

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

TO: Don Clark
FROM: Anna Davis, Office of Commissioner Ohlhausen
DATE: December 9, 2012
RE: COPPA Rule: Comments to be placed on the public record

On October 24, at 2:30 pm, staff in Commissioner Ohlhausen's office met with representatives from NetChoice.

Attendees

Steve Delbianco: NetChoice

Carl Szabo: NetChoice

Anna Davis: Attorney Advisor – Commissioner Ohlhausen's office

Pablo Zylberglait: Attorney Advisor – Commissioner Ohlhausen's office

Sarah Bamford: Intern – Commissioner Ohlhausen's office

Marianne Watts: Office of General Counsel

Phyllis Marcus: Division of Advertising Practices

Steve: Our concerns are under two main umbrellas:

1. Who is covered?
2. What is covered?

And from those questions, what are the unintended consequences of these proposed amendments?

Carl: The first change that is concerning is the definition of *mens rea*. It changes it from a "specific intent" standard to "a reason or likely to know standard." The "likely to know" standard may have some unintended expansion. The current rule only requires those with actual knowledge that children were using the site would be subject to COPPA but now it greatly expands the websites that are covered.

Example: teen.com.

- The website is oriented towards teens but it may appeal to those under 13.
 - References to Justin Bieber and Selena Gomez
- If the proposed modifications go into effect, then teen.com may be a "likely to know" website and would therefore may restrict functions for fear of COPPA liability

Phyllis: A real question is the definition of "targeted" to children. Does targeted mean intent? This is a restrictive reading. Perhaps it is directed a children but maybe the intent wasn't 8-12 year olds. There can be a number of intended audiences, there may be layers of different audiences that are intended. Intent may not be as narrow as NetChoice would like. If you look at the Supplemental NPRM, the Commission has been very cautious in this area.

Carl: We also have a concern that you run into a temporal issue. Example: Angry birds.

- On a facial analysis it may seem like it is obviously attracted to kids under age X but actually, we now know that Angry Birds attracts much more than kids under age X because it has been so widely popular.
- The concern is that it may be more difficult to get funding

Steve: I think one of our questions is, how will the FTC analyze these issues? Will they look at snapshots? Signaling to companies as to how the Commission will analyze these websites will be beneficial for companies to know.

Phyllis: Another good example is Hello Kitty, on its face it certainly seems geared towards children but many adults also have Hello Kitty merchandise.

Carl: Next issue is 3rd party liability. Pinewoodderby.com is a website that allows Cub Scouts to learn about racing a car. There are videos from youtube.com that have been embedded into the site. However, if YouTube has a “reason to know” under the new proposed standards that its videos are embedded on a website that is targeted for children, then it would be subject to COPPA liability. Because this would be difficult for YouTube to track, it may remove the embedded videos from the website. This is likely an unintended consequence of the proposed modifications.

Steve: The concern is that the information that Google is obtaining is information such as: this video is popular in one area of the country, but not another. This is just good marketing information that any business would want to have. Essentially we are concerned about clarity.

Phyllis: We are certainly available for operators to ask these types of questions.

Carl: Moving on the contextual advertising concerns. We are unsure what contextual advertising means and would like to clarify that contextual advertising doesn't just mean the immediate context of the page but rather, also includes previously viewed pages.

Phyllis: We thought that the terms of art we had used were settled, but perhaps they are not.

Carl: For example, Fanpop webpage, I visited myself. I visited the Disney FanPop fan page and then when I clicked back to the homepage, an advertisement to Walt Disney World popped up. This is likely not a coincidence. This provides a tangible example of how an advertisement is delivered based on the prior context that was viewed on the website.

Steve: But the problem is, for companies, they would like to target their advertisements to those who are interested because it would be nice to show an advertisement that is relevant enough to pay for itself. In other words, you want to show the advertisement to the right people so that the revenue from the viewers purchasing the product will be enough to pay for the advertisement itself.

Phyllis: so is the persistent identifier OR overtime is causing concern.

Carl: next we have concerns about the definition of “collection.” For instance, there are a lot of websites that have a “tell your friend” component, is this considered collection?

Phyllis: This I can say definitively no. This is not considered to be prompting or encouraging. In other words, the open fields or mere display are not subject to COPPA. Of course there is a question about tweets or “likes” but that’s a separate issue. It is important that we not separate the definitions from the other requirements.

Steve: So if a site is directed to children and there is a like us on Facebook message, is Facebook then at risk?

Phyllis: That would be a factual inquiry.

Steve: But is reading a cookie collection?

Phyllis: We would need to know what the purpose was of reading the cookie. I’ll have to get back to you.

Carl: lastly, the “for any other purpose” language is confusing and unnecessary. There may be situations in which personal information collected for internal operations may be needed for purposes other than those delineated by the FTC. We appreciate the FTC’s improvements to the “support for internal operations” language, but we are concerned about this “for any other purpose” language because it limits it to only the features that are listed. As Commissioner Ramirez stated, a lot has changed in this industry. Things will just continue to change and therefore, this language may stifle growth for children’s content.

Carl: The original intent to COPPA was to protect children from being contacted.

Phyllis: Well, no. There were always two prongs to COPPA. There was the prong about protecting them from the creepy people out there but there was also the prong that was directed at the fact that children have an inability to appreciate what is being asked of them.

Carl: But, for instance, there are magazines out there with an insert that allowed children to fill it out and have other magazines and what not sent to the address.

Phyllis: Online and Offline are treated differently. Offline does not create as much of a stir in Congress. However, we have had a lot of comments about the “for any purpose” language and have had requests to make it a non-exhaustive list and we hear those concerns.

Steve: It would be helpful for instance to have a word (a qualifier) in front of “purpose.”