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COMPLIANCE

Marketing to Kids In the Online Age

This holiday season again reinforced what advertisers already know—the kids market can be an absolute gold mine. That said, while marketing to children presents tremendous opportunities, challenges lurk not that far below the surface. One of those challenges is the Children's Online Privacy Protection Act of 1998 (COPPA). Despite the law's passage over a decade ago, despite all of the attempted education, and despite all of the previous enforcement activities, companies are still getting into hot water over COPPA violations.

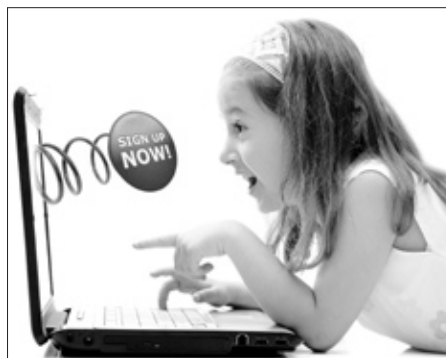
The Federal Trade Commission has brought enforcement actions, and the Children's Advertising Review Unit of the Council of Better Business Bureaus (CARU) has been especially active recently, issuing warnings and requesting changes to Web sites' marketing practices. Advertisers as diverse as the brand owner Iconix, a fan club for the Jonas Brothers, and even a site that goes by kidzworld.com, have been tripped up over their respective marketing practices. It cannot be THAT hard to comply with the law—can it?

COPPA was an attempt early in the Internet era to protect kids by controlling online marketers' collection of personally identifiable information from children under 13 years old. COPPA applies to operators of Web sites specifically directed to kids under 13, operators of general audience Web sites

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with actual knowledge that they collect kids' personal information, and operators of general audience Web sites with separate kids' oriented Web pages. It requires, among other things, that verifiable parental consent be obtained before a Web site collects, uses, or discloses the personal information of a child under 13 years old. COPPA also requires that these Web sites provide notice of what information is collected, how the Web site uses the information, and the disclosure practices for such information.



Enforcement

The FTC is charged with enforcing COPPA, and it has brought a number of enforcement actions over the years. Recently, the FTC investigated Web sites operated by Iconix Brand Group Inc., the owner of several teen

and children apparel brands (Mudd, Candie's, Bongo), for COPPA violations. The companies agreed to settle the FTC's allegations by, among other things, paying a fine of \$250,000.

The FTC alleged that Iconix required consumers to provide their personal information to receive updates, enter sweepstakes, and the like. Through these requests for personal information, the FTC alleged, Iconix knowingly collected personal information from approximately 1,000 children without informing the parents or obtaining prior parental consent. The Web sites also permitted, in some instances, kids to publicly share personal stories and photos online. This all transpired despite statements in Iconix's privacy policies that it did not collect information from children without parental consent and that it would delete any such information about which it became aware.

When faced with the FTC's allegations, the company denied any wrongdoing, and responded by saying that any non-compliance, in the company's view, was inadvertent and did not result in any harm to any children. The settlement with the FTC, though, required Iconix to pay the \$250,000 civil penalty, and among other things, delete within five days all personal information collected and maintained in violation of COPPA.¹

Self-Regulation Program

Although it does not have the authority to issue fines or bring legally binding enforcement proceedings, CARU, the arm of the advertising industry's self-regulation program geared toward children's advertising, does have the power of publicity and persuasion. CARU evaluates child-directed advertising and

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promotional material for compliance with COPPA as well as compliance with its own Self-Regulatory Guidelines for Children's Advertising. Unlike the FTC, CARU's evaluations result only in non-binding recommendations for the advertiser to consider implementing. However, most advertisers do, as CARU recommendations are closely tracked by the media, and because it can and does refer non-compliance to the FTC.

CARU learns of cases both through its own monitoring and through third parties who bring violations to its attention. Recently, through its routine monitoring practices, CARU determined that kidzworld.com needed to update its practices. Kidzworld.com features chat rooms, online games, message boards, and the like targeted to children ages 6 to 17, and live personnel actively monitor and moderate all interactivity on the site. The registration feature required users to enter a variety of information, including date of birth. If the date of birth indicated that the user was under 13, a field for "parent's email" appeared. The appearance of the parent's e-mail field could be construed to be a "tip off" for kids to go back and change their date of birth, which they could do very simply on that same page.

CARU determined that the tip off and the ability to go back and change the inputted age did not comply with COPPA. In response, kidzworld.com agreed to screen for age and include a session cookie that would prevent a new registrant from going back and changing the date of birth.

CARU was also concerned about the site's "Invite Your Friends" functionality and the potential for disclosure of the member's personally identifiable information to third parties. The site required the use of the member's first and last name, and e-mail address, and the e-mail to a friend would be generated from the member's e-mail account. The site operator disagreed with CARU's concern that a child's personally identifiable information would be disclosed to a third party because it was a reasonable assumption that the member and recipient knew each other when the member already has the recipient's e-mail address. Notwithstanding the disagreement, the site operator agreed to remove the "Invite Your Friends" functionality entirely.

Earlier this year, CARU recommended alterations to a paid membership fan site for the Jonas Brothers. The site collected personal information and payment information to register, and stated "If you

are under 13 years of age and live in the U.S.... your parent or legal guardian may complete this registration on your behalf." In addition, to sign up for an online newsletter provided by the site, the user had to provide various personal information. If a user entered a date of birth that indicated that she was under 13, she could not sign up for the newsletter and a message appeared that stated "U.S. residents must be thirteen years of age or older to sign up for jonasbrothersfanclub.com. If you are under 13 please check with your parent or guardian about joining the site."

This kind of language is considered to be a "tip off" to kids that they could lie about their age in order to register for the site. Users could nevertheless simply go back and change their birth dates to indicate that they were 13 or older. Despite these measures, and despite the obvious target audience for a Jonas Brothers fan club, the Web site's privacy policy stated that the site was not directed to individuals under the age of 13.

First, CARU evaluated the site and determined that because a large percentage of the Jonas Brothers' fans are kids younger than 13 (who knew?) and the appearance of the site itself indicated that it targeted that audience, a reasonable expectation existed that kids under 13 would visit the site. CARU was also concerned that simply stating that children should get their parents to register was not sufficient to comply with COPPA's "express parental consent" requirement. Additionally, CARU noted that the "tip off" about the age requirement and the easily changeable birth year made their screening mechanisms unreliable and contrary to CARU's guidelines, which require that age-screening questions be asked in a neutral manner to discourage inaccurate answers from children. In response to CARU's concerns, the operator of the Web site, Ultrastar Entertainment, changed its policy to permit those under 13 to register for the newsletter, but removed its "tip off" language and required a parental e-mail address to send notification pursuant to COPPA.

COPPA compliance is not especially difficult, but Web sites can get tripped up in myriad ways. New issues are also emerging as the Internet evolves, such as how to deal with Internet access through mobile devices by kids under 13, and the popularity of social networking sites. In dealing with these as well as traditional online compliance issues, companies should be aware of the potential pitfalls involved with COPPA and the various

compliance obligations and procedures. A small amount of prevention, i.e., compliance, is worth a pound of cure, i.e., hefty FTC fines or negative CARU publicity.

Recommendations

Here are some recommendations from COPPA and CARU Guidelines on compliance:

- Where personal information is collected, screen for kids under 13 years old and either prevent them from registering or obtain prior verifiable parental consent or notice and opt-out.

- Ask age screening questions to avoid "tip off" language which would prompt kids to lie about their age (e.g., "you must be at least 13 to use this site!").

- Include a "session cookie" to prevent kids from changing their date of birth after entering a date of birth that indicates they are under 13.

- Detail in the company privacy policy each item of personal information (full name, e-mail address, mailing address, phone number, etc.) collected from children, how such information is collected, and how it is used and shared, including whether a child can make personal information available through a chat room or by other means.

- Include in the company privacy policy a notice that parents can review and delete their kids' personal information from company records, and the specific contact information for doing so.

- Look into registering with FTC-approved COPPA "safe harbor" programs such as those run by CARU, Truste, the Entertainment Software Ratings Board, or Privo.

- Make sure company day to day practices are fully consistent with those stated in the Privacy Policy!

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1. As a side note, the \$250,000 fine is not the largest FTC COPPA fine—two advertisers have tied for the distinction of paying \$1 million to resolve alleged COPPA violations: Sony BMG Music, which settled alleged COPPA violations with the FTC in December 2008, and Xanga, which similarly settled with the FTC in 2006.