

Santa Clara University

Privacy Policies in the US

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What is a Privacy Policy?

- Privacy policy = statement of company's privacy practices
- Privacy policies typically part of a user agreement = both contract and marketing

When Must You Do a Privacy Policy?

- Children under 13
- California
- Third party certification
- Specific industries
- When you need user consent. Ex: CFAA

Who Reads Privacy Policies?

- **Drafting 101: always write for your audience!**
- **Consumers...almost never**
 - Some consumers overinterpret the label "privacy policy"
 - Consumers routinely misinterpret the substance. Ex: Instagram
- **Press**
- **Plaintiffs' lawyers**
 - Hoang v. Amazon.com, C11-1709MJP (W.D. Wash. Mar. 30, 2012): Amazon promised to use customer information "carefully and sensibly"
 - In re JetBlue Airways Corp. Privacy Litigation, 79 F. Supp. 2d 299 (E.D.N.Y. August 1, 2005)
- **FTC/state AGs**
 - FTC v. Wyndham:
 - "We recognize the importance of protecting the privacy of individual-specific (personally identifiable) information collected about guests, callers to our central reservation centers, visitors to our Web sites, and members participating in our Loyalty Program ..."
 - In re Sears, FTC File No. 082 3099 (2009)
- **Judges**
 - In re Sec. 2703(d) Order (E.D. Va. March 11, 2011)
 - [b]efore creating a Twitter account, readers are notified that IP addresses are among the kinds of "Log Data" that Twitter collects, transfers, and manipulates Thus, because petitioners voluntarily conveyed their IP addresses to Twitter as a condition of use, they have no legitimate Fourth Amendment privacy interest.
 - Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 566-567 (S.D.N.Y. 2004)
 - the Terms of Service state that "Cablevision has the right to disclose any information as necessary to satisfy any law, regulation or other governmental request." Accordingly, defendants have little expectation of privacy in downloading and distributing copyrighted songs without permission.

Common Trouble Areas

- Cookies/unique IDs
- Vendors who get data or listen in
- What is PII?/reidentification/data merging
- Granularity of user controls/immutable data
- Integration across sites/the PP's "borders"
- Subpoena responses
- Amendment

**NEVER, EVER
CLONE-AND-
REVISE**

Drafting Privacy Policies

- Review all related vendor contracts for passthrough terms. Ex: ad networks, analytics services
- Review industry guidelines/standards
- Do privacy/security audit
- No puffy/aspirational statements
- Predict the future
- Implement properly and scrub website

COPPA

- **Governs “commercial website or online service, or portion thereof, that is targeted to children”**
 - “Actual knowledge” of collecting personal info from kids
 - Or: “subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children”
 - Also “competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience”
 - Safe harbor: if directed to kids but doesn’t target kids as primary audience (?), can do age self-verification if no PI collection beforehand
- **Also: vendors that collect PI from kid-targeted websites**
- **How general-audience websites can avoid COPPA**
 - Don’t collect age information
 - If collect age information, bounce kids
 - Or, if collect age information, commingle kids and adults

COPPA Requirements (Selected)

- Post COPPA-compliant privacy policy (notice)
- Obtain verifiable parental consent before data collection, use, disclosure (choice)
- Let parents review collected data and restrict future collection/use (access)
- Can't condition participation on unnecessary data disclosure
- Use reasonable security procedures (security)