

Nonprofit Risk Management and the Internet: Liability, Confidentiality and Privacy Issues

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The internet provides great opportunities for nonprofit organizations to share and access information, publicize activities, or even raise money. However, *nonprofit organizations must be informed of certain legal issues when using the internet: (1) website privacy policies (2) disclaimers in website terms of use; and (3) website content.*

This article will address each of these concerns and outline what nonprofits can do to reduce their risk of liability for their online activities. This article is not intended to be exhaustive, so any nonprofit organization seeking to establish a website and related business processes should consult an attorney for individual advice.

I. WEBSITE PRIVACY POLICIES

For the purposes of this article, online privacy refers to maintaining confidentiality of all personally-identifiable information (PII) collected from users of a website (users). PII includes any information that would allow someone to identify or contact the user submitting his information, such as full name, address, e-mail address, or phone number. Note that this includes information that, if combined with publicly-available information, can identify an individual. PII can also include more general information, such as hobbies, collected through automatic tracking mechanisms like cookies when that information is tied to PII.

The two main vehicles for safeguarding online privacy are (1) the privacy policy and (2) information practices. Privacy policies contain and disclose an organization's information practices to users to allow the users to make informed decisions as to whether to disclose their PII on the website. Information practices include, among other items, processes for collecting data, whether the data is shared with third parties, how the data is secured, and how end users can obtain and make corrections to their own PII.

A. Regional Privacy Laws

Because the internet is global, an organization should be cognizant of the various privacy legislation and principles around the globe because they vary by country or region. To the extent that an organization collects data from users in other countries, the organization should comply with those countries' privacy laws. The United States uses spot regulation for privacy, meaning that there is no comprehensive privacy legislation¹. The U.S. specifically regulates (1) online privacy of children, through the Children's Online Privacy Protection Act (discussed below), (2) privacy of health

¹ The European Union and Canada have comprehensive privacy regulations that cover collection, use, and disclosure or transmission of personal information.

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information, through the Health Insurance Portability and Accountability Act, and (3) privacy of personally identifiable financial information, through the Gramm Leach Bliley Act of 1999. Individual states can also regulate privacy, and often do.

B. Basic Privacy Principles and Requirements for Privacy Policies

In the United States, the Federal Trade Commission (“FTC”) has developed guidelines, called the Fair Information Principles (“FIPs”) that organizations should use in drafting their privacy policies and developing their information practices.

The following points outline the **U.S. Fair Information Principles** and how to incorporate them into a privacy policy:

1. **Notice** – Organizations must, *before collecting any PII*, give notice to users of the reason for which it is collecting the information and the organization’s information practices.
 1. *A link to the privacy policy should be located on each page of a website, but at a minimum on the home page and any pages on which PII is collected, preferably next to the collection point. California law requires that a link to the privacy policy be conspicuous (i.e. in a larger, different, or differently-colored font) and that it appear on the home page. Where possible, the link to the privacy policy, and to any other important terms and conditions, should appear “above the fold” so users do not have to scroll down to see the link.*
 2. *The policy should list the PII and other information collected, how it is collected, the purposes for collecting it, how it will be used (e.g. to fulfill a requested transaction, keep records, or market back to the user), whether it will be disclosed to third parties and agents, and the process for a user to access and change or delete the PII the organization has collected.*
 3. *The privacy policy should be written in clear and concise language that an average person would understand and be able to use as a basis to make an informed decision.*
2. **Choice** – A user must have a choice as to how extensively PII will be collected and used.
 4. *The privacy policy should outline the options a user has and the process for selecting whether to consent to PII being collected and used.*
 5. *The two types of consent are “opt-in” consent and “opt-out” consent. To give opt-in consent, where the default setting is that the user does not consent to the*
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8. *question being asked, a user is asked to check a box to affirmatively give his consent. For opt-out consent, where the default setting is that the user consents to the question being asked, a user is asked to uncheck a box to withdraw his consent.*
3. **Access** – A user should be able to have access to the PII an organization has about him. This access must also include opportunity to at least correct that information, if not have it deleted. The privacy policy must outline the process for a user to obtain the data, correct it, or have it deleted.
4. **Security** – Organizations must take reasonable steps to ensure the information collected is accurate and to protect it from unauthorized access and misuse. The privacy policy should contain a statement that the organization will take reasonable steps to ensure the information collected is accurate and protect it from unauthorized access and misuse. The privacy policy should not contain a statement that the organization will absolutely protect the information from intrusion because assuming that responsibility could create a duty on the organization's part that the organization may not be able to fulfill.
5. **Enforcement** – The policy should explain mechanisms for ensuring compliance with the principles and providing recourse for noncompliance.

In addition to items geared toward compliance with the Fair Information Policies, an **organization's privacy policy should also contain the following items:**

1. Identify the website, products, and services that the privacy policy covers. It is best to have a single privacy policy for the entire website.
2. A statement that the options a user selects on the website for disclosure or use of PII are not related to options he has selected for disclosure or use of PII in other unrelated transactions. The FTC has stated it may enforce web-based privacy policies for information collected by means other than the web. If offline policies differ, the web policy should specifically mention that fact.
3. A statement indicating that use of the site constitutes the user consenting to the privacy policy, including all data collection and information practices contained in the privacy policy.
4. A statement that the organization may be forced to disclose PII without notice to and consent of users if required by law, such as to comply with law or legal process served on the organization, to protect and defend the property and other rights of the organization, or



5. to act in urgent circumstances to protect the personal safety of the organization's members, its websites, or the public.
6. A statement that the organization may update the privacy statement without notice.
7. Whether the organization participates in the US safe harbor agreement.

C. Children's Online Privacy

The Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501-6508, specifically regulates the collection and use of PII from children. Its purpose is to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of PII of children online. COPPA applies to websites geared toward children under the age of thirteen (13), and to general audience websites whose operators knowingly collect PII from children under the age of thirteen (13). COPPA contains specific requirements for privacy policy disclosures and requires organizations to obtain verifiable parental consent before children can disclose PII to the organization.

COPPA does not apply to most nonprofit organizations, but nonprofits that operate for the profit of their for-profit members may be subject to the rule. However, nonprofits are **encouraged** to set an example by posting privacy policies and providing the protections of COPPA to children using their sites. For more information regarding the specific COPPA requirements, please see www.ftc.gov/bcp/online/pubs/buspubs/coppa.htm.

II. DISCLAIMERS IN WEBSITE TERMS AND CONDITIONS

Organizations with websites containing any amount of content should be sure to include disclaimers in its website terms and conditions to reduce liability to users as a result of reliance on the information. Two particularly important disclaimers are disclaimers for outdated or inaccurate site content and disclaimers for medical or other professional advice.

A. Disclaimers for Outdated and Inaccurate Website Content

Liability for outdated or inaccurate site content varies based on whether the organization developed the content on the website or obtained it from another party. If the organization created, or substantially helped, in the creation of the content and the content is inaccurate or outdated, the organization is more likely to be liable for negligence or fraud. Though posting information, by itself, generally does not create a duty to readers of the information, if the organization holds itself out as having expertise in the subject matter, the law may imply a duty of the organization to provide accurate and reliable information to users.



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To mitigate the chances of liability for negligence and fraud, organizations should include in their terms of use disclaimers stating that the organization does not represent that the content is accurate or up to date, is not responsible for the accuracy of the content (if true), does not regularly update the content, has no expertise in the subject matter and advising in the matter, advises users not to rely on the information, and that users relying on the information do so at their own risk.

On the other hand, if an organization does not create the content, but instead posts content sent to it from another content creator, the organization could be immune from liability related to content on its website as a provider or user of an interactive computer service under the ISP Immunity Provision of 47 U.S.C. § 230. Determinations of liability or immunity are very fact-intensive and vary widely depending on the circumstances of each case.

B. Disclaimers for Medical or Other Professional Information and Advice

Organizations that provide medical or other professional information and advice on their websites should use strong language in their disclaimers in website terms of use. The goal of these disclaimers is to mitigate the risk of liability to users for relying on the information and advice. Even if an organization is not inviting users to rely on the information, the law may imply a duty of the organization to provide accurate information on which users can rely if the organization holds itself out as having expertise in an area.

As such, website terms of use should strongly disclaim any responsibility for the information. Further, the terms should include the following items:

1. The content is for general informational purposes only;
2. Conditions can vary by individual and age group;
3. The information on the website is not a substitute for professional advice (professional medical advice, diagnosis, or treatment in the medical context);
4. Do not disregard professional advice or delay seeking professional advice based on information on the website;
5. Users must not rely on the information, and if they do so, it is at their own risk; and
6. If the situation is urgent or it is an emergency, the user should seek professional advice immediately (For the medical context, if symptoms are urgent or the user has a medical emergency, the user should call 911 or seek medical advice immediately).



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As with any content to be posted for general consumption, the language should be clear, relevant and concise. Finally, the more prominent the material that could give rise to liability, the more prominent the disclaimers must be.

III. CONTENT

Organizations can incur liability for using others' property on their websites. Two of the ways in which a nonprofit organization can misappropriate others' property are using stories and photos of clients in advertising and inappropriately linking to other websites.

A. Use of Photos and Stories for Advertising

Organizations that use photos or other likenesses of identifiable individuals for advertising should obtain consent from each individual before using the items to avoid liability for misappropriation of another's name or likeness.

Using a client's story for advertising purposes may also expose an organization to liability for invasion of privacy for public disclosure of private facts. An organization may be liable even if the story is true if the story is not publicly known or available and its release would be offensive and objectionable to a reasonable person. On the other hand, an organization should not be liable for defamation for publishing a client's story for advertising if the story is true and already known to the public, but would be liable if the story is untrue. Nevertheless, it is best to get the client's consent before using a story in order to ascertain its truthfulness and avoid liability.

B. Linking to Other Websites

Links to websites are valuable in building useful websites and avoiding duplication of content. There are three main types of website links. The first, and most common, is a **hyperlink** using text or an image that, when clicked, leads to the linked-to website, either in the same browser window or a new one. The second main type of link is **framing**, where the linked-to website appears in one portion of the linking website so the user can view parts of both websites simultaneously. The third type of linking is **deep linking**. This occurs when the linking website, either by a normal hyperlink or framing, links to a webpage one or more hierarchical levels below the homepage of the linked-to website.

As a general matter, hyperlinks are usually permissible, notwithstanding a linked-to organization's objections. If the hyperlink would be the equivalent of pointing to the linked-to organization's storefront down the street or telling a third party how to reach the linked-to organization, the hyperlink is probably permissible.

Hyperlinks that go further than merely directing users to other websites could give rise to liability. This includes liability for engaging in unfair trade practices, trademark infringement, and trademark dilution. Liability for unfair trade practices arises if the linking organization derives some benefit by linking to the linked-to website without paying for that benefit.



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Trademark infringement can occur if users are likely to be confused as to whose content they are looking at or cannot determine whether the linking organization is affiliated with the linked-to organization. Trademark dilution can occur if the linking organization masks the distinctive quality of the linked-to organization's trademark.

Further, linking organizations also often remove or bypass the advertisement of the linked-to website and do not give proper attribution to the linked-to organization for the content on the linking website. To avoid liability on these items, linking organizations should do the following things:

1. Include a clear disclaimer on pages where links are provided that the linking organization does not endorse the linked-to website or organization, is not affiliated with the linked-to organization, and is not responsible for content on the linked-to website.
2. Avoid framing whenever possible, but if you must frame:
9. Include a conspicuous statement that the website appearing in the frame is another organization's website.
10. Give proper credit for the content of the framed website.
11. Do not disable banner ads and links of the linked-to website.
3. Link to the homepage of a website only and avoid deep linking.
4. Make links to other organizations' websites open in a new window to emphasize that the user is leaving the linking website and loading a different website.
5. Do not portray the linked-to organization's trademarks in a negative light or dilute the distinctive quality of the linked-to organization's trademarks.

Linking organizations can also avoid liability by obtaining the linked-to organization's permission to link to its website by entering into a linking agreement with that organization and complying with the agreement. Linking agreements grant permission for the linking website to link to the linked-to website. These agreements are particularly important when the linked-to organization does not want its website content to be associated with another organization without permission.

Conclusion

Nonprofit organizations with websites should make sure they post privacy policies and terms of use on their websites and avoid misappropriating others' property in the content of their websites. First, privacy policies should, at a minimum, comply with the FTC's Fair Information Principles. Second, disclaimers in website terms and conditions should be written with the goal of preventing users from relying on website content, and should be as prominent as the content they relate to. Last, organizations



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should obtain consent from all identifiable individuals they wish to use in their advertising, and avoid deep linking and framing of other organizations' websites to reduce liability for misappropriating others' property.

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This publication is intended to provide general information, and is not a substitute for legal advice. If you have additional questions about this issue, contact Community Legal Resources at 313/964-4130.