

YouTube Fine Showcases Expanded Enforcement Of COPPA

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If your company has a reasonable expectation that its online services or other technologies are being accessed by children under the age of 13, then you need to take into account the increasing risk from adverse government actions. With growing concerns about data privacy, the Children’s Online Privacy Protection Act is finding momentum among both federal and state regulators.

Case in point — on Sept. 4, the [Federal Trade Commission](#) and the New York attorney general announced[1] that [Google LLC](#) and its subsidiary, [YouTube LLC](#), will pay \$170 million, a record amount, to settle allegations that YouTube

was collecting children’s personal information without parental consent in violation of COPPA.

Additionally, the FTC recently announced that it is seeking public comment on the effectiveness of the amendments it made in 2013 to the COPPA Rule and on whether, in light of new technologies, further clarification is needed to make it more effective.[2] COPPA is also giving state attorneys general an emerging area to prosecute companies for online consumer privacy violations.

As COPPA applies to online service operators whether or not they are intentionally directing their services to children, and may apply to emerging technologies in the future, companies should understand COPPA and its potential expansion.

Children’s Online Privacy Protection Act

Congress enacted COPPA in 1998 to protect children’s online privacy and safety. There is no private cause of action under COPPA; only the FTC and state attorneys general can enforce it. State attorneys general that successfully prosecute companies under COPPA can collect damages, restitution or other compensation on behalf of their residents, including “such other relief as the court may consider to be appropriate.”

COPPA applies only to (1) operators of websites or online services directed to children under 13, or (2) operators that actually know they are collecting personal information from children under 13. Under the current COPPA Rule, personal information means any information that can identify a child, such as their name, address, telephone number or email address.

It also means photos or videos, audio files that contain children’s images or voices and geolocation data contained in these files that can identify a child’s location.

The FTC has also clarified that whether a company intends to have its site directed at children does not matter for purposes of coverage under COPPA — what matters is how the content is presented and who it is likely to attract, meaning a website or app intended



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for a mature audience (e.g., adult websites with Japanese anime) may actually be directed to children under COPPA because the website's design is likely to attract children.

Companies covered under COPPA are required to do the following: (1) provide notice on their platforms of what information is collected from children and how such information is used; (2) obtain parental consent prior to the collection, use or disclosure of children's personal information; (3) provide reasonable means for parents to review their child's collected personal information and to refuse any further collection; (4) refrain from conditioning a child's participation in the online service "on the child disclosing more personal information than is reasonably necessary to participate in such activity"; and (5) establish reasonable procedures to protect personal information collected from children.

Finally, COPPA provides companies a safe harbor if companies follow "a set of self-regulatory guidelines, issued by representatives of the marketing or online industries, or by other persons, approved" by the FTC. This means that any company following an FTC-endorsed safe harbor program will be deemed compliant with COPPA. There are currently seven^[3] FTC-approved COPPA safe harbor programs.

Recent Enforcement Actions

COPPA enforcement is on the rise among both federal and state authorities. Most recently, Google agreed to pay the largest penalty ever assessed under COPPA, with \$136 million going to the FTC and \$34 million going to New York.

In their complaint, the FTC and New York attorney general alleged that, using internet "cookies," YouTube was collecting personal information of viewers of child-directed channels without notifying parents and obtaining parental consent as COPPA requires.

Through its data collection, YouTube was able to earn millions of dollars by delivering targeted ads to viewers of those channels. In addition to the monetary penalty, YouTube agreed to implement a system where YouTube channel owners can identify their child-directed content to YouTube so it can ensure COPPA compliance. Further, YouTube must notify channel owners that their content may be subject to COPPA.

Finally, on the same day as the FTC reportedly voted to approve the proposed settlement agreement, YouTube announced a new, separate video portal for children. Notably, two FTC commissioners did not vote to approve the settlement, with one commissioner arguing that the settlement did not include individual accountability, and that the penalty was disproportionately low compared to COPPA actions taken against smaller companies.^[4]

One commissioner also took issue with the scope of the injunctive relief, arguing that it does not require YouTube to actively police whether content creators properly designate their material as child-directed. The commissioner then specifically called upon state attorneys general to bring additional actions under COPPA in an effort to obtain injunctive relief that would create a technological backstop to keep content creators honest about whether their material is child-directed.^[5]

The second-largest penalty assessed by the FTC came earlier this year, on Feb. 27, 2019, where TikTok agreed^[6] to pay \$5.7 million for violating COPPA. TikTok is an app that

allows their users to create and share videos of three to 15 seconds.

There are over 500 million worldwide users and 65 million accounts registered in the United States. TikTok knew that many of its users were children because it collected names, email addresses, what school grade the user was in, and a short biography of the user and profile pictures. TikTok also collected geolocation information from users of its app. Notwithstanding its knowledge, TikTok failed to obtain the parental consent required under COPPA, failed to provide notices on its site about the information they collected, how they used it, and what their disclosure practices were. They also failed to honor parents' requests to delete any information collected from their children.

State attorneys general have also been acting on their own to enforce COPPA. In December 2018, the New York attorney general fined [Oath Inc.](#), \$4.95 million for COPPA violations. Oath Inc. oversaw billions of auctions for display ad space on numerous websites they knew were intended for use by children. By means of these auctions, Oath Inc. collected, used and disclosed personal information of the children in disregard of COPPA, permitting advertisers to track and deliver targeted ads to those children.

Oath Inc. conducted these auctions knowing that the ads were directed to children because its clients stated that their websites were subject to COPPA, and because Oath Inc. itself conducted a review of the content and privacy policies of its clients' websites. As part of its settlement agreement, Oath Inc. agreed to stop allowing online advertisers to target children under 13 with online ads.

Additionally, in September 2018, New Mexico's attorney general sued the app-making company Tiny Lab Productions as well as its contracted advertisers for failure to obtain parental consent to collect children's data, and to give notice of the collection and use of data to their users.

Tiny Lab sold this data to third parties that allowed them to target children for advertisements. In the 85-page complaint, the attorney general states, "This action is brought to protect children in the State of New Mexico from Defendants' surreptitious acquisition of their personal information for the purposes of profiling and targeting them for commercial exploitation."^[7] A motion to dismiss by a number of defendants is currently pending before the court.

As these enforcement actions show, companies run afoul of COPPA by failing to implement procedures to detect data suggesting that children are using their websites and failing to properly maintain procedures to ensure ongoing compliance with COPPA. These enforcement actions also demonstrate the high penalties companies face — and are increasingly facing — if they fail to be proactive in protecting children's data in this privacy-conscious age.

FTC's Request for Comments

On July 25, 2019, the FTC issued^[8] a request for public comments regarding its current rule applying and enforcing COPPA. The FTC is seeking comments four years before its typical review period because "of questions that have arisen about the Rule's application to the educational technology sector, to voice-enabled connected devices, and to general

audience platforms that host third-party child-directed content.”[9]

The FTC is also seeking comments to gauge the effectiveness of its current COPPA Rule and to determine whether it should make revisions to the rule’s major provisions, including, among other things, its definitions, its safe harbor provisions and its parental consent requirements.

Some of the questions the FTC is seeking public comments on include:

- What impact has the current COPPA Rule had on children, parents, consumers and website operators?
- Do the factors currently listed in the COPPA Rule adequately answer whether a website or online service is directed to children?
- How is COPPA enforcement impacted by emerging technologies such as interactive television, interactive gaming, chatbots, and other similar interactive media?
- Should there be a specific exception from parental consent for the use of educational technology in schools?
- Should the FTC revise and expand its definition of “personal information”?
- Should there be additional means for companies to obtain parental consent given the change in technology over the last few years?

Interested parties can submit their comments no later than Oct. 23, and can attend in person or via webcast a public workshop on Oct. 7 to review the FTC’s current COPPA Rule. To what extent the FTC will consider these comments and substantially alter its current rule applying COPPA is unclear, but given the growing attention to COPPA enforcement and online privacy in general, companies should expect, at a minimum, an expanded definition of personal information and significant debate around any exceptions to parental consent.

Guidance[10] for COPPA Compliance

The aforementioned cases illustrate several things companies can do to ensure their websites or other online platforms remain COPPA compliant, including:

- Companies should closely monitor their user’s data when the users disclose their age.
- Where the user indicates that he or she is under 13, the registration process should automatically seek parental emails, and the parent should be emailed with a consent request to activate the children’s registration.
- Companies should have reasonable procedures to verify that the parent is actually consenting to the use of the child’s personal information — e.g., sign a consent form; answer knowledge-based questions that only a parent would know; have the parent call the company; and have the parent provide government-issued identification.
- Companies should closely monitor parental complaints, as that may indicate that the company is subject to COPPA.
- Companies should clearly and conspicuously disclose the personal information the company collects, how that information is used, and whether third parties have

access to it. The company's policy should also account for the practices of any other parties involved in the company's services — e.g., ad networks.

- Companies should adopt policies and procedures to properly vet third parties that will interact with their website or app and thus collect, use and allow others access to children's personal information.

Conclusion

As children spend more time online and use emerging technologies, COPPA enforcement is likely to continue growing at both the state and federal levels. Companies that provide online services that children may use, even if the service is not intended for children, should be aware that COPPA may apply to them, and those companies should therefore be proactive in ensuring that they are COPPA compliant. Moreover, companies that are gathering consumer data through other technologies should stay informed about how the FTC may modify and broaden COPPA, as they may come within its scope and also be subject to both state and federal scrutiny.

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[1] See <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

[2] See <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-seeks-comments-childrens-online-privacy-protection-act-rule>.

[3] See <https://www.ftc.gov/safe-harbor-program>.

[4] See <https://www.ftc.gov/public-statements/2019/09/statement-commissioner-rohit-chopra-regarding-youtube>.

[5] See <https://www.ftc.gov/public-statements/2019/09/statement-commissioner-rebecca-kelly-slaughter-regarding-youtube>.

[6] See <https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc>.

[7] See <https://int.nyt.com/data/documenthelper/295-new-mexico-kid-apps-complaint/206d4ea39896e264fe3a/optimized/full.pdf>.

[8] See <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-seeks-comments->

childrens-online-privacy-protection-act-rule.

[9] See <https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online>.

[10] See also FTC, Children’s Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business, <https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance>.