

FRIEND, HUDAK & HARRIS, LLP

ATTORNEYS AT LAW
3 Ravinia Drive, Suite 1450
Atlanta, Georgia 30346-2117
(770) 399-9500
(770) 395-0000 Fax

A Briefing on E-Commerce, Corporate/Commercial law

COPPA: Regulating Use of Information Gathered from Children via the Internet

by Michael K. Stewart¹

OVERVIEW

In October 1999, the Federal Trade Commission (“FTC”) issued final regulations² to implement the Children’s Online Privacy Protection Act of 1998 (“COPPA”).³ Briefly, these final regulations, which became effective on April 21, 2000,⁴ require operators of web sites directed to “children” (defined by COPPA as minors under thirteen (13) years of age),⁵ as well as operators of any web site who acquire actual knowledge that they have collected the personal information of a child, to comply with certain parental consent and notice requirements to protect the privacy of children using the Internet.

Compliance with COPPA will not be easy or inexpensive, and web site operators have

¹Michael K. Stewart is an associate at Friend, Hudak & Harris, LLP, where he practices e-commerce, technology and intellectual property-related law. Mr. Stewart obtained his J.D., *magna cum laude*, from the University of Georgia and his B.A. from Emory University.

²Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59,888 (1990) (to be codified at 16 C.F.R. § 312).

³Title XIII, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (October 21, 1998), codified at 42 U.S.C. §§ 6501-6507.

⁴COPPA should be distinguished from the Child Online Protection Act, a criminal statute which regulates the distribution via the Internet of material “harmful to minors”. The latter was the subject of a court decision which enjoined enforcement of that statute on First Amendment grounds.

⁵42 U.S.C. §§ 6501(1).

already begun to face difficulties in complying with the impending notice and consent requirements set forth in the FTC's rules. In late February 2000, while attempting to satisfy those obligations, the web site Surfmonkey.com inadvertently disclosed the e-mail addresses of thousands of children. At the same time, NBCi, operator of Snap.com and other sites which provide Internet services to children, announced that access to those services by children under the age of thirteen would be discontinued indefinitely due to the potential costs imposed by compliance with COPPA.

A summary of the FTC's rules, along with a discussion of their applicability to web sites which are not directed to children, follows.

BACKGROUND

COPPA, which was enacted in October of 1998, regulates the manner by which (and circumstances under which) web site operators may collect, use and disclose certain information collected online from children. Under COPPA, the FTC was given one year to issue rules to implement the statutory privacy protections. Following publication of a proposed rule⁶ and consideration of comments from interested parties, the FTC issued its final regulations on October 20, 1999.

KEY PROVISIONS OF THE FTC'S REGULATIONS

Who Must Comply, and When?

Under COPPA, as implemented by the FTC's rules, operators of web sites which are targeted to, or that knowingly collect information from, children under the age of thirteen must obtain parental consent before collecting, using, or disclosing such childrens' "personal information" (defined to mean any information which directly or indirectly identifies an individual child, and includes names, e-mail addresses, and even "cookies")⁷ via the Internet. In addition, these operators must provide parents with notice of site policies with respect to the collection, use and disclosure of such personal information, and must allow parents to control the use or dissemination of information regarding their child.

However, COPPA does not regulate every instance in which a web site operator gathers personal information from a child. COPPA duties are implicated only with respect to personal information which is actually collected (i) online, *i.e.*, where the personal information of a child

⁶Children's Online Privacy Protection Rule, 64 Fed. Reg. 22,750 (1999) (proposed April 27, 1999).

⁷42 U.S.C. §§ 6501(8).

is actually transmitted to the operator via the Internet,⁸ and (ii) on or after April 21, 2000.⁹

Furthermore, an operator of a web site not specifically targeted to children - a so-called “general audience site” - has no COPPA duties until she acquires actual knowledge that she is collecting, using or disclosing personal information of a child. Upon discovering that she has collected the personal information of a child, that operator may discharge her COPPA duties by deleting such personal information from her system before it is disclosed or otherwise used. However, if the operator intends to retain that information (or use or disclose it), she must comply with all notice and consent obligations set forth in the final regulations below.¹⁰ Importantly, with respect to the “actual knowledge” standard applicable to general audience web sites, operators of a general audience web site have no general duty to investigate the ages of those who visit the site.¹¹

For the remainder of this article, operators of web sites directed to children, along with operators of general audience web sites which knowingly collect, use or disclose personal information of a child, will be referred to collectively as “regulated web sites”.

Verifiable Parental Consent

Under COPPA, the operator of a regulated web site will be required to obtain “verifiable parental consent” before collecting, using, or disclosing personal information from a child. While COPPA defined “verifiable parental consent” to mean “any reasonable effort (taking into consideration available technology) . . . to ensure that a parent of a child . . . authorizes the collection, use, and disclosure” of a child's personal information,¹² that statute did not mandate any particular method of obtaining such consent.

Methods of Obtaining Consent

The FTC has adopted a temporary “sliding scale” approach that will allow operators of regulated web sites to use differing consent methods based upon the risk to a child’s safety or privacy posed by the site’s intended use of that child’s personal information. Specifically, for

⁸Children’s Online Privacy Protection Rule, 64 Fed. Reg. at 59,889.

⁹Children’s Online Privacy Protection Rule, 64 Fed. Reg. at 59,898.

¹⁰Children’s Online Privacy Protection Rule, 64 Fed. Reg. at 59,889 - 58,890.

¹¹Children’s Online Privacy Protection Rule, 64 Fed. Reg. at 59,892.

¹²42 U.S.C. §§ 6501(9).

the two-year period beginning April 21, 2000, operators of regulated web sites are permitted to use less reliable methods to obtain verifiable consent for “internal” uses of a child’s personal information (uses which do not implicate disclosure of such information to third parties). Operators are permitted to obtain consent to such “internal” uses via e-mail, so long as additional steps are taken to ensure that the parent has indeed provided consent (*e.g.*, sending a delayed confirmatory e-mail or letter to the parent following receipt of consent).¹³ Of important practical note to e-commerce sites, disclosure of a child’s personal information to a third party fulfillment entity (*e.g.*, for purposes of shipping merchandise ordered by a child) appears to be an “internal” use under the FTC’s rules, so long as that fulfillment entity makes no other use of the child’s information.

However, where the operator of a regulated web site seeks parental consent in connection with activities that pose greater risks to the safety and privacy of children - those which implicate disclosure of a child’s personal information to a third party (*e.g.*, chat rooms, message boards, creation of an e-mail account), that operator will be required to obtain consent via a method which provides greater assurance that the person providing such consent is indeed the child’s parent. Such methods may include consents transmitted to the operator via e-mail (so long as that e-mail is accompanied by a PIN or password provided by the operator), postal mail, facsimile or toll-free telephone number, or use of a credit card or digital signature.¹⁴

The availability of “sliding scale” compliance is set to terminate on April 21, 2002. After that date, the more reliable methods of consent verification will be required for all uses of information, unless the FTC determines that more secure electronic methods of consent are not widely available.¹⁵

Parental Choice Regarding Disclosure of Information to Third Parties

The FTC’s regulations require operators of regulated web sites to give the parent the option to consent to the collection and use of the child’s personal information without consenting to disclosure of his or her personal information to third parties.¹⁶

Exceptions to the Parental Consent Requirement

¹³See 16 C.F.R. § 312.5 and discussion at Children’s Online Privacy Protection Rule, 64 Fed. Reg. at 59,898-59,902.

¹⁴See 16 C.F.R. § 312.5 and discussion at Children’s Online Privacy Protection Rule, 64 Fed. Reg. at 59,898-59,902.

¹⁵See 16 C.F.R. § 312.5(b).

¹⁶16 C.F.R. § 312.5(a).

The FTC's regulations permit a web site operator to make use of a child's information under certain limited circumstances without obtaining prior parental consent. Specifically, these exceptions permit web site operators to collect a child's online contact information (e.g., an e-mail address) without parental consent in order to:

- (i) seek parental consent or provide parental notice;
- (ii) respond directly to a specific, one-time request of the child (e.g., a request for information);
- (iii) respond directly more than once to a specific request of the child but for no other purpose, so long as reasonable efforts are made to notify the child's parent;
- (iv) protect the safety of the child but for no other purpose, so long as reasonable efforts are made to notify the child's parent; and
- (v) protect the security of the web site, take precautions against liability or to provide such information to law enforcement, so long as the information is used for no other purpose.¹⁷

Privacy Notice on the Web Site and Notice to Parents

Under the FTC's final regulations, a regulated web site must create a Privacy Notice which (i) provides the name of and contact information for the operator of the web site; (ii) identifies the types of personal information collected from children; (iii) describes how the personal information is used; and (iv) indicates whether the information is disclosed to third parties. Furthermore, the Privacy Notice must inform parents of their right to review the child's personal information, have the child's personal information deleted and/or refuse to permit further collection or use of the child's information at any time. Finally, the Privacy Notice must disclose that the operator is prohibited from conditioning a child's participation in an activity upon the disclosure of more personal information than is reasonably necessary to participate in that activity.

The operator of a regulated web site must place prominent links to the Privacy Notice on the home page of the web site and at each separate area of the web site where personal information is collected from children, and must provide parents with updated copies of the Privacy Notice whenever there is a material change in how the web site collects, uses or

¹⁷16 C.F.R. § 312.5(c).

discloses a child's personal information. Operators of regulated web sites must also make reasonable efforts to transmit this Privacy Notice to parents when consent to collection, use or disclosure of a child's personal information is sought.¹⁸

Safe Harbor Program

COPPA, as implemented by the FTC's regulations, provides that an operator's compliance with FTC-approved self-regulatory guidelines will serve as a safe harbor to any enforcement action arising out of alleged violation of the FTC's regulations. Specifically, if an operator can demonstrate that it is in full compliance with FTC-approved guidelines, the operator will be deemed to be in compliance with the FTC's regulations.¹⁹ Though the FTC's approval of those guidelines is a prerequisite for safe harbor treatment, an operator may rely upon its compliance with any FTC-approved guidelines, whether promulgated by that operator or otherwise.²⁰

To qualify for Commission approval, the guidelines must, *inter alia*, (i) offer children the same or greater protections than those afforded by the FTC's rules; (ii) provide a mechanism for periodic reviews of the operator's information practices by an industry group or independent assessor; and (iii) provide incentives for compliance with the guidelines (e.g., self-imposed penalties for non-compliance).²¹

Enforcement

Violations of COPPA or the rules promulgated thereunder are actionable by the FTC as a violation of a rule regulating unfair or deceptive trade practices within the meaning of Section 18(a)(1)(B) of the Federal Trade Commission Act,²² meaning that violators may be subject to injunctive relief and civil penalties of up to \$10,000 per day for continuing violations.²³ In addition, COPPA permits the attorney general of each state to pursue compensatory and

¹⁸See 16 C.F.R. § 312.4(b) and discussion at Children's Online Privacy Protection Rule, 64 Fed. Reg. at 59,893-59,898.

¹⁹16 C.F.R. § 312.10.

²⁰Children's Online Privacy Protection Rule, 64 Fed. Reg. at 59,906.

²¹16 C.F.R. § 312.10(b).

²²16 C.F.R. § 312.9.

²³See 15 U.S.C. 45.

injunctive relief on behalf of the residents of such state against operators who violate the FTC's regulations.

PRACTICAL IMPLICATIONS

The following considerations should be kept in mind regarding web sites operated by clients:

- \$ Operators of web sites which do not knowingly collect, use or disclose personal information of children under the age of thirteen do not need to implement special procedures to comply with COPPA. Web sites seeking to avoid future COPPA obligations should, if consistent with the business model utilized by the web site, refrain from soliciting (or allowing) the transmission of any age-identifying information via the web site. This would include not only refraining from asking the age of a user, but also from asking questions which would solicit information by which the age of a user could be ascertained (*i.e.*, "what grade of school are you in?").

- \$ If a web site operator acquires actual knowledge that she has collected personal information of a child under the age of thirteen after April 21, 2000, she may still avoid further obligations under COPPA by deleting such information before the same has been further used or disclosed to a third party. However, in the event that the operator chooses to retain the personal information of a child, the operator must obtain parental consent.

- \$ If the operator has collected, used or disclosed personal information of a child prior to April 21, 2000, the operator does not need to seek parental consent as with respect to that prior collection, use or disclosure. However, if the operator seeks to continue to collect additional personal information from that child after April 21, 2000, the operator must comply with COPPA to the same extent as it must with all other collection, use or disclosure of such personal information after that date; namely, the operator must (i) obtain verifiable parental consent prior to collection, use or disclosure of personal information of children, and (ii) promulgate a Privacy Notice detailing the web site's information practices in a manner consistent with the FTC's regulations. Thereafter, the operator must seek new parental consent to, and amend its Privacy Notice to reflect, any new or additional types of collection, use or disclosure not previously consent to by the child's parent.

This article is intended solely to serve as an overview of the COPPA rules as implemented by the FTC, and should not be construed as legal advice. Specific issues raised by a web site's use of a child's personal information should be analyzed by direct reference to the texts of the COPPA statute and the FTC's rules related thereto.

These materials are merely a summary, published for tutorial purposes only, and are not published for the purpose of rendering legal advice.

About the Firm

FRIEND, HUDAK & HARRIS, LLP concentrates its practice in the representation of information technology clients. The Firm's attorneys combine extensive experience in corporate/commercial law with mastery of computer/communications law and intellectual property. As a result, the Firm is uniquely suited to represent growing information technology companies across all areas of corporate, commercial and information technology law.