

APPENDIX B: PRIVACY AND FREE SPEECH: THE LEGAL LANDSCAPE

The purpose of this Guide is not to provide legal advice. However, it is important for business executives to understand the broad contours of the legal landscape so that they can begin to work proactively with their attorneys to address areas where their products and business services may intersect with free speech and privacy laws. The laws governing privacy and free speech in the United States are set out in the United States Constitution, state constitutions, federal and state statutes, and regulations and orders by federal and state agencies.

UNITED STATES CONSTITUTION

The First and Fourth Amendments of the United States Constitution embody fundamental American values; namely, that individuals must be able to speak freely in society and that their private lives must be protected from intrusion. Over the years, these constitutional rights have been interpreted and refined by the Supreme Court and other federal courts. These rights inform Americans' expectations about privacy and freedom of expression when they use the Internet and other technologies.

- ◆ **RIGHT TO FREE EXPRESSION:** The First Amendment includes the *right of free speech* and *freedom of the press*.¹²¹ It prevents the government from making any law that restricts either of these freedoms. It is important to note that the First Amendment also guarantees the right to anonymous speech, which the Supreme Court has found to be necessary for a democracy.¹²²
- ◆ **NO UNREASONABLE SEARCH AND SEIZURE:** The Fourth Amendment guards against *unreasonable search and seizure* of people and property by the government.¹²³ Generally speaking, when an individual has a reasonable expectation of privacy—from the content of telephone calls¹²⁴ and emails¹²⁵ to documents stored on personal computer hard drives¹²⁶—the government cannot search or seize this information without demonstrating probable cause and obtaining a warrant from a judge.

STATE CONSTITUTIONS

Many states, such as California, also include specific guarantees of privacy and free speech in their state constitutions that further augment the federal constitutional rights.

- ◆ **RIGHT TO FREE EXPRESSION:** Article I, section 2 of the California State Constitution guarantees that “every person may freely speak, write and publish his or her sentiments on all subjects” and that California laws “may not restrain or abridge liberty of speech.”¹²⁷ California courts have held that safeguarding free speech from government intrusion is a paramount concern because speech is “a freedom which is the matrix, the indispensable condition, of nearly every other form of freedom.”¹²⁸

- ◆ **RIGHT TO PRIVACY:** Article I, section 1 of the California Constitution guarantees an “inalienable” right to privacy.¹²⁹ The Privacy Amendment, overwhelmingly passed by ballot proposition in 1972, was specifically intended to safeguard informational privacy by preventing the expansion of data collection and the potential misuse of that data by both the government and the private sector.¹³⁰ Unlike most constitutional provisions, Article I, section 1 applies to private parties as well as to the government.¹³¹
- ◆ **NO UNREASONABLE SEARCH AND SEIZURE:** Article I, section 13 of the California Constitution also protects data privacy by safeguarding citizens from unlawful governmental searches and seizures more expansively than the parallel version of the Fourth Amendment. In contrast to federal courts,¹³² the California Supreme Court has held that Californians do not necessarily relinquish the privacy of personal information when they provide information that is necessary to participate in modern life to third parties.¹³³ Since it is a “fiction” that providing information to companies to engage in necessary activities is voluntary, individuals do not automatically forfeit their reasonable expectation of privacy in their information.

FEDERAL LAWS

In addition to constitutional protections, federal law also includes specific statutory safeguards for both free expression and privacy.

- ◆ **RIGHT TO FREE EXPRESSION:** Because the First Amendment prohibits Congress from making laws that abridge freedom of speech, federal statutes that implicate rights to free expression must have a buffer to safeguard constitutional rights. The federal copyright law is a good example. While copyright law provides a set of six exclusive, limited-time rights to copyright holders to serve as an incentive for them to create works, these rights are limited by the fair use doctrine that is delineated in section 107 of the Copyright Act.¹³⁴ The fair use doctrine guarantees individuals the right to use copyrighted materials, without seeking a copyright holder’s permission, for activities such as parody, satire, criticism, news reporting, teaching, scholarship, research, and transformative works. Fair use guarantees a “breathing space,” or buffer, that helps to reconcile the tension that would otherwise exist between copyright law and the First Amendment’s guarantee of freedom of expression.¹³⁵
- ◆ **RIGHT TO PRIVACY:** Although the United States does not have a comprehensive, national privacy law, federal law does protect specific types of data or transactions. Separate statutes safeguard the privacy of telephone, email, Voice-over-Internet Protocol (VoIP), and other electronic communications,¹³⁶ financial records,¹³⁷ consumer credit information,¹³⁸ government records,¹³⁹ motor vehicle records,¹⁴⁰ student education records,¹⁴¹ medical and health records,¹⁴² and video rental records.¹⁴³

STATE LAWS

Many state laws further augment federal constitutional and statutory protections, particularly in the area of privacy. California has been on the forefront in crafting legislation that safeguards privacy rights, and its legislation has often been a model for other states to follow.

- ◆ **PRIVACY POLICIES:** The California Online Privacy Protection Act (OPPA) requires that all California companies operating a commercial Web site post a conspicuous privacy policy on their site and disclose the kinds of personally identifiable data that they collect and share with third parties. Companies must also clearly label their privacy statements, abide by their policies, inform consumers of processes to opt out of data sharing, and publish a date the policy goes into effect.¹⁴⁴
- ◆ **NOTICE AND CONSENT:** California law also empowers consumers to learn how their personal information is shared by companies and encourages companies to adopt simple methods for individuals to opt out of information sharing.¹⁴⁵
- ◆ **DATA BREACH REPORTING:** California law, as well as that of 42 other states, requires companies to notify individuals in the event that their information is lost or stolen as a result of a data breach.¹⁴⁶
- ◆ **DATA USE RESTRICTIONS:** California law prohibits publicly posting or displaying Social Security numbers or embedding them on a card¹⁴⁷ and swiping drivers' licenses or recording driver's license information except for very limited circumstances, such as age verification or fraud control.¹⁴⁸

FEDERAL AND STATE AGENCIES

Several federal agencies regulate companies that collect personal information or provide mediums for free speech. For example, the Federal Trade Commission,¹⁴⁹ which serves to safeguard consumer rights and police anticompetitive practices, has become a forum for formal complaints on issues such as net neutrality and privacy policy enforcement. The Federal Communications Commission,¹⁵⁰ which is charged with regulating interstate and international communications by radio, television, wire, satellite, and cable throughout the United States, allocates communication spectrum resources and issues regulations and rulings concerning the manner in which media companies operate the networks through which third parties communicate and share information.¹⁵¹

State agencies, such as public utilities commissions, can also play an important role in enforcing privacy rights. Following the National Security Agency spying revelations, several state utilities commissions were forums for formal complaints and investigations into the role of telecommunications providers.¹⁵²