

Hurdles for apps directed at children

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In July, shortly after publicly announcing a broader expected crackdown on mobile apps for violations of the Children's Online Privacy Protection Act, or COPPA, the Federal Trade Commission sought to quell the industry's anxiety by issuing a COPPA compliance guide for businesses that make apps directed at children.

Players in the mobile app industry — including app developers, app platforms like Google Play and the Apple App Store, and third-party services — praised the FTC's guidance. Such praise is rare in light of the FTC's recent amendments to its COPPA implementing rule significantly expanding the scope of liability for online services. For app developers, the good feelings also may be short lived, given the FTC's expressed interest in vigorously enforcing COPPA against noncompliant mobile apps.

The FTC's Guidelines

COPPA requires online services directed to children under 13 to provide notice and obtain parental consent before collecting or disclosing children's personal information, including their names and email addresses. Some have viewed the statute's rigorous requirements as discouraging innovation in educational and child-directed apps because developers viewed children as their "Achilles heel." Stuart Parkerson, "New Regulations to Protect Kids Is Driving Change in the Mobile App Industry," App Developer Magazine, July 23, 2014.

In its guidance, the FTC clarified how apps can more easily avoid civil and significant monetary liability for violating COPPA:

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language in its implementing rule — about limiting the use of credit cards as a method of parental consent to only those situations involving a real transaction — the FTC clarified that operators can verify the identity of a parent by using a credit or debit card coupled with additional verifying information, such as a monetary transaction or answering questions for which only a parent would know the answer.

- The FTC also approved of apps relying on third parties to obtain consent on their behalf. Operators, not the third-party services, will ultimately be responsible for ensuring that their notice, information collecting practices, and consent mechanisms comply with COPPA.

- Finally, the FTC clarified that app platforms, like Google Play and the Apple App Store, may be among those third parties who obtain consent on behalf of apps. Again, the child-directed apps, rather than the platforms, would be liable for any COPPA violation.

A Boon and Liability Risk

Although both privacy advocates and the mobile app industry alike welcomed these easier ways to comply with COPPA, the new guidelines also underscored that mobile app developers, platforms and third-party services may face significant exposure for noncompliance.

While the FTC made it easier for developers to obtain parental consent through third-party services, the guidelines also increase pressure on developers by reiterating that reliance on faulty third-party consent services will not immunize the developers from liability.

As for platforms, the federal regulations already shielded them from liability for obtaining consent

for apps. As such, the more notable clarification is platforms' potential liability for deceptive practices under Section 5 of the FTC Act should they provide those consent services and misrepresent the level of oversight the platform provides. This move may deter platforms from providing consent services in the first place, even though platforms are in a superior position to obtain parental consent — both economically and technologically — than small start-ups that create apps. Time will tell how platforms weigh the risk of liability for unfair trade practices against the risk that COPPA's costly requirements may inhibit new child-directed apps from stocking platforms' digital shelves. The new guidelines also appear to provide a great boon for third-party consent services — but even this is tempered with a risk of liability. The FTC reiterated that "common consent mechanisms" — or third parties who obtain parental consent on behalf of operators — could be more efficient and benefit smaller operators. Indeed, some third-party services offering COPPA-compliance software were in high demand amid the rumored-FTC crackdown on apps following the 2013 amendments to COPPA. The FTC's clarifications will likely spur further innovation for third-party consent services, as only a few services occupy the field. There is also plenty of space for services' innovation for the parental consent requirement, as the "reasonably calculated, in light of available technology" standard is broad and the list of pre-approved methods is nonexhaustive.

Although the FTC directed its final guideline to app platforms, presumably third-party consent services also would face liability for deceptive practices under Section

5 of the FTC Act. Third-party services may always mitigate this risk by requesting pre-approval for their consent method under COPPA's safe harbor program, which may shield self-regulating services from formal FTC investigation.

Privacy and the Mobile App Industry

The FTC's clarifications to COPPA demonstrate the agency's efforts to advance children's privacy while still accommodating technological innovation. For instance, the guidelines acknowledge that start-ups may need to rely on third-party consent services and that apps often provide their services for free, without monetary transactions. Indeed, COPPA itself was amended in 2013 to update its privacy protections to a world with smartphones and mobile apps — threats to children's privacy that did not exist when it was originally passed in 1998. Whether the FTC has struck the appropriate balance between the protection of children's privacy and technological advancement likely will remain a disputed issue.

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