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REPORT

Child, Teen Privacy

Maine's Marketing to Minors Statute

Although Maine's new law banning most collection and use of personal data of minors for marketing purposes has been put on hold and may likely never be implemented, the statute has been overwhelmingly successful in increasing the focus on the issues of child and teen privacy, the authors write.

An Uneasy Peace: Maine's Act to Prevent Marketing to Minors and the Continuing Problems of Privacy for Children and Teens

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Even before going into effect, Maine's new Act to Prevent Predatory Marketing Practices Against Minors was overwhelmingly successful in increasing the focus on the issues of child and teen privacy. The new law was slated to go into effect Sept. 12, 2009, but a court challenge has essentially vitiated the law when a federal district court issued an order Sept. 9, 2009, finding a reasonable likelihood that the law would be shown to be too broad and violate the First Amendment (*see related report in this issue*).

In seeking to protect children from aggressive marketing practices, Maine's Act applied to nearly all child or teen friendly interactive websites and prohibited the commercial transfer of child and teen data. The law thus represents a significant attempt to expand regulation beyond the federal Children's Online Privacy Protection Act (''COPPA''). Indeed, the Maine law was challenged as preempted by COPPA as well as a violation of the First Amendment and the Dormant Commerce Clause. For present purposes, that lawsuit has been resolved with an express notice to potential plaintiffs that the measure suffers from overbreadth defects. The impact of that acknowledgement on potential future class actions plaintiffs remains uncertain, however, and that order does not directly bind future plaintiffs.

Significantly, the Maine attorney general has committed to the Court hearing the constitutional challenge that she will not enforce this new law. Although the law still includes a private right of action with a liquidated damages provision, the Court's order was clearly designed to deter private litigation. It made clear that in light of ''the Attorney General's concerns about the law's overbreadth and the fact that the Maine Legisla-

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ture would revise the law when it reconvenes'' . . . ''third parties are on notice that a private cause of action under Chapter 230 could suffer from the same constitutional infirmities.'' Any class action lawyers willing to rush in where the attorney general feared to tread would thus face an initial presumption against the basis for any claims under the Maine Act.

Relationship to COPPA

The Maine Act and other similar bills will necessarily have a complicated relationship to COPPA. Like the federal act, the Maine Act certainly reflects the natural impulse to protect children and it recognizes that information about children is worthy of heightened protection. Significantly, it tracks the federal definition of ''verifiable parental consent,'' so that COPPA-compliant sites should not face any additional burdens from that provision. Certainly no state would garner praise from altering a definition of verifiable parental consent that is already so strict as to persuade many websites that they should not collect any data about children under the age of 13.

Moreover, COPPA includes the following broad preemptive language:

> No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section.

15 U.S.C. § 6501. Because COPPA allows the use of minor's information with verified parental consent, any law that barred the use of information even when verified parental consent is present would be unlikely to survive scrutiny.

Sweeping Maine Prohibitions

The Maine Act's most notable elements were in its attempt to extend and expand COPPA's protection. Most prominently, the Maine Act applies to all minors—generally defined as under the age of 18—rather than COPPA's application to children under the age of 13. COPPA is silent as to children outside of its age range, although the history of COPPA makes clear that the choice of 13 was a hard-fought compromise effort to define the extent of COPPA's shield. Moreover, the Maine Act applies to information collected in any manner, rather than COPPA's limitation to information collected online.

The Maine Act has three basic prohibitions. First, the Act prohibits knowingly collecting or receiving personal or health information from minors for marketing purposes without verifiable parental consent. Significantly, the *scienter* element may extend only to the knowing collection of information, not knowledge of the data subject's age.

Second, the Maine Act bars all use of personal or health information about minors for marketing to that minor ''or promoting any course of action for the minor relating to a product''—even where there was verified parental consent. In essence, this provision treats all marketing to any minor as inherently unfair when that marketing uses the health or personal information of that minor.

Third, again even where verified parental consent exists, the Maine Act purports to bar selling, offering to sell or otherwise transferring a minor's personal or health information to a third party where it individually identifies the minor or violates the other two provisions. In particular, the prohibition on transferring personal or health information to third parties where it individually identifies a minor is exceptionally far reaching, particularly in its ban on ''otherwise transfer[ring]''—which by its plain language would extend even to noncommercial uses of personal or health information about minors. Surprisingly, there are no exceptions for political, religious, or nonprofit uses of the data, so that every Maine religious leader, Scout Master, Den Mother, soccer coach, and youth political activist who ''otherwise transfers'' their youth group contact list would be a potential defendant—regardless of verified parental consent—unless one is willing to re-interpret the statute on the assumption that the Maine Legislature did not intend to enact a such blatantly unconstitutional provision.

The Maine Act also defines personal information very broadly to include a first name or initial and last name, a physical address, Social Security number, driver's license or state ID number and ''information concerning a minor that is collected in combination with an identifier described in this subsection.'' Separately, it defines and includes health-related information. The law also has a broad characterization of predatory marketing practices, covering essentially any advertising geared to minors that markets ''a product or service to that minor or prompting any course of action for the minor relating to a product.''

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Beyond the attorney general actions, the consequences of this law are still a threat given that the Act authorizes a private right of action with specified damages of $250 per violation (or actual damages if greater), in addition to the recovery of attorney fees. Maine does of course have a small population of about 1.3 million people, but if 20 percent of Maine population is under 18, there would be on the order of 250,000 individuals under 18 potentially affected by the law, and surely the potential for large enough databases to attract a class action.

Challenges and Revisions

The heart of this fight lies with the teens. By extending strict regulation to teens, the Maine Act would affect a massive amount of commerce including cell phones, media, cars, fashions, etc. And the potential for lawsuits seeking $250 per customer (plus attorney fees) for sites interacting with Maine teens as of Sept. 12, 2009 is hardly insignificant.

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Belatedly, the sponsor of the law, State Sen. Elizabeth Schneider (D) stated that she is open to working with industry to amend the law to ''make it something that is not a threat'' (Justin Ellis, ''New Maine Law Spins a Tangled Web,'' *Portland Press Herald*, Aug. 24, 2009). But the Maine Legislature is in recess until Jan. 6, 2010, nearly four months after the law becomes effective.

The scope and consequences of this law—as well as the enticing right of action beckoning class action plaintiff lawyers—practically guaranteed a swift court challenge. On Aug. 26, a group of plaintiffs including representatives from local colleges, marketers, media, and information companies filed a complaint in the U.S.District Court for the District of Maine seeking an injunction (*Me. Indep. Colls. Ass'n v. Baldacci*, No. 1:09-cv-00396-JAW (D. Me.), *complaint filed* Aug. 26, 2009).

Such facial challenges, however, are particularly difficult because the law must be found to have no legitimate application and ''the challenger must establish that no set of circumstances exists under which the Act would be valid.'' *United States v. Salerno*, 481 U.S. 739, 745 (1987). Moreover, this complaint faced a significant ripeness issue given that the attorney general had claimed that she will not enforce the Act as written. In an attempt to address this issue, the plaintiffs also named a ''John Doe'' who might harm them in the future, but the court was unwilling to entertain a suit on these grounds.

Fundamentally, the suit rested on preemption, First Amendment, and Dormant Commerce Clause issues, but it was the First Amendment concerns that were paramount. In sum, the plaintiffs argued not only that the law presents impractical restrictions on the speakers, but that it harms children as well, by limiting their access to important information such as college application information, test preparation ads, and career counseling information, and due to the explicit restrictions on health information, minors could also be denied access to critical health information such as on weight loss, contraception or sexually transmitted diseases, and they are constitutionally entitled to have access to this information as well. Although the vast bulk of the Maine Act focuses on commercial uses, Maine gave them a significant hook here because the Act literally bars any ''transfer'' of personal or health information about a minor. Based on these amply supportable overbreadth concerns, the district court was more than willing to accept the attorney general's concession of the Maine Act's errors.

Practical Guidance

The resolution of the current challenge may well just move the fight to the Legislature, where the issues raised by the COPPA preemption, the First Amendment, and the Dormant Commerce Clause will remain.

Certainly the Legislature should allow breathing room for the First Amendment and remove all applications of the Maine Act to noncommercial activity. Even this significant change would still leave the core challenges to the Maine Act intact. Fundamentally, the validity of these laws will depend upon how much truthful, non-misleading commercial speech can be banned before a court will find that the law does not directly advance the government's interest or that the law bars speech more extensively than is necessary. Significantly, the Supreme Court and numerous lower courts have consistently afforded legislatures great latitude in protecting children, and so the challengers could still face a stiff fight in this context if the Maine Act or others like it are revised with care.

At the end of the day, COPPA preemption makes it likely that the federal standard permitting the use of children's information with verified parental consent will remain the rule for those under 13. States, however, likely do have some reasonable room to consider a more nuanced approach to protecting teens from aggressive marketing.

In light of the Act's expansive efforts to regulate the use of data from minors, even businesses that do not consider themselves child or teen focused should consider whether they maintain data of minors, what age and residency verification measures are within their technical capability, and perhaps even whether they could temper or eliminate marketing to minors if there is no marginal benefit for them. For some businesses, excluding everyone under 18 will not pose significant difficulties; for others, it would be a catastrophe. Whether businesses can effectively alter their data collection practices to identify and potentially treat teens differently remains to be seen, but the awareness of this issue will likely remain heightened as the Maine Legislature revisits the issue. Perhaps this time, the legislators and industry will be able to engage more directly so that the result protects the interests of all concerned and avoids another legal challenge.

An electronic copy of the current Maine Act is available at http://www.mainelegislature.org/legis/bills/bills_124th/chapters/PUBLIC230.asp.