

Kids, Cookies And COPPA: Firms Pay A Price On Privacy

Law360, New York (September 30, 2016, 5:14 PM EDT) --

Last week, the New York attorney general announced a settlement with Viacom, Mattel, Hasbro and Jumpstart, for a combined penalty of \$835,000 based on alleged violations of the Children’s Online Privacy Protection Act (COPPA). These four media companies are makers of some of the most popular children’s websites and mobile apps, including Nick Jr. and Nickelodeon (Viacom); Barbie, Hot Wheels and American Girl (Mattel); Neopets (JumpStart); and My Little Pony, Littlest Pet Shop and Nerf (Hasbro).

After a two-year investigation, dubbed “Operation Child Tracker,” the NY AG alleged that these four companies permitted third party ad networks and plug-ins operating on their websites to collect personal information from children through tracking technologies without parental consent in violation of COPPA. These cases are the latest in a string of COPPA actions which focus on the passive collection of children’s information through tracking technologies.

COPPA applies to cookies and other passive data tracking technologies

COPPA was passed in 1998 and prohibits website or online services from collecting personal information from children under the age of 13 without verifiable parental consent, subject to certain narrow exceptions.

In December 2012, the FTC updated its COPPA Rule (the regulation under which the FTC enforces the Act), to expand the definition of “personal information” to include (i) geolocation data sufficient to identify a child’s city and street; (ii) photos, videos and audio files that contain a child’s image or voice; (iii) a screen or user name, if it functions as an identifier which permits direct contact with a person online; and (iv) a persistent identifier, which can be used to recognize a child across different websites and online services. Further underscoring the expanded scope of the Rule, the FTC also updated the definition of “collects or collection” to include “the gathering of any personal information from a child by any means, including ... passive tracking of a child online.”

Since the update went into effect in 2013, any website or app which is directed to children under 13 or where the operator has knowledge that it collects information from children under 13, must obtain verifiable parental consent before collecting any geolocation data or persistent identifiers, including those obtained through the use of passive tracking technologies, such as an IP address, a number held in a cookie, a processor or device serial number, or a unique device identifier, unless the persistent



Emily Tabatabai



Antony Kim

identifiers are collected solely to support the site's internal operations.[1] As most websites and apps leverage tracking technologies to collect persistent identifiers from users, this expanded definition of personal information significantly raises the stakes for online operators.

The FTC has settled three cases involving passive tracking technologies since the COPPA Rule update went into effect. In December 2015, the FTC brought enforcement actions against two mobile app makers for permitting third party advertising companies to collect personal information about children under 13 on their apps through tracking technologies. LAI Systems (makers of My Cake Shop, My Pizza Shop and others) agreed to pay a \$60,000 civil penalty, and Retro Dreamer (makers of Happy Pudding Jump, Ice Cream Drop and others) agreed to pay \$300,000 to settle the action. Even though these apps did not collect a user's birthdate, and in many cases the app did not collect any personal information from the users at all, the FTC found that the apps were clearly targeting children under 13 given the subject matter of their games, and therefore should not have permitted third party marketers to collect persistent identifier information on their apps without parental consent.

In June 2016, the FTC turned its focus from the website/app operators to the third party tracking companies, announcing a \$950,000 settlement with InMobi, a mobile ad network that provided ad services to thousands of popular mobile apps, many of which targeted children under 13. InMobi's website and agreements with developers claimed that it complied with the revised COPPA rule by avoiding the collection of tracking information from child-directed apps, yet it allegedly continued to collect location data and persistent identifiers from users even after the app developers notified InMobi that their apps were directed to children. In addition to requiring 20 years of audit and reporting requirements, the FTC settlement levied a \$4 million penalty against the company, which was suspended down to \$950,000 based on the company's financial condition.

The New York Attorney General COPPA settlement with Viacom, Mattel, JumpStart and Hasbro

While COPPA actions are typically brought by the FTC, which has a history of aggressive enforcement under the Act, COPPA also empowers state attorneys general to bring enforcement actions. New York's case against leading media companies Viacom, Mattel, JumpStart and Hasbro is the largest state action to date.

While the precise allegations and settlement are not public as of the time of this writing, the lengthy press release by the AG's Office reveals the state's detailed investigation into the advertising ecosystem and a nuanced application of the COPPA Rule to these companies' online operations. Indeed, the New York cases appear to push farther than the FTC's previous enforcement actions relating to the online tracking of children.

The New York cases reveal several lessons for companies to consider in evaluating their own third party advertising or tracking practices.

1. A website operator will be liable for the downstream activities of third parties that operate on the site.

The AG noted that many advertisers and agencies that placed ads on the Nick Jr. and Nickelodeon websites (owned by Viacom) also implemented other third party tracking technologies which tracked, profiled and targeted advertising to children under the age of 13 in violation of COPPA. There appears to be no allegation that Viacom intended for these third party ad trackers to be placed on its sites. Nonetheless, the AG faulted Viacom for not implementing sufficient safeguards to protect children from

unwanted tracking and data collection.

The AG listed several examples of Mattel allegedly failing to properly audit and control third party trackers operating on its sites. First, Mattel embedded Google's YouTube.com videos onto the child-directed portions of Mattel's websites, including the Barbie website, which enabled Google tracking technologies to operate on the site. Second, the AG took issue with Mattel's use of a third party data broker which deployed tracking technology on Mattel's sites, including Barbie, Fisher-Price and Thomas & Friends, for the purpose of providing site analytics. Though tracking for internal purposes — such as website analytics — is permitted under COPPA, the third party technology used by Mattel's data broker "piggy-backed" many more third party tracking technologies onto the sites, many of which engaged in tracking, profiling and targeted advertising to children under 13.

Similarly, Hasbro was cited for integrating a third-party plug-in into many of its websites that introduced other third parties that engaged in tracking, profiling, and targeting advertisements in violation of COPPA.

While the FTC COPPA FAQs clearly state that an operator of a child-directed app is required to conduct an inquiry into the data collection practices of every third party that can collect data through the operator's site or app (see FAQ D8) the Viacom and Mattel examples reinforce just how difficult such oversight may be for a web operator.

Take-Away #1: A website operator is expected to take affirmative steps to understand, audit and police the activities of the third party tracking companies it permits to operate on its site to ensure that unintended tracking technologies are not present. In today's complex advertising ecosystem, it is neither easy nor straightforward to monitor the complicated web of partners responsible for any given tracking activity, particularly for smaller operators who may lack the resources to regularly scan for unexpected cookies. In addition to technological auditing and oversight, website/app operators are well advised to contractually limit any marketing vendor's ability to introduce other, downstream third party tracking tools, and/or to collect personal information for any purpose other than to provide the services to the operator.

2. An operator of a mixed-use website must comply with COPPA when permitting third party tracking technologies to passively collect data, even if children are not the primary audience of the site.

Viacom displayed third party behavioral advertising and tracking technologies on the home page of the Nick Jr. website. Viacom argued that Nick Jr. shows appeal to children ages 2-5 who are unlikely to be browsing the web, and that the Nick Jr. homepage was directed to the parents of those children. The AG disagreed, noting that the Nick Jr. homepage displayed content (such as cartoon characters) that was appealing to children under the age of 13, and should therefore be considered a "mixed-audience" site.

The FTC COPPA FAQs explain that a site directed to children must assume that all visitors are children under 13, and provide COPPA protections to all users. The FAQs consider a narrow exception to this rule for a site that is directed to children, but does not target children as its primary audience. These mixed-use sites may impose an age screen to identify which users are under the age of 13 and require parental consent for data collection only as related to this subset of site visitors. See FTC COPPA FAQs D2.

Because the NY AG found that the Nick Jr. site was a mixed-audience site, it argued that the Nick Jr. site should have had procedures in place to identify which users are children, and then comply with COPPA when interacting with them — i.e., obtain consent to engage in behavioral advertising and tracking.

While it is common for mixed-use sites to install a COPPA-compliant age screen to prevent an underage user from registering for the site (i.e., active data collection), many mixed-use site operators fail to take COPPA into account if they are not actively collecting user data on the site. Companies are often surprised to learn that even the passive collection of data from site visitors who may be underage runs afoul of COPPA, even if underage users are not the intended audience of the site.

Take-Away #2: An online operator targeting tweens, teens, or parents must carefully consider whether the site may be attractive to a younger audience (i.e., “directed to”) or partially directed to a younger audience, and if so, whether parental consent or an age screen is needed before implementing third party passive tracking technologies. A regulator will not rely on the site operator’s own description of its target audience, but will look at a number of factors, including the site’s visual content, the use of animated characters, the age of the models, and the presence of child-oriented activities, to determine whether the site is “directed to” children. Any site that contains many of these elements should be on notice that it may be considered a mixed-use site, subject to COPPA restrictions that apply to both active and passive types of data collection.

3. A website operator will be responsible for mistakes such as inadvertent tracker placement.

The New York AG called out Viacom for inadvertently introducing the third party ad platform it used on certain sites onto another child-directed section of the Nick Jr. website for a six-week period, unintentionally permitting third party ad tracking on that child-directed portion of the site without parental consent. Similarly, the AG faulted Mattel for inadvertently deploying a tracking technology that it properly used on an adult-directed website to certain child-directed webpages of the American Girl website.

Take-Away #3: A company must meticulously manage tracking technologies, as small errors can lead to heavy penalties. This is easier said than done, given the complex online advertising ecosystem and the sheer volume of cookies that are set on any particular webpage. More problematic is that for many companies there may not be clear communication between the legal department and the advertising, product and IT teams, any of which could be responsible for placing a particular tracking cookie on a webpage.

COPPA violations can lead to big penalties

The NY settlements imposed substantial fines on three of the four companies: Viacom (\$500,000), Mattel (\$250,000) and JumpsStart (\$85,000). Hasbro escaped financial liability because it belongs to an FTC-approved COPPA Safe Harbor program. The agreements also require the companies to implement various reforms, including adopting procedures to vet third party technologies before they are introduced on a child-directed site, conducting regular scans to monitor a site for unexpected third party tracking technologies, and alerting all third parties operating on the site that the site is directed to children.

COPPA violations are getting much more expensive. As of August 1, 2016, the maximum civil penalty that can be assessed for COPPA violations jumped from \$16,000 to \$40,000, thanks to the Federal Civil Penalties Inflation Adjustment Act.

Is your child-directed website or app at risk? To a company, the passive collection of data through tracking technologies generally does not feel as intrusive as the active collection of personal information, yet these passive trackers are squarely covered by COPPA. Both federal and state

regulators are actively enforcing compliance under the expanded definition of the COPPA Rule, including against operators of online services which claim to target adults rather than children. If your website or app is directed to children under 13, or if it is attractive to children under 13 to such an extent that children could be considered a secondary audience, consider prioritizing a COPPA compliance review of both active and passive data collection practices and implementing a COPPA compliance program for ongoing protection. An effective COPPA compliance program should involve periodic review and assessment of data collection practices and third party data activities, active vendor management, and employee training and awareness programs. It's best to stay on the safe side of the COPPA.

—By Emily S. Tabatabai and Antony P. Kim, Orrick Herrington & Sutcliffe LLP

Emily Tabatabai is of counsel at Orrick Herrington & Sutcliffe LLP in Washington, D.C. She is a member of the cybersecurity and data privacy team and regularly advises clients on internet commerce matters. Antony Kim is a partner in Orrick's antitrust and competition practice in Washington, D.C., and global co-chairman of the cybersecurity and data privacy team.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] There is an exception to this rule that permits an operator to collect persistent identifiers without parental consent if the identifier is collected solely for the purpose of providing support for the internal operations of the online service, such as performing network communications, authenticating users, or maintaining or analyzing site functions. To fall under this exception, the site must collect no other personal information and the persistent identifier may not be used to contact the individual, including through behavioral advertising, or to amass a profile on the individual. 16 C.F.R. §312.2, and FTC Complying with COPPA: Frequently Asked Questions, at I.5, (“FTC COPPA FAQs”) available at <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions>, last viewed Sept. 30, 2016.