

Dealing with Customers: Protecting Their Privacy and Enforcing Your Contracts

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Overview

- Protecting Privacy of Customers
- Enforcing “Click Through” Agreements against Customers
- Enforcing Web Site “Terms and Conditions of Use” without “Click Through”

Protecting Privacy

- Current status of web privacy in the United States
- European Union's Data Privacy Directive
- Application of European Union's standard to the United States -- results of recent U.S.-E.U. negotiations

Web Privacy in the United States: Statutory Protections vs. Govt.

- Privacy Act: safeguards the privacy of personal records held by Fed. Govt.
- Financial Privacy Act: regulates release of consumer information to federal agencies
- Fair Credit Reporting Act: protects the privacy of an individual's financial records by requiring federal agencies to obtain consent or a court order
- Family Educational Rights and Privacy Act: prohibits govt. access to information on a person's education without consent or a court order.

Web Privacy in the United States: Statutory Protections vs. Private Companies

- Laws addressing aspects of personal data privacy in the private sector include Fair Credit Billing Act, Fair Debt Collections Practices Act, Electronic Funds Transfer Act and Children's Online Privacy Protection Act
- Focus on data accuracy, correction and (more recently) protection of children
- Focus is not on consent for particular uses or notice upon collection

Web Privacy in the United States: Increasing Regulatory Interest

- receiving increasing attention from FTC
- as of 3/99, of 1,400 Web sites reviewed by FTC, only 14% informed visitors of their information-collection practices
- only 28 of those sites posted “comprehensive” privacy statements

European Union's Data Privacy Directive

- Protects privacy across-the-board
- Directive attached as Appendix A: establishes a Europe-wide set of legal principles for privacy protection and free flow of data within the European Union
- Principles are both a minimum and a maximum
- Prohibits the transfer of personal data from EU countries to any countries which do not have “adequate” data protection laws

Principle of Data Quality for Personal Data

- Processed fairly and lawfully
- Collected for specified, explicit and legitimate purposes and used in a way compatible with those purposes
- Adequate, relevant and not excessive in relation to those purposes
- Accurate and, where necessary, kept up to date
- Not kept in identified form for longer than necessary for those purposes

Principle of Finality -- Data Used for Original Purpose Collected, UNLESS

- #1 - It is with the unambiguous consent of the data subject.
- #2- It is necessary for the performance of a contract with the data subject, or for steps requested by the data subject prior to a contract.
- #3- It is necessary to comply with a legal obligation to which the controller is subject.

Principle of Finality -- Data Used for Original Purpose Collected, UNLESS (continued)

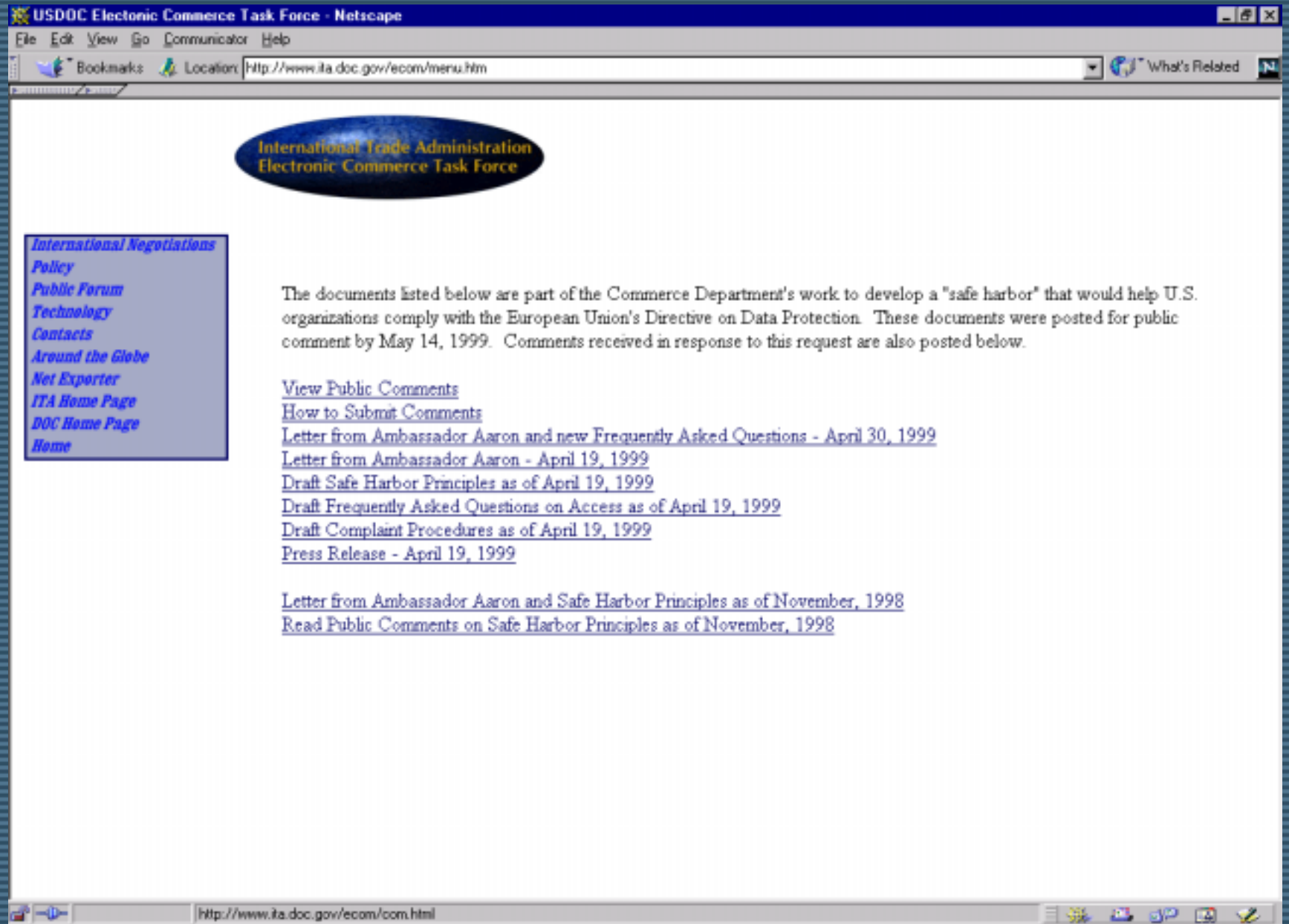
- #4- It is necessary to protect the vital interests of the data subject.
- #5- It is necessary for the performance of a task in the public interest or carried out in the exercise of public authority vested in the controller or in a third party to whom the data is disclosed.
- #6- It is necessary for the purposes of the legitimate interests pursued by the controller or by the third party to whom the data is disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject.

Other Rights of Data Subject

- Right to be informed of the purposes of collection, intended recipients, and data subject's rights, at the time of collection
- Right to obtain a copy of data about oneself
- Right to obtain corrections, or erasure or blocking of data processed in violation of the Directive
- Appropriate security safeguards must be adopted by controllers of data

Application of EU's Standard to U.S. -- Results of Recent Negotiations

- U.S. companies would be denied access to E.U. data because the U.S. does not have laws setting minimum privacy standards for personal data, and is opposed to enacting them.
- U.S. and E.U. are negotiating a set of "safe harbor" principles which meet the E.U.'s privacy requirements.
- While negotiations continue, E.U. has agreed not to enforce the Privacy Directive against U.S. companies.
- Appendix B: Draft guidelines



Proposed Safe Harbor Guidelines: Seven Privacy Principles

- #1- Notice
- #2- Choice
- #3- Onward Transfer
- #4- Security
- #5- Data Integrity
- #6- Access
- #7- Enforcement
- further described in Appendix C

Example of Voluntary Approach: TRUST.e

- Independent, non-profit organization dedicated to the protection of information on the Internet
- Certifies a company's web site follows specific privacy principles and that company agrees to a structured privacy dispute resolution procedure
- Allows Web sites that have successfully met its privacy principles to identify themselves with TRUST.e's seal.

Significance of TRUST.e's Seal

- TRUST.e's principles address U.S. government fair information practices issued by the FTC.
- TRUST.e program's privacy principles do not currently meet the EU data Privacy Directive, but they are expected to be adjusted once safe harbor guidelines are implemented.

TRUSTe: Building a Web You Can Believe In - Netscape

File Edit View Go Communicator Help

Bookmarks Location: <http://www.truste.org/> What's Related

Building a Web you can believe in.™ **TRUSTe**

for WEB PUBLISHERS

Everything you need to know about dealing with privacy on your site, plus news, resources and more.

Privacy Central
Web publisher's storehouse for online privacy information, domestic and global.

SPOTLIGHT

Wizard
Need help creating a privacy statement for your Web site? Get help from our wizard.

Join
Want to join the TRUSTe program? Click here.

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for WEB USERS

Learn how to protect yourself online, file a complaint, check your 'privacy IQ', and more.

Special Note to Consumers
If you got here by clicking on our trustmark, you may have visited a fraudulent website. [Click here](#) to contact us.

SPOTLIGHT

Microsoft Investigation Results
Statement of TRUSTe's findings in our recent investigation of the Microsoft.com Website.

Georgetown Survey
TRUSTe comments on Georgetown Survey.

SHORTCUTS

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- ▶ [How TRUSTe Protects Privacy](#)
- ▶ [FAQs](#)
- ▶ [Protecting Your Privacy Online](#)
- ▶ [Look up a Company](#)
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about TRUSTe

Who we are, what we do, and how we're helping Web users and publishers deal with privacy on the Web.

SPOTLIGHT

TRUSTe Announces New Exec
Bob Lewin named new executive director. Lewin replaces Susan Scott.

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Document: Done

Enforcing Your Contracts

- Why use “click through” agreements (a/k/a web-wrap)?
- Enforceability of click and accept agreements
 - domestically
 - internationally
- Uniform strategy for delivering products both domestically and internationally

Why use “click through” agreements?

- Disclaim Implied Warranties
- Limit Direct Damages to Purchase Price of Product
- Exclude Indirect Damages
- Choice of Law; Choice of Dispute Resolution; Choice of Forum
- Limit Uses (e.g., only for internal purposes; not to be used to conduct service bureau for benefit of third parties; etc.)
- Prohibit decompilation and reverse engineering
- Protect non-copyrighted material

Traditional Methods of Shrink-Wrapping

- Initial -- License Terms on Envelope Containing Media
- More Refined
 - statement that software is copyrighted and that the data is subject to an enclosed license agreement
 - License terms printed in full in user guide or licensing brochure
 - license terms appear on screen and must be accepted in order to install the software
 - the end-user can return product for a full refund if license terms are unacceptable to the end-user

ProCD Incorporated v. Zeidenberg

- Shrink-wrap agreements are enforceable, provided that:
 - their terms are “commercially reasonable” and not otherwise unconscionable or subject to any other defense available under contract law
 - user has right to reject terms upon opening package and to receive a full refund
- Rejected argument that all of the terms and conditions of a shrink-wrap agreement must be printed on the outside of the product packaging.
- Decision and analysis attached as Appendix D.

Enforceability of “Click Through” Agreements

- Develop four-step domestic strategy
- Extend that strategy internationally

Domestic Strategy for Enforceability: Step #1 - Before Submitting Order

- Immediately above key where customers submit orders, cause customer to accept terms and conditions
- Two alternative methods
- Method #1: Use of this product is subject to LetItBreed.com's [terms and conditions of sale](#).

Domestic Strategy for Enforceability: Step #1 - Before Submitting Order

- Method #2: Terms and Conditions visible through scroll field.
- Below scroll field:
 - By submitting this order, I accept the terms and conditions set forth above.
 - “Submit Order” or “I accept” button



Domestic Strategy for Enforceability:

Step #2 - Installation

- As part of the installation program for any downloaded software product, show those terms and conditions again.
 - The user must be able to scroll down through the agreement if he so chooses. The user must hit an "Accept Terms" key TWICE before he can complete installation and then use the product.
 - If he hits the "Reject Terms" key, the installation program aborts and the user will not be able to use the product.

Domestic Strategy for Enforceability: Step #3 - Splash Screen and Help Menu

- Once installed, the user would not be asked again to accept the terms.
- However, every time the user enters the product, the splash screen for the product will display, in addition to the typical copyright and trademark notices, the statement:
 - Use of this product is subject to the terms and conditions found under this product's Help Menu.

Domestic Strategy for Enforceability: Step #4 - Battle of Forms

- If LetItBreed.com receives a purchase order from a prospective user, then it must either:
 - (a) send that prospective user a copy of the terms and state very clearly that: (i) LetItBreed.com's acceptance of the purchase order is expressly conditioned upon those terms; and (ii) LetItBreed.com shall not ship the product until the prospective user communicates its acceptance of those terms; or

Domestic Strategy for Enforceability: Step #4 (continued)

- (b) (although a bit riskier) ship the product with a packing slip that clearly and prominently states that: (i) shipment of the product is pursuant to the user's purchase order and is subject to LetItBreed.com's terms; and (ii) if the user does not accept those terms, it should return the product and LetItBreed will refund any amounts that the user may have already paid for that product.
- The product then shipped to that customer will also have to follow Steps #2 and #3 described above.

International Strategy for Enforceability, based on current statutes and advice of foreign counsel

- Likely to Be Enforced: U.S., Canada, France, Italy, Spain, Netherlands, Scandinavia, Brazil, Saudi Arabia, Hong Kong
- Likely to Be Enforced, Subject to Consumer Protection Laws: Mexico, Argentina, Chile
- Less Certain: Japan and Korea
- Unlikely to Be Enforced: Germany, United Kingdom, Australia (?), China -- yet still worth trying

Specific Issues Affecting International Enforceability

- Translate terms into local language
- Comply with localization requirements
 - Spain: all packaging in Spanish
 - France: documentation and on-line help in French
- Variations in consumer warranty requirements
- European Union Software Directive
 - cannot block assignments of software
 - cannot prohibit reverse engineering

Enforcing Web Site “Terms and Conditions of Use” without “Click Through”

- Depends on what is included in those terms and conditions
- Privacy statement: serves to give notices to users and comply with government requirements
- Copyright warnings: puts people on notice
- Restriction for internal use only
- Waiver of warranties or limitations of liability: require a meeting of the minds

Is Use of Web Site a Meeting of the Minds on Terms of Use?

- No cases on point
- Cases on shrink-wrap agreements emphasized making users aware of terms and their ability to reject
- Applying same principles, easy to see how courts might distinguish terms of use as not meeting same tests
- Play it safe -- Require Click-Through!

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