

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE FEDERAL TRADE COMMISSION

RIN 3084-AB20

“COPPA Rule Review, 16 CFR Part 312, Project No. P104503”

September 24, 2012

By notice published on August 6, 2012, the Federal Trade Commission (“Commission”) has proposed further revisions to the agency’s Children’s Online Privacy Protection Act Rule (“COPPA Rule”).¹ Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to improve the proposed revisions and better protect the online privacy of children.

EPIC is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the Commission. EPIC has a strong interest in children’s online privacy and has pursued many of the critical online privacy issues concerning children over the last 15 years. In the mid-1990’s, EPIC exposed industry practices that “ma[de] available to the public the names, addresses, ages and telephone numbers of young children,”² and worked with the Center for Media Education to

¹ Children’s Online Privacy Protection Rule, 77 Fed. Reg. 46643 (proposed Aug. 6, 2012) (to be codified at 16 C.F.R. pt. 312), <http://www.ftc.gov/os/2012/08/120801coppaerule.pdf> [hereinafter “COPPA Rule Review, Supplemental”].

² Letter from Elec. Privacy Info. Ctr. to Christine Varney, Commissioner, Fed. Trade Comm’n (Dec. 14, 1995), *available at* http://epic.org/privacy/internet/ftc/ftc_letter.html.

develop COPPA”.³ Since that time, EPIC has continued to protect the privacy of children by advocating before the Commission and providing expert advice to lawmakers.⁴ In 2009, EPIC submitted a detailed complaint with the Commission alleging that Echometrix, a software company, was selling “parental control” software that was in fact monitoring children’s online activity for marketing purposes.⁵ Eventually, the Department of Defense,⁶ the Attorney General of New York,⁷ and the Commission⁸ investigated Echometrix. The New York Attorney General fined the company, and the Department of Defense cancelled a contract with the company. The company’s illegal business practices illustrate the need for vigorous enforcement in cases involving privacy violations and children.

EPIC also submitted comments⁹ on revisions proposed by the Commission in September 2011.¹⁰ EPIC made three principal suggestions. First, EPIC recommended that Commission clarify the definitions of “Internet” and “Web site located on the Internet,” and include short message services (“SMS”) and multimedia messaging services (“MMS”) within the Rule’s

³ CTR. FOR MEDIA EDUC., WEB OF DECEPTION: THREATS TO CHILDREN FROM ONLINE MARKETING (1996).

⁴ *Children’s Privacy Protection and Parental Empowerment Act: Hearing on H.R. 3508 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. (1996) (statement of Marc Rotenberg, Executive Director, Elec. Privacy Info. Ctr.), available at https://epic.org/privacy/kids/EPIC_Testimony.html; *An Examination of Children’s Privacy: New Technologies and The Children’s Online Privacy Protection Act (COPPA) before Subcomm. on Cons. Prot., Prod. Safety, and Insur. of the Sen. Comm. On the Judiciary*, 111th Cong. (2010) (testimony of Marc Rotenberg, Executive Director, Elec. Privacy Info. Ctr.), available at https://epic.org/privacy/kids/EPIC_COPPA_Testimony_042910.pdf.

⁵ Echometrix, Inc., ___ F.T.C. ___ (2009) (Complaint, Request for Investigation, Injunction, and Other Relief by Elec. Privacy Info. Ctr.), <http://epic.org/privacy/ftc/Echometrix%20FTC%20Complaint%20final.pdf>; see also Elec. Privacy Info. Ctr., *Echometrix*, <http://epic.org/privacy/echometrix/>.

⁶ Email from Matthew McCoy, Army and Air Force Exchange Service, to Kevin Sullivan and Jeffrey Supinsky, Echometrix (Oct. 14, 2009) available at http://epic.org/privacy/echometrix/Excerpts_from_echometrix_docs_12-1-09.pdf. (“It is very unfortunate that [EchoMetrix] did not inform me of this issue. Our customer’s privacy and security is very important to us, and we trust our Mall partners to maintain the security of our customers. I have removed [EchoMetrix’s] site, and it will stay offline until this matter with EPIC and the FTC is resolved.”).

⁷ Press Release, Office of the Att’y Gen., Cuomo Announces Agreement Stopping Software Company “EchoMetrix” from Selling Children’s Private Online Conversations to Marketers (Sept. 15, 2010), http://www.ag.ny.gov/media_center/2010/sep/sep15a_10.html.

⁸ Press Release, Fed. Trade Comm’n, FTC Settles with Company that Failed to Tell Parents that Children’s Information Would be Disclosed to Marketers (Nov. 30, 2010), <http://www.ftc.gov/opa/2010/11/echometrix.shtm>.

⁹ Comments of the Elec. Privacy Info. Ctr., FTC Docket No. P104503 (Dec. 23, 2011), available at <https://epic.org/privacy/kids/EPIC-COPPA-Rule-Comments-FINAL-12-23-11.pdf>.

¹⁰ Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59804, 59813 (proposed Sept. 27, 2011) (to be codified at 16 C.F.R. pt. 312), <http://www.ftc.gov/os/2011/09/110915coppa.pdf>.

coverage.¹¹ Second, EPIC supported extending the definition of “personal information” to cover the combination of date of birth, gender, and ZIP code.¹² Finally, EPIC proposed adding data breach notification requirements that require operators to notify parents within 48 hours whenever a breach involving children’s personal information occurs.¹³

These modifications, EPIC wrote, would help “ensure that children’s online privacy is adequately protected in response to changes in technology, business practices, and the use of the Internet.”¹⁴ EPIC reiterates the recommendations described in September 2011, and still believes that they would strengthen the COPPA Rule. In light of further revisions proposed by the Commission, however, EPIC focuses these comments on the proposed definition of “personal information,” “operator,” and “website or online service directed to children.”¹⁵ Specifically, EPIC: (1) supports the new definitions of “operator” and “website or online service directed to children,” which hold child-directed websites and third-party services equally responsible for the collection of children’s personal information; (2) recommends that the Commission scrutinize the proposed age-screening exception; and (3) requests that the Commission confirm the broad scope of the prohibition on using persistent identifiers for the marketing to or the profiling of children in the “internal operations” provision.

I. The Scope of the Revisions to the Commission’s Proposed COPPA Rule

¹¹ Comments of the Elec. Privacy Info. Ctr., *supra* note 9, at 14-15.

¹² *Id.* at 16.

¹³ *Id.* at 17.

¹⁴ *Id.*

¹⁵ The scope of these comments is based on the revisions proposed by the Commission, and EPIC agrees that there are other important issues raised by COPPA. For example, children need privacy from their parents in many circumstances, such as cases involving abuse or sensitive health issues, and the COPPA Rule has implications for the ability of websites and online services to assist children in these circumstances. *See* comments of danah boyd, FTC Docket No. P104503 (Dec. 15, 2011), *available at* <http://www.ftc.gov/os/comments/copparulereview2011/00243-82160.pdf>.

The Commission proposes further revisions to three proposed definitions: (1) “personal information”; (2) “operator”; and (3) “website or online service directed to children.”¹⁶ The Commission seeks to modify the definition of “operator” to create COPPA obligations for child-directed websites or services that collect no personal information *themselves* but use third-party services or plug-ins which do collect personal information.¹⁷ The Commission would also modify the definition of “website or online service directed to children” to cover third-party services or plug-ins which “know[] or ha[ve] reason to know” that they collect personal information through a child-directed website or service.¹⁸ Another modification to the definition of “website or online service directed to children” would allow mixed-audience websites to age-screen all users and incur COPPA obligations only for those users who self-identify as being under 13.¹⁹ Finally, the Commission proposes two modifications to the definition of “personal information.” First, screen or user names would be considered “personal information” only if they function as online contact information that “permit[] direct contact with a person online.”²⁰ Second, the provision allowing for the use of persistent identifiers to support the internal operations of a website or online service is clarified through the enumeration of six types of permissible activity.²¹

II. EPIC’s Comments and Recommendations

EPIC’s comments and recommendations focus on four areas connected to the Commission’s modifications. First, EPIC supports the new definitions of “operator” and “website or online service directed to children” that hold *both* child-directed websites or services

¹⁶ See COPPA Rule Review, Supplemental.

¹⁷ *Id.* at 46644.

¹⁸ *Id.* at 46645.

¹⁹ *Id.* at 46646.

²⁰ *Id.*

²¹ *Id.* at 46647.

and third-party information-collecting services or plugins equally responsible under the Rule. Additionally, EPIC recommends that the Commission consider whether the age-screening provision might unexpectedly hamper enforcement efforts or lead to age-screening mechanisms that cause children to misrepresent their ages. Finally, EPIC requests confirmation of the broad scope of the prohibition on using persistent identifiers for the marketing to or the profiling of children in the “internal operations” provision.

A. Revision of the Proposed Definition of “Operator” and “Website or Online Service Directed to Children”

EPIC supports the revised definitions of “operator” and “website or online service directed to children.” The proposed definition of “operator” extends COPPA coverage to child-directed websites that “integrate social networking and other personal information collection features into the content offered to their users, without maintaining ownership, control, or access to the personal data.”²² The proposed definition of “website or online service directed to children” extends COPPA coverage to a third-party service, such as an advertising network or plug-in, if the service “knows or has reason to know” that it is collecting personal information through a child-directed website or service.²³ Thus, if the child-directed website ExampleKidsWebsite.com collects no personal information itself but uses the services of the advertising company ExampleAdNetwork, and ExampleAdNetwork does not intentionally target children but “knows or has reason to know” that it is serving advertisements on Kids.com, then *both* ExampleKidsWebsite.com *and* ExampleAdNetwork would have obligations under the COPPA Rule.

²² *Id.* at 46644 (revising the definition of “operator” to state that “Personal information is collected or maintained on behalf of an operator where it is collected in the interest of, as a representative of, or for the benefit of, the operator.”).

²³ *Id.* at 46645.

Principles of fairness and economic efficiency support these proposed revisions.

Operators of websites control which plug-ins or advertising services their websites incorporate, and thus possess better information about data collection practices than either parents or children.²⁴ Operators of third-party services might or might not have better information about data collection practices than operators of websites, but they certainly have better information than either parents or children. Furthermore, operators of websites and third-party services are both in a better position than parents to avoid privacy violations by controlling their information-collecting practices. Thus, because of their superior information and control, these entities are the least cost avoiders,²⁵ and should assume the duties imposed²⁵ by COPPA. COPPA liability will encourage both website operators and third-party services to choose the optimal level of information collection and integration into child-directed websites.²⁶

Fairness also supports COPPA obligations for child-directed website operators that use third-party information collecting services and for third-party services that knowingly collect children's information through a child-directed website. Operators who profit from collecting the personal information of children should not be able to escape the responsibilities that such data collection entails. This conception of fairness—of having to assume both the burden and the

²⁴ *Id.* at 46644 (“the operator is in the best position to know that its site or service is directed to children and can control which plug-ins, software downloads, or advertising networks it integrates into its site.”).

²⁵ *See Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732, 743 (7th Cir.1999) (explaining that rules should be set to impose contractual liability on the party who is the “least cost avoider”—that is, the party who can avoid the mistake at the lowest price); *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 490 (7th Cir.1995) (“duties should rest upon the least-cost avoider.”); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965) (“In any event, as between two faultless parties, liability should rest with the one who is best positioned to avoid the loss”).

²⁶ *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C.*, 5 F.3d 554, 557 (D.C. Cir. 1993) (“Placing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures and ensures that such measures would have the greatest marginal effect on preventing the loss.”); *Conoco Inc. v. J.M. Huber Corp.*, 289 F.3d 819, 827 n.6 (Fed. Cir. 2002) (“[T]he district court's equitable calculus relies in part on the concept that placing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures and ensures that such measures would have the greatest marginal effect on preventing the loss.”) (internal quotations omitted); *see also* COPPA Rule Review, Supplemental, at 46645 (noting that equal responsibility for website and third-party service operators will “ensure that operators in each position cooperate to meet their statutory duty to notify parents and obtain parental consent.”).

benefit—underlies a variety of legal rules, such as the doctrine of equitable estoppel,²⁷ and the limitations on the infancy defense to contract formation.²⁸ Here, a similar regard for fairness dictates that the burden of children’s data collection should be borne by those who benefit.

B. Mixed-Audience Websites and Age-Screening

EPIC requests that the Commission scrutinize the proposed age-screening exception to the definition of “website or online service directed to children.” The Commission’s proposed revision would allow mixed-audience websites that have children as an over-represented group to avoid being considered “directed to children” if they age-screen all users prior to data collection, and then comply with COPPA for only those users who identify themselves as being under age 13.²⁹ The Commission believes that, although children may lie about their age, “many children truthfully provide their age,” and states that it has no history of “charg[ing] child-friendly mixed audience site[s] as being *directed to children* because of the burdens it imposes.”³⁰

Truly mixed-audience websites should not have to treat all users as children, and age-screening provides a privacy-friendly method of identifying an audience. Nevertheless, the

²⁷ See *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003) (“Pertinently, the doctrine of equitable estoppel precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations. . . . On this basis, “a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.”) (internal citations and quotations omitted).

²⁸ *E.K.D. ex rel. Dawes v. Facebook, Inc.*, No. 11-461, 2012 WL 3242392 (S.D. Ill. Mar. 8, 2012) (“The infancy defense may not be used inequitably to retain the benefits of a contract while reneging on the obligations attached to that benefit.”); See, e.g., *MacGreal v. Taylor*, 167 U.S. 688, 701, 17 S.Ct. 961, 42 L.Ed. 326 (1897) (“To say that the consideration paid to [a minor] ... is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to ... make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong.”); *Peers v. McLaughlin*, 88 Cal. 294, 26 P. 119, 120 (Cal.1891) (“[N]o person, whether minor or adult, can be permitted to adopt that part of an entire transaction which is beneficial, and reject its burdens. This commanding principle of justice is so well established, that it has become one of the maxims of the law.... [Minors] must either accept or repudiate the entire contract,” and “they cannot retain [the contract’s] fruits and at the same time deny its obligations.”).

²⁹ COPPA Rule Review, Supplemental, at 46646.

³⁰ *Id.*

success of this provision will depend on the design of the age-screening mechanisms and on the potential for abuse that age-screening presents. A child-friendly website or online-service might intentionally or negligently design an age-screening mechanism in a way that causes an unusually high percentage of children to misrepresent their age. Also, age-screening might make enforcing COPPA against child-directed websites or services more difficult. Many child-directed websites might begin employing age screening in the hope of escaping legitimate COPPA obligations. As a matter of law, these websites would likely be covered under the Rule as sites that “knowingly target,” or have content “likely to attract” children under 13 as their primary audience. As a practical matter, however, the Commission might experience difficulty enforcing COPPA in the face of an ostensibly good-faith effort to age-screen users. Thus, COPPA violators might employ age-screening as a shield to delay or repel Commission enforcement activities. The Commission should address these possibilities before adopting the final definition, and, if adopted, should monitor closely for age-screening violations.

C. Persistent Identifiers and Support for Internal Operations

EPIC recommends that the Commission clarify the “internal operations” exception to the definition of “personal information.” The proposed revisions define “personal information” to include “persistent identifier[s] that can be used to recognize a user over time, or across different websites or online services.”³¹ Persistent identifiers are not considered personal information, however, if they are used to “support . . . the internal operations of the website or online service.”³² The Commission proposes to define “support for internal operations” as: those activities necessary to:

- (a) Maintain or analyze the functioning of the Web site or online service;
- (b) perform network communications;
- (c) authenticate users of, or personalize the

³¹ *Id.* at 46647.

³² *Id.*

content on, the Web site or online service; (d) serve contextual advertising on the Web site or online service; (e) protect the security or integrity of the user, Web site, or online service; or (f) fulfill a request of a child as permitted by §§ 312.5(c)(3) and (4); so long as the information collected for the activities listed in (a)–(f) is not used or disclosed to contact a specific individual or for any other purpose.³³

The presence of the word “necessary,” as well as the broad prohibition on using or disclosing persistent identifiers “to contact a specific individual *or for any other purpose*,” indicates that the use of persistent identifiers is to be limited to the above activities, and that these activities are to be narrowly construed. The Commission appears to recognize this, as it “notes the importance of the proviso at the end of the proposed definition: to be considered *support for internal operations*, none of the information collected may be used or disclosed to contact a specific individual, *including through the use of behaviorally-targeted advertising*, or for any other purpose.”³⁴ EPIC understands this proviso to prohibit the use of persistent identifiers not only for behavioral advertising, but for other data-driven means of profiling or marketing to children.³⁵ EPIC requests that the Commission confirm the broad scope of the prohibition on using persistent identifiers for profiling or marketing to children.

III. Conclusion

EPIC supports updating the COPPA Rule and reiterates suggestions made in response to the Commission’s September 2011 revisions. EPIC also urges the Commission to adopt the proposed definition of “operator” and “website or online service directed to children,” and to address potential issues with age-screening and the use of persistent identifiers.

³³ *Id.* at 46648.

³⁴ *Id.*

³⁵ With the exception of contextual advertising, which is explicitly enumerated as an allowable use.

Respectfully Submitted,

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