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## Session 55

# *Internet Privacy Laws*

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## *Background*

- There really aren't any per se privacy laws.
- Instead, there is a patchwork of federal and state laws that are potentially applicable.
- We will cover these areas and see if we can identify some useful constructs.



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# ***Should You Have a Privacy Policy and What Should it Say?***

*This is the question that always comes up.*

*Perhaps the answer is that you need privacy practices and in some cases privacy policies.*



## *Privacy Issues*

- A college or university that deals with student records, financial aid information or health care information online may have to deal with a number of privacy issues.
- The irony is that, with certain limited exceptions, there is no legal requirement for a web site operator to have a privacy policy.



## *Privacy -- the Legal Framework*

- There are no comprehensive federal privacy laws -- instead, specific federal laws were enacted to deal with particular types of privacy abuses.
- Privacy law is largely based on state law.
- The FTC has jurisdiction to challenge "unfair or deceptive practices," which can include failure to comply with privacy promises.



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# *State Privacy Laws*

- Generally based on four common law causes of action.
  - 1) Intrusion into another's solitude or seclusion;
  - 2) Public disclosure of sensitive private facts;
  - 3) Misappropriation of name/likeness;
  - 4) Presentation of another in a "false light".
- May have claims for misappropriation of personal information



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## *Federal Privacy Laws*

- Generally these only deal with specific types of situations.
- They are not always consistent with one another.
- Furthermore, some of them leave unanswered important questions on how to comply.



## *Federal Privacy Laws*

- *Children's Online Privacy and Protection Act (COPPA)*. Applies to web sites or online services “directed” to children under 13 **or** general audience web sites that have *actual knowledge* of collecting personal information from children.
- Requires a posted privacy notice, but probably not applicable to most college/ university web sites.



## *Federal Privacy Laws (cont.)*

- *Family Educational Rights and Privacy Act (FERPA)*. Generally requires educational institutions that receive federal funds to keep students' personally identifiable education information (such as grades or application information) private.
- Does not require a privacy policy, but if a school maintains student information on a web site, must be careful to keep it private.



## *Federal Privacy Laws (cont.)*

- FERPA appears to be strict liability - good faith effort **may not be enough.**
- No exception for security breaches?
- Recent example at University of Montana (accidental posting of psychological records of 62 children and teenagers).



## *Federal Privacy Laws (cont.)*

- *Gramm-Leach-Bliley Act (GLB Act).*  
Requires that “financial institutions” (broadly defined) issue privacy notices to their customers and, in certain circumstances, provide them with the opportunity to opt out of disclosures.
- If a school deals with students’ financial information online, a privacy notice may be required.



## *Federal Privacy Laws (cont.)*

- Compliance with FERPA with respect to student financial data will be deemed compliance with the GLB Act.
- Creates a loophole for financial aid? But does not necessarily cover all financial data gathered and disseminated online.
- Also, affiliates may not be entitled to GLB Act exemptions.



## *Federal Privacy Laws (cont.)*

- *Office of Health and Human Services Rule (HHS Rule)*. Establishes that consumers have the right to receive written notice of information practices of health care providers that conduct certain transactions electronically.
- If a school has a health care provider (i.e., a student health clinic), may need “written notice” of electronic information practices.



## *Federal Privacy Laws (cont.)*

- *Electronic Communications Privacy Act* (ECPA). Generally forbids the interception, use, and disclosure of private e-mail.
- Does not require a posted privacy policy, but recent cases have found no liability under the ECPA where privacy policies existed. (Similarly, a privacy policy could serve to dispel the “reasonable expectation of privacy” under the Fourth Amendment.)



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## *Additional Federal Law Considerations*

- FTC has enunciated five core privacy principles -- notice, choice, access, security, and enforcement -- and encourages companies to follow them. Voluntary industry self policing thus far has convinced regulators not to act.
- Nevertheless, nearly 50 privacy bills await consideration by Congress.



## *So Why Adopt a Privacy Policy?*

- One of the federal laws may require it.
- Federal government may adopt one for you if you don't.
- Consumers may expect it -- it can be used as a marketing tool (with disclaimers).
- More important, lessons from the case law illustrate that an effective privacy policy may reduce exposure to privacy lawsuits.



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# Lessons from the Case Law #1

- Lesson #1: ***If you have a privacy policy, you must follow it.*** The FTC has brought a number of unfair or deceptive practices lawsuits where the defendant companies failed to collect or use the personal information in accordance with their own privacy policy.



## *Lessons from the Case Law #2*

- Lesson #2: ***Privacy policies that truthfully disclose information collection practices can be helpful in defending lawsuits.*** Courts have dismissed complaints relating to certain information practices where the consumer has consented to the practice. (Of course need to consider how to evidence agreement.)



# *Drafting Privacy Policies*

- Should follow the FTC's core principles and fully disclose information practices.
- Policy should reflect various information practices taking into account changes -- should be accompanied by an internal assessment of all information practices.



# *Drafting Privacy Policies*

- Avoid being overly legalistic and remember the audience.
- May need more than one privacy policy - for example, rules change when a prospective student becomes a student (GLB Act and FERPA).



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# Sample Privacy Policies

The screenshot shows a Microsoft Internet Explorer browser window with the title "Harvard University Homepage privacy statement - Microsoft Internet Explorer". The address bar shows "http://www.harvard.edu/privacy.html". The page content includes the Harvard University logo and a navigation menu with links for HOME, SEARCH, INDEX, SITE MAP, and HELP. The main heading is "Privacy Statement for Harvard University Homepage". The text below states: "The following discloses our information gathering and dissemination practices for the Harvard University Homepage (<http://www.harvard.edu/>):". Under the heading "Information gathering", it says: "We use your IP address to help diagnose problems with our server and to administer our Web site by identifying (1) which parts of our site are most heavily used, and (2) which portion of our audience comes from within the Harvard network. We do not link IP addresses to anything personally identifiable. This means that user sessions will be tracked, but the users will remain anonymous." It also mentions: "Our staff occasionally monitors search terms that users enter into the Harvard Search Engine (<http://search.harvard.edu:8765>) but this tracking is never associated with individual users." The section "Use of information" is partially visible at the bottom. The Windows taskbar at the bottom shows the Start button and several open applications, with the system clock displaying 2:15 PM.

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# Sample Privacy Policies (cont.)

The screenshot shows a Microsoft Internet Explorer browser window with the following details:

- Title Bar:** Privacy Statement - Microsoft Internet Explorer
- Address Bar:** http://www.bentley.edu/privacy.cfm?CFID=818404&CFTOKEN=41498129
- Page Header:** BUSINESS for the information age BENTLEY COLLEGE
- Navigation:** Home, Undergraduate, Graduate, Executive
- Breadcrumbs:** Bentley home > privacy policy
- Section Title:** PRIVACY STATEMENT
- Text Content:**
  - Safeguarding the privacy of our community is of utmost importance to Bentley College.
  - You do not have to give us personal information to visit the college's web site.
  - We collect personal information (name, e-mail address) only if you intentionally supply it.
  - Personal identity information that you provide will be used only in connection with Bentley College or for such other purposes as described at the time of collection.
  - Information is collected for statistical purposes. For example, Bentley College sometimes performs analyses to measure user interest in the various areas of our web site. We will disclose this information to third parties only in aggregate form. We do not give, sell or transfer any personal information to a third party.
- Taskbar:** Shows Start button, Internet Explorer icon, and several open applications (Mail, DL&..., Micr..., Pow..., Micr..., iMA...). The system clock shows 2:17 PM.

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# Sample Privacy Policies (cont.)

The screenshot shows a Microsoft Internet Explorer browser window with the title "Privacy Statement, University of North Texas". The address bar shows "http://www.unt.edu/unt\_ps.html". The page content includes the UNT logo and a navigation menu with links for "About Us", "News & Events", "Community", "Alumni", and "Faculty & Staff". The main heading is "Privacy Statement: http://www.unt.edu/".

This Web site (<http://www.unt.edu/>) uses browser detection to determine the browser type and browser version of site visitors. This information is used only in its aggregate form, to help us further refine our web site design. The remote host name is collected from each site visitor, and is used only to provide statistical data, specifically, the percentage of "hits" from the UNT domain vs. the percentage of "hits" from outside the UNT domain for this Web site. The pages accessed by each visitor are recorded and preserved in an aggregate form to provide us with information about the relative usage of the pages in our Web site. The web page that referred the site visitor to this UNT Web site is also recorded, and used to improve overall site navigation.

Email messages sent to the email contact for this Web site will be answered by that account holder or forwarded to another individual at UNT to be answered. Email messages sent to the email contact for this Web site and copies of replies sent by this email contact may be kept and reviewed to help ensure the relevance of information presented in this Web site and the usefulness of the replies from the email contact.

The taskbar at the bottom shows several open applications including "Start", "Internet", "Pri...", "Mail...", "DL&...", "Micr...", "Pow...", "Micr...", and "iMA...". The system clock shows "2:20 PM".



## *Additional Complexities*

- International considerations, such as the EU privacy directive and safe harbor.
- Use and combination of information collected online with information collected offline.
- What rules apply to personal information about a person other than the person who submits it?



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## *SFA Tech Slide*

We appreciate your feedback and comments. We can be reached:

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