

Children's Right to Privacy on the Internet in the Digital Age

Bethany Brown

Abstract

As access to the internet has become easier and more widespread in recent years, children have also started getting both increased and easier access to the internet, whether at home or at school. This access, coupled with a decrease in supervision while on the internet, implicates certain questions in regard to children. Questions involving data privacy rights are relevant to both adults and children in the digital age, but there are certain concerns that arise uniquely for children.

This Note will focus on one piece of legislation that concerns data privacy rights for children—the Children's Online Privacy Protection Act (COPPA) (16 C.F.R. § 312). The main question that this Note will seek to answer is whether COPPA is adequate in protecting children's data privacy rights. Part II will explore the history behind COPPA and explain what it actually is, defining key terms as used in the legislation as well as explaining certain provisions. Part III will discuss problems that have arisen under COPPA recently, analyzing lawsuits that have occurred under COPPA as well as the legislation's shortcomings which have been highlighted in recent events. Finally Part IV will offer possible solutions to these problems, explaining what other scholars have suggested as solutions to these problems as well as other suggestions.



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I. INTRODUCTION

As access to the internet has become easier and more widespread in recent years, children have also started getting both increased and easier access to the internet, whether at home or at school. This access, coupled with a decrease in supervision while on the internet, implicates certain questions in regard to children. Questions involving data privacy rights are relevant to both adults and children in the digital age, but there are certain concerns that arise uniquely for children.

This Note will focus on one piece of legislation that concerns data privacy rights for children—the Children’s Online Privacy Protection Act (“COPPA”).¹ The main question that this Note will seek to answer is whether COPPA is adequate in protecting children’s data privacy rights. Part II will explore the history behind COPPA and explain what it is, defining key terms as used in the legislation as well as explaining certain provisions. Part III will discuss problems that have arisen under COPPA recently, analyzing lawsuits that have occurred under COPPA as well as the legislation’s shortcomings which have been highlighted in recent events. Finally, Part IV will offer possible solutions to these problems, explaining what other scholars have suggested as solutions to these problems as well as other suggestions.

II. WHAT IS COPPA?

COPPA was enacted in October of 1998.² Before it was enacted, “activist groups called for some legislation to protect children’s privacy on the Internet.”³ At the time, personal information was being collected on the internet and sold to third

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¹ 16 C.F.R. § 312.

² Melanie L. Hersh, *Is COPPA a Cop Out? The Child Online Privacy Protection Act as Proof that Parents, Not Government, Should be Protecting Children’s Interests on the Internet*, 28 FORDHAM URB. L.J. 1831, 1854 (2001).

³ *Id.* at 1853.

parties.⁴ When people found out about this sale, which included children’s personal information, they took action and urged the FTC to do something in order to protect children’s personal information.⁵ There were a number of reports that looked into the problem, as well as some research “show[ing] that young children cannot understand the potential effects of revealing their personal information; neither can they distinguish between substantive material on websites and the advertisements surrounding it.”⁶

Prior to COPPA, the FTC conducted a study which ultimately found a need for “better implementation of privacy policies among commercial websites.”⁷ This was because of the rise of the online market.⁸ Adults were concerned about providing their personal information on the internet, which then caused more concern for children who were on the internet as well.⁹ This concern was multiplied by the possibility of children providing personal data indirectly through the use of cookies.¹⁰ By the time the legislation was enacted, the FTC was particularly concerned about protecting the data privacy of children on the internet.¹¹

The legislation had several goals: “to enhance parental involvement in children’s online activities to protect both their privacy and safety; to maintain the security of the personally identifiable information collected from children online; and to protect children’s privacy by limiting the collection of personal information from children without their parent’s consent.”¹² Ultimately, COPPA was signed into law in October of 1998 and took effect in April of 2000.¹³ COPPA “asks the FTC to implement a rule to protect privacy online in accordance with several key

⁴ *Children’s Online Privacy Protection Act (COPPA)*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/privacy/kids> (last visited Apr. 21, 2020) [hereinafter EPIC].

⁵ *Id.*

⁶ *Id.*

⁷ Lauren A. Matecki, *Update: COPPA is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J. L. & SOC. POL’Y 369, 373 (2010).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 374.

¹² Noah Joshua Phillips, Commissioner, Fed. Trade. Comm’n, Remarks on the Future of the COPPA Rule, FTC Staff Workshop (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_statements/1547700/phillips_-_coppa_workshop_remarks_10-7-19.pdf.

¹³ EPIC, *supra* note 4.

principles.”¹⁴ The rule that the FTC implemented is known as the Children’s Online Privacy Protection Rule (“the Rule”).¹⁵

It is worth noting that, as of the time of writing this Note, the Rule is being reviewed in light of the recent development of technology and is therefore currently up for notice and comment from the public.¹⁶ Overall, the Rule “prohibits unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.”¹⁷

There are several definitions contained within the Rule that help with comprehension. First, for purposes of the Rule, a child is anyone who is under the age of thirteen.¹⁸ It also defines an operator as anybody who operates a website and “collects or maintains personal information” from the website’s users.¹⁹ The Rule further defines “collects” or “collection” as “the gathering of any personal information from a child by any means,” which includes both passive information gathering through techniques like cookies, as well as active information gathering in which a child may be prompted to give out personal information.²⁰ The Rule also defines what qualifies as personal information, stating several categories that qualify as personal information.²¹ Personal information ranges from information like first and last names to geolocation and information gathered through the use of cookies. In order for a website to be subject to the Rule, the website or online service must be “directed to children.”²² To an extent, the Rule clarifies how to determine if a website is directed to children, stating that the FTC will look to different factors, such as subject matter and the use of “child-oriented activities and incentives.”²³ Finally, the Rule defines “obtaining verifiable consent” as “making any reasonable effort . . . to

¹⁴ Matecki, *supra* note 7, at 376.

¹⁵ *Id.*

¹⁶ Kristen Cohen, *YouTube Channel Owners: Is Your Content Directed to Children?*, FED. TRADE COMM’N (Nov. 22, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children>. The Rule is up for notice and comment until December 9, 2019.

¹⁷ 16 C.F.R. § 312.1.

¹⁸ 16 C.F.R. § 312.2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

ensure that” parents of children have “notice of the operator’s personal information collection” and then authorize that collection.²⁴

Generally speaking, operators cannot collect personal information from a child in a way that violates the regulations outlined in the Rule.²⁵ There are five regulations provided in the Rule.²⁶ First is the notice regulation: operators must provide notice on their website about what information they collect and how they use this information.²⁷ Second, operators must “[o]btain verifiable parental consent” before they collect or disclose any of the child’s personal information.²⁸ Third, operators must “[p]rovide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance.”²⁹ Fourth, operators may not make children give out more personal information than is reasonably necessary in order to play a game or participate in an online activity.³⁰ Finally, operators must have reasonable procedures in place “to protect the confidentiality, security, and integrity of personal information collected from children.”³¹

One of the difficulties with this is the requirement for verifiable parental consent. The Rule provides some examples of how operators may obtain verifiable parental consent, including parental consent forms, debit or credit card use, or verifiable parental consent via phone.³² However, parents may be reluctant to provide a credit or debit card number to a provider for their own security reasons. Consent forms would take a while for parents to complete and turn in, whether that be by postal mail or electronic scan. Calling a number may be the most efficient way for operators to obtain verifiable parental consent, but there are even issues with doing that, because there may not be a way to actually confirm that the person calling is, in fact, the parent of the child.

²⁴ *Id.*

²⁵ 16 C.F.R. § 312.3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² 16 C.F.R. § 312.5.

Enforcement of COPPA comes through civil penalties, including fines.³³ In order to discover noncompliance with COPPA, “the FTC monitors the Internet and encourages complaints from parents on its website.”³⁴ Upon discovering noncompliance with COPPA, the FTC can impose civil penalties as well as fines on the violator.³⁵

III. PROBLEMS WITH COPPA AS HIGHLIGHTED IN RECENT EVENTS

Within ten years of the Rule being in place, the FTC released a report highlighting its effectiveness.³⁶ However, the report also found that there would be challenges moving forward because of the development of technology.³⁷ As children’s access to the internet increased with the advent of different devices such as smartphones and tablets, so did the challenges with the Rule.³⁸ One big challenge is how easy it is for somebody to claim that they are older than they truly are.³⁹

Something else that has proven to be a real challenge to the effectiveness of the Rule is enforcement. The penalties for noncompliance with the Rule are primarily monetary. For large companies, a monetary fine can be like a small slap on the wrist. Recently, this concern was highlighted in an FTC settlement with Google and YouTube.⁴⁰ Google and YouTube were found to have allegedly violated COPPA by having child-directed YouTube channels that collected the personal information of children without having any sort of verifiable parental consent or parental notification.⁴¹ Ultimately, Google and YouTube were fined around \$170 million for their alleged noncompliance with COPPA.⁴² This punishment was criticized, with several senators voicing concerns “[t]hat monetary penalty provided almost no

³³ EPIC, *supra* note 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Press Release, Fed. Trade Comm’n, COPPA Protects Children But Challenges Lie Ahead (Feb. 27, 2007), <https://www.ftc.gov/news-events/press-releases/2007/02/coppa-protects-children-challenges-lie-ahead>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Press Release, Fed. Trade Comm’n, Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law (Sept. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

⁴¹ *Id.*

⁴² *Id.*

deterrence value at all and was not paired with sufficient structural injunctions to prevent future violations by Google.”⁴³

About a month before this settlement, the FTC announced that it was reviewing the Rule and seeking public comment on it.⁴⁴ The Rule was not scheduled to be under review again until 2023, but the FTC stated that with the advent and rapid development of technology, questions arose that warranted an earlier review for the Rule.⁴⁵ Educational technology has made its way into the classroom, and children have started playing more videogames, whether they be on a gaming device or on a smartphone.⁴⁶ With the amount of technology that children have access to, it seems as though review of the Rule is not only appropriate, but necessary.⁴⁷

While many agree that the Rule requires review at this time, several senators are concerned about the revision.⁴⁸ In particular, these senators are concerned about the Rule being updated in such a way that children’s privacy will not be prioritized and will therefore ultimately not be protected.⁴⁹ In a letter to the FTC, these senators voiced their concerns with the review of the Rule.⁵⁰ The primary concern is that the FTC will change the Rule in such a way that there will be less safeguards on the privacy of children.⁵¹ Part of the concern with the review of the Rule is the questions that the FTC is asking, which the senators believe seems to “suggest an intention to add exceptions and other rule changes to COPPA that would weaken children’s privacy online.”⁵² Another big concern that the senators explained was “an FTC official suggested that limiting targeted advertising could impact the quality and

⁴³ Letter from Senator Edward J. Markey, Senator Richard Blumenthal, Senator Josh Hawley & Senator Marsha Blackburn to The Honorable Joseph Simons, The Honorable Rohit Chopra, The Honorable Christine Wilson, The Honorable Noah Phillips & The Honorable Rebecca Slaughter (Oct. 4, 2019), <https://www.markey.senate.gov/imo/media/doc/COPPA%20Letter%20to%20FTC%202019.pdf>. [hereinafter Letter from Senators].

⁴⁴ Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule, <https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online> (last visited Apr. 17, 2020).

⁴⁵ *Id.*

⁴⁶ Letter from Senators, *supra* note 43, at 2.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

amount of child-directed content—a statement that appears to reveal troubling disregard for the core mission of COPPA: safeguarding kids’ privacy.”⁵³

A brief review of the comments provided by various members of the public show different concerns.⁵⁴ Many of the comments center around YouTube and content creators who make things specifically for children.⁵⁵ Since being a YouTuber can be a money-making career for some people, some of the public comments highlight a concern for those people who may no longer be able to make as much money due to their videos being regarded as child-directed.⁵⁶ Other comments highlight concerns over how it is determined that a video is child-directed, finding the term to be vague and frustrating to define.⁵⁷ In particular, the comments highlighted that a lot of YouTube content can be family-friendly yet not child-directed, making the term confusing for creators.⁵⁸

IV. POSSIBLE SOLUTIONS

A major problem with the Rule, in light of the recent development of technology, is highlighted in both the FTC settlement with Google and YouTube as well as in the public comments regarding the review of the Rule: how to determine whether certain content is child-directed. Currently, it is hard to define what it means for something on the internet to be child-directed.⁵⁹ Short of operators and creators declaring that certain content is directed towards children, it looks like the Rule does not provide an adequate definition of what is considered to be child-directed.⁶⁰ In fact, in defining what counts as child-directed, the most that the Rule offers is the following:

In determining whether a Web site or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and

⁵³ *Id.*

⁵⁴ FTC Seeks Comments on COPPA Rule Review, Fed. Trade Comm’n, Docket ID: FTC-2019-0054, <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=FTC-2019-0054> (last visited Apr. 17, 2020).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 16 C.F.R. § 312.2.

⁶⁰ *Id.*

incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.⁶¹

This language is confusing for creators because many of the examples provided in the Rule could very easily be included in content that is not necessarily directed at children. For example, there are plenty of animated shorts on YouTube that are not directed at children, but rather at a more adult audience. Therefore, in order for the Rule to adapt and become more effective, a clearer definition of what content is child-directed is necessary.⁶²

An easy way for the FTC to determine if content is child-directed would be to have creators say at the outset whether they intend this content to be directed at children.⁶³ However, this approach has its own flaws in that people may have more incentive to say that their content is not child-directed, but rather, family-directed or family-friendly. If creators admit that their content is directed at children, then they will have to comply with the Rule, which would probably lead to problems with the monetization of their content. Therefore, YouTubers would have incentive to deny that their content is child-directed and instead, simply state that it is family-friendly content.

Overall, the FTC needs to better define what it means for content to be child-directed in light of the struggles that creators on YouTube are having over complying with the Rule.⁶⁴ With a more concrete definition of the term “child-directed,” implementation and adherence to the Rule will be easier for creators and operators. A more concrete definition of the term “child-oriented” would also alleviate many concerns over family-friendly material on websites like YouTube.

The FTC should also consider introducing different avenues for obtaining verifiable parental consent. The use of dual factor authentication is something that is becoming more common now, and this method of authentication could prove useful for operators to have an easier way to achieve verifiable parental consent. A parent could easily have an app on their phone that could be used to provide verifiable parental consent. In order for the child to access the child-directed site, a parent could

⁶¹ *Id.*

⁶² Matecki, *supra* note 7, *passim*.

⁶³ *See id.*

⁶⁴ *See id.*

have to verify consent through either an app on a phone or even a text message. However, this would rely on the parent being the only person using their phone.

VI. CONCLUSION

Questions involving data privacy are only getting more and more difficult to solve as technology advances. These questions only get tougher as younger generations get involved in the internet as well. Special care must be taken to ensure that children's privacy rights on the internet are protected. This begins with a precise definition of what it means for content to be child-directed.⁶⁵ Ultimately, with the development of technology, it may become easier for content creators to obtain verifiable parental consent, but that ease of access comes with other concerns.

⁶⁵ *See id.*