# OPPA and Web site operators

**by Dan Appelman**

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In mid-October of 2003, Governor Gray Davis signed the Online Privacy Protection Act (OPPA). The new law took effect on July 1, 2004, and became part of the Business and Professions Code at §§22575 through 22579. OPPA requires every person and business entity in the United States (and, presumably, anywhere in the world) who owns a Web site and collects personal information about California residents to post a conspicuous privacy policy on that Web site stating what information they collect and with whom they share it, and to comply with that policy. Violations of the new law can result in civil penalties and can be the basis for suits brought by the California attorney general as well as by private individuals.

Federal law generally does not require Web sites to include privacy policies, although there are exceptions related to the banking and health services industries and to Web sites directed at children. The new California law is one of several recent examples where the California legislature has gone further than Congress in imposing significant restrictions on the way companies, regardless of where they are located, conduct their business online or with the aid of computers, to the extent that such business practices affect California residents.[1] Compliance with OPPA is not intuitive, and companies must become familiar with its particular requirements.

## Who Must Comply

The new law applies to all "operators" of commercial Web sites and online services that collect personally identifiable information about California consumers. This includes out-of-state operators as well as those based in California.

The term "operator" means the owner of a Web site or an online service. It does not include third parties who may operate, host, or manage the site or service or who process information on behalf of the owner. The term "personally identifiable information" means individually identifiable information collected online about individual consumers, such as a first and last name, a street address, an email address, a telephone number, a social security number, or any other identifier that would permit the operator, or others who obtain access to that information, to contact a specific individual. The term "consumer" means any individual who seeks or acquires goods, services, money, or credit for personal, family, or household purposes. OPPA does not apply to owners of Web sites that only collect information about other businesses.

## What the New Law Requires

The new law requires an operator to conspicuously post a privacy policy on their Web site, or, in the case of an online service, to use reasonable means to make that policy available to consumers. In order to meet the "conspicuously posted" requirement, the privacy policy must:

- appear prominently on the home page of the Web site;
- be directly linked to the home page by means of an icon that contains the word "privacy" and uses a color that contrasts with the background of the Web page; or
- be linked to the home page by means of a hypertext link that includes the word "privacy," is written in capital letters equal to or greater in size than the surround-

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1. Other examples include a new law requiring companies that maintain databases that include personal information about California residents to disclose any breach in security of those databases, which became effective on July 1, 2003, and a broad prohibition against sending unsolicited commercial email messages ("spam") to California email addresses, absent a clear opt-in by the recipient. This law was preempted by the new federal CAN-SPAM Act.

ing text, or is otherwise readily distinguishable from the surrounding text on the home page.

The privacy policy itself must do all of the following:

- It must identify the categories of personally identifiable information the operator collects.
- It must identify the categories of third parties with whom the operator may share the personally identifiable information that it collects..
- It must describe the process (if any) by which consumers can review and request changes to any of the collected information.
- It must describe the process by which the operator will notify consumers of material changes in its privacy policy.
- It must identify the effective date of the privacy policy.

OPPA contains a built-in "cure period"—it expressly provides that an operator who has been notified that they are not complying with the requirement to post a privacy policy will not be considered in violation of the law unless they fail to post the privacy policy within 30 days of such notification. Other provisions of the new law indicate that an operator intentionally failing to comply with the law will be considered in violation of OPPA even if the noncompliance is immaterial, while an operator whose noncompliance is not intentional, but negligent, will be considered in violation of OPPA only if the noncompliance is material.

## The Consequences of Not Complying

The new law does not itself contain enforcement provisions. It is expected that OPPA will be enforced through California's Unfair Competition Law (the UCL), which is located at Business and Professions Code §§17200–17209.

Under the UCL, the attorney general, district attorneys, and certain city and county attorneys may bring civil actions based on acts of "unfair competition" as defined in Business and Professions Code §17200. Acts of "unfair competition" include acts, in business, that violate any law, which means that once OPPA takes effect in July 2004, a violation of OPPA will also be a violation of the UCL. The identified law enforcement officials may seek civil penalties and injunctive or other equitable relief.

Of greater concern, under the UCL "any person" may bring an action "in the interests of itself, its members, or the general public." This "private attorney general" provision has been broadly interpreted to allow a person with no personal interest and who has suffered no harm to bring a private action for restitution (to be paid to those who have suffered harm) or injunctive relief. In a private attorney general action brought under this special standing provision, the plaintiff may also recover attorneys' fees. Therefore, private plaintiffs will be able to use alleged violations of OPPA as a basis for asserting private UCL claims.

## Recommendations

It is imperative that companies start complying with the new law immediately or risk fines and penalties and, perhaps, adverse publicity. Even if OPPA is preempted or overturned, posting a privacy policy and complying with it is becoming standard practice for those doing business on the Internet. To comply with the new law, privacy policies should disclose:

- What information Web site operators collect from those visiting their sites.
- How that information is used.

- With whom that information is shared.
- How consumers can review and correct the collected information.
- Whether consumers can "opt out" of having that information retained by the operator or shared with others.
- How consumers can communicate with the operator.

The Federal Trade Commission (*http://www.ftc.gov*) also has Web pages devoted to recommended best practices for privacy policies. Readers who have questions about how to comply with the new California law or federal requirements should contact the author of this article.