MORNING RECESS

Added experience. Added clarity. Added value.
End User Licensing Agreements - Terms and Conditions
Gillian Tuck Kutarna
educationlaw@millerthomson.com
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Introduction

• Use of Internet, social media and apps for Instructional purpose(s)
  – Enhanced communication options
  – Differentiated instruction
  – Student engagement/focus
  – Authentic audience
  – Cooperative/group learning
  – Low or no cost
Last Month:

- Social media tools for classroom instruction
- Teacher and school board communications, and professional responsibility for off-duty conduct
- Parental consent
- Copyright
- Recommendations for Board Policy & Procedures
This Month: Terms and Conditions of End User Licensing Agreements (“EULA’s”) and Privacy Policies

• Are they binding?
• Common terms
• Implications for users
• Implications for school boards
• Responsibility and liability
Contract formation requires: offer, acceptance, consideration

- **Offer**: User must have sufficient notice and knowledge of the offer for acceptance to form a contract.

- Constructive knowledge (e.g. well-placed hyperlink) may suffice.
Acceptance:

- Express: click on this “I agree” button; or
- Implied: Use of this site or download of this app constitutes acceptance of all terms and conditions of use.

Provider is not required to prove that User had actual knowledge or understanding of the terms if express acceptance is given.
• **Consideration**: courts have held that online information/services have value.

• **BSSC**: A User’s expectation that information or service is available without cost or restriction, is not determinative:

  “An erroneous expectation, even with legal advice, does not prevail.”
Century 21 Canada Ltd. (2011, BCSC):

(i) existence of terms and conditions was brought to attention of User;

(ii) terms and conditions were available for User’s review;

(iii) User accepted terms in some manner.

Where these three elements are present, an agreement must be “afforded the sanctity that must be given to any agreement in writing”
Common EULA Terms

- User retains copyright, but gives Provider an unrestricted and perpetual license to use data.
- Provider can share User’s data with 3rd parties, without further notice to User.
- Either User or Provider can unilaterally terminate agreement at any time.
- Provider’s right to access and store User’s data survives termination.
Common EULA Terms (cont.)

- Upon termination User has no further right to access their own data.
- Site has the right, but not the obligation, to monitor content and activity.
- Purchaser assumes Providers rights, including right to use and sell User data.
- Provider has the right to unilaterally change terms without notice to User.
Common EULA Terms (cont.)

- User indemnifies Provider against loss
- User waives the right to file suit against Provider
- User waives the right to bring a class action suit
- Law of host country applies – allows for forum shopping
Mobile App Terms

- Provider has access to contact list and device activity
- Device identifier and geo tagging will be installed
- Analytics will be used for tracking
- Online behavioural advertising
Privacy Policies

• Most EULA’s contain a link to a privacy policy.
• Applies only to Provider, and not to third parties with whom Provider disclosed/sold information.
• Allow for access to personal information of User, and those whose information is stored on User’s device.
• Personal information may be used, shared and stored indefinitely.
• Not necessarily compliant with Canadian privacy laws.
Valid Consent - Students

*Simon Gillies et al v. Toronto District School Board 2015 ONSC:*

For students waiver of *Charter* right to be secure from unreasonable search and seizure, must be established that student was aware of:

a) Nature of conduct they were being asked to consent to;

b) Their right to refuse;

c) Potential consequences of giving consent.
Valid Consent: Students (cont.)

PIPEDA definition of valid consent:

• Reasonable to expect that an individual “would understand the nature, purpose and consequences of the collection, use and disclosure of the personal information to which they are consenting.” (Schedule 1, S.4.3.2)
Valid Consent: Students (cont.)

- Contextual analysis also required for valid consent to a contractual agreement.
- Does a student have the maturity and sophistication to appreciate the “nature, purpose and consequences” of EULA or app terms?
- Could a school board be held liable for encouraging student use of a site or app in which personal information is disclosed?
- Subject to complaint to IPC or Ombudsman
Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)

• School board should not use or disclose personal information in its custody or under its control except where:

  (a) the individual has consented; or

  (b) the personal information is used or disclosed for the purpose for which it was obtained or compiled, or for a consistent purpose
Valid Consent – Students (cont.)

**Consent**: from either student, or parent or guardian, depending on student’s ability to give informed consent;

**Consistent purpose**: teacher-led on-line activity which directly or indirectly results in the disclosure of a student’s personal information – unlikely to be held consistent with purpose for which information was obtained.
Policy Recommendations

- Restrict use to approved Internet and other social media sites and apps, where school board has reviewed terms and conditions, and privacy policy; or
- Instructor may choose tools, providing terms and conditions comply with Board requirements
- Procedures stating when consent is required.
- Guidelines regarding what constitutes valid student consent.
Conclusion (cont.)

- PC Pitstop sells diagnostic tools for PC’s. In 2005 - hid the right to claim a $1,000.00 prize in their EULA
- 3000 units and five months late, someone emailed to claim the prize.
- No one reads the fine print
- Students far less sophisticated and impatient than purchasers of diagnostic software
- Provider/app has access to a students data from the point of download.
Conclusion (cont.)

- Terms and conditions are non-negotiable, and are often lengthy, complicated, use legal and/or misleading terms, and are written entirely for the benefit of the Provider.

- Legal liability of school boards – not clearly defined. Informed consent is key.

- Teaching preventative measures, safe practices, wariness, will assist students in protecting their personal information/digital footprint.