

Massachusetts' Highest Court Cites Benesch Amicus Brief in Wiretap Case Ruling

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Relying in part on an amicus brief Benesch Partner Michael Vatis filed on behalf of the National Retail Federation (NRF) and Retailers Association of Massachusetts, The Massachusetts Supreme Judicial Court ruled that website operators' use of web analytics and tracking software does not violate the state's wiretap law, which prohibits interception of communications.

In a 5-1 vote, the court ruled that Massachusetts' wiretap law, originally intended to prevent eavesdropping on phone conversations, does not apply to the collection of website browsing data. The case involved hospitals accused of using tracking tools, such as Google Analytics and Meta Pixel, to gather users' online behavior without consent. The court found that browsing activity does not constitute the type of communication the wiretap law was designed to protect, which traditionally covered person-to-person interactions.

Notably, the majority opinion cited Benesch's amicus brief-in particular, our discussion of the ubiquity of web analytics and advertising technology on the Internet and the role of these technologies in the modern digital economy. The dissent complained that the majority was motivated by "business realities" rather than interpretive principles, and the majority acknowledged that "courts should, of course, take care to consider the real-world application of a statute."

The court acknowledged that other courts have held that the Federal Wiretap Act and various state wiretapping laws apply to the monitoring of web browsing activities. But it reasoned that those statutes had been updated more recently than the Massachusetts act, and in ways that made them more clearly applicable to users' interactions with websites. The court also stressed that other statutory and common law remedies are available for false, deceptive or misleading activity on the Internet.