

Journal of Civil Rights and Economic Development

Volume 16
Issue 3 *Volume 16, Fall 2002, Issue 3*

Article 7

September 2002

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A SYNOPSIS OF THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT

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My task today is to set forth the basic requirements of the Children's Online Privacy Protection Act ("COPPA").² In general, I can sum up COPPA for you in one sentence: A website operator cannot collect or disclose personally identifiable information from a child without getting prior verifiable parental consent from the child's parent.³ There are about half a dozen definitions in that sentence and about 90 pages of FTC commentary describing what they all mean. But in this symposium I'll just give you a broad overview.

First, what's a "child"? A child is someone under the age of 13.⁴ A "parent" is the child's parent or a legal guardian,⁵ in

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² Children's Online Privacy Protection Act, 15 U.S.C. § 6501 - 6506 (2002) (seeking to stop unfair and deceptive acts and practices involved in collection or disclosure of personal information from Internet users who are thirteen and under [hereinafter COPPA]). See Children's Online Privacy Protection Rule, 16 C.F.R. § 312.1 (2002) (noting FTC final rule pursuant to COPPA went into effect on April 21, 2000, and applies to personal information collected, used, or disclosed online from that date forward [hereinafter COPPR]).

³ See generally 15 U.S.C. § 6502 (2002); 16 C.F.R. § 312.3 (2002).

⁴ See 15 U.S.C. § 6501(1) (2002) (defining "child" as person under age of thirteen); see also 16 C.F.R. § 312.2 (2002) (same).

⁵ See 15 U.S.C. § 6501(7) (defining parent to include legal guardian); See 16 C.F.R. § 312.2 (2002) (same).

certain circumstances, a "parent" can also be a teacher or a school.⁶

The "personally identifiable information" we're talking about is, among other things, a full name, a mailing address, a social security number – or any one of these items.⁷ It's also an e-mail address or any other online identifier where you can communicate directly with the child.⁸ Even if you know nothing else about them, if you know their e-mail address, then that provides for direct communication with the child, and that is personally identifiable information.

The definition also includes among other things, any other information about the child or the family that is associated with one of the other forms of personal information.⁹ So that if you collect a zip code, for example, in addition to an e-mail address, that zip code now becomes personally identifiable information.

What does "collect" mean? Data collection under COPPA refers to (1) data that children knowingly give a website through online forms and similar features ("active" data collection); (2) data a website collects automatically through cookies and other technology ("passive" data collection); and (3) data that a child discloses publicly online.¹⁰ Active data collection refers to the online forms that children fill out when they want to register for a site or a contest. And before COPPA, there were some really egregious situations where in order to get the cool T-shirt or to play an online game, the kids were asked to fill out forms that asked very invasive questions such as, "What sort of cars do your parents drive?" "Where are they banking your education funds?" "What's your social security number?"¹¹ Truly invasive questions

⁶ See FTC Children's Online Privacy Protection Rule Statement of Basis and Purpose, 64 Fed. Reg. 59,888, 59,903 (Nov. 3, 1999) [hereinafter FTC COPPR Commentary] (schools may act as parents' agents); How to Protect Kids' Privacy Online: A Guide for Teachers (available at <http://www.ftc.gov/bcp/online/pubs/online/teachers.htm>) (last visited July 21, 2002).

⁷ See 15 U.S.C. § 6501 (8) (2002) (enumerating several forms of individually identifiable information that qualify as "personal information"); 16 C.F.R. § 312.2 (2002) (same).

⁸ See sources cited *supra* note 7.

⁹ See 15 U.S.C. § 6501 (8) (g) (2002); 16 C.F.R. 312.2 (2002).

¹⁰ See 16 C.F.R. § 312.2 (2002).

¹¹ See generally *Privacy Online: A Report to Congress*, FTC June 1998 at 31-33, 39-40 (available at <http://www.ftc.gov/reports/privacy3>) (last visited Oct. 11, 2002).

designed to gather information so the sites could do direct marketing or sell this information to third parties. When a site asks a child to fill out a form, type in information online, that is a collection.

“Collection” also refers to passive information, such as cookies and tracking technology, particularly if they are linked to personal information.¹² To take an example, at one major e-commerce site, the privacy policy states that cookies and other technologies are used, and further information is at the end of the policy. If you take the time to scroll down, you learn that the cookies and other technology collect an amazing amount of personal information, including your purchase history, search terms, and your movements at their site

Cookies can be good. Indeed, the FTC in certain circumstances encourages websites, particularly those not directed towards children, to use cookies to make sure that children who honestly put in their age as under 13, and then are told they cannot use a particular feature, are prevented from going back and changing their age information because they really want to get access to whatever feature it was.¹³ Cookies are also useful for shopping carts and other features that make browsing easier. So it all depends what they're being used for.

“Collect” in the COPPA context also means something that most people wouldn't think it does – the use of online communication features.¹⁴ COPPA was actually aimed at two different dangers. One was to stop the irrelevant and invasive questions that websites would ask in order to gather information

¹² See FTC COPPR Commentary, 64 Fed. Reg. 59,892-93. Cookies are small text files that sit on your computer and they communicate with the server of the Web site. They can retain information and store it on your computer. They can make surfing easier, such as by remembering your username and password for a particular site. And when you go shopping online, if there were no cookies, every time you selected something you would have to buy it then, one at a time. Cookies let online “shopping carts” retain the information about multiple purchases on your computer and then at the end, when you go to check out, the server reaches in and pulls up all the information and then you can do the checkout of more than one item.

¹³ See *Frequently Asked Questions About the Children's Online Privacy Protection Rule: Volume I*, Federal Trade Commission, at <http://www.ftc.gov/privacy/coppafaqs.htm> (last visited Oct. 11, 2002).

¹⁴ See 16 C.F.R. § 312.2 (2002) (defining collection as including, among other methods, information made public through chat rooms and message boards); see also FTC COPPR Commentary, 64 Fed. Reg. at 59,890-91 (commenting that rule states that definition of “collection” includes posting of personal information).

for direct marketing purposes or even to sell to third parties.¹⁵ But the other danger COPPA was aimed at was protecting children from some of the unsafe things on the Internet and, in its worst form, what we're talking about is pedophiles.¹⁶ Using communication tools – e-mail, message boards, chat, etc. – pedophiles masquerade as children, and they go in and develop one-on-one relationships with children that can go on for years. And the poor kids think they have a bosom buddy who's more or less their age and after a few years of being strung along and thinking they had this close relationship, they agree to meet their online friend at the mall, resulting in terrible consequences.

The danger with communication tools is that children themselves can give out personal information about themselves – even if the website does not ask them to or specifically instructs them not to. So they can have a very innocuous e-mail address, such as *snowball@SITE.com*, but by giving them access to tools where they can communicate with other people, they can type in: “Hi, my real name is Susie Smith. This is my address, this is my phone number, I live here, I go to school there.” Also offering children a place to create their own web page can allow them to post similar information. And with this potential flow of personal information, the “bad guys” on the Internet can contact the children directly, even offline. And it was believed very rightly that parents should know and have to give consent before children are allowed to use such communication tools and be able to communicate with strangers. This is for all of you, too: Everyone on the Internet that you don't know in real life is a stranger, no matter how long you've communicated with them. You don't know a thing about them except what they have chosen to tell you. And it's particularly hard for kids, who are so trusting, to understand that.

So collection under COPPA includes allowing children to use these kinds of communication tools. And, under COPPA,

¹⁵ See FTC COPPR Commentary, 64 Fed. Reg. at 59,888 (discussing that purpose of statute is to prevent abuse of personal information disclosed by children on Internet).

¹⁶ See FTC COPPR Commentary, 64 Fed. Reg. at 59,890 (commenting chat room participation is included under COPPA to protect children from risk of predators); see also *Privacy Online: A Report to Congress*, FTC June 1998 at 4-6 (available at <http://www.ftc.gov/reports/privacy3>) (last visited Oct. 11, 2002).

children cannot use them without prior “verifiable parental consent.”¹⁷ But what does that mean?

It doesn't mean that a site can post a screen that says: “Kids, make sure you tell your parents before you sign up here.” It also doesn't mean: “Kids, go run get your parents right now and have them click this button and send us an e-mail and say that it's okay for you to use this site.” There has to be some indication that there's actually a parent who's giving consent. And depending on the use that the information's being put to (and except for a limited number of very narrow exceptions where prior consent is not required)¹⁸, the level of consent varies, at least at the moment.¹⁹

If a website is collecting information, but does not have communication tools or at least ones where the children are free to post personal information about themselves, and the site is only using the information internally and not disclosing it to third parties, then at least until April 2005, websites can use what is known as “e-mail plus” consent.²⁰ That means they have to send parents a COPPA compliant notice, because the consent must be informed. And COPPA has very strict requirements for what has to be in the notice, which also includes the privacy policy, that's sent to parents to let them know what the site is doing with their children's information.²¹ So when the parents read the privacy policy, they have their informed consent, and under “e-mail plus” they can in fact send an e-mail back saying, “yes, my child can use your website” because you're not going to be doing anything with their personal information other than

¹⁷ See 16 C.F.R. §§ 312.3 (b), 312.5 (requiring “verifiable parental consent” prior to collection of information).

¹⁸ 15 U.S.C. § 6502(b)(2); 16 C.F.R. § 312.5(c) These sections exclude from prior consent requirement a limited number of exceptions, including where email address collection is for the purpose of contacting a parent to obtain consent; to respond once to child's specific request (as with homework help); and to respond more than once to child's specific request (such as to receive a weekly email newsletter). All have restrictive requirements, including prompt deletion of the information, and, in some circumstances, notice to the parent.

¹⁹ See 16 C.F.R. § 312.5; *see also* FTC COPPR Commentary, 64 Fed. Reg. at 59901 (positing that sliding scale should be used to match degree of notice with level of disclosure).

²⁰ See 16 C.F.R. § 312.5(b)(2); 67 Fed. Reg. 18,818, 18,821 (April 17, 2002) (extending sunset provision of 16 C.F.R. § 312.5(b)(2) to April 21, 2005); *see also* FTC COPPR Commentary, 64 Fed. Reg. at 59902.

²¹ See 16 C.F.R. § 312.4 (detailing requirements for notice); *see also* FTC COPPR Commentary, 64 Fed. Reg. at 59894-95.

using it for your own internal purposes. But even there it has to be e-mail *plus*. There has to be something more. And the more can be something such as a delayed confirmatory e-mail to make a good faith effort to ensure that it wasn't the child going in and sitting there typing, saying: "Yes, I'm my parent," and "yes, this is all okay." If the website sends an e-mail three days later to that same e-mail address and says -- "Hi, you may not know this, but our understanding was that you gave consent for your child to use our website three days ago. If you really did, and you have no problem with it, fine. But if it's not you or you want to revoke that consent, you just let us know" -- this delayed confirmation is a way to try to verify that it was the parent who actually gave the consent.

If a website is allowing children to use communication tools or if it wants to share their personal information with third parties, then the consent has to be of a much higher order. And there really has to be some indication that it was an adult, the parent, who was giving the consent. E-mail is simply not an option for use as a consent mechanism here. So the requirement is for an actual signature on a letter or a fax (presumably, an eight year-old's handwriting will look different from an adult's handwriting). Other ways to get consent include using a credit card, because it's presumed that children under the age of 13 do not have credit cards; and having a toll free number where the parent can call and orally give their consent, staffed with trained operators who can tell the difference between an adult voice saying: "Yes, I'd like my daughter to sign up" and some little boy saying, "hi, I'm my dad."

What COPPA really is is a notice and disclosure statute.²² It is not a safety statute. It informs parents of the information practices of the site, and lets the parents decide whether to consent to their child's use of it. It does not mandate any particular safety practices (such as moderated chat rooms, for example). For the website operators, their obligation is to comply

²² See 16 C.F.R. §§ 312.4-312.5 (positing terms of giving proper parental notice of child's use of website and requirement of disclosure of such information on demand); see also FTC COPPR Commentary, 64 Fed. Reg. at 59894-95 (discussing notice and disclosure requirements of statute).

with the statute and use good faith to ensure that notice is sent to and consent is received from the parent. Sites are allowed to rely in good faith on the various indicia of consent – a signature, a credit card, a voice – to establish “adulthood.”²³ If the child takes the parent’s credit card, the site is not responsible for that as long as they meet COPPA’s requirements. We don’t now have digital identities. It could be that in several years when you sign on, your age or category (adult or child) will go with you and that might make compliance with or enforcement of COPPA easier. But right now it’s all good faith reliance.

COPPA has very detailed requirements for what needs to be in the site’s privacy policy.²⁴ Among them are informing the parents of certain rights that COPPA gives them, such as the right to access their children’s personal information, to review it, and to ask that the information be deleted from the website operator’s database.²⁵ In implementing this right, website operators have to use reasonable measures. As a first step, operators can respond to an inquiry from a parent asking what information the site is collecting by setting forth the generic categories of information²⁶ such as: “From our child visitors, we collect their full name, their e-mail address, their music interest and their zip code.” If the parent then wants to know exactly what information the site has on their child, the site has to take much stronger measures than just the verifiable parental consent kind of measures to make sure that it is really the parent of that child, because you don’t want to be giving the child’s personal information away to a stranger.²⁷ And the FTC commentary sets out ways that this can be done.²⁸ For example, when you first get

²³ See 16 C.F.R. § 312.5 (positing mechanisms for obtaining verifiable parental consent for child’s use of website); see also FTC COPPR Commentary, 64 Fed. Reg. at 59899-902 (clarifying mechanisms for adequate parental verification in different circumstances).

²⁴ 16 C.F.R. § 312.4(b).

²⁵ See 16 C.F.R. §§ 312.4(b)(2)(vi), 312.6(a) (requiring parent to have access to personal information provided by child); see also FTC COPPR Commentary, 64 Fed. Reg. at 59903-04 (noting that statute gives parents right to review information provided by child).

²⁶ 16 C.F.R. § 312.6(a)(1).

²⁷ See 16 C.F.R. § 312.6(a)(3)(i) (stating operator must “ensure that the requestor is a parent of that child, taking into account available technology”); see also *id.* § 312.6(b) (website operators will not be liable for mistakenly giving out child information if reasonable procedures to verify identity of individual seeking information were followed in good faith).

²⁸ See FTC COPPR Commentary, 64 Fed. Reg. at 59905.

verifiable parental consent, a website can establish a PIN number system. And then if that parent then writes back using the assigned PIN number and it's coming from the same e-mail address, it's very likely the same person who gave the parental consent to begin with. If the site didn't do that, then it makes it more difficult and the site really does have to get the parents to demonstrate that they are this child's legal guardian.

There's also a requirement that the privacy policy state that the website operator cannot condition a child's participation in an activity on the child providing more information than is reasonably necessary to participate.²⁹ So that takes care of the situations I discussed when we started, where they're asking for social security numbers to sign up to get a free T-shirt, for example.

When websites want to collect information from children, COPPA requires that they send a notice to the parents.³⁰ The notice to parents needs to include everything that has to be in the privacy policy, plus the information that "we (this website) want to collect personal information from your child."³¹ The site can link to the privacy policy in the e-mail notice or the privacy policy information can be set forth in full in the notice.³² The notice also has to tell the parents how they can give consent.³³ As I mentioned previously, COPPA has really detailed requirements for what has to be in the notice and everything else in the privacy policy always has to be included, whether directly or via a link, before the site can get any sort of consent.

²⁹ See 16 C.F.R. §§ 312.4(b)(2)(v), 312.7 (stating: "An operator is prohibited from conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity."); see also 15 U.S.C. § 6502(b)(1)(C) (2002) (directing FTC to promulgate regulation prohibiting operators from conditioning child's participation on disclosure of more personal information than reasonably necessary).

³⁰ See 16 C.F.R. § 312.4(c); id. at 312.2 (definition of "verifiable consent").

³¹ See 16 C.F.R. § 312.4(c)(1)(i)(A) (2002) (requiring all notices to parents to state operator wishes to collect personal information from child).

³² See FTC COPPR Commentary, 64 Fed. Reg. at 59897 (as long as certain requirements are met, "operators may include the hyperlink to the notice on the sites in an e-mail to parents").

³³ 16 C.F.R. § 312.4(c)(1)(ii) (for notice under § 312.5(a), notice "must also state that the parent's consent is required for the collection, use, and/or disclosure of such information, and state the means by which the parent can provide verifiable consent to the collection of information").

Now if you had been a mostly private practitioner group, I would have started with "who does this law apply to." A lot of website operators think it only applies to a kids' website. But it is really much broader than that. COPPA applies obviously to websites directed towards children, but it also applies to what are called "general audience" websites when they have actual knowledge that children, under the age of 13, are using that site.³⁴

How does a general audience site gain actual knowledge? In a lot of ways that bring me lots of clients because they don't realize they're doing it. General audience sites don't have children in mind. So they have a nice registration page: "Hi, where do you live, what's your name" and some place in there, they collect age or age-related information like your birth date or your birth year or they ask you to fill out an occupation field that includes an option for "elementary school student." And they collect that information and the information shows that the person who filled it out was under the age of 13. They now have actual knowledge.

Then you have these wonderful well meaning websites that know they have a general audience section, but they want to do something for children. So they create a sort of sub-site just for kids. And they collect no information except they have a newsletter. And everything is COPPA compliant. They have this wonderful privacy policy that complies with COPPA at their kids' area. With the newsletter they get the proper kind of notice and opt-out from the parent. They do everything right. Now they have this list of e-mail addresses from children to whom they send their newsletter that's designed just for kids.

But now they have actual knowledge that those e-mail addresses belong to children. And so they are now on notice that they cannot let those e-mail addresses they know belong to children use the communication tools they have at the general audience part of the site. Another good application of cookies is to drop them on the kids so they can't go back in and use the communication tools of the general audience part of the site.

A site can also gain actual knowledge if a parent lets it

³⁴ See 15 U.S.C. § 6502(a)(1); 16 C.F.R. § 312.3; FTC COPPR Commentary, 64 Fed. Reg. at 59889.

know that their child is using the site. The site doesn't ask for age. It gives everyone who comes there a free e-mail account. The site is not attractive to children. It looks like a regular grownup kind of site, and then the website gets a letter from a parent saying: "My 10-year old has an e-mail account with you." Well, the website just can't say: "We didn't market it to children, we didn't know" and then do nothing. They now have to do something because they have actual knowledge.

I want to end by saying that the FTC has been truly wonderful and proactive in helping the industry comply with this law. They've held workshops, they've taken a much greater interest than virtually any other federal agency that we've dealt with to try to educate the industry and get compliance, because the goal really is to protect the children. And I'm thrilled that I'm being followed by Beth Delaney of the FTC.