

Are Privacy Notices Worthless?

Jay Cline

January 26, 2007 ([Computerworld](#))

While the rest of the country was debating the merits of Nancy Pelosi's new look, minor shockwaves were reverberating throughout the U.S. privacy community over a truly critical issue: privacy notices.

Fred Cate, a highly regarded privacy guru at the Indiana University School of Law, had testified at a November [Federal Trade Commission \(FTC\) hearing](#) that privacy notices have failed us. "There's no one in America who's read a privacy notice who wasn't paid to," he taunted.

Cate, usually a libertarian, said that instead of having companies provide their customers privacy notices and the chance to opt out — two bedrock principles the FTC has long promoted — the U.S. government needs to impose new restrictions on what U.S. businesses can and can't do with customers' information. It was the privacy world's equivalent of Donald Rumsfeld saying that the U.S. has lost in Iraq and that France needs to take over.

So what's the big deal? Why did this cause so much buzz across the country's back corridors of privacy?

I think it's this: Privacy-policy writing has become a cottage industry. Our forefathers of privacy — those luminaries who worried about database aggregation long before Al Gore invented the Internet — had long advocated that organizations publicize their privacy policies. Legislators around the world deferentially took this common-sense advice and included requirements for privacy notification in every major privacy law.

Consequently, law firms have made millions helping companies write accurate privacy policies, and audit firms have made similar millions helping companies audit their compliance against them. So, there's big money hanging on this question.

There are also a lot of chief privacy officer careers on the line. Privacy notices and the policies they're based on are often the main authority a CPO has for getting things done in a large organization. Take them away, and CPOs lose. And if they lose, our privacy suffers.

But Cate has a point. The perplexing secret every CPO in America knows is that one of the least-clicked links on a company's home page is the one that says "privacy." Americans, despite the regular clamoring of privacy Pollyannas, don't really pay attention to these tomes.

So is it time to reconsider the ubiquitous Web site privacy notice? That's what I recently asked a class of up-and-coming privacy attorneys at the [John Marshall Law School](#) in Chicago.

I heard two main themes from the class, taught by Liisa Thomas, a privacy lawyer at [Winston & Strawn LLP](#):

1. **Simplified, standardized versions of privacy policies are long overdue.** Whether in the form of a privacy seal, icon or one-page policy template, the country is in great need of innovation in this area. "Since people don't want to read privacy policies, don't make them do it," said student Matthew Hector. "Give consumers recognizable visual cues, like icons with short descriptions that tell them the core principles behind the policy."
2. **Detailed privacy policies are essential.** They form a contract between company and customer, customers need access to them, and Web sites are the best place for them. They need to stay.

Thomas summarized this sentiment best: "Standardized documents risk not being sufficiently reflective of the company's activities and may leave out crucial details."

So, no, privacy notices aren't worthless. They're critical for holding companies accountable. But they're also not the main vehicle a company should use to communicate its privacy position to its customers.

This notion of having *two* ways of communicating a company's privacy stance -- via a long, detailed, customized policy or through a short, standardized template -- has been the driving principle behind several

related initiatives that you probably haven't seen in the headlines but that will soon affect your company.

The grandfather of these efforts has been the Short Notices Project of the Center for Information Policy Leadership at [Hunton & Williams LLP](#).

Under the leadership of Marty Abrams, the center has brought together a pioneering group of large U.S.-based multinationals to agree on a common format and terminology for simple, "layered" privacy notices, as spelled out in their **paper** last February.

Other initiatives include:

- A Nov. 25, 2004, paper by the European Union's Article 29 Working Party that proposed the European adoption of simplified, "multilayered" privacy notices.
- A March 2005 study by the U.K. information commissioner on fair processing notices in the financial sector, which advocated a simple, standard template for all privacy notices.
- The Form Development Project of a group of six U.S. federal agencies, whose Feb. 26, 2006, report advocated that U.S. financial institutions adopt simple, standard, audience-tested formats for privacy notices.
- A July 24, 2006, report by the Organisation for Economic Cooperation and Development, "Making Privacy Notices Simple," which similarly encourages international cooperation on the simplification of privacy notices.

Indeed, the U.S. Congress last October enacted the Financial Services Regulatory Relief Act requiring, among other things, that the FTC and bank regulators issue rules on simplified privacy notices by this spring.

So what does this mean for your company? Within the next few years, something different is going to happen when Web visitors click on the privacy link on your home page. They'll see a short, simple, plainly worded description of what will and won't happen with their personal data, with links to that legalese document you now have on your site.

Something different may also be in store for the e-mail blasts that come from your marketers. Instead of merely linking to your Web site privacy

policy, your e-mails may well display three universal icons for no data sharing, no spamming and certified security, the three main ways people want their privacy protected.

And, just maybe, you'll see that uptick in e-commerce that marketing and IT have been promising for some time.

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Privacy Notice Alternatives

If five-page Web site privacy policies aren't working, what are our alternatives? Here are four options, ranked by feasibility.

	Pros	Cons
One-page, standardized, layered policies (examples: IBM , Eastman Kodak , Procter & Gamble)	Provides both a one-page snapshot of the policy as well as underlying details if you follow the links.	It still requires customers to click on the "privacy" link and spend a moment reviewing the policy summary.
Privacy seals (Examples: Truste , BBBOnline)	The seals obviate the customer's need to read any privacy verbiage.	The major seals are still not known and understood by a critical mass of Americans.
Privacy policy icons (Example: A common symbol would indicate you have a no-data-	The icons obviate the customer's need to read any privacy verbiage.	Icons haven't even made it to the drawing board yet.

sharing policy)

All companies required to have the same basic privacy policy (Example: Nonessential data sharing is forbidden)

No policies, seals or icons needed.

After Sarbanes-Oxley, do you really think industry has the appetite for another massive fire drill?

Source: Jay Cline