



COMMON SENSE COMMENTS ON CHILDREN’S ONLINE PRIVACY PROTECTION

INTRODUCTION

The primary goal of Congress in creating the Children’s Online Privacy Protection Act (COPPA) in 1998 was to help parents control the information that is collected from and about their children online and to control how that information is used.

Today, extraordinary changes in technology and digital media have made it far more difficult for parents and young people to protect their privacy. Quite simply, parents can’t control their children’s personal information online unless they have reasonable and easily understandable opportunities to do so. Thus, industry must make significant changes, as soon as possible, under the guidance of the federal government. In addition, parents can’t control children’s personal information online unless they understand how the online world works, so there is a pressing need for ongoing public education efforts about key online privacy issues.

Several essential steps must be taken to provide families with the tools, opportunities, and information they need to protect their children’s privacy and personal information. These critical measures include:

- I. COPPA must be strengthened and clarified in fundamental ways, and must apply to children under the age of 18, not just under the age of 13.
- II. The basic industry standard for collecting and using personal information must change from “opt-out” to “opt-in.”
- III. Companies and operators should not transfer children’s personal information to third parties without a clearly defined parent opt-in, except for important medical, public health, or law enforcement purposes.
- IV. For most children, parents must opt-in on their children’s behalf; older teens (16-17) can be permitted to opt-in for themselves, provided they are given adequate warnings and explanations.
- V. There should be no behavioral marketing using children’s personal information without a clear and formal opt-in.
- VI. Companies must provide parents – and teens – with clear, easy to understand information about how companies will use any and all personal information, so that these consumers can make informed choices. Educators and government agencies should also provide better information and educate children and their parents about key privacy issues on an ongoing basis.
- VII. Some of these changes can be made with simple clarifications of the COPPA Rule by the Federal Trade Commission. Where necessary, the Commission’s rule-making authority should be expanded by Congress to ensure that parents have the tools and information they need to control their children’s personal information online.

THE PURPOSE OF COPPA

COPPA was created by Congress with the express purpose of giving parents more control over what information is collected from and about their children online and how such information may be used.¹ COPPA was based on the Federal Trade Commission's 1998 report to Congress, "Privacy Online," which included several key points:

- "These [information collection] practices present unique privacy and safety concerns because of the particular vulnerability of children, the immediacy and ease with which information can be collected from them, and the ability of the online medium to **circumvent the traditional gatekeeping role of the parent.**"
- "Traditionally, parents have instructed children to avoid speaking with strangers. The collecting or posting of personal information in chat rooms and on bulletin boards online runs contrary to that traditional safety message. Children are told by parents not to talk to strangers whom they meet on the street, but they are given a contrary message by Web sites that encourage them to interact with strangers in their homes via the Web."
- "There is considerable **concern about online collection practices that bypass parents, who have traditionally protected children** from marketing abuses. Children generally lack the developmental capacity and judgment to give meaningful consent to the release of personal information to a third party." And,
- "Congress (should) develop legislation placing parents in control of the online collection and use of personal information from their children... Such legislation would protect children and ensure that **parents have knowledge of, and control over, the collection of information from their children.**"²

The need to ensure that parents can control their children's personal information is even greater in today's rapidly changing digital world, in which there are significantly more opportunities for companies and operators to collect, use, and exploit personal information, as well as more forms of personal information, such as geographic location. The increased complexity of the online digital world makes it much harder for parents to be gatekeepers.

Parents today need tools, opportunities, and information that reflect the rapidly changing and increasingly mobile digital world. Building and expanding these tools and resources must

¹ Senator Richard Bryan (D-NV), a Congressional sponsor of COPPA, described the goals as: "(1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent." 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998)

² <http://www.ftc.gov/reports/privacy3/priv-23a.pdf> pages 4, 5, 5, and 42. (Emphasis added.)

involve efforts from industry, from parents, and from the Commission and Congress, which must update and strengthen COPPA as outlined below.

INDUSTRY MUST HELP PARENTS CONTROL PERSONAL INFORMATION

Companies and operators must make significant changes in the ways that they collect and use personal information because parents can't control their children's personal information online if companies don't give parents a chance.

Whether parents are concerned about avoiding advertising, preventing inappropriate contact, protecting their children's privacy, or other issues, parents need more opportunities to decide whether information is collected from their children and how that information is used.

The most important step to helping parents is changing the current standard industry practice from "opt-out" to "opt-in" – in other words, from a practice of collecting or using personal information unless customers say otherwise to a practice of *not* collecting or using personal information unless customers give explicit approval for such use or collection.

According to the Interactive Advertising Bureau (IAB), an organization of hundreds of leading media and technology companies engaged in online advertising:

Opt-in refers to an individual giving a company permission to use data collected from or about the individual for a particular reason, such as to market the company's products and services.³

In May 2009, the IAB also published "Social Advertising Best Practices" written by the IAB's User-Generated Content & Social Media Committee, which is made up of more than 150 companies, including Facebook, Google, MySpace, Sprout, and Comcast. The publication included the following guidelines:

...it is important for consumers to have visibility and control of what can be shared with their social connections. The following special care is to be taken with respect to consumer choice:

- **Opt-In:** A social ad should show consumers what would be shared with their friends prior to consumers choosing to share their information, with explicit approval of the message to friends prior to usage. Consumers can waive future notices by opting-in to "auto-sharing," wherein their consent to share information via social ads is explicit.⁴

³ IAB Glossary of Interactive Advertising Terms v 2.0 – <http://www.iab.net/media/file/GlossaryofInteractivAdvertisingTerms.pdf>.

⁴ <http://www.iab.net/media/file/Social-Advertising-Best-Practices-0509.pdf>.

Industry best practices like these would enable consumers to have the most control over their personal information and put the onus on companies and operators to secure permission before collecting and using personal information. Unfortunately, many online companies seem to be working with a much lower standard. Earlier this year, danah boyd, a researcher at Microsoft Research and a fellow at Harvard University's Berkman Center for Internet and Society, addressed the practices of social networking companies in her keynote address at South by Southwest, "Making Sense of Privacy and Publicity":

I'm going to give them the benefit of the doubt on this one because a more insidious framing would be to say that they wanted to force people into opting-in because this makes the service more viral and more monetizable. While I'm trying not to let conspiracy theories cloud my analysis, I can't help but notice that more and more companies are opting people in and waiting until they flip out to adjust privacy settings.⁵

Put more simply, opt-in empowers consumers to make informed choices; opt-out is built on the approach that it's easier to beg forgiveness than to ask permission. This is unfair and unacceptable for all consumers and especially for parents trying to control their children's personal information. Opt-in must be the standard.

Online companies and operators must receive consent from parents prior to collecting or using personal information from or about children. In addition:

- Considering all of the ways that older children now use social networks and other online services to communicate and share information, the COPPA protections should be extended to all children under 18. Companies and operators must get an opt-in from parents before collecting or using personal information from children under 16. For children aged 16 and 17, companies and operators must get an opt-in from the children themselves.
- No personal information from or about children should be shared in any form (including aggregate) with third parties without express consent from parents, except for medical, public health, or law enforcement purposes. Too many online companies today claim that they do not collect or use children's personal information, when in fact third party operators – such as mobile app developers – work through and with these companies to collect and use personal information. This third party distinction is meaningless to parents. *All* companies working in the online environment should meet the same standard and should get express consent from parents *before* collecting or using their children's personal information.
- The opt-in standard should also apply to behavioral advertising. When COPPA was written in 1998, online behavioral advertising was not an issue, but today it is a

⁵ danah boyd, "Making Sense of Privacy and Publicity," South by Southwest, March 13, 2010 - <http://www.danah.org/papers/talks/2010/SXSW2010.html>

sophisticated technology for marketing to children – exactly the sort of practice that COPPA was designed to prevent.

- Finally, to truly empower parents, their opt-in must involve *informed* consent. We will expand on this issue in the next section, but clearly parents need simple, clear, accessible information about what personal information will be collected from their children and how that information will be used.

PARENTS MUST LEARN HOW TO CONTROL PERSONAL INFORMATION

A crucial improvement to COPPA and the overall protection of children’s privacy is a greater emphasis on empowering parents with information and education. Parents can’t control their children’s personal information in the digital world if they don’t understand how the digital world works.

This means that companies need to provide parents with more information – easily found and in plain language – about how their children’s personal information may be collected and used online so that parents can make smarter choices. This also means that parents must take steps to engage in what their children are doing – and trying to do – online and must learn more about how personal information is being collected and used online.

Studies show that when parents engage with their children in online activities, their children have “the lowest rates of information disclosure and other ‘risky’ behaviors like meeting online friends face-to-face.”⁶ Parent involvement is the most effective tool for protecting children’s personal information online – and for preparing children to protect their own information – so industry, educators, and government should all take steps to encourage and enable parents. For example:

- Online company and operator privacy policies are frequently so long and complex that no one is clear on what they mean, and most children (and parents) don’t bother to read privacy policies before giving their consent. Companies must provide parents with more and better information – in clear and useful ways. As the Commission noted in its 1998 report to Congress, the notice “should also be unavoidable and understandable so that it gives consumers meaningful and effective notice of what will happen to the personal information they are asked to divulge.”⁷ Parents shouldn’t need law degrees to understand how a site will use their children’s information.

⁶ See Eastin, M.S., Greenberg, B.S. & Hofschire, L., 2006. Parenting the Internet. *Journal of Communication*, 56(3), 486-504; and Rosen, L.D., Cheever, N.A. & Carrier, L.M., 2008. The association of parenting style and child age with parental limit setting and adolescent MySpace behavior. *Journal of Applied Developmental Psychology*, 29(6), 459-471.

⁷ <http://www.ftc.gov/reports/privacy3/priv-23a.pdf> page 8.

- Online companies and operators must do more to inform parents about what their children are doing online and how they can get involved. The Commission’s recent COPPA roundtable and Congressional hearings have highlighted how parents are often confused about how COPPA works. For example, researchers at Harvard University’s Berkman Center for Internet and Society found that:

Across all socio-economic and educational levels, parents and youth who are not actively engaged in privacy conversations believe that the age requirements that they encounter when signing up to various websites are equivalent to a safety warning. They interpret this limitation as: “This site is not suitable for children under the age of 13.” While this is sometimes true, the safety message conveyed by the age limitation completely obscures any effort to help consumers understand privacy issues, let alone make wise choices about how to navigate issues related to collection of data about them by commercial actors.⁸

- The Commission’s COPPA roundtable highlighted some of the challenges for companies in verifying parental consent. Those challenges are legitimate, but companies also have many opportunities to inform parents and should be doing more to help parents understand what children are doing online.
- Teachers, schools, and other organizations can help by informing parents about controlling their children’s personal information online and by educating children about controlling their own personal information. There are several early efforts in this area, and their growth is a sign of the demand for more and better tools and information. For example:
 - The Commission’s new guide, “Net Cetera: Chatting with Kids About Being Online,” provides parents with practical tips to teach their children about Internet fraud, keeping computers secure, and protecting privacy. Since Net Cetera was first published in October 2009, more than 3.5 million copies have been shipped around the country.
 - Common Sense Media’s parent media education program, Common Sense Schools, includes tips about protecting children’s information online. The program was launched in November 2008, and there are now nearly 8,000 schools using the parent education resources across the country. Building on that program, Common Sense has just launched new middle school curriculum tools called “Digital Citizenship in a Connected World.” These free resources will help

⁸ “How the COPPA, as Implemented, Is Misinterpreted by the Public.” Statement to the United States Senate, Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science, and Transportation, by danah boyd, Urs Gasser, and John Palfrey, April 29, 2010 - http://cyber.law.harvard.edu/publications/2010/COPPA_Implemented_Is_Misinterpreted_by_Public.

teachers and other mentors engage children about many issues in the digital world, including protecting their privacy and reputation online.⁹

Empowering parents also builds on core principles of fair information practice, which are widely recognized by the Commission and others as essential to ensuring that the collection, use, and dissemination of personal information are conducted fairly and in a manner consistent with consumer privacy interests. As the Commission stated in “Privacy Online”:

These core principles require

1. that consumers be given *notice* of an entity's information practices;
2. that consumers be given *choice* with respect to the use and dissemination of information collected from or about them;
3. that consumers be given *access* to information about them collected and stored by an entity; and
4. that the data collector take appropriate steps to ensure the *security* and integrity of any information collected.

Moreover, it is widely recognized that fair information practice codes or guidelines should contain enforcement mechanisms to ensure compliance with these core principles.¹⁰

ROLE OF THE COMMISSION IN FACILITATING CHANGES

As outlined above, some of the most important ways to enhance parents’ ability to control their children’s personal information online should come from improved industry practices and from parents getting more engaged in their children’s digital activities. In addition, there are crucial steps that the Commission must take to improve online privacy protection for children:

- Clarify that COPPA applies to all online, digital, and mobile environments.

By Congressional design, COPPA applies to any *collection* (including publication or sharing by users themselves) of *personal information* through a website or online service, regardless of the device used to access that site or service.

In its 1999 COPPA rulemaking, the Commission declared that the “proposed Rule’s definition of ‘Internet’ made clear that it applied to the Internet in its current form **and to any conceivable successor**. Given that the technology used to provide access to the Internet will evolve over time, it is imperative that the Rule not limit itself to current access mechanisms.”¹¹

⁹ <http://www.common sense media.org/schools>

¹⁰ <http://www.ftc.gov/reports/privacy3/priv-23a.pdf> page ii.

¹¹ Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,891 (Nov. 3, 1999), available at www.ftc.gov/os/1999/10/64fr59888.pdf

In addition, the Commission FAQ, which serves as its primary interpretive guide, says the “Rule’s Statement of Basis and Purpose makes clear that the term Internet is intended to apply to broadband networks, as well as to intranets maintained by online services that either are accessible via the Internet, or that have gateways to the Internet.”¹²

This comprehensive definition is also supported by leading advocacy groups, including the Progress & Freedom Foundation, which testified that:

As a matter of statutory construction, this interpretation is probably correct and would probably receive deference from a court under the Chevron doctrine if challenged. This interpretation would allow the FTC to apply COPPA’s requirements to services like text messaging and Massively Multiplayer Online (MMO) games like *World of Warcraft* and *Second Life* that are “accessible via the Internet,” regardless of the device used to access them.¹³

- Clarify that the COPPA definition of “operator” means all companies and third parties that collect or use children’s personal information. The Rule defined operator as

any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users or visitors, *or on whose behalf such information is collected or maintained.*¹⁴

Too many online companies dodge responsibility for the collection and use of children’s personal information through their sites and services by claiming that other third party operators are collecting and using the information. *All* companies and operators involved must be held to the same standard and must get informed consent from parents *before* collecting or using children’s personal information. The Commission must make clear that COPPA and the COPPA Rule apply to *all* of these companies and must ensure that they meet these requirements.

- Clarify that COPPA applies to new ways that companies collect and use children’s personal information and to new forms of personal information.

Currently, COPPA requires parental consent only for use of information that can specifically identify an individual child. However, new behavioral advertising strategies use non-personal information or aggregate data, and COPPA should require parental consent for using this information as well.

¹² Federal Trade Commission, Frequently Asked Questions about the Children’s Online Privacy Protection Rule, Question 6 (“What types of online transmissions does COPPA apply to?”), www.ftc.gov/privacy/coppafaqs.shtm.

¹³ Szoka, Berin. Response to Questions from Senator Mark Pryor (D-AR) Regarding Hearing on “An Examination of Children’s Privacy: New Technologies & the Children’s Online Privacy Protection Act” Before the Subcommittee on Consumer Protection, Senate Committee on Commerce, Science & Transportation, June 1, 2010.

¹⁴ Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,891 (Nov. 3, 1999), available at www.ftc.gov/os/1999/10/64fr59888.pdf.

The COPPA Rule defines “personal information” as individually identifiable information that could be used to locate an individual either online or offline, which includes:

information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.¹⁵

The issue isn’t how the marketing is constructed or labeled or whether it’s driven by one company or another “third party.” The issue is whether it targets children, which is one of the things COPPA was created to prevent. The Commission should ensure that the COPPA Rule clearly prohibits all online marketing using children’s personal information without informed parental consent.

As importantly, many new online and mobile services use geo-location information – which certainly fits the definition of “personal information” – and that information can be used to market to children, to contact them offline, and for many other purposes.

The changes described are crucial but simple. For the most part, they involve clarifications by the Commission about how the COPPA Rule applies to a constantly changing and increasingly mobile online environment. If necessary, Congress should expand the Commission’s rule-making authority to ensure that parents have the tools, opportunities, and information they need to control their children’s personal information online.

CONCLUSION

Twelve years ago, the Commission’s “Privacy Online” report highlighted how the online medium can circumvent the traditional gatekeeping role of the parent. Today, the rapidly evolving and increasingly mobile digital world makes it significantly harder for parents to control their children’s personal information online.

There are many things that parents should do to get more involved and engaged in their children’s activities online. There are also many ways that companies and operators should self-regulate and provide parents with better opportunities and clearer information. However, if industry will not take these necessary steps, the Commission and Congress must act to ensure that parents have the tools, information, and opportunities they need to protect their children’s privacy and personal information.

¹⁵ Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,891 (Nov. 3, 1999), available at www.ftc.gov/os/1999/10/64fr59888.pdf