

# LEGAL UPDATE

January 2013 *By: Jeffrey C. Johnson, Robert J. deBrauwere, and Jill C. Braibanti*

## FTC ANNOUNCES MAJOR OVERHAUL OF CHILDREN'S ONLINE PRIVACY PROTECTION RULE

The Federal Trade Commission (FTC) has announced new amendments to the Children's Online Privacy Protection Rule (COPPA Rule), effective on July 1, 2013, that refine almost all aspects of the current COPPA regulatory regime. The revised COPPA Rule requires the operators of websites and services directed to or used by children younger than thirteen years of age to modify the collection, disclosure and retention of their users' personal information. This legal update highlights the most critical changes in the new COPPA Rule.

Since 2000, the COPPA Rule, issued pursuant to the Children's Online Privacy Protection Act (COPPA), 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. The FTC has spent several years reviewing the COPPA regulatory framework to keep pace with the rapid advance of technological development. In 2011 and 2012, the FTC issued proposed rule revisions and solicited public comment, resulting in the issuance of its final revisions on December 19, 2012.

The FTC's modifications in the revised COPPA Rule include updated definitions of key terms that

clarify and expand the application of the COPPA Rule, additional disclosure and information protection requirements, and new methods of obtaining verifiable parental consent from young users.

The FTC's most wide-ranging 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?

The revised COPPA Rule adds photos, videos and audio files that contain a child's image or voice to its definition of "personal information." Operators who afford children the opportunity to upload such media must comply with COPPA notice and consent requirements, even if these media files are not associated with an email address or other previously-defined personal information.

The COPPA Rule previously included in its definition a user's name, address, email address, telephone number, Social Security number, and similarly individually identifiable information. In addition to mailing address, detailed geolocation information (i.e., that provides a level of specificity similar to a user's street address) is now defined as personal information which, if knowingly collected online from those younger than 13, requires the website operator to comply with the COPPA notice and consent requirements. Personal information also includes online contact identifiers when used for direct, private user contacts in a manner similar to email addresses, such as instant message, VOIP and video chat screennames (but is not considered personal information when used for general site or

service functionality like content personalization, filtered chat, and public display as a user's account identifier).

The revised rule defines tracking cookies and other persistent identifiers that are used to recognize a user over time and across different websites or services as personal information, except where the tracking information is being collected by the operator to deliver content to children for the sole purpose of providing support for its internal operations (e.g., user authentication, site navigation, setting user preferences, serving contextual advertisements, protecting against fraud or theft, frequency capping for advertising and legal and compliance purposes) is excluded. In other words, website operators will not be required to obtain notice and consent under the COPPA Rule if the persistent identifiers are solely being used internally to maintain and improve the user experience. If persistent identifiers are used externally, for behavioral advertising or retargeting, for example, the operator must provide notice and obtain consent under the COPPA Rule. The FTC specifically intends websites that amass data on a child's online activities or are behaviorally targeting online advertising to the child, and 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) be subject to the COPPA Rule.

This expansion of what is considered personal information, particularly concerning online advertising, requires operators to reevaluate how they currently use geolocation information, third-party network advertisers, user-submitted media, cookies and IP addresses in light of the new compliance standards. As many websites generate significant revenue from network advertisers, maintaining compliance could necessitate a review of website business models.

### **WHO IS A WEBSITE OPERATOR?**

The revised COPPA Rule applies to "operators" of websites or online services 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. The amendments clarify that child-directed sites or services that allow plug-ins, advertising networks or other

outside services to collect personal information from users are also subject to COPPA compliance. This includes the plug-in networks or online services, provided they knowingly collect personal information through a website or service directed at children. The FTC states that actual knowledge in such a situation is when (i) a child-directed content provider directly communicates the child-directed nature of its content to the other online service or (ii) when a representative of the online service recognizes the child-directed nature of the content.

To make compliance practicable, such child-directed sites and services can differentiate between their visitors and comply with the notice and verifiable parental consent requirements only from those who self-identify as younger than thirteen.

### **WHAT IS COLLECTION OF PERSONAL INFORMATION?**

The FTC has revised 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. The FTC has removed the former COPPA Rule "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 that are able to implement an automated system to scrub user posts of personal information. Accordingly, website operators should review how they aggregate personal information and evaluate whether their collection methods are compliant with the new rule amendments.

### **HOW MAY WEBSITES USE COLLECTED PERSONAL INFORMATION?**

COPPA allows subject websites and services to use collected personal information for certain permitted activities without parental consent. The revised COPPA Rule clarifies that these activities include contextual advertising, frequency capping, legal compliance, site analysis, and network

communications. However, the COPPA Rule does not permit this personal information to be used to amass a profile on the subject user, including for behavioral advertising, or to contact the subject user, without obtaining verified parental consent.

The new COPPA Rule amendments modify under what circumstances operators may release personal information to third parties and service providers. Operators now must take reasonable steps to ensure that such third parties are capable of maintaining the confidentiality, security and integrity of the personal information. If operators fail to comply, and the operator benefits from allowing the third party to collect this personal information, or if the third party is acting as an agent or service provider for the operator while undertaking this collection, the operator may be held strictly liable for the third party's failure to comply with COPPA. Because of this strict liability, it is imperative that website operators review the data collection and security policies of plug-ins or other service providers they use, and set up an ongoing monitoring process regarding both compliance with, and changes to, these third party policies. As mentioned above, parties that operate plug-ins or services that collect information through the websites of others themselves become subject to COPPA compliance as an "operator" if they have actual knowledge of collecting personal information from websites or services directed at children.

The revised COPPA Rule also mandates that operators retain personal information for only as long as reasonably necessary to fulfill the purpose for which the information was collected, and requires the use of regular deletion practices to safeguard against data breaches.

#### **WHAT PARENTAL NOTICE IS REQUIRED TO BE GIVEN?**

The revised COPPA Rule shifts from emphasizing disclosures in operator privacy policies to focusing on direct notices placed at the point of information collection and disclosure throughout the site or service. In addition to linking to the website's privacy policy, key information must now be presented in a "just in time" fashion, clearly labeled and prominently located on the website home page and at each location where personal information is collected, in addition to linking to the website's

privacy policy. The required contents of the privacy policy have been streamlined to include only (1) operator contact information, (2) what information is collected and whether users are permitted to make personal information public (via message boards, chat rooms or similar means), (3) how the information is used, and (4) the operator's disclosure practices.

For applications designed to be viewed on mobile devices, the FTC now requires that the "just in time" notice be displayed on the landing or home screen of the application, i.e., the screen immediately visible after opening the application. As a best practice, the FTC also encourages app makers to have "just in time" notice displayed at the time of mobile app download, so that users can evaluate the privacy practices of the application prior to use.

Since websites typically contain these disclosures only in their Privacy Policy section, COPPA-covered websites will need to undertake a full review of their site structure and add new COPPA Rule-compliant disclosures where information is being collected.

#### **HOW MUST WEBSITES OBTAIN PARENTAL CONSENT?**

The COPPA Rule requires that websites obtain verifiable parental consent before collecting personal information from children younger than thirteen. Available Methods for doing so 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 revised rule adds new methods of verification: (1) electronic scans of signed consent forms, (2) videoconference, (3) checking parent government-issued identification against a database, and (4) using online payment systems such as Paypal or Google Payments. To accommodate innovation in the evolving digital marketplace, the FTC also sets out a voluntary approval process for operators proposing new

methods of obtaining this verifiable parental consent.

Website operators currently relying on costly methods of consent verification may wish to consider whether implementing one of the new methods would be more cost-effective.

#### **WHICH WEBSITES ARE “DIRECTED” AT CHILDREN?**

The COPPA Rule applies to websites and services directed at children younger than thirteen or those who have actual knowledge of usage by this age group. The COPPA Rule contains certain factors considered by the FTC in determining whether a website is “directed” at children, and the revisions add new factors for consideration, including music or other audio content, age of models, the presence of child celebrities and celebrities who appeal to children. The FTC will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.

#### **ADDITIONAL REVISIONS**

The revisions 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 now requires 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**

In light of the FTC’s revised COPPA Rule, 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, should thoroughly evaluate their current website operations for compliance with the new rules, focusing on collection, disclosure, third-party uses and parental consent methods.

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*The foregoing is merely a discussion of the FTC’s overhaul to the Children’s Online Privacy Protection Act 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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Jeffrey Johnson is a partner experienced 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. Representative assignments include:

- Representation of Lady Gaga in her investment in The Backplane, as reported in The New York Times on June 6, 2011
- Representation of a private equity fund in connection with the acquisition and disposition of patent portfolios and related assets
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- Representation of a public telecommunications company in connection with a strategic reorganization to maximize the value of its patent portfolio and licensed rights
- Representation of a pharmaceutical company's bioinformatics group negotiating and documenting numerous strategic alliances, software development agreements and software licenses, as well as the group's form agreements for the provision of bioinformatics services and the licensing of genomic and proteomic databases
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Jeffrey has been an invited speaker and panelist at a variety of public and private events. He is frequently called upon by the press to comment upon intellectual property and other matters.



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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*. Before attending law school, Mr. deBrauwere was a senior logistics analyst and did computer programming for Unisys Corporation. He also worked in the areas of concert and theater sound and lighting production.



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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*.