Website Privacy Policies: Do you really need to care (Hint – Probably)?

Presented by:

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August 27, 2020

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Discussion Agenda

- Survey of the US authority impacting Website Privacy Policies
  - Federal Trade Commission ("FTC") guidance and developments for Websites
  - Overview of State-Imposed Regulations
  - Discussion of some key decisions by FTC and Federal courts regarding practical impact of website privacy policies.

This presentation provides specialized information but should not be relied on or construed as legal advice.

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Today's Presenters

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Joe is a registered U.S. Patent Attorney and a shareholder with the firm. He is experienced in all areas of intellectual property law, including patent, trademark, copyright, and trade secret law, as well as licensing and franchising. Joe represents a wide range of clients in the local, regional and national manufacturing and service sectors and helps those clients build fences around their intellectual property, allowing them to maintain technological and market advantages over their competitors throughout the world and in cyberspace.

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With 12 years of legal experience, Andy combines his background as a veteran software developer and small business owner to his technical and scientific-focused law practice that includes environmental litigation, e-discovery, complex commercial disputes and municipal compliance. His technology law practice includes crafting and responding to e-discovery requests as well as reviewing software licensing and service agreements. Andy's environmental litigation work has included representing manufacturers, property owners, farmers and environmental organizations.

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Guidance from the FTC (Page 1/4)

- The FTC published "*Protecting Consumer Privacy in an Era of Rapid Change"*, a report containing privacy recommendations for businesses and policymakers. The FTC Report establishes a privacy framework centered on three baseline principles:
  - "Privacy by Design";
  - Simplified consumer choice; and
  - Transparency
- The "Privacy By Design" framework promotes individual control over one's personal information and privacy through privacy-sensitive practices that offer "a sustainable competitive advantage" for businesses. As part of its discussion of Privacy by Design, the FTC recommends that businesses incorporate data security, reasonable collection limits, sound retention and disposal practices, data accuracy and other such substantive privacy protections into their operations.

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Guidance from the FTC (Page 2/4)

- The FTC's second principle is "simplified consumer choice." In evaluating the efficacy of consumer choice mechanisms, the FTC considers consumer expectations. When personal information collection and use practices are consistent with the context of the transaction—that is, the collection and use are in line with consumer expectations—the FTC imposes relatively few restrictions. However, if the business' planned collection, use and/or disclosure practices are likely outside a consumer's reasonable expectations, the FTC recommends that the business provide notice and obtain the consumer's express affirmative (opt-in) consent.

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Guidance from the FTC (Page 3/4)

- Specifically, the FTC recommends that a business offer consumers "just in time" notice—notice and choice at a time and in a context in which the consumer is making a decision about his or her personal information.
- The business should also obtain opt-in consent from a consumer before:
  - using consumer data in a "materially" different manner than claimed when the personal information was collected; or
  - collecting certain types of sensitive personal information (e.g., health or financial).

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Guidance from the FTC (Page 4/4)

- In discussing its third principle, "transparency", the FTC notes that privacy policies are often too long, difficult to comprehend and lacking in uniformity, and encouraged businesses to adopt privacy policies that are clearer, shorter and more standardized.
- The FTC has investigated numerous businesses for unfair and deceptive trade practices when the level of security provided to protect personal information did not accurately reflect what was promised in their privacy policies.

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FTC Decisions Re Privacy Policies

- Early FTC enforcement actions focused on obvious failures to follow your own rules or statements.
  - Section 5 cases surrounding deceptive trade practices.
- Later actions centered around third party apps, particularly advertisers and tracking services, and the interplay between what the company was doing and what the 3rd party was doing

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FTC Decision – GeoCities

- GeoCities collected data on application form.
  - Mandatory personally identifiable information
  - Optional information that was supposed to be private.
  - Asks about receiving special offers
  - Kids sign up for the GeoCities' Enchanted Forest
  - "We will NEVER give your information to anyone without your permission."
- FTC found it to be deceptive
  - Falsely represented it was only for 3rd party special offers if you opted in – they sold it no matter what you selected.
  - Shared underlying general membership information with 3rd parties.
  - Enchanted Forest was run by a third party
    - No verification of parental consent

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FTC Decision – GeoCities

- The Order
  - Clear and Prominent "Privacy Notice"
    - In multiple places – home page and anywhere data is collected
    - Information on how the data was to be used and to whom it was to be disclosed
    - How consumer can access/request deletion of data
    - Cannot misrepresent who the data is being collected for.
    - Parental authorization for kids 12 and under.

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Other Interesting FTC decisions

- Uber – failing to keep driver and rider data private from own employees.
- Upromise – browser toolbar that tracked what you did online and promised "personalized offers". Among other things FTC required Upromise to allow customers to disable the tracking.
- Facebook case – 2012 FTC order to honor consumers privacy choices. Facebook didn't
  - 2019 Order Enforcement Action, FTC fines facebook $5 billion.

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Summary of State Regulations (1/5)

- While the most well-known state regulation on consumer data privacy is the California Consumer Privacy Act of 2018 ("CCPA"), a number of other states have created regulations for the following as well:
- Consumer data privacy:
  - **Nevada** NRS § 603A.300
  - **Vermont** 9V.S.A. § 2446-2447
- Children's online privacy:
  - **California** Calif. Bus. & Prof. Code §§22580-22582
  - **Delaware** Del. Code §1204C

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Summary of State Regulations (2/5)

- E-reader privacy:
  - **Arizona** Ariz. Rev. Stat. §41-151.22
  - **California** Cal. Govt. Code § § 6254, 6267, 6276.28
  - **Delaware** Del. Code Tit. 6, §1206C
  - **Missouri** Mo. Rev. Stat. § §182.815,182.817
- Other laws related to disclosure or sharing of personal information:
  - **California** California Civil Code § §1798.83 to .84 ("Shine the Light" Law)
  - **Utah** Utah Code § §13-37-201 to -203

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Summary of State Regulations (3/5)

- Privacy policies and practices for websites or online services:
  - **California**
    - Calif. Bus. & Prof. Code §22575-22578 ("CalOPPA")
    - Calif. Civ. Code § §1798.130(5)m 1798.135(a)(2)(A)
    - Cal. Ed. Code §99122
  - **Connecticut** Conn. Gen. Stat. §42-471
  - **Delaware** Del Code Tit. 6 §205C
  - **Nevada** NRS § 603A.340
  - **Oregon** ORS §646.607

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Summary of State Regulations (4/5)

- Privacy of personal information held by internet service providers (or "ISPs"):
  - **Maine** 35-A MRSA § 9301
  - **Minnesota** Min. Stat. § §325M.01 to .09
  - **Nevada** NRS §205.498
- False and misleading statements in privacy policies:
  - **Nebraska** Neb. Stat. §87-302(15)
  - **Oregon** ORS §646.607
  - **Pennsylvania** 18 Pa. C.S.A. §4107(a)(10)

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Summary of State Regulations (5/5)

- Notice of monitoring of employee e-mail communications and internet access:
  - **Connecticut** Gen. Stat. §31-48d
  - **Delaware** Del. Code §19-7-705
  - **Colorado** Colo. Rev. Stat. §24-72-204.5
  - **Tennessee** Tenn. Code §10-7-512

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Austin-Spearman v AARP

- Class Action alleging AARP website violates privacy of those who sign up by allowing third parties to collect extensive personal information.
  - Included breach of contract claim alleging privacy policy was contract
- Interplay between Facebook and Adobe results in personal data being transmitted
- Court found language of the privacy policy that discussed

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Austin-Spearman v AARP

- Court found language of the privacy policy that discussed sharing information was sufficient to put users on notice of what was happening.
- Privacy Policy was essentially a shield against liability for third party access to user information.
  - So long as it was explicit enough.
- AARP now has a massive privacy policy, detailing all the ways they use your data.

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Questions/Comments?

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