

Chapter 5.4

Ensuring Users' Rights to Privacy, Confidence and Reputation in the Online Learning Environment: What Should Instructors Do to Protect Their Students' Privacy?

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ABSTRACT

There is no clear right to privacy, confidence, and reputation in United States case law or in legislation for students in the online environment. While some privacy interests are protected under a variety of legal theories, none expressly applies to online education. This study examines pertinent issues concerning the privacy rights of students while engaged in online learning. A survey of students using online tools in their courses demonstrated a widespread belief that their communications were private. A second survey of business law instructors using online tools revealed a lack of awareness of the potential for abuse by third parties able to access users' information. Survey results were inconclusive with regard to the existence of policies and procedures within the institutions with regard to protecting users' privacy rights in online instruction. Survey respondents made several recommendations for action to mediate the lack of existing protections for privacy in online learning.

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INTRODUCTION

What are the rights to privacy, confidence and reputation as they apply to online instruction? While a person's right to privacy has been recognized in several forums, the right to confidence or trust, and the right to reputation are less discussed. The United States Supreme Court has recognized a right to privacy emanating from the First, Fifth and Fourteenth Amendments. In Commonwealth countries, the right to privacy can be protected under the equitable doctrine of breach of confidence. Member nations of the Council of Europe accord a right to privacy under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

However, what do the rights to privacy, confidence and reputation mean in the educational context; specifically, what do the rights to privacy, confidence and reputation mean in an online classroom environment? More importantly, how do instructors ensure that those rights are protected? Are instructors building safeguards into their courses to protect users' rights? Are university policies in place to support instructors' efforts? Are the instructors aware of, and using, those policies?

To date, research has focused on how best to use the online platform to facilitate learning, with limited attention given as to how online instruction might impact the students' rights to privacy, confidence, and reputation. Francis (2002) noted that online courses bring into play a new set of instructional factors and variables. We argue that chief among these is the matter of online security without which online learning may be constrained.

As the use of information communication technologies in education continues to grow, and as access to information broadens, institutions and their instructors need to find ways to ensure students' rights to privacy, confidence, and reputation in the online learning environment. It is not that the need to protect students' rights is new, but rather that the potential for violation of those

rights has increased with expanding internet usage. Technology opens up the world to students and students to the world in ways that educators and policy-makers had not thought possible a decade ago, confirming that the information highway is, if you will, a two-way street.

The focus of this chapter is on: (1) U.S. case law relative to privacy in cyber-space and the Family Education Rights and Privacy Act of 1974 (FERPA); (2) expectation of privacy in an online setting and what students believe about the privacy of their communications online; (3) what educational online platforms are doing to advise users of privacy issues; (4) what institutions of higher education are currently doing to ensure students' rights to privacy, confidence and reputation in online learning programs; (5) what instructors are doing to protect students' privacy, confidence and reputation in their courses; and (6) suggestions as to what steps institutions might take to effect policies and procedures to ensure users the rights to privacy, confidence and reputation in online learning programs.

BACKGROUND

Rights to Privacy, Confidence, and Reputation

Sandler (1997) defines "privacy" as an expectation that personal information disclosed in a private place that if known, would cause distress to a reasonable person, will not be disclosed to a third party. Personal information is a broad concept that encompasses facts, photos, videos, and opinions. The "right to privacy" as a separate and distinct entitlement is an emerging right (Sandler) which has been protected under various legal theories including the equitable doctrine of breach of confidentiality. Reputation is generally protected under the umbrella of legal theories protecting an individual's right to privacy as a property interest. For the purposes of this chapter, the rights

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