

FTC COPPA Reform: Aiming for the Regulatory Sweet Spot
Keynote Address of Commissioner Edith Ramirez
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I recently saw a cartoon in the *New Yorker* that brought to mind the topic I will be discussing this morning. It's a cartoon that brings the children's fairy tale *Goldilocks and the Three Bears* into the 21st century. Standing at the kitchen table with his parents behind him, Baby Bear looks with horror at his open laptop. It seems that Goldilocks has done much more damage than eating his porridge, breaking his chair, and sleeping in his bed. As Baby Bear exclaims to a concerned Mother Bear and Father Bear, "And someone has stolen my identity."¹

Although the cartoon is an amusing reminder of how much the world has changed for kids, it touches on the serious issue of children's privacy in the digital age, which is the focus of my remarks. More specifically, I will address the Children's Online Privacy Protection Act or COPPA, which regulates the commercial collection and use of personal data about children, and the Federal Trade Commission's recent proposal to update our COPPA Rule. These proposed updates are designed to ensure that COPPA stays current amidst whirlwind technological change.

Indeed, one does not have to go back far to witness striking developments in technology in the daily lives of children. The changes in the last five years alone have been remarkable, and they make 1998, the year that Congress enacted COPPA, seem like ancient history. So, before turning to the FTC's proposal, I want to start with a reminder of what the world looked like in 1998. I will close with a brief discussion of our latest COPPA enforcement action filed just yesterday in federal court here in Manhattan.

¹ Molvig, Ariel, "And someone has stolen my identity," Cartoon, *The New Yorker* (Sept. 10, 2012), available at <http://nyr.kr/TenPT0>.

I. Background: 1998 v. Today

In 1998, Google was a fledgling start-up based out of a garage in Menlo Park, California. Apple was introducing the iMac, a sleek, cutting-edge—and by today’s standards, bulky—desktop computer. The term WiFi had yet to be coined, and the 25 percent of American households with access to the Internet relied primarily on the dial-up modem to take them there.²

Only about 14 percent of children were online in 1998.³ On average, children used computers for about an hour and a half a day, and only a third of that time was spent online.⁴ Much of their time on computers was spent playing games, doing schoolwork, surfing the web, in Internet chat rooms, and using e-mail.⁵ The major fad in 1998 for children—and for adults—was AOL Instant Messenger, which offered the novelty of real-time conversations over a computer. Not even cell phone usage was mainstream. Only 36 percent of households had a cell phone, and they were used for one reason only—to make phone calls.⁶

Fast forward to today. Even among toddlers, Internet usage has skyrocketed. About a quarter of children as young as three years old go online every day.⁷ Over two-thirds of eight-year-olds use the Internet daily.⁸ A 2010 Kaiser Family Foundation study indicates that the

² NAT’L TELECOMM. & INFO. ADMIN., U.S. DEP’T OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE, PART II (1999), available at <http://www.ntia.doc.gov/legacy/ntiahome/ftn99/part2.html>.

³ FED. TRADE COMM’N, PRIVACY ONLINE: A REPORT TO CONGRESS 4 (1998), available at <http://www.ftc.gov/reports/privacy3/priv-23a.pdf>.

⁴ VICTORIA J. RIDEOUT ET AL., THE HENRY J. KAISER FAMILY FOUNDATION, KIDS & MEDIA @ THE NEW MILLENNIUM, EXECUTIVE SUMMARY 24-25 (1999), available at <http://www.kff.org/entmedia/upload/Kids-Media-The-New-Millennium-Executive-Summary.pdf>.

⁵ *Id.* at 25.

⁶ *Cellphone Ownership Soared Since 1998*, WALL ST. J., Nov. 27, 2009, available at <http://blogs.wsj.com/economics/2009/11/27/cellphone-ownership-soared-since-1998/>.

⁷ AVIVA LUCAS GUTNICK ET AL., THE JOAN GANZ COONEY CENTER AT SESAME WORKSHOP, ALWAYS CONNECTED: THE NEW DIGITAL MEDIA HABITS OF YOUNG CHILDREN 16 (2011), available at http://joanganzcooneycenter.org/upload_kits/jgcc_alwaysconnected.pdf.

⁸ *Id.*

average American between the ages of two and eighteen spends about 7.5 hours a day using a smart phone, a computer, a television, or another electronic device.⁹ In other words, American children now spend about as much time consuming electronic media as sleeping.¹⁰

Moreover, children today are engaging in activities online that their counterparts in 1998 could not have imagined. As before, today's kids play video games, surf the Web, and even email. But much of children's time online is now spent on services that did not exist in 1998, namely, social networks like Facebook and video sites such as YouTube. It may come as no surprise that social networks are the most popular computer activity among children over the age of seven.¹¹ And those children who visit a social network will spend an average of almost an hour a day there.¹²

Of course, a child in 1998 with Internet access was limited to a PC. Today, almost anything that a child can do on a PC can be done on a smartphone or tablet. And it is becoming the rare child who lacks a mobile phone of his or her own. By middle school, 80 percent of children have their own cell phones.¹³ Anywhere in the United States, and at any time, a child can download apps, upload a photo or video, and share unlimited personal information with friends, acquaintances, and even strangers.

This confluence of changes has extraordinary privacy implications. First, there's the simple fact of quantity. With all the time children today are spending online, their digital trail is

⁹ VICTORIA J. RIDEOUT ET AL., THE HENRY J. KAISER FAMILY FOUNDATION, GENERATION M²: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 1 (2010), available at <http://www.kff.org/entmedia/upload/8010.pdf>.

¹⁰ *Id.*

¹¹ *Id.* at 20.

¹² *Id.* at 21.

¹³ ELIZABETH K. ENGLANDER, MASSACHUSETTS AGGRESSION REDUCTION CENTER, RESEARCH FINDINGS: MARC 2011 SURVEY GRADES 3-12 at 3 (2011), available at http://vc.bridgew.edu/marc_reports/2/.

exponentially longer. Second, digital media is now delivered in a more layered fashion on platforms in which many more actors are involved in the delivery of content and collection of data. Third, using their phones and tablets, children today can take and share videos and photos of themselves and their friends with an ease that was unimaginable in 1998. And there is the ability of mobile devices to track children's precise location. The privacy ramifications of these developments are staggering.

II. Updating COPPA to Meet New Technological Challenges

It was this dramatically altered digital landscape that prompted the FTC to propose wide-ranging changes to the FTC's COPPA Rule last fall,¹⁴ which we supplemented in August of this year.¹⁵ Our overriding goal has been to ensure that COPPA keeps pace with incredible technological change, while retaining the congressionally-mandated COPPA framework. As most of you know, that framework requires online services directed to children under 13, or those that know they are collecting data from children under 13, to notify parents of the service's data practices and obtain parental consent *before* collecting a child's personal information. COPPA's aim is to give parents greater control over the commercial collection and use of their children's personal data.

To give effect to that goal, we have made several proposed changes to our COPPA Rule. First, our proposal makes clear that COPPA applies to mobile apps. That is critical if COPPA is to remain relevant as the world goes mobile. We have also proposed expanding the definition of "personal information" to include the types of data that children are sharing about themselves

¹⁴ Notice of Proposed Amendments to the Children's Online Privacy Protection Rule, 76 Fed. Reg. 59,804 (Sept. 27, 2011) (proposal to amend 16 C.F.R. pt. 312), *available at* <http://ftc.gov/os/2011/09/110915coppa.pdf>.

¹⁵ Supplemental Notice of Proposed Amendments to the Children's Online Privacy Protection Rule, 77 Fed. Reg. 46,643 (Aug. 6, 2012) (proposal to amend 16 C.F.R. pt. 312) (hereafter "Supplemental Notice"), *available at* <http://www.ftc.gov/os/2012/08/120801coppa.pdf>.

today. That means data about precise physical location as well as photos, videos, and audio files containing children's images or voices.

The Commission also seeks to address the online tracking of young children for advertising purposes. We therefore propose to deem persistent identifiers, such as cookies, unique device identifiers, and IP addresses as "personal information," except where they are used solely to support the internal operations of the site or service.

In addition, we have sought to address the now-common situation where multiple parties deliver content and collect data on children's sites. This includes where a child-directed app or website integrates the social networking plug-ins of another company, which collects data from the users of the child-directed property. In that circumstance, we have proposed that the children's site have primary responsibility for COPPA compliance. As for the third party, it would not have a duty to investigate whether its app or service was being used by a child-directed site, but it could not ignore credible evidence to that effect.

On another front, the Commission has sought to promote more online services that appeal to a range of ages. From a content perspective, there is nothing magical about the age of 13. Childhood development is a continuum, and sites and services naturally can appeal to children older and younger than the age of 13. However, under the current COPPA Rule, if the totality of circumstances indicates the site is directed towards children under 13, then the site must treat all visitors as though they are under 13. To blunt this effect of the rule, we have often prosecuted cases under an "actual knowledge" theory rather than alleging the sites were "directed to children."

But we considered if there wasn't a better way to encourage family-friendly content that appeals to a range of ages. Under the proposed revised definition of what it means to be

“directed to children,” sites that target kids under 13 or are likely to draw kids under 13 as their primary audience would remain classified as services “directed to children.” But if sites that appeal to a mixed audience—younger and older users—age-screen all users before collecting personal data, the site will not be deemed to be “directed to children.” This would bring the rule more in line with our enforcement practice and is intended to encourage sites to offer a range of family-friendly content. To be clear, the FTC is not suggesting that general audience sites be required to age-screen. Our proposal only seeks to encourage age-screening by sites that draw a mixed audience, where part of the target audience is clearly children under 13.

Those are some of the crucial components of the Commission’s proposed COPPA Rule change. In my view, the FTC has proposed a measured and balanced approach to COPPA reform. Last year, a more neutral judge, Congresswoman Mary Bono-Mack, praised the FTC for hitting the regulatory “sweet spot” with our COPPA proposal.¹⁶ Despite that praise from a key legislator, the proposal has many critics, who seem to grow louder as we draw closer to finalizing the rule. Although we are continuing to consider the comments we have received, I want to take this opportunity to offer my current thoughts about some of the arguments we have heard.

III. Response to Criticism

First, in the name of privacy, some have questioned whether the FTC should not seek to effectively abandon, rather than update, COPPA. Last fall, the well-known researcher danah boyd, along with several academics, published an article questioning whether COPPA has

¹⁶ *Protecting Children’s Privacy in an Electronic World: Hearing Before the Subcomm. on Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce*, 111th Cong. 5 (Oct. 5, 2011), available at http://democrats.energycommerce.house.gov/sites/default/files/image_uploads/100511%20CMT%20Protecting%20Children%27s%20Privacy%20in%20an%20Electronic%20World.pdf.

unintentionally hampered parents' efforts to control their children's online experience.¹⁷

Ms. boyd argues that the online industry's response to COPPA has been to adopt terms of service that prohibit those under 13 from joining a site. For example, Ms. boyd notes that general-audience services such as Facebook, Gmail, and Skype have adopted this approach.¹⁸ Despite policies like these, as Consumer Reports reported last year, millions of children under the age of 13 have Facebook accounts.¹⁹

Ms. boyd and her co-authors conducted a survey of their own of 1,000 parents and found that many of them assisted their children in setting up Facebook accounts by lying about their age. Ms. boyd describes this as a "worst-case" scenario where children's data is being collected, but parents are unable to avail themselves of COPPA's benefits. And children are being taught that it is acceptable to lie. As a solution, Ms. boyd argues that age-based systems like COPPA should be eliminated. Instead, she advocates comprehensive privacy rights for all consumers.

Like Ms. boyd, a majority of us at the FTC have called for the enactment of general privacy legislation for everyone, regardless of age. However, I do not see comprehensive privacy legislation as a substitute for the more robust protections for young children that already exist under COPPA.

Nor do I interpret the results of Ms. boyd's survey as an indictment of COPPA. Instead, I read them as an affirmation that parents want to be involved in making decisions about the online

¹⁷ See danah boyd, Eszter Hargittai, Jason Schultz, and John Palfrey, *Why Parents Help Their Children Lie to Facebook About Age: Unintended Consequences of the 'Children's Online Privacy Protection Act,'* 16 FIRST MONDAY (Nov. 7, 2011), available at <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3850/3075>.

¹⁸ *Id.* at 2.

¹⁹ *CR Survey: 7.5 Million Facebook Users are Under the Age of 13, Violating the Site's Terms,* CONSUMER REPORTS, May 10, 2011, available at <http://pressroom.consumerreports.org/pressroom/2011/05/cr-survey-75-million-facebook-users-are-under-the-age-of-13-violating-the-sites-terms-.html>.

services that their children use. This idea lies at the heart of COPPA. If Ms. Boyd's survey results are a denunciation of anyone, it is of the many online firms that have chosen to write off the under-13 set. I appreciate that many such firms have been engaged in our rulemaking and filed comments. It is our goal to issue a final rule that advances parental control without creating unnecessary burdens on businesses.

On a different front, marketers have criticized our proposal to apply COPPA to online tracking for advertising. Outside the COPPA context, this is an issue on which the Commission has taken a leading role. A majority of us on the Commission have called on industry to institute a Do Not Track system to give all users a simple, one-stop mechanism to control the collection and use of data about their online activity across websites. We are actively encouraging industry to establish Do Not Track on a voluntary basis. But I see the issue differently when it comes to children. Wherever one stands with regard to online tracking in general, I believe it is a different question whether parents should have the legal right to say "no" before marketers track their young children across the web in order to create marketing profiles.

Marketers claim they do not target children in their online tracking. But a Wall Street Journal investigation found that popular children's websites installed more tracking software on personal computers than the top websites aimed at adults.²⁰ And other studies have reported similar findings.²¹ As a result, I believe there was a valid basis for our proposal, and the more industry protests this change, the more it raises questions about its claimed intention not to target children.

²⁰ See Steve Stecklow, *On the Web, Children Face Intensive Tracking*, WALL ST. J., Sept 17, 2010, available at http://professional.wsj.com/article/SB10001424052748703904304575497903523187146.html?mod=WSJ_WhatTheyKnow2010_WhatsNews_4_2_Right_Summaries&mg=reno64-wsj.

²¹ See RICHARD M. SMITH, A SURVEY OF WEB TRACKING TECHNOLOGIES USED BY POPULAR CHILDREN'S WEB SITES (2011), available at <http://www.ftc.gov/os/comments/copparulereview2011/00373-82399.pdf> (Appendix A).

We have also heard the argument that the FTC’s COPPA proposal will impede innovation by app developers, many of which are small businesses. In support of that argument, some cite the fact that, not long after the Commission issued its notice of proposed rulemaking last fall, the mobile analytics firm, Flurry, announced it would no longer serve apps directed to children.²² And, a recent *Washington Post* article asserted that the FTC, by proposing that persistent identifiers be classified as personal information under COPPA, may deter some app developers from collecting analytics about the performance of the service in order to understand and improve their effectiveness.²³ However, in our supplemental notice of proposed rulemaking, we made clear that sites and apps directed to kids can continue to engage in analytics. As we explained, the collection of persistent identifiers to analyze or improve the functioning of a site’s service would be deemed “support for internal operations,” meaning that parental consent would not be required.²⁴ There is therefore no good reason why the Commission’s proposal should force any app developer to go without analytic data.

Our proposal to impose COPPA obligations on third parties such as plug-ins that are collecting and using data from child-directed sites has also provoked the criticism that the Commission will dampen innovation. On the other side of the debate, privacy advocates claim that the Commission’s proposal would give such entities a “pass” and effectively relieve them of all liability.

²² See Jim Brock, *Developer Alert: Flurry Analytics Adopts New Child Privacy Rule*, PRIVACYCHOICE BLOG, Oct. 25, 2011, available at <http://blog.privacychoice.org/2011/10/25/developer-alert-flurry-analytics-adopts-new-child-privacy-rule/>.

²³ See Mohana Ravindranath, *App Developers Wary of Children’s Online Privacy Law*, WASH. POST, Sept. 5, 2012, available at http://www.washingtonpost.com/business/on-small-business/app-developers-wary-of-childrens-online-privacy-law/2012/09/04/a7f709b2-f2ce-11e1-a612-3cfc842a6d89_story.html.

²⁴ Supplemental Notice, 77 Fed. Reg. at 46,648 (“[This revision] would also specifically permit the collection of persistent identifiers for functions related to site maintenance and analysis, and to perform network communications, that many commenters view as crucial to their ongoing operations.”).

Some privacy advocates are also no fan of the proposal to modify the definition to sites “directed to children” in order to encourage content appealing to a broader range of ages. This proposal, they argue, would enable what are truly child-directed sites to call themselves “family” sites and employ age-screening as a way of evading COPPA’s safeguards.

As we work to finalize the rule, I take some comfort from the fact that the FTC’s proposal has generated opposition from industry and privacy advocates alike. Perhaps that means that we are in fact on the path toward a regulatory “sweet spot.”

IV. Artist Arena COPPA Enforcement Action

While the FTC’s COPPA team has been hard at work on the rulemaking, our vigorous enforcement efforts have continued. Yesterday, our 20th COPPA case was filed at the federal courthouse just a few blocks away. The court is considering a proposed consent decree so you are among the first to hear about our action against Artist Arena, a company now owned by Warner Music, that operates the official fan websites of Justin Bieber, Rihanna, Selena Gomez, and Demi Lovato.²⁵ The FTC alleged that each of these fan sites collected, used, or disclosed personal information from children, with actual knowledge they were dealing with children under 13, without complying with COPPA.

The fan websites differed in their operations, but all fell short on the COPPA front. For example, the FTC has alleged that BieberFever.com got off to a bad start from a COPPA standpoint, and things got worse from there. During the first month the site was up and running, the site gathered a host of personal information, including birthdate and email address, and then told users they were registered and logged into the BieberFever site. But that was not what Artist

²⁵ *USA v. Artist Arena LLC*, No. 12 Civ. 07386-JGK (S.D.N.Y. filed October 3, 2012) (proposed consent decree and order), available at <http://www.ftc.gov/os/caselist/1123167/121003artistarenadecree.pdf>.

Arena told parents. We allege that Artist Arena sent parents an email suggesting their child's email address would be collected and allowed into the Justin Bieber fan club site only after the parents consented. After that first month, Artist Arena dispensed with the email to parents and instead immediately directed children who registered for the fan club to a checkout page, where they were asked to input more personal information.

In all, the FTC alleged that the Justin Bieber, Rihanna, Demi Lovato, and Selena Gomez fan sites run by Artist Arena collected, used, or disclosed personal information from over 100,000 children without providing the required notice or obtaining the verifiable parental consent required by COPPA. The Commission also charged Artist Arena with violating Section 5 of the FTC Act through emails that misleadingly suggested that parents could prevent their children's personal data from being collected. The court is considering a consent order imposing a \$1 million civil penalty and an injunction against Artist Arena.

This case illustrates the value of what we are trying to do with our proposal to modify what it means to be a site "directed to children." This was a case where the Commission might have charged that the web sites were directed to children rather than general audience sites with actual knowledge that they were being used by children. Justin Bieber, Selena Gomez, Rihanna, and Demi Lovato appeal to children and, I think it's fair to say, that children are a significant part of the target audiences of their fan websites. But, under the current rule, if the Commission had treated these sites as child-directed, they would have been required to provide notice and get parental consent for all of their visitors. The burden that would have imposed was a factor in our decision to bring this as an "actual knowledge" case. Our proposal would align the requirements of our rule and these types of enforcement decisions.

The Artist Arena case also illustrates the need for companies to redouble their efforts to ensure their compliance with COPPA. Here we have a company with high-profile websites and ample resources charged with violating what are basic COPPA requirements. Although we are in the midst of updating COPPA to address groundbreaking new technologies, we also need to continue to ensure that well-established companies like this one, employing familiar online tools, are complying with COPPA's requirements.

Plainly, more needs to be done to ensure that marketing departments are mindful of COPPA. I have no doubt that Artist Arena executives never wanted to run afoul of the statute. But somewhere between their good intentions and the reality of their marketing campaigns, COPPA compliance got lost. There is no excuse for companies, especially those with ample resources, not to take their COPPA obligations seriously enough to avoid fundamental mistakes like the ones we alleged against Artist Arena.

V. Conclusion

In closing, let me say that my fellow FTC Commissioners and I recognize that, in addition to parents and children, marketers and those in the online community will feel the effects of what we do in our COPPA rulemaking. I want to thank those of you who have commented in our COPPA proceeding. Many of the issues we are facing are challenging, and we rely on commenters to help us get it right. As I have said, I believe we are on the path to do that, but we will be carefully considering the comments that were filed last week on our supplemental rulemaking proposal as we finalize our rule.

I want to thank Lee Peeler and CARU for inviting me to speak here today. I know you have a terrific program planned, and I appreciate the chance to be a part of it.