

January, 2009

Supreme Court Declares COPA Unconstitutional; But Website Operators Beware – Other Laws Remain Relevant and Effective

Sometimes, the United States Supreme Court makes law by doing nothing. That happened on Wednesday, January 21, 2009 when the Court declined to hear an appeal from a federal court that held the Child Online Protection Act ("COPA") unconstitutional. But other laws protecting children online remain effective, require compliance and impose significant penalties on those who fail to comply.

The Unconstitutionality of COPA.

COPA was enacted by Congress in 1998 to protect minors from exposure to sexually explicit material on the World Wide Web. COPA provided for criminal penalties of up to six months in prison and fines up to Fifty Thousand Dollars for anyone who posted material that is harmful to minors on a website.

COPA was a second attempt by Congress to pass legislation protecting children from harmful material on the Internet. In 1997, the Supreme Court held that the Communications Decency Act violated the First Amendment. COPA was designed to be a more limited law, and one that could pass the scrutiny of the courts when considering its negative effects on free speech.

In an opinion issued in July, 2008, the United States Court of Appeals for the Third Circuit upheld a lower court decision holding that COPA was vague, overbroad, not narrowly tailored and not the least restrictive alternative that the Government could use to accomplish its purposes of protecting minors from sexually explicit material on the Web. As such, it therefore placed an unconstitutional burden on First Amendment rights.

On January 21, 2009, the Supreme Court refused to hear the Government's appeal from the Third Circuit's decision. Thus, the prior decision stands, and COPA cannot be enforced.

Implications for Companies Operating Websites.

Under COPA, companies that operated websites containing sexually explicit material faced the possibility of fines and the imprisonment of their officers and directors, even if the material they posted was not obscene or otherwise illegal. This was a problem not just for companies that provide content that they themselves created, but also for companies that operate their websites as forums and allow third parties to submit their own content. This includes social networking sites and other websites that invite user or member participation.

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COPA's standards for determining illegality were vague, so it was impossible for Web operators to know in advance whether their activities came within the danger zone or not. Furthermore, the courts determined that blocking and filtering software was likely to be more effective and less restrictive on free speech rights than the law itself.

Now that COPA has been declared unenforceable, website operators no longer face the uncertainty of guessing what sexually-explicit content will subject them to fines and imprisonment.

COPPA, Not COPA

COPA wasn't the only law that provided penalties for Internet-related activities deemed harmful to children. In 2000, the confusingly similar-named Children's Online Privacy Protection Act of 1998 ("COPPA") became effective. COPPA is an entirely different law that prohibits unfair and deceptive practices related to the collection and use of personal information from and about children. It remains good law.

The Federal Trade Commission ("FTC") has jurisdiction to administer and enforce COPPA; and the FTC has promulgated rules and regulations under the Act. Generally, the law and the rules make it illegal for the operator of any website or online service to collect personal information from a child without providing notice of what information is being collected, how the operator uses that information, and with whom that information is shared.

In brief, COPPA and the FTC's rules require website operators to post privacy policies on their websites disclosing their practices and procedures with respect to the information they collect from children. The rules for complying with COPPA are complex. But every company should have a complying privacy policy for their website. Otherwise, the company and its officers and directors risk substantial fines and unwanted negative publicity for failing to comply with the law and its rules.

Beyond COPPA: The Federal Trade Commission

The FTC also enforces more generally-focused laws against unfair or deceptive trade practices; and it has applied those laws to companies that operate websites. FTC actions against companies misusing the personal information they collect from visitors to their websites are increasing. These actions have often resulted in substantial fines and negative publicity for non-complying companies.

Other Federal Laws Apply to Privacy in Particular Industries

Congress has enacted laws protecting the privacy of personal information collected by companies operating in certain areas of commerce. For example, the Gramm-Leach-Bliley Act of 1999 mandates certain privacy practices for financial services companies; and the Health Insurance Portability and Accountability Act does the same for medical service providers. These laws and their requirements often apply as well to those who do business with those companies, such as vendors, suppliers and contractors.

State and Foreign Website Privacy Laws

Many states have enacted laws that require companies to post privacy policies on their websites and to comply with certain requirements as they do so.

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In California, for example, anyone who operates a website that collects personally identifiable information about people must post a privacy policy that discloses many things, including the kinds of information that are collected, how that information is used, with whom that information is shared, how long the information is retained, the security measures the company uses to safeguard that information, how a user can view and edit the information, and how a user may communicate with the company about that information and their concerns.

One problem affecting virtually all companies that maintain websites is that each of the state laws regarding website privacy is somewhat different and has different compliance requirements. A related problem is that websites are also accessible from abroad, and many other countries have enacted their own laws addressing website privacy.

How to Comply

Needless to say, it would be impossible to comply with every law that regulates information-collection and privacy on the Internet. The best one can do is to attempt to comply with some of the most demanding laws in the hope that one would therefore also be complying with many of the less demanding ones.

Companies should comply with COPPA, because it is so specific, and with the most demanding of the state laws in the United States. All companies that use their websites to collect personal information about individuals must do this. Once a company has substantial operations or business in another country, it should begin complying with the website laws in that country as well. In addition, companies operating in areas of commerce such as financial or medical services, and companies sharing information with such companies, must understand and comply with applicable industry-specific privacy laws.

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