach
 - Withholding of payment
- Arbitration
 - Rules
 - Arbitrator selection
 - Enforcement
- Litigation
 - Class actions
 - Jury trial waiver
- Governing law and venue
- Issues with off-shore vendors



Remedies and Limitation of Liability

- Liquidated damages
- Injunctive relief
- Direct damages limitation
 - Fees paid/payable or multiplier
 - Fixed amount
- Special, indirect, consequential, punitive damages
- Claim limitations
- Exclusions to limitation
 - Confidentiality or security breach
 - Indemnification
 - IP infringement
 - Violation of law

Additional Provisions

Provisions for Counsel to Negotiate:

- Indemnification
- Representations and Warranties
- Audit Rights

Legal Boilerplate:

- Notices
- Assignment
- Counterparts
- Relationship of the Parties
- Severability
- Waivers
- Entire Agreement
- Survival
- Governing Law/Venue
- Headings





Questions?

Jeffrey S. Tenenbaum, Esq.

Partner and Chair, Nonprofit Organizations
Practice, Venable LLP
JSTenenbaum@Venable.com
202.344.8138

A. J. Zottola, Esq.

Partner, Intellectual Property Transactions
Practice, Venable LLP
ajzottola@Venable.com
202.344.8546

Christopher J. Kim, Esq.

Associate, Intellectual Property Transactions
Practice, Venable LLP
cjkim@venable.com
202.344.4418

Allison L. Laubach, Esq.

Associate, Intellectual Property Transactions
Practice, Venable LLP
allaubach@venable.com
202.344.4179

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

To view Venable's Government Grants Resource Library, see www.grantslibrary.com.

Follow [@NonprofitLaw](https://twitter.com/NonprofitLaw) on Twitter for timely posts with nonprofit legal articles, alerts, upcoming and recorded speaking presentations, and relevant nonprofit news and commentary.



Speaker Biographies



Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com

AREAS OF PRACTICE

Tax and Wealth Planning
 Antitrust
 Political Law
 Tax Controversies and Litigation
 Tax Policy
 Tax-Exempt Organizations
 Regulatory

INDUSTRIES

Nonprofit Organizations

GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

BAR ADMISSIONS

District of Columbia

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last six years (2012-17). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-18 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-17 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Board of *The NonProfit Times*, on the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of *Aspen's Nonprofit Tax & Financial Strategies* newsletter.

REPRESENTATIVE CLIENTS

AARP
Academy of Television Arts & Sciences
Air Conditioning Contractors of America
Air Force Association
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for Marriage and Family Therapy
American Association for the Advancement of Science
American Bar Association
American Cancer Society
American College of Cardiology
American College of Radiology
American Council of Education
American Institute of Architects
American Nurses Association
American Red Cross
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
American Thyroid Association
America's Health Insurance Plans
Anti-Defamation League
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Auto Care Association
Better Business Bureau Institute for Marketplace Trust
Biotechnology Innovation Organization
Brookings Institution
Carbon War Room
Career Education Colleges and Universities
Catholic Relief Services
CFA Institute
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Cystic Fibrosis Foundation
Democratic Attorneys General Association
Dempsey Centers for Quality Cancer Care
Design-Build Institute of America
Entertainment Industry Foundation
Entertainment Software Association
Environmental Working Group
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Good360
Goodwill Industries International
Graduate Management Admission Council
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of Management Accountants
International Association of Fire Chiefs
International Rescue Committee

International Sleep Products Association
Investment Company Institute
Jazz at Lincoln Center
Laughing Man Foundation
LeadingAge
The Leukemia & Lymphoma Society
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
National Air Traffic Controllers Association
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of College Auxiliary Services
National Association of County and City Health Officials
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Coffee Association
National Council of Architectural Registration Boards
National Council of La Raza
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
New Venture Fund
North Pacific Research Board
NTCA - The Rural Broadband Association
Nuclear Energy Institute
Pact
Patient-Centered Outcomes Research Institute
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Romance Writers of America
Telecommunications Industry Association
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
Whitman-Walker Health

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-17

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-18

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-17

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 1,000 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 850 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times*, *Politico*, *Bloomberg Business*, *Bloomberg BNA*, *EO Tax Journal*, and other periodicals. He also has been interviewed on nonprofit legal topics on Washington, DC CBS-TV affiliate, the Washington, DC Fox-TV affiliate's morning new program, Voice of America Business Radio, Nonprofit Spark Radio, The Inner Loop Radio, and Through the Noise podcasts.



Armand J. (A.J.) Zottola

Partner

Washington, DC Office

T 202.344.8546 F 202.344.8300

ajzottola@Venable.com

AREAS OF PRACTICE

Technology Transactions and Outsourcing

Corporate

Privacy and Data Security

Franchise and Distribution

Advertising and Marketing Litigation

Intellectual Property Litigation

Intellectual Property Transactions

Copyrights and Licensing

Trademark Litigation

Trademarks and Brand Protection

INDUSTRIES

Entertainment and Media

Government Contractors

Life Sciences

Nonprofit Organizations

BAR ADMISSIONS

Maryland

District of Columbia

EDUCATION

J.D., *cum laude*, Catholic University of America, Columbus School of

Working at the intersection of commerce and technology, A.J. Zottola focuses his practice on the exploitation of intellectual property, intangible, and technology assets in business and strategic relationships.

Mr. Zottola's skills enable him to handle all types of issues, negotiations, and agreements involving:

- intellectual property;
- franchise;
- privacy;
- information security;
- contract; and
- business tort law.

His extensive experience also helps clients resolve and craft settlement arrangements for misappropriation and infringement matters and for disputes involving commercial and licensing agreements. In addition, he regularly counsels clients on intellectual property, e-commerce and privacy issues, and prosecutes and manages U.S. and foreign trademark and copyright portfolios.

His in-depth knowledge helps clients achieve practical and creative solutions to procure, exploit, manage and protect their intangible and proprietary assets. Whether resolving employer/employee intellectual property ownership issues, assessing new technology developments, or acquiring technology assets through mergers and acquisitions, Mr. Zottola assists a variety of companies and funding sources in maximizing asset value, identifying new opportunities for business expansion and generation, and preventing the unwanted loss or infringement of proprietary rights.

REPRESENTATIVE CLIENTS

Mr. Zottola regularly represents U.S. and foreign enterprises, from *Fortune* 500 companies and small start-ups to trade and professional associations. Industries include software, e-commerce, information technology, electronics, media and entertainment, medical products, toys and other consumer products, financial services, healthcare, life sciences, telecommunications and other newer technologies.

SIGNIFICANT MATTERS

Having worked exclusively in the technology space since the beginning of the Internet age in the 1990s, Mr. Zottola has extensive experience in the areas of:

- licenses and technology transfers;
- outsourcing, professional, consulting, and Internet-enabled service arrangements;

Law, 1997

Editorial Assistant, *Catholic University Law Review*

Intellectual Property Summer Institute, Franklin Pierce Law Center, Concord, NH, 1995

B.A., Bucknell University, 1992

- distribution, supply, reseller, and manufacturing arrangements;
- e-commerce, information technology, data processing, and proprietary information agreements;
- strategic partnerships and alliances;
- trademark and copyright prosecution;
- technology and intellectual property due diligence;
- mergers, sales, dispositions, and acquisitions; and
- co-branding/marketing agreements, publishing agreements, and franchising agreements and networks.

Mr. Zottola has represented:

- a large technical and software services contractor in devising new open source software business models for its products and solutions;
- a large, publicly-held leader in enterprise storage management software in connection with the intellectual property aspects of acquiring a \$403 million publicly held software company that provided data storage, access and e-mail management solutions;
- a large, publicly held global business and information technology company in orchestrating the intellectual property aspects of selling its global utilities practice for approximately \$26 million;
- a privately held Internet entertainment and marketing business in selling all its technology assets (including its entire trademark and patent portfolio) to a large media company; and
- a large, publicly held pharmaceutical product wholesaler in connection with the intellectual property aspects of its joint venture with another public company to form an independent health informatics business.

Mr. Zottola's recent dispute resolution experience includes representing:

- a large non-profit organization in a breach of contract dispute with its data management systems provider;
- a leading children's toy company in its defense of a trademark and copyright infringement lawsuit, which also involved business tort and unfair competition claims;
- a leading scented candle manufacturer and distributor in its pursuit of trademark and copyright infringement, business tort and false advertising claims against a competitor; and
- a software company in a breach of contract dispute.

HONORS

Listed in *The Best Lawyers in America* for Technology Law (Woodward/White, Inc.), 2014 - 2018

Practice ranked National Tier 1 and Washington, DC Tier 1 for Technology Law by *U.S. News-Best Lawyers "Best Law Firms,"* 2014

Recognized in *Chambers USA* (Band 3), Technology & Outsourcing, District of Columbia, 2012 - 2016

Recognized in the 2011 - 2017 editions of *Legal 500*, Technology: Outsourcing and Technology: Transactions

Recognized by 2017 Global Awards - Corporate LiveWire - Excellence in IP Law Services

PUBLICATIONS

- June 26, 2017, U.S. Copyright Office Issues Interim Rule Regarding Secure Tests: The Implications for Nonprofits with Examination, Test Development, and Certification Programs, Nonprofit Alert
- June 22, 2017, SCOTUS's new slant on trademark law, branded content on social media, and more in this issue of *Advertising Law News & Analysis*

- March 22, 2017, NIST in the Private Sector, Digital Rights Review
- March 20, 2017, Are Your Website Terms Enforceable?, *Associations Now Plus*
- December 5, 2016, Five Tips for Addressing Information Security in Your Service Contracts, Digital Rights Review
- 2014 - 2016, United States chapter, *Getting the Deal Through – Outsourcing 2014* and publication updates for 2015 and 2016
- August 18, 2016, Summer 2016 Federal Copyright and Trade Secret Legislation Update, Digital Rights Review
- July 20, 2016, Top Ten (Actually Eleven) Copyright and Trademark Tips for Nonprofits, *Tax Exempt Advisor*
- May 17, 2016, Defend Trade Secrets Act of 2016, Digital Rights Review
- March 2016, *Association TRENDS 2016* Legal Review
- January 13, 2016, What Your Nonprofit Needs to Know about Credit Card Payments: The Latest from PCI DSS
- November 20, 2015, Complying with PCI DSS Version 3.1 (2015 Update), Digital Rights Review
- October 19, 2015, Top Ten (Actually Eleven) Copyright and Trademark Tips for Nonprofits
- October 13, 2015, Liability for Content Posted by Third Parties: How to Protect Your Nonprofit
- July 9, 2015, Digital Rights Review: Summer 2015 Federal Copyright and Trade Secret Legislation Update
- May 15, 2015, What to Do when Your Nonprofit Becomes the Target of a Phishing Scam
- May 2015, Essential Steps to Consider When Your Company Becomes the Target of a Phishing Scam, *IPFrontline*, Digital Rights Review
- March 25, 2015, Apps Apps Everywhere: 5 Essential Legal Considerations for Companies Developing a Mobile App, *Electronic Retailing Association's (ERA) Blog*
- March 2015, *Association TRENDS 2015* Legal Review
- February 2015, Digital Media Link - February 4, 2015, Digital Media Link
- January 2015, Enforceability of Online Terms of Use: Guidance from the Ninth Circuit, *The Licensing Journal*
- December 15, 2014, Enforceability of Online Terms of Use: Guidance for Nonprofits from a Federal Appeals Court
- December 12, 2014, 10 Steps To A FINRA-Compliant Social Media Policy, *Law360*
- December 11, 2014, Advertising Law News & Analysis - December 11, 2014, Advertising Alert
- November 2014, Ten Practical Tips for Developing a FINRA-Compliant Social Media Policy, Client Alerts
- November 13, 2014, Advertising Law News & Analysis - November 13, 2014, Advertising Alert
- November 2014, Enforceability of Online Terms of Use: Guidance from the Ninth Circuit, Digital Media Link
- October 2014, A Marketplace for Ideas: 5 Things Companies Should Know About the New IP Financial Exchange, Client Alerts
- October 24, 2014, Five Vital Legal Considerations for Nonprofits Developing a Mobile App
- October 14, 2014, 5 Essential Legal Considerations For Cos. Developing Apps, *Law360*
- October, 2014, Digital Rights Review: Summer/Fall 2014 Federal Copyright and Trade Secret Legislation Update
- October 7, 2014, Nonprofits and Intellectual Property: What Every State Regulator Needs to Know
- October, 2014, Apps Apps Everywhere: 5 Essential Legal Considerations for

Companies Developing a Mobile App, IP Buzz

- July/August 2014, If You've Got a BYOD Policy, You've Got Legal Risks
- Spring 2014, Guidelines for Protecting Company Trade Secrets, *Employers and the Law: 2013-14 Anthology of Best Articles*
- April 30, 2014, Considerations for Businesses When Using Getty's New "Free" Images
- April 23, 2014, Considerations for Nonprofits when Using Getty's New "Free" Images
- April 2014, Legal Considerations for E-Commerce Businesses, Client Alerts
- April 3, 2014, BYOD for 501(c)s: Pros and Perils of "Bring Your Own Device"
- February 2014, Winter 2014 Federal Copyright and Trade Secret Legislation Update
- February 19, 2014, Implementing a Bring-Your-Own-Device Policy: What Your Nonprofit Needs to Know
- February 3, 2014, Bring-Your-Own-Device Programs: Steps to Minimize Nonprofits' Legal Risks
- January 2014, Guidelines for Negotiating Online Advertising Arrangements, *The Licensing Journal*
- November 5, 2013, Guidelines for Nonprofits when Negotiating Online Advertising Arrangements
- November 1, 2013, Advertising News & Analysis - November 1, 2013, Advertising Alert
- October 2013, Guidelines for Negotiating Online Advertising Arrangements, Technology Transactions Alert
- September 2013, Allowing User-Generated Content on Social Media: Steps for Minimizing Nonprofits' Legal Risks
- September 27, 2013, Building and Protecting Your Association's Brand in Social Media: Managing the Legal Pitfalls
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- September 18, 2013, Keeping Up with Technology and the Law: What Your Nonprofit Should Know about Apps, the Cloud, Information Security, and Electronic Contracting
- June 13, 2013, Advertising News & Analysis - June 13, 2013, Advertising Alert
- May 2013, Guidelines for Protecting Company Trade Secrets, *Employers and the Law: 2013-14 Anthology of Best Articles*, Technology Transactions Alert
- April 2013, Information Security Implications for Business Agreements, Technology Transactions Alert
- April 9, 2013, Legal Risks for Associations in Social Media
- March 13, 2013, Preparing an Online Social Media Policy: The Top Ten Legal Considerations for Your Nonprofit
- January 2013, Trade Secret Legislation May Increase Infringement Claims and Lead to a Private Right of Action, Technology Transactions Alert
- December 20, 2012, Guidelines for Nonprofits for Creating Enforceable Contracts Online
- December 20, 2012, Guidelines for Creating Enforceable Contracts Online – The New Way is the Same as the Old Way, *Association of Corporate Counsel*
- December 11, 2012, Understanding the Dark Sides of the Cloud: Top Ten Legal Risks for Cloud Computing Providers, *Association of Corporate Counsel*
- December 11, 2012, Understanding the Dark Sides of the Cloud: Top Ten Legal Risks for Cloud Computing Users, *Association of Corporate Counsel*
- September 2012, Contracts 2.0: Making and Enforcing Contracts Online
- July 2, 2012, Online Social Media Legal Risks for Associations
- June 13, 2012, Ten Best Practices for Protecting Your Nonprofit's Intellectual Property

SPEAKING ENGAGEMENTS

- October 13, 2015, Legal Quick Hit: "Liability for Content Posted by Third Parties: How to Protect Your Nonprofit" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 13, 2015, Managing Your Nonprofit's FACEBOOK, TWITTER, and LINKEDIN Presence: Avoiding the Legal Pitfalls
- February 5, 2015, "Intellectual Property of Nonprofits – Perspectives and Intersections" for the Columbia Law School National State Attorneys General Program – Charities Regulation and Oversight Project
- October 7, 2014, "Nonprofits and Intellectual Property: What Every State Regulator Needs to Know" at the 2014 National Association of Attorneys General/National Association of State Charity Officials Conference
- April 3, 2014, *Association TRENDS* Webinar: "BYOD for 501(c)s: Pros and Perils of 'Bring Your Own Device'"
- February 19, 2014, Implementing a Bring-Your-Own-Device Policy: What Your Nonprofit Needs to Know
- December 12, 2013, "Making Nice with Bring Your Own Device - Tips for Successfully Implementing a BYOD Policy," WMACCA Technology and IP Forum
- September 27, 2013, "Building and Protecting Your Association's Brand in Social Media: Managing the Legal Pitfalls" at ASAE's Annual Association Law Symposium
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- September 18, 2013, Keeping Up with Technology and the Law: What Your Nonprofit Should Know about Apps, the Cloud, Information Security, and Electronic Contracting
- May 20, 2013, "Keeping Your Website Out of Legal Hot Water" for Nonprofit Spark Radio
- May 2, 2013, "Online Social Media Legal Risks for Associations" for the RAFFA Learning Community
- April 17, 2013, Government Contracts Symposium
- March 13, 2013, Preparing an Online Social Media Policy: The Top Ten Legal Considerations for Your Nonprofit
- October 26, 2012, "Online Social Media Legal Issues and Risks" at *TRENDS Communications LIVE: Annual Legal Update*
- September 30, 2012 - October 3, 2012, Association of Corporate Counsel (ACC) 2012 Annual Meeting
- June 13, 2012, Ten Best Practices for Protecting Your Nonprofit's Intellectual Property
- May 17, 2012, "Key Legal Issues to Consider When Procuring Cloud Computing Solutions" for Licensing Executives Society
- April 26, 2012, "Social Media and Charitable Solicitation Considerations" at the 2012 Exempt Organizations General Counsel Conference
- February 2, 2012, "SOPA, PIPA and the MEGAUPLOAD Indictment: What Do these Developments Mean for the Internet?" for the Association of Corporate Counsel's IT, Privacy & eCommerce Committee
- September 1, 2011, "Cloud Computing Legal Issues" for the Association of Corporate Counsel's IT, Privacy & eCommerce Committee
- May 19, 2011, Association of Corporate Counsel Webcast: "Online Social Media and Nonprofits: Navigating the Legal Pitfalls"
- January 11, 2011, Legal Quick Hit: "The Top Five Technology Legal Traps for the Unwary Nonprofit" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- August 4, 2010, "Avoiding Legal Pitfalls When Using On-Line Social Media" for the Indiana Grantmakers Alliance, in collaboration with various State Grantmakers Alliances



Christopher J. Kim

Associate

Washington, DC Office

T 202.344.4418 F 202.344.8300

cjkim@Venable.com

AREAS OF PRACTICE

Intellectual Property
Intellectual Property Transactions
Technology Transactions and Outsourcing
Corporate
Copyrights and Licensing
Trademarks and Brand Protection
Brand and Content Protection
Domain Names and Cyber Protection
Privacy and Data Security
Intellectual Property Litigation
Patent Litigation
Trademark Litigation
Advertising and Marketing Litigation

BAR ADMISSIONS

Maryland
District of Columbia

EDUCATION

J.D., Georgetown University Law Center, 2013
B.A., University of Maryland, College Park, 2010

Christopher Kim is an associate in Venable's Intellectual Property Transactions Group. His practice focuses on assisting clients with intellectual property and technology transactions across a wide variety of industries. He also advises clients on the licensing, sale, acquisition, maintenance, and protection of their intellectual property assets, and provides general corporate counseling for technology products and services.

In addition to his primary transactional practice, Mr. Kim has participated in numerous intellectual property litigation matters. He utilizes his litigation experience to provide clients with a full picture of the commercial opportunities and risk management strategies that apply to their business.

PUBLICATIONS

- June 22, 2017, SCOTUS's new slant on trademark law, branded content on social media, and more in this issue of *Advertising Law News & Analysis*
- August 18, 2016, Summer 2016 Federal Copyright and Trade Secret Legislation Update, *Digital Rights Review*
- May 17, 2016, Defend Trade Secrets Act of 2016, *Digital Rights Review*
- July 9, 2015, *Digital Rights Review: Summer 2015 Federal Copyright and Trade Secret Legislation Update*
- June 26, 2014, Patent Reform: It's Alive!
- May 29, 2014, *Octane and Highmark: Supreme Court Decisions Give District Courts Greater Discretion to Award Fees*

SPEAKING ENGAGEMENTS

- April 11, 2014, "Copyright Law in the United States" for the U.S. Department of State International Intellectual Property Rights Leadership Program



Allison L. Laubach

Associate

Washington, DC Office

T 202.344.4179 F 202.344.8300

allaubach@Venable.com

AREAS OF PRACTICE

Intellectual Property Transactions

BAR ADMISSIONS

North Carolina

District of Columbia

EDUCATION

J.D., Vanderbilt University Law School, 2016

Phi Delta Phi Legal Honor Society

Managing Editor, *Vanderbilt Journal of Entertainment and Technology Law*

B.A., *magna cum laude*, Duke University, 2012

Board of Directors, Duke Alumni Association

Allison Laubach is an associate in the firm's Intellectual Property Transactions Group focusing on intellectual property and technology transactions across a wide variety of industries. She advises clients in drafting commercial agreements, including software and content licenses and professional services agreements. Ms. Laubach also counsels clients on various intellectual property matters including website terms of use, data protection and privacy, and technology assignments and transfers.

Ms. Laubach graduated from the Vanderbilt University School of Law. While in law school, she served as Managing Editor for the *Vanderbilt Journal of Entertainment and Technology Law* and worked as a legal intern for United States Attorney's Office - Western District of North Carolina. Prior to law school, Ms. Laubach worked as an intern in the Office of Congresswoman Wasserman Schultz. Ms. Laubach earned a B.A. of Art in History from Duke University, where she graduated *magna cum laude*.

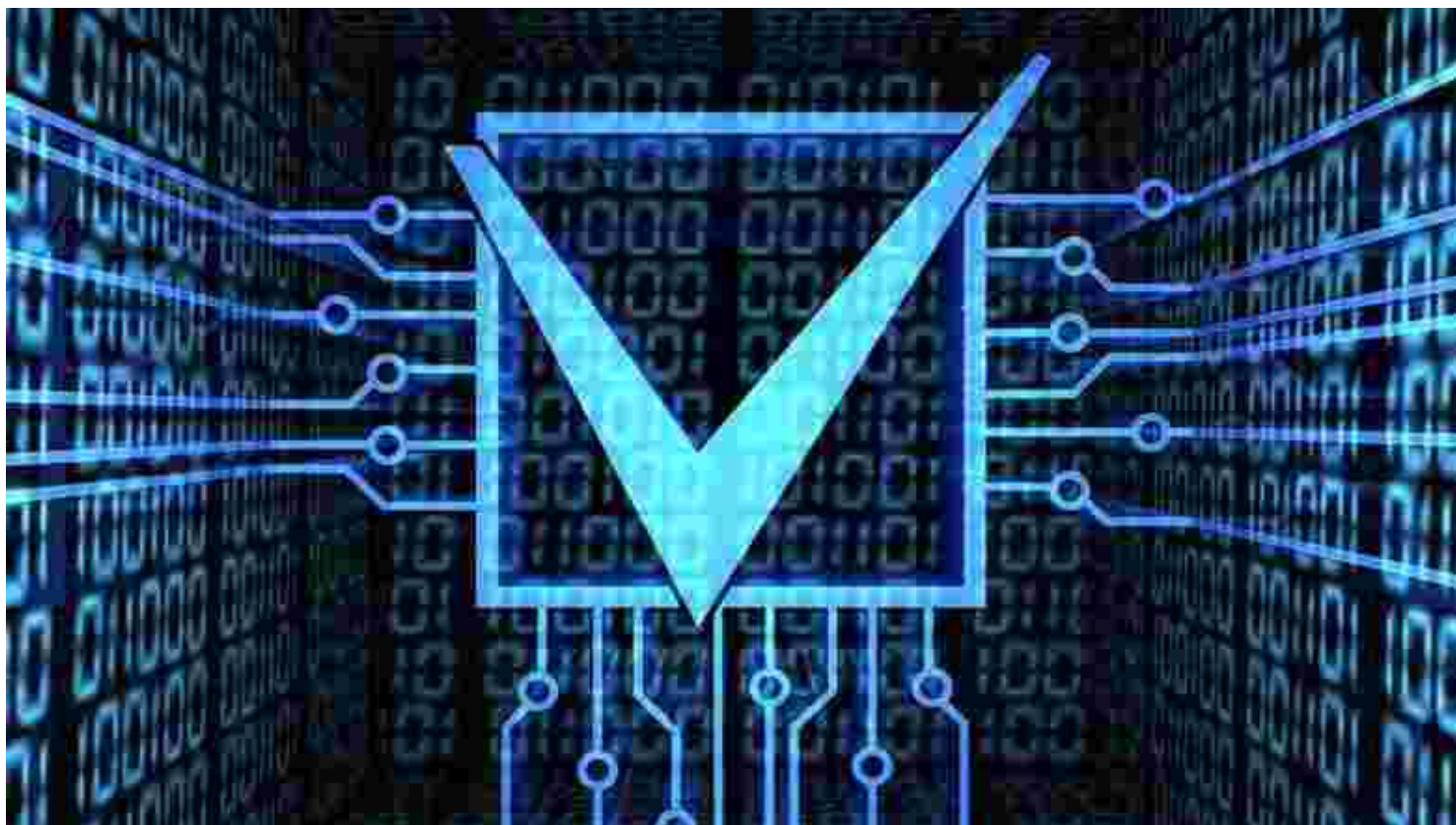


Additional Information



[Home](#) [Resources](#) [Are Your Website Terms Enforceable?](#)

Are Your Website Terms Enforceable?



March 20, 2017

By: *A.J. Zottola*

Your website's legal terms and conditions can't protect your association if they can't be enforced. Here are the elements that courts look for in assessing enforceability.

When an association makes sales, or otherwise engages in commerce, through a website, it's important that the site include appropriate legal terms and conditions that can be made enforceable against the user. Properly executed terms and conditions create a contract between the website

owner and the user, governing issues such as licensed use, intellectual property ownership, warranty disclaimer, and limitation on liability.

To form a binding agreement, website legal terms—like traditional contracts—generally must show an offer and acceptance between the contracting parties. In the case of an association website, the organization "offers" to provide the content on its site to a member or other user consistent with the published terms. The user shows acceptance by taking some action, which indicates his or her agreement to the terms and conditions.

A number of court rulings have made clear that the implementation of legal terms and conditions is sometimes inadequate. These courts have determined that the website owner had no contract with the user, and therefore the terms were unenforceable—often because the site did not include proper notice of legal terms and did not supply a sufficient process to confirm the user's agreement.

Contracting Methods

The contracting process is often accomplished online by providing a user with conspicuous notice, an opportunity to review the governing legal terms before accepting them, and a way to show acceptance of the terms—for example, by clicking a checkbox or an "I Agree" button. This type of direct agreement, sometimes called a "click-wrap" agreement, is the most widely accepted by the courts for ensuring contract enforceability.

“ Courts have held that merely providing a link to browse legal terms and conditions is not sufficient to form a contract because there is no clear offer and acceptance.

However, some associations and other website owners attempt less formal approaches to get users to agree to their site's terms and conditions, not requiring them to click to agree. This approach can be valid if the website owner can show that it gave clear notice of the terms and that the user took a specific action that constituted acceptance. For example, an association may give notice to users that its terms will apply to them and state that downloading a document or clicking on a link constitutes acceptance.

Under this method, which resembles the traditional "shrink-wrap" contract that was commonly used with retail software years ago, the user accepts the terms by undertaking a pre-announced action, such as using the website. This less formal method is more difficult to defend than the click-wrap agreement, and it is best suited to general-audience websites that don't typically require a fee for access.

A failure to provide notice or make clear that taking certain actions constitutes acceptance can open the door to arguments that the site has an unenforceable "browse-wrap" agreement. Courts have held that merely providing a link to browse legal terms and conditions is not sufficient to form a contract because there is no clear offer and acceptance. Courts are unwilling to infer acceptance without plain evidence that the user knew of the terms and understood that an act constituting acceptance would create a binding contract. For example, courts have held that no contract existed when the website owner merely provided a link to the terms in a web-page footer and required the user to scroll to the bottom of a page to find the link.

Keys to Enforcement

When deciding on how you will establish a contract with website users, weigh carefully the legal certainty of the "click-wrap" agreement against the efficiency of a less formal process. Generally speaking, don't rely on the "browse-wrap" option—although providing a link to the legal terms is always recommended as a way to give easy access to them (this can sometimes suffice as a "legal notice" for websites with limited functionality or content).

Other factors that a court may consider when determining whether online legal terms are enforceable include:

Timing. If the time allowed for the user to review the terms and conditions is deemed too short (the page "times out" too quickly), a court may find that the terms are not binding because insufficient notice was given, and the user did not have a reasonable opportunity to review them.

Availability and visibility. The legal terms should be readily available and conspicuous. Don't make it difficult to find them by requiring the user to go through multiple steps to get there. In one case, a court found the terms and conditions unenforceable (insufficient notice) because the only way a user could access them was by first scrolling to the bottom of the homepage and clicking a "Customer Service" link, and then scrolling to the bottom of the next page to find the legal terms.

Clarity. Be clear about what constitutes an acceptance of legal terms. Vague references to binding legal terms and conditions—such as labeling a link "Legal"—may not provide sufficient notice.

Website terms and conditions, when properly executed, provide an association significant legal protections. Careful consideration of the manner by which legal terms and conditions are implemented and made enforceable is as important as the terms themselves.

Author's note: Julien D. Bowers at Venable LLP assisted with the preparation of this article.

Tags:  [CONTRACTS](#)  [WEBSITE DEVELOPMENT](#)

A.J. Zottola

A.J. Zottola is a partner at Venable LLP in Washington, DC.

[Email \(mailto:ajzottola@venable.com\)](mailto:ajzottola@venable.com)

READ THESE NEXT

How to Optimize Your Search Functionality

7 Steps for a More Accessible Association Information Ecosystem

8 Tips for Achieving User-Friendly Search

Your New Website Is Launching in Two Weeks? Don't Panic! Tips for a Smooth Go-Live



American Society of Association Executives™ (ASAE), 1575 I St. NW, Washington, DC 20005, P. 888.950.2723, F. 202.371.8315 or P. 202.371.0940 (in Washington, DC).

© Copyright 2017 ASAE. All rights reserved.

ARTICLES

January 13, 2016

WHAT YOUR NONPROFIT NEEDS TO KNOW ABOUT CREDIT CARD PAYMENTS: THE LATEST FROM PCI DSS

The Payment Card Industry Data Security Standard (PCI DSS) is a set of technical and operational security standards for entities that store, process, or transmit cardholder data, including nonprofit organizations. The [Payment Card Industry Security Standards Council](#), organized in 2006 by leading payment brands, manages and updates the PCI DSS requirements.

PCI DSS is not a law, and the Security Standards Council does not enforce PCI DSS requirements. Rather, each payment card brand has its own variation of compliance requirements and compliance enforcement mechanisms. When a nonprofit fails to abide by the PCI DSS requirements, payment card brands may fine that nonprofit's acquiring bank for noncompliance. Often an acquiring bank will pass those fines on to the noncompliant nonprofit, and these may total thousands of dollars or more. Furthermore, the acquiring bank might terminate its relationship with the noncompliant nonprofit, ending its ability to process payment cards altogether. In sum, ensuring compliance with PCI DSS can be vital to a nonprofit's ability to conduct commerce and, thus, its financial health.

How Does PCI DSS Apply to Nonprofits?

If a nonprofit stores, processes, or transmits cardholder data or sensitive authentication data, it must be PCI DSS compliant, regardless of how many cards it processes or the manner in which it processes them. Stated more simply, PCI DSS applies to any nonprofit that accepts payment cards. Even if a nonprofit outsources its cardholder data environment or payment operations to an outside vendor, the nonprofit remains responsible for ensuring the outside vendor abides by PCI DSS requirements on its behalf. If the vendor fails to comply with PCI DSS, payment card companies may still hold the nonprofit responsible.

Validating Compliance

While all nonprofits that accept payment cards must be PCI DSS compliant, payment card brands vary in the extent to which they validate compliance. Generally speaking, however, the rigor of a payment card brand's compliance assessment increases as a nonprofit's annual transaction volume rises. All nonprofits will fall into one of four compliance validation levels, based on annual transaction volume. Most nonprofits fall into the lowest processing volume category (Level 4, with less than 20,000 transactions per year). Annual transaction volume is calculated based upon the aggregate number of payment card transactions (inclusive of credit, debit, and prepaid) from a merchant "doing business as (DBA)" a particular business. If a nonprofit has more than one DBA, a payment card brand will aggregate the volume of transactions stored, processed, or transmitted by the nonprofit entity to determine the validation level. If data is not aggregated because each DBA is conducting business separately and, more important, such that the nonprofit entity does not store, process, or transmit cardholder data on behalf of multiple DBAs, the payment card brand will consider each DBA's individual transaction volume to determine the validation level. The validation requirements for each payment card brand can be found in the contract between the nonprofit and the payment card brand, and are generally available on the applicable payment card brand's website. Although many nonprofits fall into the lowest validation level, all nonprofits must ensure compliance with the requirements of their respective validation levels, especially as they grow.

Complying with PCI DSS v. 3.1

To ensure that nonprofits which accept payment cards adequately protect cardholder data, the Security Standards Council regularly updates PCI DSS requirements. In April 2015, the Security Standards Council released Version 3.1 of the PCI DSS. The most important difference between Version 3.0 and Version 3.1 is with respect to the level of data encryption necessary to be considered PCI DSS

AUTHORS

Armand J. (A.J.) Zottola

RELATED PRACTICES

Privacy and Data Security
Technology Transactions
and Outsourcing

RELATED INDUSTRIES

Nonprofit Organizations

ARCHIVES

2017 2013 2009
2016 2012 2008
2015 2011 2007
2014 2010

compliant. Secure Sockets Layer (SSL) and early versions of the Transport Layer Security (TLS) protocol will no longer be considered compliant encryption levels after June 30, 2016. Moreover, effective immediately, merchants are prohibited from implementing new technology that relies on SSL and early TLS. Further, Version 3.1 requires merchants to have a formal risk mitigation and migration plan for transitioning off of SSL or early TLS.

The current PCI DSS lists 12 compliance requirements, which are organized into six groups of broad objectives. Generally, all entities, including nonprofits, required to follow PCI DSS must do the following to be considered PCI DSS compliant:

- . **Build and Maintain a Secure Network and Systems.** PCI DSS requires nonprofits to operate using a secure network and systems by installing and maintaining a firewall configuration to protect cardholder data and changing all vendor-supplied defaults for system passwords and other security passwords. Generally speaking, a firewall is a device that controls computer traffic between a nonprofit's internal networks and untrusted, external networks. Effective firewalls examine this computer traffic and block transmissions that do not meet specified security criteria. Having an effective firewall in place is an essential first step in ensuring compliance with PCI DSS. When technology vendors sell software, they typically provide default system passwords and other security parameters. These default settings provide an accessible avenue for hackers to locate cardholder data. Accordingly, PCI DSS prohibits nonprofits from continuing to use any vendor-supplied default settings, passwords, or other security parameters after installation.
- . **Protect Cardholder Data.** All PCI DSS requirements are designed, in part, to protect cardholder data. However, PCI DSS more specifically requires that a nonprofit protect stored cardholder data and encrypt its transmission of cardholder data when it crosses open, public networks. Nonprofits that accept payment cards may intentionally or unknowingly store cardholder data. PCI DSS requires these nonprofits to keep cardholder data storage to the minimum necessary that is required for legal, regulatory, or business requirements. Furthermore, when a nonprofit does store the data, PCI DSS contains a host of technical requirements that force the nonprofit to mask and protect personal information. Nonprofits that accept payment cards also transmit cardholder data to external, public networks. When this transmission occurs, PCI DSS requires nonprofits to encrypt this data using "strong cryptography and security protocols." Importantly, as mentioned above, Version 3.1 of the PCI DSS mandates for the first time that Secure Sockets Layer (SSL) and early versions of the Transport Layer Security (TLS) protocol are not "strong cryptography" and cannot be used as security controls after June 30, 2016. To ensure PCI DSS compliance, nonprofits that transmit cardholder data should ensure that these protocols are phased out as quickly as possible.
- . **Maintain a Vulnerability Management Program.** A vital part of any risk mitigation program is the identification and mitigation of system vulnerabilities. Accordingly, PCI DSS requires that nonprofits protect all systems against malware, regularly update anti-virus software or programs, and develop and maintain secure systems and applications. To comply with the first requirement, nonprofits should deploy anti-virus software on all systems commonly affected by malicious software. Nonprofits need to ensure that their anti-virus protection runs actively and cannot be disabled by users without management authorization. Nonprofits can satisfy the second prong of PCI DSS's vulnerability management program requirement by undertaking several measures. Among other things, nonprofits must establish a process to identify their system vulnerabilities. Nonprofits also must ensure that all system components are protected by the latest vendor-supplied security patches.
- . **Implement Strong Access Control Measures.** PCI DSS requires that nonprofits limit access to cardholder and sensitive data. In particular, nonprofits must restrict access to cardholder data on a need-to-know basis, identify and authenticate access to all system components, and restrict physical access to cardholder data. PCI DSS contains a host of more technical requirements under each prong, and nonprofits should seek outside guidance in ensuring that their network and systems are secure.
- . **Regularly Monitor and Test Networks.** To discourage breaches and identify individuals who cause data breaches, the PCI DSS requires nonprofits to track and monitor all access to network resources and cardholder data and regularly test security systems and processes.
- . **Maintain an Information Security Policy.** By ensuring all employees are aware of their responsibilities to keep data secure, a nonprofit can take significant steps toward mitigating the risk of a cardholder data breach. Accordingly, the PCI DSS requires nonprofits to ensure that all employees are informed of and have access to the organization's information-security policies.

Given the threat of fines or termination of a nonprofit's ability to process payment cards for failing to comply with PCI DSS, nonprofits should pay close attention to the requirements in the latest version of

the PCI DSS. Understanding and complying with these requirements can sometimes be complex. Nonprofits may therefore want to consider engaging consultants and legal counsel with expertise in PCI DSS to ensure continued compliance.

ARTICLES

December 15, 2014

ENFORCEABILITY OF ONLINE TERMS OF USE: GUIDANCE FOR NONPROFITS FROM A FEDERAL APPEALS COURT

AUTHORS

Armand J. (A.J.) Zottola
Jeffrey S. Tenenbaum

RELATED PRACTICES

Technology Transactions
and Outsourcing

RELATED INDUSTRIES

Nonprofit Organizations

ARCHIVES

2017 2013 2009
2016 2012 2008
2015 2011 2007
2014 2010

The U.S. Court of Appeals for the Ninth Circuit recently decided a case addressing the enforceability of "browsewrap" terms of use, which are terms posted on websites as mere notices that are not affirmatively accepted by users through a formal acceptance process such as checking an "I agree" box. This case reinforces certain principles of online contract formation and provides helpful guidance to nonprofits of all types and sizes that use websites and/or mobile applications to facilitate their communication, marketing, fundraising, and other efforts.

Background

In a recent decision, *Nguyen v. Barnes & Noble Inc.*, 2014 U.S. App. LEXIS 15868 (9th Cir. August 18, 2014), the plaintiff alleged that the website operator engaged in deceptive business practices and false advertising by cancelling an order placed through the website operator's website. The website operator moved to compel arbitration because the terms of use (TOU) posted on its website contained a provision that required all disputes arising out of website use to be resolved through arbitration. The plaintiff argued that it was not bound by this arbitration provision because it neither had notice of, nor agreed to, the TOU. In response, the website operator argued that the arbitration provision was enforceable because (i) the placement of the TOU on the website provided constructive notice of the contract, including its arbitration provisions; and (ii) the plaintiff continued to use the website after such notice.

In analyzing the case, the court closely scrutinized the website's actual design and content, as well as the contract notice and implementation measures used for the TOU. Following this review, the court concluded that (i) the TOU was accessible through underlined hyperlinks set in green typeface located in the bottom left-hand corner of every page on the website; and (ii) those hyperlinks were located (a) alongside other legal notices, and (b) in proximity to buttons users must click to complete online purchases. Despite these findings, the Ninth Circuit Court of Appeals ultimately ruled against the website operator as follows:

"[W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice."

Accordingly, the court held that the plaintiff did not receive sufficient notice of the TOU, and therefore did not accept the terms and enter into a contract with the website operator. Without an enforceable contract, the website operator could not rely upon arbitration as a means to address the plaintiff's claims.

Implications

This recent decision does not break any new legal ground. Traditional contract formation analysis will still apply to website terms of use. Nonetheless, this case does illustrate and confirm a number of important principles that bear repeating about the use and enforceability of online contracts. For instance, courts remain reluctant to enforce against individual consumers normally bargained-for contractual terms contained in browsewrap agreements, including, without limitation, forum selection clauses, class action waivers, and/or mandatory arbitration provisions. In addition, this decision highlights the importance of evaluating the unique facts and circumstances when considering whether to implement terms of use through a browsewrap agreement or a more formal clickwrap agreement (*i.e.*, terms that must be accepted through some affirmative process). The content and functionality of the

website, the website operator's risk tolerance, the products and services offered on the website, the particular terms included in the terms of use, whether any fees apply, and the types of contracting parties and their respective bargaining positions can all be relevant in determining the proper method for implementing terms of use under the applicable circumstances.

Furthermore, this decision teaches nonprofits not to lose sight of the vital fact that drafting properly customized terms of use for a particular website is only half the battle. All online legal terms also must be presented to and implemented with users in a manner that would make them enforceable. Otherwise, even the most protective and clearly drafted terms of use are at risk of being set aside.

Lastly, although this case does not directly address principles of online contract formation on mobile applications, it seems to suggest that nonprofits should be particularly cautious when considering how to implement online agreements on mobile applications.