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CHILDREN'S ADVERTISING REVIEW UNIT

ELIZABETH L. LASCOUTX*

My three colleagues here have covered just about everything I wanted to say, so I'm just going to hit on a couple of points. I guess the first thing I should do is back up and say that CARU is the self-regulatory part of this whole mix and we've been in existence for a long time,¹ having nothing to do with privacy. We were founded in 1974 by the advertising industry in response to what was then a very credible threat to, if not outright ban advertising to children, at least attempts to severely curtail it. And the industry was smart enough to realize that the best way to forestall intrusive regulation was to get its own house in order. So they adopted a very comprehensive set of Guidelines dealing with, obviously truth and accuracy, but also everything from peer pressure and sales pressure to pro-social role modeling and safety issues.

It's frequently said that the industry has to choose between self-regulation and regulation, but they both have an important role to play.

Going back to what Commissioner Thompson said at lunch, the interactivity among the various constituencies: consumer groups, regulatory community, business community, was critical in the development of COPPA. The FTC did a remarkable job of bringing all the interested parties together, and it wasn't just a question of educating the business community. The Commission really was also there to be educated themselves. So that was

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¹ See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 735-36 (1999) (stating CARU, which promulgates guidelines for all forms of children's advertising, has been in operation for over twenty-five years); see also Gary M. Armstrong, *An Evaluation of the Children's Advertising Review Unit*, 3 J. PUB. POL'Y & MKTG. 38, 40 (1984) (explaining CARU was "established to forestall efforts by groups outside the industry which would severely restrict or even ban advertising to children").

what was going on, what were the real concerns and what was realistic to expect from the industry. I don't know of another instance when that kind of inclusiveness went into what ultimately became a regulation.

Andrew Shen talked about self-regulation earlier, but self-regulation isn't just a company looking after its practices in order to safeguard its good name and not antagonize the consumer. There is such thing as industry-wide self-regulation and that's what CARU does. If a specific company isn't doing the right thing with its advertising or Website privacy practices, we go after them. We find them, and work cooperatively to bring the advertising or privacy practices into compliance with our Self-Regulatory Guidelines.

Some of our guidelines have no backup in law, so somebody can actually blow us off and all we do is publish the results and give them bad publicity. But our procedures do provide for referral to an appropriate government agency if there is a corollary law. So that the enactment of COPPA² which essentially mirrored guidelines that CARU initially promulgated in 1996, is helpful to us. It leaves self-regulation to take care of the bulk of the industry because most of the industry wants to be responsible.³ If they're doing the wrong thing, usually it's because they're new to the kids' arena and don't know the rules, or they're really confused as to what the rules are. But there are bad actors out there, and having COPPA there mirroring what our voluntary Guidelines require provides us with an added stick for compliance, and a place to refer the instances of non-compliance. And we have referred a couple of cases to the FTC. I certainly

² See Children's On-line Privacy Protection Act, 15 U.S.C.S. §§ 6501, 6502 (Lexis 2002) (enumerating regulations of operators of any website or online service directed to children and which collects personal information from them); see also Children's Online Privacy Protection Rule, 16 C.F.R. § 312.1 (implementing Children's Online Privacy Protection Act which prohibits unfair or deceptive practices in connection with use of personal information about children). See generally Joshua Warmund, *Can COPPA Work? An Analysis of the Parental Consent Measures in the Children's Online Privacy Protection Act*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 189, 201 (2000) (describing public workshop by FTC included representatives from internet industry, private advocates, consumer groups, and representatives of other government agencies).

³ See Campbell, *supra* note 1, at 714-18 (discussing advantages of self-regulation including increased flexibility, efficiency, increased incentive for compliance and reduced cost); Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 CARDOZO ARTS & ENT. L.J. 697, 698 (1995) (arguing electronic media outlets have experimented with a wide range of self-regulatory approaches as accountability remains strictly voluntary).

trust that we will be hearing about them from the FTC but I'm not going to talk about them.

I think a little bit of history here is appropriate. The first children's privacy case on the Internet was brought by CARU in 1997.⁴ There was no COPPA. We had this set of voluntary guidelines and it concerned Ty Inc.'s Beanie Babies Website. And they weren't doing anything evil. They had bulletin boards where children and adult collectors could swap information about their Beanie Babies. But they could also share addressees and phone numbers and whatever other information they wanted. So although there was no law in effect, Ty Inc. instituted what was then a rather baroque consent mechanism which involved several websites and pin numbers and going from one to another. But they did implement this protection, although there was no legal requirement that they do so, just our voluntary system.

Over the years, the solutions the websites and CARU came up with evolved so that by the time FTC got around to its rule making, we had some of the best practices in place. But I think one of the important things to understand is that a lot of it is evolving, a lot of it is education. It's terribly important to get the word out, and when we do, most people do want to do the right thing. Like Beth Delaney, I have to make a disclaimer too, and mine is that I didn't come out of the advertising industry. I'm a one-time anti-establishment sixties radical, and when I first heard about advertising self-regulation, I was real skeptical. But I'm a convert because having worked with the kids' industry for 10 years now, I've learned that they really mainly want to get it right. As I said, there are exceptions, but for the most part they don't want to do the wrong thing and they don't want to alienate the parents of their customers.

So what have we been doing? We've been bringing cases all along and I think the most interesting thing is that because we're a voluntary system and we have our voluntary Guidelines, we can interpret our Guidelines and purview more flexibly than the FTC. So while the COPPA Rule deals with websites targeted to

⁴ See Angela J. Campbell, *Ads2Kids.com: Should Government Regulate Advertising to Children on the World Wide Web?*, 33 GONZ. L. REV. 311, 342 (1997) (discussing CARU's review of Beanie Babies website which found several areas where visitors could enter personal information and communicate directly with each other without notice of its information collection or privacy policies).

children, or where they have actual knowledge that children are visiting, and they very specifically say what constitutes actual knowledge,⁵ we kind of pushed it. And we've been getting compliance.

So in addition to a Nickelodean.com site, which is clearly kid targeted, or a site collecting age information so you know you have a child visiting, we say, "[l]ook, if you're a general audience Website, and there's a reasonable expectation that kids are going to be visiting, then you have a responsibility to screen for age in a neutral way. This should not be done by saying 'You have to be 13, now how old are you?' This cookie should be used to keep kids from lying about their age and re-registering. So those were two places where we pushed the standard and have gotten a lot of cooperation from the industry. This is what I meant earlier by evolving "best practices."

We recently had informal inquiries, which didn't even go to the length of becoming a formal case where we had to argue with the websites, with the five major entertainment conglomerates, and they all said, you know what, that makes sense. We've got kids coming here, even though we're not targeted to kids, so okay, we'll do it. So they have implemented COPPA compliant registration procedures.

Some of the websites we've dealt with are by no means kids' websites: Lycos, which is a major portal, Alta Vista, and a lot of teen sites like Alloy and Bolt. They really are teen sites. But extrapolating from the off-line world, we know, because we've seen the demographics, that the audience that's drawn to "teen" media is the pre-teens or tweens. They're the ones who want to

⁵ The Children's Online Privacy Protection Act states:

(B) making personal information collected from a child by a website or online service directed to children or with actual knowledge that such information was collected from a child, publicly available in identifiable form, by any means including by a public posting, through the Internet, or through—

- (i) a home page of a website;
- (ii) a pen pal service;
- (iii) an electronic mail service;
- (iv) a message board; or
- (v) a chat room.

See Children's Online Privacy Protection Act 15 U.S.C.S §6501 (Lexis 2002); see also, Joseph A. Zavaletta, *COPPA, Kids, Cookies & Chat Rooms: We're From The Government And We're Here To Protect Your Children*,¹⁷ COMPUTER & HIGH TECH. L.J. 249, 257 (2001) (commenting operators of general audience chat sites who have actual knowledge that children are posting personal information in chat room or bulletin board must provide notice and obtain verifiable parental consent).

act out the "teen" lifestyle. Teens want to be adults.

So anything that calls itself "teen" is going to be drawing kids. And all of those sites have, I won't say eagerly, but certainly willingly, complied with our request that they modify their practices to comport with COPPA even they don't fall in the definition under the Rule of people who have to comply with COPPA.

So what our voluntary system has been doing is developing and evolving industry standards and best practices. And we're all learning and feeling our way together. And that includes Nancy Savitt and her legal practice, and certainly Beth Delaney and the Commission when they're looking at what websites are doing, and Andrew Shen when he's figuring out what to tell us what we all should be doing. But as we evolve these best practices, CARU has the luxury of not having to go to Congress and ask them to enact new laws. We can make these evolving best practices requirements of compliance with our Guidelines.

So gradually, we are raising the bar on COPPA compliance and what is remarkable about this is that it is with the cooperation of the industry. I think I'd like to open this up for questions because we said we were going to leave a lot of time.

