California online privacy act has widespread effects

by John Nicholson

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Editor's Note: This issue features two different approaches to describing the new California Online Privacy Protection Act. John Nicholson's article includes motivations, reasonings, and discussions of all sorts of nuances of OPPA. Dan Appelman's article addresses businesses and contains only the nitty-gritty, though sometimes with a more business-oriented slant. While there is overlap between the articles, seeing the different points of view is fascinating.

I used the information in these articles to create a potentially compliant privacy notice for the USA Computing Olympiad. It was interesting to perform the mental exercise that answers the question, "Just how is this information actually used, and who else can see it?" I imagine this will be very challenging for larger organizations. Some, as Nicholson's article points out, have simply opted out: Children under 13 are not allowed at their sites.—RK

1. California Business and Professions Code, §22575 et seq. (2003).

On July 1, 2004, the California Online Privacy Protection Act of 2003[1] (OPPA) took effect. OPPA requires owners of commercial Web sites that collect personal information from California residents to post *conspicuously* a privacy policy explaining the types of information collected and the parties with whom the information is shared. Complying with OPPA's requirements is relatively straightforward. Not only does OPPA apply to all businesses that collect information from California consumers, regardless of the location of those businesses, but OPPA also exposes businesses to civil lawsuits, including class actions, even for negligent violations.

Summary of Requirements

OPPA specifies both the information "operators" (see definition in Section II, below) must include in a privacy policy and the methods by which operators must post the policy. Under OPPA, a privacy policy must include: (1) a list of categories of personal information collected and parties with whom the collected information is shared; (2) if applicable, a description of the process by which the users can update collected personal information; (3) a description of the process by which the operator notifies users of "material" changes to the privacy policy; and (4) the date the privacy policy becomes effective. To post a privacy policy conspicuously, an operator must do at least one of the following: (1) include the policy on the home page of the Web site or the "first significant page" after the home page; (2) hyperlink to the policy from the home page or the "first significant page" with an icon containing the word "privacy" in colors that contrast with the background of the page; or (3) hyperlink to the policy from the home page or the "first significant page" with text including the word "privacy" in a font style and size distinguishable from surrounding text.

Who Must Comply with OPPA

OPPA applies to all "operators" of "commercial website[s] or online service[s]" if they collect "personally identifiable information" from consumers residing in California. Internet service providers and other groups that transmit and store information on behalf of third-party operators, such as Web site development companies, are expressly exempt from OPPA's requirements. Under OPPA, "consumers" are California residents who "seek or acquire" goods, services, money, or credit online. "Personally identifiable information" includes names, addresses, telephone numbers, social security numbers, or any other information that allows operators to contact consumers. As will be discussed below, companies that might collect personal information from a California consumer via a Web site should implement a privacy policy that satisfies the requirements of OPPA (including those regarding the location of the

privacy policy, its appearance, and its content) and a policy for evaluating, investigating, and responding to complaints under OPPA.

But My Business Isn't In California! How Can It Be Subject to a California Law?

The sweeping language of OPPA means that operators anywhere in the United States and possibly abroad are potentially subject to suit. Further, under California case law regarding Internet jurisdiction, most operators collecting information for commercial purposes will be subject to the jurisdiction of California courts. All operators in the following categories are subject to California jurisdiction: (1) those incorporated in California, (2) those with a principal place of business in California, and (3) those with "systematic and continuous" ties with the state due to the presence of offices, personnel, bank accounts, and other tangible assets in the state. In addition, those operators who have limited or no physical ties to California will still be subject to the jurisdiction of California courts if the operators are found to have certain "minimum contacts" with the state.

California courts endorse a sliding-scale approach to assessing the concept of "minimum contacts" in Internet jurisdiction cases. Those operators who are outside of California and who maintain completely passive Web sites that simply advertise services are the least likely to be subjected to California jurisdiction. For example, in *Advanced Software, Inc. v. Datapharm, Inc.*,[2] a California federal district court found that an Ohio operator had not subjected itself to California jurisdiction simply by posting a Web site describing its services and employees, listing contact information, and providing links to other pharmaceutical sites.

At the other end of the scale, those operators who post interactive Web sites allowing them to contact California residents repeatedly or to form contracts with California residents are the most likely to be subject to jurisdiction in California. In *Snowney v. Harrah's Entertainment, Inc.*,[3] a Nevada operator was subjected to California law based on the operator's Web site solicitation of California residents to make hotel reservations on its Web site, evidence that Californians actually made reservations using the Web site, and the fact that the Web site targeted Californians by providing directions from California to hotel locations in Nevada. In *Panavision Int'l, L.P. v. Toeppen*,[4] the Ninth Circuit Court of Appeals found the required "minimum contacts" in a transaction in which an operator registered as a domain name the trademark of a California business and then attempted to profit from reselling the domain name to the trademark holder. Finally, in *Colt Studio, Inc. v. Badpuppy Entertainment*,[5] a federal district court found the required "minimum contacts" where the operator had entered into contracts with 2,100 Californians to provide them with monthly subscriptions to an adult Web site.

OPPA is specifically aimed at operators who are closer to the *Colt Studio* end of the sliding scale. Because OPPA is focused on actively collecting personally identifiable information rather than passively advertising goods and services, and because that personally identifiable information will potentially give the operator notice that the subjects of the information are California residents (e.g., the information may include their address), California Internet jurisdiction case law is likely to give California's courts subject matter jurisdiction over operators who collect data from California citizens for commercial purposes, making them subject to OPPA enforcement actions.

2. 1998 U.S. Dist. LEXIS 22091 (D. Cal. 1998).

3. 11 Cal. Rptr. 3d 35 (Cal. Ct. App. 2004).

4. 141 F.3d 1316 (9th Cir. 1998).

5. 75 F. Supp. 2d 1104 (D. Cal. 1999).

Noncompliance

An operator can be held liable for failure to comply with OPPA if either (1) the operator is negligent and the failure is "material"[6] or (2) the operator knowingly or willfully violates OPPA, regardless of the "materiality" of the violation. OPPA provides a 30-day grace period to allow operators to come into compliance once they are notified of a violation. It should be noted, however, that intentionally violating the requirement would probably qualify as "notice." OPPA, however, does not specify a particular party to fulfill the role of notifier. Accordingly, it is possible that a California consumer's complaint to an operator regarding noncompliance may serve as a trigger for the 30-day grace period.

OPPA does not include an explicit enforcement provision. Commentators have suggested that California's Unfair Competition Law[7] (UCL) will provide the means of enforcement. The UCL governs "unfair, unlawful, and fraudulent business acts" and specifies that the attorney general, district attorney, or city attorney may bring civil actions. More important, any "person, corporation, or association, or . . . any entity acting for the interests of itself, its members, or the general public" can initiate actions under the UCL. Damage awards can reach $2500 per violation. Commentators have also suggested that the UCL's allowance for personal actions may result in class action lawsuits under OPPA.

Recommended Business Response

Because OPPA contains no jurisdictional limitations and because OPPA violations could result in costly fines, companies that might collect personal information from a California consumer via a Web site should implement a privacy policy that satisfies the requirements of OPPA (including those regarding the location of the privacy policy, its appearance, and its content) and a policy for evaluating, investigating, and responding to complaints under OPPA. In creating a privacy policy, companies should determine the types of personal information they collect, the ways in which they use the information, the parties with whom they share the information, and the means by which they notify customers regarding changes to their policies.[8]

6. Note: "material" is one of those words used by lawyers to express a concept that can only be determined in context in a specific situation. Basically, something is "material" if a reasonable person would care. So, in this situation, a violation of OPPA is material if a reasonable person would care about (i.e., suffers harm from) the violation.

7. California Business and Professions Code, §§17200–17209 (2003).

8. This article provides general information and represents the authors' views. It does not constitute legal advice and should not be used or taken as legal advice relating to any specific situation.