


PAUL, WEISS, RIFKIND, WHARTON & GARRISON

THE CHILDREN'S ONLINE
PRIVACY PROTECTION ACT

CAREY R. RAMOS - JACK F. BAUGHMAN

MAY 10, 2000



On April 21, 2000, regulations implementing the Children's Online Privacy Protection Act ("COPPA") became effective. The regulations, which are designed to protect the privacy of children using the Internet, impose important requirements on all operators of websites and online services targeted at children. Most significantly, any online operator who knowingly collects personal information from children over the Internet now must first seek verifiable parental consent before doing so and before disclosing any information collected to third parties.

COPPA -- Background

The president signed COPPA into law on October 21, 1998. The purpose of the statute was to regulate unfair and deceptive practices in connection with the collection and use of personal information from and about children on the Internet.

The statute charged the Federal Trade Commission (the "FTC") with adopting implementing regulations. The FTC has now promulgated regulations, which became effective April 21, 2000. Compliance with those regulations is mandatory.

The FTC Regulations

The FTC regulations impose a variety of requirements on the operators of websites and online services. Generally speaking, these rules require operators that collect personal information from children to provide notice of what information is collected and how it is used.

Who Must Comply

The COPPA regulations apply to two types of commercial website or online service "operators": (1) operators of websites directed at children under 13 that collect personal information from children visiting the site; and (2) any other operator that has actual knowledge that it is collecting personal information from a child.

To determine whether a website is directed at children, the FTC will consider several factors, including the subject matter; visual or audio content; the age of the models on the site; language; whether advertising on the site is directed to children; information regarding the age of the actual or intended audience; and whether the site uses animated characters or other child-oriented features.

To determine whether an entity is an "operator," the FTC will consider who owns and controls the information; who pays for the collection and maintenance of the information; what the pre-existing contractual relationships are in connection with the information; and what role the website plays in collecting or maintaining the information.

"Personal information" is defined as "individually identifiable information about an individual collected online" and includes, a full name, home address, telephone number, social security number, email address, other online information (such as an

instant- messaging user identifier) that reveals an email address or any other information that would allow someone to identify or contact a child. The statute and the regulations also cover other types of information, such as hobbies, interests, and information collected through cookies and other types of tracking mechanisms, when they are tied to an identifiable person.

As should be evident, these provisions are broad, and anyone operating a website or online service that could potentially attract children should consider very seriously the COPPA requirements.

General Compliance Requirements

The COPPA regulations impose five basic requirements on operators. Generally, an operator must:

- (1) provide notice on the website or online service of what information it collects from children, how it uses such information and its disclosure practices for such information;
- (2) obtain verifiable parental consent prior to any collection, use or disclosure of personal information from children;
- (3) provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance;
- (4) not condition a child's participation in a game, the offering of a prize, or any other activity on the child disclosing more personal information than is reasonably necessary to participate in such activity; and
- (5) establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of the personal information collected from children.

The Notice Requirement

An operator of a website or online service directed at children must post a link to a notice of its information practices on its homepage and in each area of the site where personal information is collected from children. An operator of a general audience website or online service with a separate children's area must post a link to a notice of its information practices on the home page of the children's area. In all such locations, the notice must be clearly labeled as a notice and placed in a clear and prominent place. The COPPA regulations contain detailed requirements regarding the contents of the notice, which should be reviewed carefully by counsel.

Obtaining Parental Consent

Under COPPA, one rule is paramount: before collecting or disclosing any personal information from a child, an operator must obtain verifiable parental consent from the child's parent. There are detailed specific requirements that should be reviewed carefully by counsel. In general, however, the FTC has elected to adopt a sliding scale approach until April 2002. Under this approach, the required method of obtaining consent will vary depending on how the operator uses a child's personal information. If the operator uses the information only for internal purposes, a less rigorous method of consent is required than if the operator discloses the information to others.

With respect to internal uses (such as marketing back to a child based on his or her preferences), operators may use email to get parental consent, but must take additional steps to increase the likelihood that the parent has, in fact, provided the consent. For example, operators may seek confirmation from a parent in a follow-up email, or confirm the parent's consent by letter or phone call.

If the operator wants to disclose a child's personal information to third parties, or make it publicly available (for example, through a chat room or message board), the sliding scale requires a more reliable method of obtaining parental consent. Options include: having the parent mail or fax a signed consent form; accepting and verifying a credit card number; taking calls from parents through a toll-free telephone number staffed by trained personnel; having the parent send an email using a digital signature; and having the parent send an email accompanied by a PIN or password.

There is an additional, specific requirement relating to disclosure to third parties. An operator must give the parent the option to agree to the collection and use of the child's personal information without agreeing to the disclosure of information to third parties. That is, a parent can grant consent to allow his or her child to participate in activities on the site without consenting to the disclosure of the child's information to third parties.

An operator also must take care to send a new notice, and obtain a renewed parental consent, if there are material changes to the collection, use or disclosure practices to which the parent previously agreed. For example, if an operator obtained parental consent for a child to participate in a contest, but now wanted to offer the child the chance to participate in chat rooms, a new notice and consent would be required.

Parental Review & Revocation of Consent

At a parent's request, operators must disclose the types of personal information they collect from children as well as the specific information collected from the parent's child. Operators must ensure that they are dealing with the child's parent before they provide access to the child's specific information.

At any time, a parent may revoke his or her consent for the operator to use or collect a child's personal information. A parent can also require the operator to delete any personal information about the child that the operator has already collected. In turn, the operator may terminate any service provided to the child, but only if the information at issue is reasonably necessary for the child's participation in that activity.

Exceptions

There are a number of important exceptions to the parental consent requirement. Specifically, parental consent is not required where:

- (1) an operator collects a child's or parent's email address to provide notice and seek consent;
- (2) an operator seeks an email address to respond to a one-time request from a child and then deletes it;
- (3) an operator collects an email address to respond more than once to a specific request, such as for a subscription to a newsletter, in which case, the operator must notify the parent that it is communicating regularly with the child and give the parent the opportunity to stop the communication before sending a second communication to a child;
- (4) an operator collects a child's name or online contact information to protect the safety of a child who is participating on the site, in which case, the operator must notify the parent and give the parent the opportunity to prevent further use of the information; and
- (5) an operator collects a child's name or online contact information to protect the security or liability of the site, or to respond to law enforcement and does not use it for any other purpose.

Although these exceptions are significant, they should be used sparingly and any operator considering relying on them should review them carefully with counsel.

Safe Harbors

Industry groups and others can apply to have self-regulatory programs approved by the FTC. If approved, these programs would provide a "safe harbor" for operators. Operators who comply with one of these self-regulatory programs will be deemed to be in compliance with COPPA. To date, no self-regulatory programs have been approved, although some proposals have been submitted to the FTC for review.

* * *

This memorandum is designed only to provide an overview of COPPA and its requirements. It is not intended to provide legal advice. Therefore, no legal, regulatory or business decision should be based on its content.

Carey R. Ramos is a partner and Jack F. Baughman is an associate in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison.