

LEGAL UPDATE

January 2012 By: *Jeffrey C. Johnson, Robert J. deBrauwere, and Jill C. Braibanti*

FTC PROPOSES OVERHAUL TO CHILDREN'S ONLINE PRIVACY PROTECTION RULE

The Federal Trade Commission (FTC) has proposed new amendments to the Children's Online Privacy Protection Rule (COPPA Rule) that, if adopted, will have wide-ranging implications for websites used by children younger than thirteen years of age.

Since 2000, the COPPA Rule, issued pursuant to the Children's Online Privacy Protection Act, has required that website operators that knowingly collect personal information from users who are less than thirteen years of age, or whose websites are directed at users younger than thirteen, must obtain verifiable parental consent before collection, use or disclosure of user personal information. Website operators must keep this personal information secure and are prohibited from collecting more personal information from children than is reasonably necessary to allow them to participate in website activities. The COPPA Rule also provides a "safe harbor" for industry groups to self-regulate their compliance with this mandate. In light of the rapid advance of technological development, the FTC has proposed overhauling this regulation to keep pace.

PROPOSED CHANGES

The FTC's most far-reaching proposed changes to the COPPA Rule concern the following questions posed to website operators whose sites or services are used or marketed to children under age thirteen:

WHAT IS PERSONAL INFORMATION?

Under the current COPPA Rule, "personal information" is defined to include a user's name, address, email address, telephone number, Social Security number, and similarly individually identifiable information. The FTC's proposed revisions add other commonly used online

identifiers, including instant messaging user names and VOIP or video chat user identifiers. The revised rule would also include detailed geolocation information (i.e., that provides a level of specificity similar to a user's street address) and tracking cookies, as well as other persistent identifiers, within the scope of personal information, except that tracking information that is only being utilized by the operator to deliver content to children within the ordinary operation of the website or online service (e.g., user authentication, site navigation, setting user preferences, serving contextual advertisements, and protecting against fraud or theft) would nevertheless be excluded. This exclusion emphasizes that website operators will not be subject to the COPPA Rule if personal information is solely being used internally to improve the user experience.

The FTC intends the new definition to apply the COPPA Rule, however, where a website is amassing data on a child's online activities or behaviorally targeting online advertising to the child, and specifically intends network advertisers and analytic services (which build a database of user profiles based on IP address to serve targeted ads across a network of websites) to be subject to the COPPA Rule. The FTC also adds photos, videos or audio files containing a child's image or voice to the definition of personal information. This expansion of what is considered personal information, particularly concerning online advertising, will require website operators to reevaluate their use of third-party network advertisers, user-submitted media, cookies and IP addresses to ensure compliance with the revised rule. As many websites generate significant revenue from network advertisers, compliance could even require consideration of revised business models.

WHAT IS COLLECTION OF PERSONAL INFORMATION?

The FTC's proposed amendments would modify the definition of "collection" of personal information under the COPPA Rule to (i) clarify that collection includes encouraging or prompting children to enter personal information even if the entry of such personal information is not mandated or a condition of use, and (ii) allow children to participate in online interactive communities without parental consent, as long as the operators take reasonable measures to delete all or virtually all of a child's personal information from public posts and website records. Under the current definition of collection, website owners are subjected to a "100% deletion" standard of a child's personal information from online posts and website records; relaxing this standard to only require "reasonable measures" and removal of "all or virtually all" is intended to be less onerous for website operators, who would perhaps be able to implement an automated system to scrub user posts of personal information. If this change is enacted, website operators will need to review how their websites are aggregating personal information and evaluate whether their current collection methods are compliant with the proposed rule revisions.

WHAT PARENTAL NOTICE IS REQUIRED TO BE GIVEN?

The FTC also proposes streamlining the requirement that direct notice be given to parents before a website collects any personal information from children. Notably, key information would be presented in a "just in time" fashion, not just in the website's privacy policy, which might easily be ignored by website users. Such notice would be required to be clearly labeled and prominently located on the website home page and at each location where personal information is collected. In practice, as most websites contain these disclosures in their Privacy Policy section, if this change is implemented, websites subject to the COPPA Rule will likely require additional COPPA Rule-compliant disclosures displayed in other areas of the website.

HOW MUST WEBSITES OBTAIN PARENTAL CONSENT?

The COPPA Rule currently requires that websites obtain verifiable parental consent before collecting personal information from children younger than thirteen. Methods currently available under the COPPA Rule include providing a consent form to be signed by the parent and returned by mail or fax, requiring a parent to use a credit card in connection with a transaction, having a parent call a toll-free telephone number for screening, using a digital certificate with public key technology, and "e-mail plus," which entails registering an e-mail address and then taking an additional verification step, such as confirming the consent by mail or telephone call or sending a delayed confirmation email. The FTC's proposed revisions would eliminate the "e-mail plus" method of obtaining consent, considered to be less reliable and currently only available to websites that only collect personal information only for internal use. The FTC also proposes authorizing new methods of obtaining verifiable parental consent, including: (i) electronic scans of signed parental consent forms, (ii) video-conferencing, (iii) use of government-issued ID checked against a database (provided that this ID information is deleted promptly after being verified).

For website operators currently relying primarily or entirely on the "e-mail plus" method of verification, the proposed changes would require abandoning this method in favor of a different method to verify parental consent, the implementation of which could involve considerable effort and expense.

WHICH WEBSITES ARE "DIRECTED" AT CHILDREN?

The COPPA Rule applies to websites whose operators have actual knowledge that their users are younger than 13, or to websites that are "directed" at this age group. The COPPA Rule contains certain factors considered by the FTC in determining whether a website is directed at children. The FTC's proposed revisions added additional factors, including music, the presence of child celebrities and celebrities who appeal to children. The FTC declined to recommend a bright-line rule based on actual website visitor demographics in its proposed revisions in favor of these minor changes to the COPPA Rule's non-exclusive list of indicia, as follows:

“... the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.”

ADDITIONAL PROPOSALS

In its proposed revisions, the FTC also seeks to require that website operators ensure that third parties to whom a child’s personal information is disclosed have reasonable procedures in place to safeguard the information, that website operators only retain personal information for as long as reasonably necessary, and that deletion of personal information is done with reasonable disposal measures to protect against unauthorized access to or use of the discarded information.

Finally, the FTC is proposing to require self-regulatory safe harbor programs to audit their members at least annually, and file periodic audit reports with the FTC. The FTC would further carve out an exception to parental consent to enable websites who do not otherwise use, collect or disclose children’s personal information to collect parent contact information solely to keep these parents updated on the child’s use of the website.

NEXT STEPS FOR WEBSITE OPERATORS

The FTC is currently reviewing public comments regarding these proposed revisions. If implemented according to the FTC proposal, the revised COPPA Rule will require website and online service operators who are currently subject to the COPPA Rule, and many operators who have not been subject to the COPPA Rule in the past, to thoroughly evaluate their current website operations for compliance with the new rules, focusing on collection, disclosure, third-party uses and parental consent methods.

The foregoing is merely a discussion of the FTC’s proposed overhaul to the Children’s Online Privacy Protection Rule. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Jeffrey Johnson at 212-326-0118, Robert deBrauwere at 212-326-0418, or Jill Braibanti at 212-326-0138.

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ABOUT THE AUTHORS



JEFFREY C. JOHNSON

Partner

Direct Tel: 212-326-0118

Direct Fax: 212-798-6314

jjohnson@pryorcashman.com

Jeffrey Johnson is a partner specializing in the transactional aspects of technology and intellectual property exploitation (patents, trade secrets, trademarks and copyright) including, in particular, all aspects of mergers and acquisitions, joint ventures, strategic alliances, joint development and marketing agreements, private placements and licensing in the biotech, entertainment, Internet, pharmaceutical, software and telecommunications industries.

Jeffrey typically focuses on transactional matters principally involving intellectual property or goods and services the value of which are largely attributable to intellectual property. Recent assignments include the representation of Lady Gaga in her investment in The Backplane, as reported in The New York Times on June 6, 2011.

Jeffrey has been an invited speaker and panelist at a variety of public and private events.



ROBERT J. DEBRAUWERE

Partner

Direct Tel: 212-326-0418

Direct Fax: 212-710-6086

rdebrauwere@pryorcashman.com

Robert J. deBrauwere is co-chair of the Firm's Digital Media Practice Group and specializes in the areas of digital media, social media compliance, intellectual property, trademarks, unfair competition, advertising, copyrights, entertainment, publishing, pre-publication counseling, video gaming and licensing. He regularly lectures attorneys, insurance underwriters and claims personnel, as well as law school students, in the areas of digital media, trademark law, defamation and publishing law.

Recent speaking engagements include a panel discussion at the Harvard Law School Entertainment Law Symposium: The Democratization of Entertainment, discussing "Online Music Licensing: Is Open Source viable?," speaking at the 5th Annual Social Media Compliance in Financial Industry Conference, focusing on privacy issues arising from the implementation of technological solutions to ensure compliance with SEC and FINRA regulations, and as moderator and speaker at Georgetown University Law School's 4th Annual GEMA Law Sports and Entertainment Law Symposium, I Want It Now! Legal Issues Surrounding the Adaptation of On-Demand Models in the Entertainment & Publishing Industries.

Mr. deBrauwere is a 1993 cum laude graduate of Benjamin N. Cardozo School of Law, where he served as Senior Managing Editor of the *Cardozo Arts & Entertainment Law Journal*.



JILL C. BRAIBANTI

Associate

Direct Tel: 212-326-0138

Direct Fax: 212-798-6937

jbraibanti@pryorcashman.com

Jill Braibanti's practice focuses on corporate, intellectual property and digital media matters, including copyright issues, social media and promotions compliance, licensing, acquisitions and corporate governance. Her practice also includes general commercial and entertainment litigation.

Jill received her B.A. from the College of William & Mary in 2003 and her J.D. from New York University School of Law in 2009. She served as an editor of the *NYU Journal of Law and Business*.