

2013 ANA ADVERTISING LAW & PUBLIC POLICY CONFERENCE

CARU, COPPA AND CHILDREN'S PRIVACY: AN ANALYSIS OF THE INTERPLAY OF FEDERAL ENFORCEMENT AND SELF-REGULATION

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INTRODUCTION

In January 2001, the Children's Advertising Review Unit (CARU) became the first Federal Trade Commission-approved Safe Harbor under the Children's Online Privacy Protection Act of 1998 (COPPA). Since then, CARU has addressed over 200 cases in which children's privacy has been at issue. As a Safe Harbor, CARU can provide advertisers with certainty in a confidential environment. Advertisers who seek and obtain approval for their privacy practices in relation to children by CARU under its Guidelines for the Self-Regulatory Program for Children's Advertising (Guidelines) are deemed in compliance with COPPA and are insulated from FTC enforcement actions. COPPA and the Guidelines have evolved together over the years and share many similarities. Yet, they are not identical, and in light of the revisions to the FTC COPPA Rule¹, which go into effect July 1, 2013, including the new requirements imposed on Safe Harbors, it is worth considering how these two institutions will work together in the years to come. It is also important to consider whether one can or should rely on the Guidelines or whether the new FTC COPPA Rule revisions and the closer relationship between the FTC and CARU have eliminated the utility of the Guidelines as a distinct source of guidance for businesses.

This article explores, through two case studies, the relationship between COPPA and the Guidelines. The Guidelines provide a helpful framework for COPPA compliance, but there are differences, and an observer of children's advertising law should consider whether those differences are a positive sign of self-regulation independence and whether the closer oversight by the FTC under the revised COPPA Rule could have a chilling effect on participation by advertisers. Furthermore, there is a tendency by CARU to find bridges to the COPPA Rule even whether its own Guidelines would not offer such linkage. This limited analysis suggests that the Guidelines may already be of limited utility to COPPA compliance and that the COPPA Rule is

¹ 16 C.F.R. Part 312.

beginning to eclipse self regulation in the area of children's privacy. More analysis should be done to confirm this particularly in 2013-2014 after the new revisions to the COPPA Rule go into effect.

MISS O AND FRIENDS

In HDGroup, LLC, CARU Case # 5541 (1/9/2013), a social networking site for teens and tween girls allowed users to create their own profiles, comment on other members' postings, play games, and participate in online activities and contests. The registration process involved the collection only of a first name, birthday, screen name, and password. Having registered with this basic information, a registrant could participate in many activities on the site. Those basic (Level 1) members could not communicate with other members. However, if the registrant wished, she could advance to a "higher" level (Level 2), which permitted communication among members. But, to advance to Level 2, the registrant had to seek parental consent. The mechanism for obtaining parental consent involved the provision by the registrant of a parent's email address. At that point, according to CARU, the operator would send to the parent an email stating that if the parent affirmatively clicked "approve," his or her child would enjoy Level 2 services on the site, including the ability to communicate with other members. CARU also described a "tell-a-friend" feature that would enable registrants, even at the basic level, to enter her address and a friend's email address and send a canned email message encouraging the friend to join. The recipient could see the sender's email address. And, the site also featured a plug-in link to Twitter.

CARU determined that HDGroup's method of obtaining parental consent was insufficient and recommended modification.

1. Data Collection

At the basic level (no communication among members), children could enter a first name, birthday, screen name and password. CARU found that once registered, a user could enter an email address into a profile page and that this profile page could be viewed by others. Under the CARU Guidelines, an advertiser must obtain verifiable parental consent when it collects personal information "(such as email addresses, screen names associated with other personal information,

phone numbers or addresses) that will be publicly posted, thereby enabling others to communicate directly with the child online or offline, or when the child will be otherwise able to communicate directly with others.”² Thus, the email address that children could voluntarily add to their profile and that could be viewed by others constituted “collection” under the Guidelines and required parental consent. Thus, even at Level 1, HDGroup was found to be in contravention of the Guidelines.

It got worse at the higher membership level. Users could “upgrade” to Level 2 at which they could post messages on other members’ “walls,” submit fashion creations, and take other actions that would permit users to share personal information with others. At this level, HDGroup employed a parental consent mechanism. Once a user selected the button that requested the upgrade to Level 2, the user was asked for his or her parent’s email address. Once in receipt of that email address, HDGroup would send an email that outlined that the child was seeking access to “submission-related sections” of the Miss O & Friends website. But, the message did not explain exactly how much sharing could occur on the site. Furthermore, the parent merely had to check a box to “approve” the child’s upgrade. CARU found that there was nothing “verifiable” about this consent approach. (The CARU Guidelines expressly refer to and incorporate the FTC COPPA Rule definition of “verifiable parental consent.”)

2. Refer-a-Friend

CARU then observed that HDGroup’s refer-a-friend system permitted users to share their email address with the recipient of the referral email. CARU has no Guideline on this point. Rather than address the refer-a-friend mechanism as a form of disclosure that requires parental consent (the same as placing an email address in the profile), CARU chose to refer to the FTC staff’s FAQs in which the FTC addresses “tell-a-friend” practices. CARU never explained what its basis was under the Guidelines, but nevertheless it stated that the refer-a-friend practices “were not in compliance with *the Guidelines* or COPPA.” (Emphasis added.)

² CARU Guidelines, III(a)(4).

3. Hyperlinks

The data collection principles described in the HDGroup are not very different than those in the COPPA Rule (current and revised). Unlike the refer-a-friend situation described above, hyperlinks are discussed in the Guidelines. In particular, the Guidelines must not “knowingly link to pages of other sites that do not comply with CARU’s Guidelines.”³ By permitting users to link through to Twitter, HDGroup was contravening the Guideline because Twitter clearly permits users to communicate to one another and it does not screen the age of its visitors before allowing them to register and disclose personal information.

4. Relationship with COPPA Rule

First name, birthday, screen name and password would not be “personal information” under COPPA unless the screen name functioned as online contact information. However, the collection of an email address in the profile would be collection of personal information under the COPPA Rule. Under a COPPA analysis, one would check to see whether the online contact information was being provided pursuant to one of the enumerated exemptions in the Rule. Adding an email address to a profile would not meet any of the exemptions. Also, the email addresses were accessible by third parties. Together, the operator would have had to obtain verifiable parental consent in order to permit the collection of the online contact information. Failing that, the operator would be in violation of COPPA.

Similarly, the COPPA Rule would have prohibited the provision of sharing capabilities without a more robust form of parental consent. The method employed by HDGroup would have been insufficient under the COPPA Rule.

As noted above, CARU simply applied the FTC’s FAQ regarding refer-a-friend messages. The FTC FAQ (#44) provides that a forward to a friend system will not violate COPPA if does not reveal any personally identifiable information other than the recipient’s email address. Under the FAQ, a system like the one in HDGroup would have been in compliance if a child were simply asked to put in her first name and the recipient’s email address, and if the form did not permit the child to freely type messages in the subject line or in the body copy. Clearly, according to the

³ CARU Guidelines, III(b)(4).

CARU decision, HDGroup went beyond these limits and therefore the system would have required verifiable parental consent under the COPPA Rule.

In the case of hyperlinks, CARU's Guidelines were a bellwether for where the FTC was moving with the COPPA Rule. Whereas CARU described the Twitter button as a "hyperlink," the FTC probably would have described it as a "plug-in" onto the HDGroup site. HDGroup would be responsible for ensuring that children who were given the ability to link through to Twitter did so only with verifiable parental consent. Indeed, under the revised COPPA Rule, HDGroup would be strictly liable for the sharing facilities offered by Twitter by virtue of its inclusion of the Twitter plug-in on the Miss O and Friends site. Thus, CARU appropriately applied its own Guidelines and came to a result that would clearly have been identical to that which the FTC would have arrived. Of course, Twitter is an "easy" case. It is well known that Twitter does not filter by age and permits free text messages. It clearly is an inappropriate site for children under 13 without parental consent. If the plug-in had not been so obviously problematic, however, CARU might still have questioned whether the "hyperlink" was appropriate and would have examined whether that plug-in was in compliance with CARU Guidelines. CARU, however, does not employ the strict liability standard. Under the Guidelines, "operators of Websites for children or children's portions of general audience sites should not knowingly link to pages of other sites that do not comply with CARU's Guidelines." (Emphasis added.)⁴ Thus, there is an important distinction here. Under the CARU Guidelines, the linking to Twitter was problematic because the operator reasonable knew that Twitter was inappropriate for children. But, if there had been a link to a lesser known site that may have permitted communication among users, CARU, without other evidence, probably would not have concluded that the operator "knowingly" linked to material that was not in compliance with CARU's Guidelines. The FTC probably would have found the operator strictly liable.

This case and particularly the space between the CARU Guidelines and the COPPA Rule as revised point to some interesting questions. In the future will CARU seek to change its Guidelines and create a "strict liability" standard? What is the use of a strict liability standard in the context of self-regulation? If CARU had examined every link on the Miss O and Friends site and determined that indeed there was a plug-in that was not in compliance with CARU, what

⁴ CARU Guidelines, III(b)(4).

would it have done? Not recommended unlinking? One might reasonably suspect that CARU would have recommended that children not be permitted to link off the site to that non-compliant third party site even though the operator did not know that the third party was not in compliance. The difference is that under the revised COPPA Rule a finding that the link led to a non-compliant site would have subjected HDGroup to significant civil penalties regardless of whether it knew that the third-party site was non-compliant or not. Thus, in effect, the “knowingly link” standard under CARU’s Guidelines work similarly to the FTC’s strict liability standard in the sense that they promote the same result. The difference is the significant punitive power that the FTC wields pursuant to COPPA.

The other interesting point about this case was CARU’s liberal application of COPPA and FTC resources such as the COPPA FAQs even when CARU’s own Guidelines would not have suggested that CARU should have applied such an analysis. It is worth questioning what authority CARU has to apply and enforce the COPPA Rule itself (except to the extent the Guidelines expressly incorporate definitions by reference).

SPIIL GAMES/GIRLSGOGAMES.COM

In SPIIL Games, CARU Case # 5533 (12/12/2012), a website, GirlsGoGames.com, allowed users to create a profile and avatar, participate in games, make friends, and view others’ profiles. During the registration process, a user was asked for her date of birth for age screening purposes. If the user input an age younger than 13, the site asked for a parent’s email address to obtain parental consent for the child’s participation on the site. However, a child could circumvent this measure by clicking the back button and changing her age. There was no cookie that would prevent the child from trying to enter an older age. Children could also register through Facebook and other social media sites, and the site provided links to those sites. The consent email sent to parents detailed the features available to children on the site, but failed to disclose that the site collected personally identifiable information (PII) and that PII was displayed on the child’s profile.

CARU determined that the site did not have a sufficient age screening mechanism, did not provide proper notice to parents, and improperly linked to other sites.

1. Age Screening

In order to discourage and disable inaccurate answers from children trying to circumvent the parental consent and notice requirement, CARU's Guidelines require that age-screening questions be asked in a neutral manner and that age-screening mechanisms be used in conjunction with available technology⁵. Even though the operator made an attempt to age screen, CARU found that children could go back and change their age an infinite number of times until they were allowed access. In essence, a defective age screen was tantamount to no age-screening at all. Because the site did not employ parental consent mechanisms, the absence of an effective age-screen was a violation of the Guidelines.

The age screen was necessary because the operator sought to use the "email plus" form of verifiable parental consent for those under the age of 13. The operator did not argue that its site was not intended for a demographic that included those younger than 13; yet, CARU nevertheless felt compelled to perform a demographics analysis, finding that 57% of the website's registered users were under the age of 13.

2. Data Collection

CARU also determined that the site's notice to parents and method of obtaining parental consent did not comply with its Guidelines or COPPA. Once the operator determined that the user was a child under 13 years of age, it required the child to provide her parent's email address. It sent a notice to the parent stating that the child had registered to joined GirlsGoGames.com and that the child needed the parent's permission to continue. However, the notice did not disclose the nature of the PII that was to be collected or whether such PII could be shared with others. The parent could simply click a button labeled, "I agree," and the permission would be deemed granted. CARU focused on the requirements under the COPPA Rule for disclosure of the privacy practices. The website collected an email address at registration and in certain areas of the website allowed child users to disclose PII. The email that was sent to parents was devoid of any

⁵ CARU Guidelines, III(b)(2)-(3).

information about the collection of PII and did not comply with the COPPA Rule or the Guidelines, according CARU.

The decision includes a footnote that sets forth the list of ways in which a parent may express consent in a “verifiable” manner pursuant to the COPPA Rule.

3. Hyperlinks

Turning to the links off of the website, CARU applied the Guidelines, which state that websites should not knowingly link to other sites that do not follow the Guidelines⁶. In this case, the site included links to social media networks, such as Facebook and Google Plus, so that the visitor could register by means of those social network sites. That is, if the user were already a Facebook or Google Plus member, they could link to their social media accounts, and thereby their relevant personal information would be imported to the operator’s website for purposes of registration on GirlsGoGames.com. Some of the sites which were plugged into the GirlsGoGames.com site had their own screening processes; others, like Twitter, did not. CARU did not address the use of the social media sites as a means of registering for the GirlsGoGames.com site, but rather focused on the links to those sites that were deemed inappropriate for children because they screen out children under the age of 13.

4. Relationship with COPPA Rule

CARU’s age-screening guidelines expressly provide advice about how to discourage circumvention by a child. “Age-screening mechanisms should be used in conjunction with technology, e.g., a session cookie, to help prevent underage children from going back and changing their age to circumvent age-screening.”⁷ The COPPA Rule does not provide such guidance itself; however, the FTC provides a recommendation in its FAQs that is very similar to the CARU Guideline on this topic.

Although you may intend for your site to target only teenagers, your site still may attract a substantial number of children under 13. A teen-directed site can identify which visitors are under 13, for example, by asking age when visitors are invited

⁶ CARU Guidelines, III(b)(4).

⁷ CARU Guidleins, III(b)(3).

to provide personal information. For sites that choose to age-screen, age information should be asked in a way that does not invite falsification. ... In addition, we recommend that sites that choose to age-screen employ temporary or permanent cookies to prevent children from back-buttoning to change their age in order to circumvent the parental consent requirement or obtain access to the site.⁸

Thus, CARU Guidelines are in sync with FTC enforcement policy (or perhaps vice versa?), but it cannot be said that by enforcing this guideline, CARU is enforcing the COPPA Rule because the standard for the quality of the age-screen is not in the COPPA Rule.

In evaluating this case under the revised COPPA Rule, it would be important to note that the revision requires operators to put key information about PII and collection practices up front in the notice they send to parents, making it easier for parents to find the information they need, when they need it. The revision also includes several new methods that operators can use to obtain verifiable parental consent: electronic scans of signed parental consent forms; video-conferencing; use of government-issued identification; and alternative payment systems, such as debit cards and electronic payment systems, provided they meet certain criteria. As noted above, the CARU Guidelines explicitly incorporate the definition of “verifiable parental consent,” and so the organization should be careful to note these changes to the COPPA Rule in cases moving forward.

The linking to social media again is an area of incoherence between CARU and the FTC. CARU continues to focus in this case on the act of linking off of the operator’s site. CARU has addressed the use of social media such as Facebook and even YouTube as sites that have screening mechanisms making them appropriate for links off of a mixed site (children and adults). *See Spin Master Ltd.*, CARU Case #5432 (2/23/2012). To date, we are not aware that CARU has addressed the use of these social media sites for the purpose of registering on the operator’s site. That is, there is no guidance to date (even though it was factually at issue in the SPIL Games case) as to whether an operator can use a plug-in to Facebook or another age-screening social media site for the purpose of securing registration of those who are 13 years of age or older. Yet, under the revised COPPA Rule, there is an exception when an operator

⁸ See <http://www.ftc.gov/privacy/coppafaqs.shtml> (#38)

collects a persistent identifier and no other personal information from a user who affirmatively interacts with the operator and whose previous registration with that operator indicates that such user is not a child.⁹ It is unclear at the moment (pending FTC clarification) whether this exception is more for the benefit of an operator using a Facebook plug in or for Facebook and Google particularly. If the former, then the revised COPPA Rule answers the question and promotes certain plug ins as long as the sharing is limited to persistent identifiers.

Perhaps the most interesting aspect of this case was the heavy reliance on the text of the COPPA Rule. CARU reproduced large sections of the COPPA Rule the heading of “Legal Requirements.” Furthermore, CARU not only presented its “conclusions” but set forth “measures” that the operator took in “response to CARU’s inquiry” rather than any recommendations. Among the “measures” were promises “going forward” to “not accept new registrations from children under 13.” This sort of promise differs from the sort of relief the FTC might have sought only in that it is not backed by a \$16,000 civil penalty and contempt powers.

CONCLUSION

This brief analysis has focused on several features of typical CARU cases and has attempted to highlight some of the differences in the way the FTC might have approached each case. By observing the differences, one can understand some of the enforcement patterns in recent self-regulatory actions and can also perceive where CARU and the FTC show signs of convergence and where there are areas that may require further examination in order for CARU to remain useful as a self-regulatory avenue. As the relationship between the FTC and CARU becomes even closer with the new safe-harbor provisions, supporters of self-regulation should be concerned that CARU’s distinctive value may require a greater reliance on its own Guidelines. Yet, it is unclear what the relationship between CARU and the FTC will look like once the new revisions go into effect and CARU becomes even more subject to FTC oversight.

⁹ 16 C.F.R. § 312.5(c)(8) (effective July 1, 2013).