

FTC Consent Order Illustrates Importance of Privacy Policy Disclosure and Adherence

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The importance of fully disclosing (and abiding by) your company's privacy policies was underscored last month when the U.S. Federal Trade Commission issued a consent order barring Epic Media Group, LLC, an online advertising company, from engaging in "history sniffing" -- a tracking technology which allows online operators to "sniff" a browser to detect websites that consumers have visited in the past.

In its privacy policy, Epic claimed that it would collect information only about consumers' visits to websites within its own advertising network. However, according to the FTC, Epic in fact used history sniffing technology to collect data about customers' visits to sites outside its network, including sites relating to the users' personal health conditions and finances. The FTC complaint described how Epic set cookies on the Internet browsers of consumers who visited its sites and then tracked the customers' web surfing outside Epic's own network, including which sites they visited and which advertisements they viewed (presumably to use the information to facilitate behaviorally-targeted ads). The Order requires Epic to permanently delete and destroy all data collected from its history sniffing and bars Epic from misrepresenting its privacy policies, including the extent to which user data is collected, used, disclosed, or shared, and whether a software code on a web page determines if the consumer has previously visited a website.

Importantly, the FTC did not take a position on the broader question of whether a company is permitted to use technology that reveals the Internet browsing habits of consumers. Rather, the FTC found that Epic had engaged in deceptive acts or practices because its history sniffing was not disclosed in the company's privacy policy -- a fact, according to the FTC, consumers would have found to be material in deciding whether to use Epic's opt-out mechanism. One thing is therefore clear: the FTC will penalize companies that do not abide by their own privacy policies or fail to accurately disclose their data collection practices.

The FTC's Order is a cautionary tale for companies operating online. The lesson of the Order is that companies must regularly monitor their privacy policies and communicate with their marketing departments, sales teams, and other company divisions that collect and use consumer data in order to ensure that their privacy policies accurately reflect their practices and are properly disclosed to consumers. Companies should also communicate with their IT groups, third party vendors, and software developers to ensure that they know what tracking tools are being used by them - or on their behalf.

About the Author

Ms. Bromberg is the head of the Firm's Intellectual Property and Licensing Group. She handles all aspects of intellectual property and technology law, including license agreements, technology transfer and vendor agreements, joint development and co-branding agreements, privacy policies, website terms of service, and management of IP litigation (including patent, trademark, copyright, and trade secret litigation). She was named as a New York *Super Lawyer* for Intellectual Property in 2010, 2011, and 2012.

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