

Privacy law overview

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Privacy Policy, Law, and Technology

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Tomorrow is Constitution Day

- On September 17, 1789 constitution signed by 12 original states
 - Rhode Island did not ratify until May 29, 1790
 - <http://www.constitutionfacts.com/us-constitution-amendments/dates-to-remember/>
 - Since 2005, US educational institutions that receive federal funds required to hold educational program on US constitution on Constitution Day
 - <http://www2.ed.gov/policy/fund/guid/constitutionday.html>
 - CMU celebration tomorrow at Posner Center
<http://cmlibblog.wordpress.com/2014/09/03/constitution-day-september-17/>

Key models of privacy protection

- Comprehensive model
- Sectoral model
- Co-regulatory model
- None

Key models of privacy protection

- Comprehensive model – EU
- Sectoral model – US, Japan
- Co-regulatory model – Australia
- None – China

US vs EU approach

US

- Mostly sector-specific laws, with relatively minimal protections - often referred to as “patchwork quilt”
- No explicit constitutional right to privacy
- Federal Trade Commission has jurisdiction over fraud and deceptive practices; other sector-specific regulators
- Many self-regulatory programs

EU

- Data Protection Directive requires all EU countries to adopt similar comprehensive privacy laws
- Privacy as fundamental human right
- Privacy commissions in each country (some countries have national and state commissions)
- Many companies non-compliant with privacy laws

Safe harbor

- Membership
 - US companies self-certify adherence to requirements
 - Dept. of Commerce maintains signatory list
<http://www.export.gov/safeharbor/>
 - Signatories must provide
 - notice of data collected, purposes, and recipients
 - choice of opt-out of 3rd-party transfers, opt-in for sensitive data
 - access rights to delete or edit inaccurate information
 - security for storage of collected data
 - enforcement mechanisms for individual complaints
- Approved July 26, 2000 by EU
 - reserves right to renegotiate if remedies for EU citizens prove to be inadequate



US sectoral
model:
Patchwork quilt
of privacy laws

US law basics

- Constitutional law governs the rights of individuals with respect to the government
- Tort law governs disputes between private individuals or other private entities
- Congress and state legislatures adopt statutes
- Federal agencies can adopt regulations which are equivalent to statutes, as long as they don't conflict with statute

US Constitution

No explicit privacy right

A zone of privacy recognized in its **penumbras**

See opinion of Justice William O. Douglas in *Griswold v. Connecticut*



pen·um·bra  *noun* \pə-'nəm-brə\
Merriam-Webster Online

plural **pen·um·brae**  *or* **pen·um·bras**

[m-w.com](https://www.m-w.com)

Definition of PENUMBRA

  

- 1 a :** a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light
b : a shaded region surrounding the dark central portion of a sunspot
- 2 :** a surrounding or adjoining region in which something exists in a lesser degree : [FRINGE](#)
- 3 :** a body of rights held to be guaranteed by implication in a civil constitution
- 4 :** something that covers, surrounds, or obscures : [SHROUD](#)
<a *penumbra* of secrecy> <a *penumbra* of somber dignity has descended over his reputation — James Atlas>

The Bill of Rights

The first 10 amendments to the US Constitution, ratified 1791 (3 years after Constitution established)

1. Freedom of religion, speech, press, assembly, and petition
2. Right to keep and bear arms
3. Restriction on quartering soldiers in a house
4. Freedom from unreasonable searches and seizures
5. Right to due process, freedom from self-incrimination and double jeopardy
6. Rights of accused criminals, e.g. right to a speedy and public trial
7. Right to trial by jury in civil cases
8. Freedom from excessive bail, cruel and unusual punishments
9. All other rights retained by the people
10. States have rights over everything not in the constitution

Federal statutes and state laws

- Federal statutes
 - Tend to be narrowly focused
- State law
 - State constitutions may recognize explicit right to privacy (AK, AZ, CA, FL, HI, IL, LA, MT, SC, WA)
 - State statutes and common (tort) law
 - Local laws and regulations (for example: ordinances on soliciting anonymously)
 - Sometimes Federal law preempts state law

Four aspects of privacy tort

- Tort: A wrongful act that causes loss or harm leading to civil legal liability
 - Not a *torte*!
- You can sue for damages for the following torts
 - Disclosure of truly intimate facts
 - May be truthful
 - Disclosure must be widespread, and offensive or objectionable to a person of ordinary sensibilities
 - Must not be newsworthy or legitimate public interest
 - False light
 - Personal information or picture published out of context
 - Misappropriation (or right of publicity)
 - Commercial use of name or face without permission
 - Intrusion into a person's solitude



The Authority of the FTC

- Federal Trade Commission deals with consumer protection
- Section 5 of the FTC Act allows the FTC to bring action against any “unfair or deceptive trade practice”
 - Deceptive = false or misleading claims
 - Unfair = commercial conduct that causes substantial injury that consumers can’t reasonable avoid, without offsetting benefits
- FTC can also enforce certain laws
- FTC does not have jurisdiction over certain industries, for example financial
- FTC action does not preclude state action
- FTC may work with companies to resolve problems informally or launch a formal enforcement action
 - May result in consent decree and/or fines

Some US privacy laws

- Fair Credit Reporting Act, 1971
- Privacy Act, 1974
- Right to Financial Privacy Act, 1978
- Cable TV Privacy Act, 1984
- Video Privacy Protection Act, 1988 – updated 2012
- Family Educational Right to Privacy Act, 1974 (but many later amendments)
- Electronic Communications Privacy Act, 1994
- Freedom of Information Act, 1966, 1991, 1996

More US privacy laws

- HIPAA (Health Insurance Portability and Accountability Act, 1996)
 - When implemented, will protect medical records and other individually identifiable health information
- COPPA (Children 's Online Privacy Protection Act, 1998)
 - Web sites that target children must obtain parental consent before collecting personal information from children under the age of 13
- GLB (Gramm-Leach-Bliley-Act, 1999)
 - Requires privacy policy disclosure and opt-out mechanisms from financial service institutions
- CAN-SPAM Act of 2003
- Video Voyeurism Prevention Act (2004)



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