

January 2016

### Is Your Website's Privacy Policy Compliant With New Legal Requirements Effective January 1, 2016?

Our firm [has written before](#) about the reasons why it is so important to have well-drafted Terms of Use and a Privacy Policy for your website, or desktop or mobile application. Now it is even more important to make sure this documentation is up to date and in compliance with the law, because Delaware has enacted the [Delaware Online Privacy and Protection Act](#) effective on January 1, 2016. Why should a business be concerned with a Delaware law if it is not based in Delaware? Because of the nature of the Internet, every domestic (and many international) website or app will reach Delaware consumers, and the law is applicable to all sites and apps accessible to Delaware consumers. This article sets forth some of the new legal requirements. Please be aware that if you do not comply with the terms of this law, the Attorney General of the Department of Justice has specific statutory authority to prosecute violations, successful prosecution of which will result in the imposition of civil and criminal penalties, including fines.

#### *Key Definitions in the New Privacy Law*

The Delaware law sets forth key terms important to understanding how the law will impact your website or app. The law applies to every "operator" of an "Internet service," with operator defined as the owner of an "Internet service," which in turn is defined as "any service, system, website, application or program, or portion thereof, which accesses the Internet or provides a user with access to the Internet." Accordingly, the law is applicable to all site owners and app owners, among others.

Another key term is "Personally identifiable information" ("PII"), which is defined as "any information about an individual that, individually or in combination with other information, can be used to distinguish or trace the identity of the individual." This would include the individual's name, signature, physical characteristics or description (and thus a photograph), street address, phone number, social security number, school or education history, passport number, and the like.

A third key term is "market or advertise" or "marketing or advertising," which the law defines as "making a communication or arranging for a communication to be made, in exchange for compensation, about a product or service the primary purpose of which is to encourage recipients of the communication to purchase or use the product or service." Thus if your site or app is selling goods or marketing the goods of others, including through any form of paid advertising on the site or app, it would meet this definition.

#### *Key Privacy Policy Posting Requirements*

The law has many requirements that site and application owners must comply with, but the most critical are set forth below. First and foremost, the privacy policy must be conspicuously available. The Delaware statute is quite specific as to what it means by "conspicuously available." To meet this requirement, the site's or application's privacy policy must satisfy one of the following criteria: (1) be the home page or the first



significant page after entering the website; (2) be accessible via an icon that hyperlinks to the web page on which the privacy policy is posted so long as the icon is located on the home page or the first significant page after entering the website, and if the icon contains the word "privacy." The icon must also use a color that contrasts with the background color of the web page or is otherwise distinguishable; (3) be accessible via a text link that hyperlinks to a web page on which the actual privacy policy is posted, if the text link is located on the home page or first significant page after entering the website, and if the text link includes the word "privacy," is written in capital letters equal to or greater in size than the surrounding text, or is written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language; (4) be accessible via any other functional hyperlink that is so displayed that a reasonable individual would notice it; OR (5) with respect to an Internet service that is not a website, any other reasonably accessible and visible means of making the privacy policy available for users of the Internet service.

### *Privacy Policy Requirements*

The Delaware law states that privacy policies must: (1) identify categories of PII that it collects and the types of third parties with which PII will be shared, (2) describe how the website or app operator notifies its users of any changes to the privacy policy, (3) identify the effective date of the current policy, and (4) disclose how the operator responds to "do not track" signals from web browsers, including whether third parties can track a user's activities over time and across different websites and/or apps when the user visits the websites and/or apps covered by the policy. In addition, if the website or app operator instituted a process by which its users can review and request changes to their PII, the privacy policy must describe that process.

### *Marketing and Advertising Requirements With Respect to Children*

The law prohibits websites and apps that are directed to children from advertising or marketing certain products and services, including alcohol, tobacco, firearms, dietary supplements and sexually-oriented material. Unlike the current restrictions in the federal Children's Online Privacy Protection Act that regulate online content directed to those under the age of 13, the Delaware law defines children as anyone under the age of 18, thereby casting a significantly wider net.

In addition, whether or not a website or app is directed to children, if the operator knows that a child is using the website or app, it cannot advertise or market any of the prohibited products or services if the marketing or advertisement is based on the child's PII. The operator of such a website or app must not disclose or compile a child's PII if the operator knows that the child's PII will be used to market or advertise any of the prohibited products or services.

### *Digital Book Service Information Disclosure Requirements*

The Delaware law also imposes numerous restrictions on the disclosure of PII and other personal information by providers of e-books and other digital book services. These restrictions prohibit the disclosure of personal information regarding the users of digital book services to law enforcement entities, governmental entities and other third parties except in certain limited circumstances. Disclosure of a user's personal information to law enforcement agencies is permitted if it is pursuant to any lawful method by which the agency is permitted to obtain such information, including in instances where there is imminent danger of death or serious injury. However, disclosure to government agencies and other third parties generally require the digital book service provider to give the user whose information will be disclosed an



NJ: 721 Route 202-206, Suite 200, Bridgewater, NJ 08807 • P: (908) 722-0700 • F: (908) 722-0755  
NY: 875 Third Avenue, 8th Floor, New York, NY 10022 • P: (212) 808-0700 • F: (212) 808-0844  
PA: 515 West Hamilton Street, Suite 502, Allentown, PA 18101 • P: (610) 391-1800 • F: (610) 391-1805

www.nmmlaw.com E: info@nmmlaw.com

opportunity to contest the disclosure. In addition, absent certain limited exemptions, the Delaware law requires digital book service providers to post online an annual report that sets forth information about the provider's disclosures of its users' personal information.

---

This *Internet Law Alert* was written by Jeanne M. Hamburg and Salil P. Jani, Members of the firm. If you wish to revise your site or application Privacy Policy, please complete the attached questionnaire and e-mail it to [jhamburg@nmmlaw.com](mailto:jhamburg@nmmlaw.com) and [spjani@nmmlaw.com](mailto:spjani@nmmlaw.com), or contact either of them if you have any questions.

This *Internet Law Alert* provides information to our clients and friends about current legal developments in the area of internet law. The information contained in this Alert should not be construed as legal advice, and readers should not act upon it without professional counsel. Copyright © 2016 Norris McLaughlin & Marcus, P.A.




NJ: 721 Route 202-206, Suite 200, Bridgewater, NJ 08807 • P: (908) 722-0700 • F: (908) 722-0755  
NY: 875 Third Avenue, 8th Floor, New York, NY 10022 • P: (212) 808-0700 • F: (212) 808-0844  
PA: 515 West Hamilton Street, Suite 502, Allentown, PA 18101 • P: (610) 391-1800 • F: (610) 391-1805

[www.nmmlaw.com](http://www.nmmlaw.com) E: [info@nmmlaw.com](mailto:info@nmmlaw.com)

1. Please advise which of the following “personally identifiable information” you collect from users that, individually or together with other information, can be used to distinguish or trace the identity of the individual -- please include every type of information you collect:
  - the individual’s name (in whole or in part),
  - signature,
  - physical characteristics or description (including photo),
  - residential, school, or other physical address,
  - telephone number,
  - online contact information (i.e., an e-mail address or other substantially similar identifier that permits direct contact with an individual online, including without limitation, an instant messaging user identifier, a voice over internet protocol (VOIP) identifier, or a video chat use identifier),
  - Social Security number,
  - passport number,
  - driver’s license number,
  - state identification card number,
  - alien registration number,
  - insurance policy number,
  - education history,
  - employment history,
  - bank account number,
  - credit card number,
  - debit card number, or any other financial information,
  - geolocation data (i.e., information that is, in whole or in part, generated by, derived from, or obtained by the operation of an electronic device that can be used to identify the past, present, or future location of an electronic device, an individual, or both),
  - DNA or other genetic material,
  - medical information or health insurance information, excluding information that is publicly available that is lawfully made available to the general public from federal, state, or local government records.
  
2. How does a user request changes to PII? Please describe the process.



- 
3. For what purposes is personally identifiable information used?
  4. What goods or services, if any, are you selling on the site?
  5. Please identify whether you are engaged in the sale of books online. If so, we will have additional questions.
  6. Do you provide personally identifiable information (see definition in question 1) to others?
  7. Will you be tracking online behavior of users? Please specify what technologies (third party or otherwise) you will be using to track online user behavior including but not limited to the following: "cookies," users' IP addresses, "pixel tags," "web beacons," "clear GIFs" or similar technologies to help you and third parties obtain information about visits to the app, deliver online and mobile others specific to interests, process requests, and or analyze visiting patterns, measure effectiveness of your advertising and third party advertising, monitor tracking patterns, and optimize and enhance online experiences.
  8. How will users "opt out" of such tracking of behaviors and recall personally identifiable information? Must they de-register/stop using the service?
  9. How does your website intend to respond to web browser 'do not track' signals or other mechanisms



NJ: 721 Route 202-206, Suite 200, Bridgewater, NJ 08807 • P: (908) 722-0700 • F: (908) 722-0755  
NY: 875 Third Avenue, 8th Floor, New York, NY 10022 • P: (212) 808-0700 • F: (212) 808-0844  
PA: 515 West Hamilton Street, Suite 502, Allentown, PA 18101 • P: (610) 391-1800 • F: (610) 391-1805

[www.nmmlaw.com](http://www.nmmlaw.com) E: [info@nmmlaw.com](mailto:info@nmmlaw.com)

that provide users the ability to exercise choice regarding the collection of PII about a user's online activities over time and across third-party websites or apps, if your website engages in that collection?

10. Please advise whether third parties may collect PII about a user's online activities over time and across different websites when a user uses your website.
11. If the answer to item 10 is "yes," please provide a clear and conspicuous hyperlink to an online location containing a description, including the effects, of any program or protocol the operator follows that offers the user the ability not to be tracked.
12. Will you be collecting and selling aggregate information?
13. Will you be accepting third party advertising?
14. Will you be marketing or advertising predominantly to children? If so we will have additional questions.
15. What is the minimum age you will allow to register/purchase goods from your site?



NJ: 721 Route 202-206, Suite 200, Bridgewater, NJ 08807 • P: (908) 722-0700 • F: (908) 722-0755  
NY: 875 Third Avenue, 8th Floor, New York, NY 10022 • P: (212) 808-0700 • F: (212) 808-0844  
PA: 515 West Hamilton Street, Suite 502, Allentown, PA 18101 • P: (610) 391-1800 • F: (610) 391-1805

www.nmmlaw.com E: info@nmmlaw.com



## PLEASE NOTE IMPORTANT INFORMATION BELOW:

Your privacy policy must be conspicuously available, which means it must meet one of the below criteria. It must be accessible on your site via:

- a. A web page on which the actual privacy policy is posted if the web page is the home page, or first significant page after entering the website.
- b. An icon that hyperlinks to a web page on which the actual privacy policy is posted, if the icon is located on the home page or the first significant page after entering the website, and if the icon contains the word “privacy.” The icon shall also use a color that contrasts with the background color of the web page or is otherwise distinguishable.
- c. A text link that hyperlinks to a web page on which the actual privacy policy is posted, if the text link is located on the home page or first significant page after entering the website, and if the text link includes the word “privacy,” is written in capital letters equal to or greater in size than the surrounding text, or is written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.
- d. Any other functional hyperlink that is so displayed that a reasonable individual would notice it.
- e. With respect to an Internet service that is not a website (e.g. an app), any other reasonably accessible and visible means of making the privacy policy available for users of the Internet service.



NJ: 721 Route 202-206, Suite 200, Bridgewater, NJ 08807 • P: (908) 722-0700 • F: (908) 722-0755  
NY: 875 Third Avenue, 8th Floor, New York, NY 10022 • P: (212) 808-0700 • F: (212) 808-0844  
PA: 515 West Hamilton Street, Suite 502, Allentown, PA 18101 • P: (610) 391-1800 • F: (610) 391-1805

www.nmmlaw.com E: info@nmmlaw.com