



Cookie Monster...?

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New legislation
came into
force in May
2012 which
affects you as a
website owner

*The so-called **EU Cookie Law** is causing a bit of a headache for businesses in the UK. Not only is it considered to be detrimental to business, it carries a maximum penalty for non-compliance of £500,000*. It affects you and every website owner, but chances are you've never heard of it.*

Whilst we have to stress that we are neither lawyers nor responsible for your compliance, this note is intended to give some information about the new law and to help you identify what - if anything - you should do about it.

* Note : There are web marketers out there who are using the potential fine to scare website owners into 'investing' hundreds of pounds in audits, software updates and expensive policies. But the position is not clear cut and we hope the following information will be useful also to reassure you if you are approached by unknown companies offering 'assistance'.

1. Start with the Basics - What is a Cookie?

A cookie is a piece of information in the form of a very small text file that is placed on a website visitor's hard drive. Most websites you are likely to visit use some form of cookies; and most are beneficial. Web pages have no memory, and so without cookies you would be treated as a new visitor every time you moved from page to page. Cookies therefore allow information to be 'remembered'. For example, they can remember products in your shopping basket or automatically log you in next time you visit - Amazon, Google and Facebook are the most obvious examples. Or they enable websites to 'count their hits' or gain **anonymous** information about visits which helps the business to monitor how their website is being used - eg Google Analytics. However, some cookies are also used to track your internet behaviour in order to target future advertising, which many users would rather avoid. It is these at which the new law is really directed, but the effect is the same for all websites.

2. What is the EU Cookie Law?

Amendments to UK law - to give it its official title, the Privacy and Electronic Communications (EC Directive) Regulations 2003 - took effect from 26 May 2012. This new UK law follows part of an EU directive on privacy. It is the responsibility of the Information Commissioners' Office (ICO) to take action on non-compliance.

The main thrust of the legislation means that the website of every UK (EU) business that uses cookies must:

- tell people they are being used
- explain what for
- get consent

Visitors can already decide whether to have cookies enabled or disabled by changing their browser settings, but this is no longer considered enough. The new law requires that visitors must actively agree to the use of cookies that are not 'strictly necessary'. Strictly necessary is defined as adding features the user has explicitly requested - for example, a shopping basket on an e-commerce site, or login to a membership site.

3. Does my website set cookies?

The answer is likely to be yes if you have any of the following :

- **Remember me/Keep me logged in' functions**
- **Shopping baskets**
- **Analytics / hit counter / website usage tracking**
- **Web Forms**
- **Blogs**
- **Social media sharing** - eg Facebook 'like' buttons and Twitter feeds
- **Embedded external media** - eg You Tube videos, Flash players, Google maps.
- **Preferences** – anything that allows the visitor to set preferences on the look and content
- **Third party advertising**

4. What does 'getting consent' mean?

This is essentially what everything boils down to – getting permission from the user before placing the cookie on their computer. The strict adherence to the Regulations would require users to be able to explicitly **opt in** before they proceed through your website - an example of this is (unsurprisingly) the website of the ICO itself: www.ico.gov.uk. Or you can see another example on BT's website: www.bt.com.

This has caused much debate, however. It is said that since putting this pop-up on the ICO site, up to 90% visitors leave without opting in (probably because the average punter may not understand what cookies are and that they are usually benign). Needless to say, that would have a fairly disastrous effect on your business!

The ICO have therefore clarified that **implied consent** can be acceptable, as long as "*clear and relevant information is readily available to users explaining what is likely to happen while the user is accessing the site and what choices the user has in terms of controlling what happens.*"

5. Clear as mud... So what should I do?

If you don't use cookies this won't affect you, but most modern websites do in some way. As this is a new law the potential implications are quite broad, and the real consequences will only be determined as/if cases go to court. For this reason we cannot give you a perfect solution that is guaranteed to comply with the law; in fact no-one can, and even the ICO guidance leaves much to interpretation.

In essence, it's up to you how seriously you want to take this, but you basically have three options:

- **Do nothing**

It seems unlikely that a small business like you will be targeted by the ICO for non-compliance, and the problem may well be solved by changes to the browsers themselves in time. This law is apparently aimed at code that subverts people's privacy, which the vast majority of websites do not. And even if the ICO were to take exception to your website, it would likely give you a chance to resolve the issue before taking action.

- **Do something**

By clearly explaining the situation to visitors, you are at the very least 'demonstrating willingness' to comply. If you haven't got one already, the simplest thing would be to add a Privacy Policy which clearly includes an explanation of what cookies you use, what for and how the visitor can disable them through their browser. The addition of a Privacy Policy is in any case good practice these days.

- **Go the whole hog**

Ask visitors to actively say they want to use cookies ("opt in"), rather than just allow them to opt out. This means you need to ask every new visitor to agree to cookies, and if they don't agree then disable any use of cookies for that visitor or have them leave. We may be able to add this kind of feature to your website, but be aware of the potential effect on your business.

6. Conclusion...?

Regrettably there isn't one really and it is up to you whether you want to take any action. We have drafted a basic Privacy Policy which can be adapted and applied to your website if you wish to take some action. You can see an example of this at the foot of www.andrewbernhardt.co.uk. There will be a nominal (not for profit) charge for this of between £25 and £45 only, to cover the time involved in performing a 'cookie audit' on your site, adapting the policy and adding it to your website.