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PRIVACY

The Federal Trade Commission recently updated its rule promulgated pursuant to the Children's Online Privacy Protection Act. The COPPA Rule, the author writes, is the FTC's paramount tool for the protection of children online. He addresses which social media companies must comply with the COPPA Rule, and when triggered, what steps those mobile applications, services, and websites must take regarding the collection of personal information and obtaining parental consent.

The New Informed Consent: Social Media and the Amended COPPA Rule

BY BENJAMIN D. PERGAMENT

Almost as ubiquitous as the free mobile applications that will allow your kids to share images of virtual desserts they have created, or virtual hairdos they have styled, are the reports declaring that more and more children are using mobile devices, for longer periods of time, or at increasingly younger ages, or both. And as polarizing and uncertain as the shift to seemingly perpetual screen time for children may be, it is

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also beginning to appear inevitable. This is not to say we need to prepare for an apocalypse brought about by cute, but unstoppable Terminator-style cyborg toddlers with vital organs replaced by tablets and smartphones. But we do need to prepare for (and thus protect) a generation of children who are increasingly connecting with others as much online as they are off. Recognizing this, the Federal Trade Commission has recently updated and amended its paramount tool for the protection of children online: the COPPA Rule.

Promulgated pursuant to the Children's Online Privacy Protection Act (COPPA), the COPPA Rule "was put in place to protect kids' personal information on websites and online services—including apps—that are directed to children under 13."¹ In order to keep up with advances in technology and changes in the way children interact with mobile apps and other online services, including "an explosion in children's use of mobile devices, the proliferation of online social networking and interactive gaming,"² the FTC amended the COPPA Rule effective July 1³, and since then the FTC has continued to issue specific guidance to providers of covered online services. Combined, the amendments

¹ FTC, *Protecting Your Child's Privacy Online*, <http://www.consumer.ftc.gov/articles/0031-protecting-your-childs-privacy-online>.

² Children's Online Privacy Protection Rule, 76 Fed. Reg. 59,804 (proposed Sept. 27, 2011) (to be codified at 16 C.F.R. pt. 312), available at <http://ftc.gov/os/2011/09/110915coppa.pdf>.

³ 16 C.F.R. pt. 312.

and recent guidance from the FTC make it clear that, rather than substantial restrictions on the personal information that can be collected, the primary method for protecting children using social media and other online services remains a combination of transparency and informed consent by their parents.

The Amended COPPA Rule

The COPPA Rule generally applies only to apps and websites that are *directed* to children younger than 13 and that collect personal information from them, either directly or through third parties. The rule can also be triggered by an app or website with a general audience that has *actual knowledge* that it is collecting personal information from children younger than 13. The recent amendments to the COPPA Rule primarily include changes to the types of personal information covered by the rule; the methods for obtaining parental consent for collection of personal information; and additional restrictions on how that personal information can be shared among companies that use such information in the course of their business. Specifically, the amendments to the COPPA Rule:

- modify the list of personal information that cannot be collected without parental notice and consent, which includes geolocation information, photos, videos, and audio files that contain a child’s image or voice⁴;
- establish a “streamlined” approval process for proposed new methods for obtaining parental consent⁵;
- require parental consent where the app or website allows third parties to collect personal information from children through plug-ins⁶;
- extend COPPA to cover persistent identifiers (such as IP addresses and mobile device IDs) that recognize users over time and across different services or websites⁷;
- increase data security protection by requiring operators of apps and websites to take steps to release children’s personal information only to other companies that are capable of keeping that information secure and confidential⁸;
- require that app and website operators adopt reasonable procedures for data retention and deletion, including retaining personal information for only as long as is necessary to fulfill the purpose for which the information was collected⁹; and
- provide increased FTC oversight with regard to self-regulatory safe harbor programs¹⁰.

The overall effect of the amendments is a closing of prior loopholes and a clarification of previously gray ar-

eas regarding the types of operators, services, and personal information that fall within the rule’s ambit. These changes provide an enhanced set of protections and more stringent requirements consistent with COPPA’s overarching goal of creating a safer and more secure online experience for children—all while positioning the parent as the ultimate gatekeeper.

Notice and Consent

Although the amended COPPA Rule expands the list of personal information it covers, it does not, by and large, do much to restrict or prohibit businesses from collecting it from children. Instead, the keys to COPPA compliance are disclosure and parental consent. As long as a provider of online services is transparent about what it is collecting and obtains the consent of parents before it collects it, COPPA does not much interfere with the commercially important ability of social media providers to compile data profiles of the segment of the market that is younger than 13.

The amended COPPA Rule requires an operator of an online service to post clear and prominent links to a privacy policy that complies with the rule’s requirements.¹¹ In general, the privacy policy must identify all operators collecting or maintaining children’s personal information through that site or service. The notice must also provide a description of types of personal information collected and how it will be used (including whether it will be used for marketing purposes or whether a child will be able to make information publicly available through some means). And finally, the notice must include a description of parents’ rights with regard to the collection of their child’s information, including their right to review the information collected; their right to withdraw consent and insist on deletion of that information; and their right to allow collection but still not allow disclosure of that information.

Once a covered online operator has provided the requisite notice, the second step in COPPA compliance is the obtaining of verifiable parental consent.¹² The rule specifies several methods of consent that meet the requirement that such methods be reasonably calculated to ensure the person providing consent is the child’s parent. Those methods are: a signed consent form sent back to the operator; use of a credit card, debit card, or other online payment system that provides notice of each separate transaction; a toll-free phone line staffed by trained personnel; a video conference; or use of a government-issued ID that is checked against a database and then deleted once verification is complete. Where information will only be used internally and not disclosed, operators may also use an “email plus” system, where parents consent via email and a confirmation is sent back to them via email, letter, or phone call.

The amended COPPA Rule thus provides parents with the power and the ultimate responsibility for permitting and monitoring the collection of their children’s personal information. As long as parents provide their informed consent prior to the collection of any personal information, online operators can proceed to collect and use that information consistent with their disclosures and the rule’s requirements on retention and deletion.

⁴ 16 C.F.R. § 312.2 (definition of *personal information*).

⁵ 16 C.F.R. § 312.12.

⁶ 16 C.F.R. § 312.2 (definition of *operator* and when personal information is *collected or maintained on behalf of* an operator).

⁷ 16 C.F.R. § 312.2 (definition of *personal information*).

⁸ 16 C.F.R. § 312.8.

⁹ 16 C.F.R. § 312.10.

¹⁰ 16 C.F.R. § 312.11.

¹¹ 16 C.F.R. § 312.4(d).

¹² 16 C.F.R. § 312.5(b).

Child-Directed Apps and Services

Apps, services, and sites that are primarily social generally already fall clearly on one side or the other of the child-directed divide. On the one hand, the mainstream giants such as Facebook, Twitter, and Google+ have exempted themselves from the rule because they are expressly not directed at children younger than 13 and take steps to restrict their users to those who are 13 and older.¹³ On the other hand, child-centric social media, such as Yoursphere or GiantHello, are clearly subject to the rule and its notice and parental consent requirements.¹⁴

A bit murkier is the effect of the amendments with regard to apps and websites that have social features that entail the collection of personal information but that cater to a more general audience. The amended COPPA Rule employs an “actual knowledge” standard,¹⁵ and requires compliance with its requirements when an operator or service provider has actual knowledge that it is collecting personal information through a child-directed app or website. Apps and websites that target a more general audience, where children are not the primary users, are required to provide notice and obtain parental consent for only those users who actually identify themselves as being younger than 13. Further, third parties (such as plug-ins and ad networks) will be deemed to have the requisite “actual knowledge” if the child-directed nature of the content is directly communicated to that third party by the content provider, or if a representative of the third party service “recognizes” the child-directed nature of the content.¹⁶

Nothing in COPPA prevents children from lying about their age to register on social media, and nothing in the amended COPPA Rule penalizes social media operators in such instances.¹⁷ If, however, it becomes apparent to an operator that a particular user is younger than 13, the notice and consent requirements of the amended COPPA Rule will kick in and apply. Social media providers that do not direct their services to children younger than 13 thus have a continuing duty to monitor their services so that any users younger than 13 can be identified and removed.

What Constitutes “Collection” of Personal Information

Although social media inherently involves the collection of personal information covered by the amended COPPA Rule, application of the rule is less clear with

¹³ How old do you have to be to sign up for Facebook?, <https://www.facebook.com/help/210644045634222>; Twitter Privacy Policy, <https://twitter.com/privacy>; Age Requirements for Google+, <http://support.google.com/a/bin/answer.py?hl=en&answer=1645514>;

¹⁴ Yoursphere Media Inc. Terms of Use, <https://yoursphere.com/page/terms-use>; giantHello Privacy Policy, <http://www.gianthello.com/site/privacy>.

¹⁵ 16 C.F.R. § 312.3.

¹⁶ Question D.10 in *Complying with COPPA: Frequently Asked Questions*, available at <http://business.ftc.gov/documents/Complying-with-COPPA-Frequently-Asked-Questions>. (Revised July 2013).

¹⁷ Question A.14 in *Complying with COPPA: Frequently Asked Questions*, available at <http://business.ftc.gov/documents/Complying-with-COPPA-Frequently-Asked-Questions>. (Revised July 2013).

regard to apps and services that offer social features as only a secondary function. Regardless of their primary purpose, many new apps or online services are incorporating social elements or links to social networks. Whether it's the ability to chat with opponents in an online multiplayer game, or the ability to share the latest artistic masterpiece they created, apps and online services for kids are more often including social features that will in fact trigger the amended COPPA Rule's requirements.

The FTC's most recent guidance on the rule's amendments provides some clarity on the effect of linking any child-directed app to social media. The FTC uses the example of a child-directed app that allows kids to make paintings and share them via email or social media.¹⁸ Despite the fact that the app operator does not “collect” the paintings, which rest on the child's device, the obligation of verifiable parental consent is still triggered because the amended COPPA Rule defines collection to include enabling a child to make personal information publicly available in identifiable form through email or a social network. Thus, the FTC's most recent guidance on the amended COPPA Rule makes it clear that just as with social media itself, any apps or services that integrate social media in any way so as to provide a social component will themselves be subject to the rule's requirements, as well.

FTC Guidance and Enforcement

As of the date of this article, the FTC had not publicly announced any enforcement proceedings brought for violations of the amended COPPA Rule since its July 1 effective date. Although this is likely a function of the fact that the amendments have been in place for about two months, it may also be indicative of the prosecutorial discretion being exercised by the FTC as it allows businesses to make good faith efforts to comply with the new requirements during this initial period. The FTC has also provided the recent expanded guidance discussed above, and the FTC staff maintains a “COPPA Hotline” email address¹⁹ where staff members answer industry questions on compliance and field suggestions and comments for future question-and-answer guidance publications.

Although predating the amendments, recent enforcement actions by the FTC provide further guidance with regard to the conduct that will lead to prosecution under the rule. Earlier this year, the FTC entered into a settlement with the operator of the Path social networking app.²⁰ Path allowed children to create personal journals and to upload and share personal information covered by the rule. The Path app also collected personal information from the address books on children's devices, including addresses, phone numbers, and email addresses. The enforcement action against Path included allegations that Path violated the COPPA Rule

¹⁸ Question D.9 in *Complying with COPPA: Frequently Asked Questions*, available at <http://business.ftc.gov/documents/Complying-with-COPPA-Frequently-Asked-Questions>. (Revised July 2013).

¹⁹ COPPAHotLine@ftc.gov.

²⁰ FTC, *Path Social Networking App Settles FTC Charges it Deceived Consumers and Improperly Collected Personal Information from Users' Mobile Address Books*, available at <http://www.ftc.gov/opa/2013/02/path.shtm>.

by not adequately disclosing its collection of children's personal information in its privacy policy and by not obtaining verifiable parental consent before collecting the children's personal information. Path agreed to a civil penalty of \$800,000 and was required to delete the information collected from children younger than 13. The FTC's approach to Path again underscores the overall importance placed on disclosure and parental consent.

Conclusion

The amended COPPA Rule expands the range of personal information that cannot be collected without prior parental consent and also provides for additional situa-

tions where that consent will be required. As a result, online operators whose apps and services are directed to children must be mindful of the personal information they are collecting; how that information is maintained and disclosed to third parties; and how their partners are using and sharing that information, as well. Businesses would be wise to craft and update their privacy policies and disclosures to be as accurate and transparent as possible and to be sure that their conduct, and the conduct of their partners, conforms to the posted policy. Although the amended COPPA Rule has been expanded to account for new technology and its various uses by children, the overall importance of informed parental consent remains firmly in place.



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