


Privacy

State Law Approaches to Address Digital Food Marketing to Youth

Privacy protections are often framed in terms of child safety from online predators. Privacy protections also are important to protect youth from junk food marketers seeking to capitalize on the wealth of information one's mobile and online habits provide—highly valuable information that can be used to segment and target young consumers as individuals and peer groups to boost sales and consumption of unhealthy foods and beverages. Privacy is one area of digital marketing that has been the subject of regulatory action at the state and federal level. In 1998 the Children's Online Privacy Protection Act (COPPA)¹ was enacted and granted the Federal Trade Commission (FTC) the authority to regulate the online collection and use of personal information from children under the age of 13.² COPPA granted the FTC rulemaking authority and initially promulgated rules and guidance after its passage. The FTC recently revised COPPA to expand the definition of personally identifiable information and the range of parties subject to COPPA compliance.³

Teens and the COPPA Revision Process

Teens are not covered by COPPA. The FTC initiated a review of its COPPA rules in 2010.⁴ One of the proposed changes made by child privacy advocates was to expand the definition of the term "child," defined as "an individual under the age of 13," to include adolescents. The FTC declined to advocate for the change to include adolescents in the definition of "child" and its rationale provides insight into how it envisions its role with respect to protecting adolescents.⁵ First, the FTC stated that it would be inappropriate to include adolescents under COPPA.⁶ Adolescents face unique privacy challenges online, and the FTC claimed COPPA was not designed to address those particular challenges. A core component of COPPA is the requirement that companies obtain verifiable parental consent prior to gathering certain



KEY TAKEAWAYS

Privacy protections are important to protect children and teens from aggressive junk food marketing.

States have successfully enforced COPPA.

Teens are a key target demographic for digital food marketing. They are not protected by COPPA. Other state privacy laws and consumer protection laws can be invoked to protect them.

State AGs can play a vital role to fill the gap around teen privacy, especially with regard to targeted and localized digital marketing.

types of personal information. This process depends on children providing their parents' contact information. The FTC asserted that adolescents are more likely to falsify or not provide their parents' contact information, and lie about their age. Second, the FTC noted that "courts have recognized that as children age, they have an increased constitutional right to access information and express themselves publicly." The FTC feared that expanding COPPA to cover adolescents would intrude upon their constitutional rights. Third, the FTC stated that it is difficult to distinguish between websites adolescents visit and websites frequented by adults. Therefore, it reasoned that expanding COPPA to include adolescents would most likely inhibit adults' right to freely use the internet.⁷ Teens were not ultimately covered by the COPPA revisions.

State COPPA Expansion Efforts

COPPA is enforceable by the states and contains a floor preemption clause allowing states to enact more

stringent internet privacy laws. In 2004, Illinois passed the Children's Privacy Protection and Parental Empowerment Act (CPPPEA) creating an opt-out process for parents of children under 16 years of age whereby parents can opt-out of the sale or purchase of their child's personal information.⁸ Personal information includes any information that can be used to locate or contact a child.⁹ The CPPPEA is enforceable by the state attorney general.¹⁰

In 2009, the State of Maine enacted an Act to Prevent Predatory Marketing Practices Against Minors (hereinafter "Maine Act") that applied to children and adolescents aged 13 to 17.¹¹ The Maine Act covered all communications—not just electronic communications, and paid special attention to protection of health-related information. The law provided relief as an unfair trade practice, a private right of action, injunctive relief, actual damages and monetary fines.¹²

The Maine Act was problematic for a number of reasons, including a provision limiting its reach to "marketing or advertising [of] products, goods or, services" that could have been interpreted to provide less protection than that conferred by the federal COPPA which applies to the collection of a child's personally identifiable information for any purpose.¹³ Opponents of the law were diverse and included the Center for Democracy & Technology, the Maine Independent Colleges Association, the Motion Picture Association of America, and the Association of National Advertisers.¹⁴ They opposed the law as an unconstitutional violation of the First Amendment and the Dormant Commerce Clause, argued it was preempted by the federal COPPA,¹⁵ and that its application to all communications rather than just electronic communications made it overbroad.¹⁶ One specific concern was that the law could prohibit the marketing of colleges or SAT prep courses to adolescents under the age of 18.¹⁷ Due to these constitutional issues and other flaws, the Maine attorney general announced she would not enforce the Maine Act as written,¹⁸ and the Maine state legislature repealed it in March of 2010.¹⁹

Maryland Attorney General Doug Gansler urged lawmakers to pass legislation that would make a violation of COPPA a violation under Maryland's consumer protection laws and to confer private standing for violations. On January 24, 2013, the bill was read for the first time. A hearing was conducted on January 25, 2013, and on March 21, 2013, the bill was returned with an unfavorable recommendation.²⁰

State COPPA Enforcement Actions

Texas and New Jersey have initiated COPPA enforcement actions to protect child consumers in their states. In 2012, New Jersey Attorney General Jeffrey Chiesa brought the first state COPPA enforcement action involving mobile applications (apps) directed to children. 24x7 Digital LLC, a Los Angeles based company that develops children's apps, allegedly illegally collected, maintained and transmitted to a third party the personal information of children. The parties settled with a consent decree stipulating that 24x7 Digital would stop collecting personal data from its app users and would destroy all previously collected data that allegedly violated COPPA.²¹ 24x7 Digital was enjoined from failing to provide notice on its website or its mobile device application about the type of personal information it collects from children and from failing to provide notice to parents about the types of information collected from children and how it is used.²²

Texas Attorney General Greg Abbott was the first in the country to use state enforcement powers against three online operators for COPPA violations. All three suits were filed in December of 2007. In *Texas v. Future US, Inc.* the State alleged that the company knowingly collected personal information from children under 13 and failed to provide sufficient notice on its website, www.gamesradar.com, of the types of information collected and the uses of that information.²³ Future US allegedly failed to obtain parental consent before collecting a child's personal information; failed to notify parents of what information it collected, how it collected it, and its

disclosure practices; and conditioned a child's participation in an activity on disclosing more personal information than was reasonably necessary. No final disposition is publicly available for this enforcement action.²⁴

In *Texas v. The Doll Palace Corp.*, the state alleged that the website www.TheDollPalace.com did not sufficiently obtain parental consent prior to gathering personally identifiable information.²⁵ For example, if a child under the age of thirteen attempted to register, The Doll Palace stated that the user needed permission from a parent in order to continue and asked if the parent was present. If the child clicked "yes," then access to the site was granted. If the child clicked "no," then an email address was required to send a link to allow permission, but any email address, including the one originally used to register, was sufficient. The website allowed users to operate a host of dolls, which were tied to users' personal information, including age, gender, email address and location. This information was viewable to all members. The State asserted that the Doll Palace failed to prominently place its privacy policy in a conspicuous location and in terms easily understood by children and parents. No final disposition is publicly available for this enforcement action.²⁶

On December 18, 2007, the Texas AG and Small's Seed Company, operator of www.Santa.com, issued an Assurance of Voluntary Compliance whereby Small's Seed agreed that it would comply with all of the COPPA (and state consumer protection) provisions, including but not limited to, maintaining a link to its privacy policy on every page of its website that informs users in a clear and conspicuous way what personal information is collected and how it is used.²⁷ Small's Seed agreed to disclose the means of collecting personal information, whether actively or passively, and whether the personal information is disclosed to third parties. Small's Seed agreed that it will not collect a child's personal information without prior parental consent unless it falls within COPPA's parental consent exceptions.

Protecting Youth Privacy Under Other State Laws

While teens are not covered by COPPA, they are protected by general state privacy laws that apply to all consumers (see Appendix). In some states, these laws were patterned after COPPA. For example, California's Online Privacy Protection Act, which became effective on July 1, 2004, protects all consumers, not just children. It defines "personally identifiable information" nearly identically to the FTC's original COPPA rules, but omits the words "child" and "parent" and replaces it with "user" and requires that operators conspicuously post their privacy policy in a manner that is reasonably accessible.²⁸

Child privacy has also been the subject of general state consumer protection law actions. On September 15, 2010, New York Attorney General Andrew Cuomo announced a \$100,000 settlement with Echometrix, a company that sells parental Internet monitoring software, allowing parents to monitor their child's web surfing.²⁹ The company had been collecting and reading children's instant messages and then selling the coveted information to third parties for marketing purposes without notifying parents. In addition to a \$100,000 penalty payable to the state of New York, the company agreed to stop analyzing or disclosing children's personal information to third parties.³⁰ The company also entered into a settlement agreement with the FTC for violations of the general prohibition on deceptive trade practices.³¹

On October 15, 2007, Facebook and New York's Attorney General, Andrew Cuomo, entered into an Assurance of Discontinuance, which required Facebook to provide better procedures and mechanisms in response to complaints about pornography and sexual solicitation of minors on its website.³² The Attorney General had made an inquiry into Facebook's representations about the safety of its site and its response time for addressing complaints about pornography and sexual solicitation of minors. Facebook allegedly was in violation of N.Y.

Gen. Bus. Law §§ 349, 350 because its statements were contrary to its actions, making those statements false and misleading.³³

Multi-state efforts have also benefited young consumers. On January 14, 2008, 49 State Attorneys General (including Interim Attorney General of Washington D.C., Peter Nickles, and excluding Attorneys General from California and Texas) reached agreements with MySpace to adopt new, more expansive measures to protect minors' online privacy, including teenagers under the age of 18.³⁴ The agreement was negotiated over several months and spearheaded by Attorneys General Richard Blumenthal of Connecticut and Roy Cooper of North Carolina. Key provisions of the agreements included:

- Participating in an industry-wide Internet Safety Technical Task Force focused on developing more sophisticated online identity authentication tools
- Giving parents the opportunity to submit their child's email address to MySpace to prevent anyone using that email address to create a profile
- Making the default profile setting "private" for users between the ages of 16 and 17
- Promising to respond within 72 hours to inappropriate content complaints and committing more resources and/or staff to review and classify photographs and discussion groups.³⁵

On May 8, 2008, Facebook agreed to similar measures with the same 49 Attorneys General.³⁶

States Can Fill the Teen Privacy Gap

These enforcement actions under COPPA and other state laws illustrate the role that state AGs can take to ensure COPPA compliance and protect the privacy of the children of their states. To date, state efforts to explicitly expand COPPA have not been successful. Teens are heavy users of mobile devices and prime targets for digital food marketing. They currently are under-protected in terms of privacy protections. As the use of mobile devices and apps proliferate and marketers seek to tailor their campaigns to local groups of young consumers, the role of state AGs to monitor teen privacy under state consumer protection laws and take enforcement action when needed will be even more vital.

Endnotes

¹ Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6508 (1998).

² Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6502 (1998).

³ Alan S. Gutterman, *Changes to Children's Online Privacy Protection Act Go Into Effect on July 1, 2013*, 6 BUS. COUNSELOR UPDATE 2 (2013).

⁴ Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, 75 Fed. Reg. 17,089 (Apr. 5, 2010).

⁵ Children's Online Privacy Protection Rule, 76 Fed. Reg. at 59,805 (proposed Sept 27, 2011) (to be codified at 16 C.F.R. pt. 312).

⁶ *Id.*

⁷ Children's Online Privacy Protection Rule, 76 Fed. Reg. at 59,805 (proposed Sept 27, 2011) (to be codified at 16 C.F.R. pt. 312).

⁸ 325 Ill. Comp. Stat. §§ 17/5, 17/10.

⁹ 325 Ill. Comp. Stat. § 17/5.

¹⁰ 325 Ill. Comp. Stat. § 17/20, 815 Ill. Comp. Stat. Ann. § 505/7.

¹¹ An Act to Prevent Predatory Marketing Practices Against Minors, 10 Me. Rev. Stat. §§ 9551-9554 (repealed 2010).

¹² *Id.*

¹³ *Id.*

¹⁴ Joseph I. Rosenbaum, *Maine Recommends Repeal of Controversial Privacy Law*, LEGAL BYTES BLOG (Oct. 19, 2009), <http://www.legalbytes.com/tags/childrens-online-privacy-prote/>.

¹⁵ Charles H. Kennedy, *Maine Enacts Sweeping Children's Privacy Law*, JD SUPRA 1,3 (Aug. 2009), <http://www.jdsupra.com/legalnews/maine-enacts-sweeping-childrens-privacy-71038/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ John P. Feldman, *Maine Introduces COPPA Extension Bill*, ADLAW BY REQUEST BLOG (Jan. 8, 2010), <http://www.adlawbyrequest.com/2010/01/articles/kidadlaw-1/maine-introduces-coppa-extension-bill/>.

¹⁹ An Act to Prevent Predatory Marketing Practices Against Minors, 10 Me. Rev. Stat. §§ 9551-9554 (repealed 2010).

²⁰ H.B. 316, 433rd Gen. Assemb. (Md. 2013).

²¹ Consent Decree and Order of Injunctive Relief at 4-5, *Chiesa v. 27x7 Digital, LLC.*, No. 2:12-cv-03402 (D.N.J., June 26, 2012), available at <http://www.nj.gov/oag/cal/press/6272012r.pdf>.

²² *Id.*

²³ Complaint, *Texas v. Future US, Inc.*, No. A07CA-987LY (W.D. Tex. 2007), available at <https://www.oag.state.tx.us/newspubs/releases/2007/120507gamesradar.pdf>.

²⁴ A public records request to the Texas AG was never answered.

²⁵ Complaint, *Texas v. The Doll Palace Corp.*, No. A07CA-988SS (W.D. Tex. 2007), available at <https://www.oag.state.tx.us/newspubs/releases/2007/120507dollpalace.pdf>.

²⁶ A public records request to the Texas AG was never answered.

²⁷ Assurance of Voluntary Compliance, *In the Matter of Texas and. Small's Seed Co., L.L.C.*, No. D-1-GU-07-002600 (Travis Cnty. 345th Dist. Court 2007), available at https://www.oag.state.tx.us/newspubs/releases/2007/121807smallseedco_avc.pdf.

²⁸ Cal. Bus. & Prof. Code §§ 22575, 22577 (West 2012).

²⁹ State of N.Y. Office of the Attn'y Gen., *Cuomo Announces Agreement Stopping Software Company "Echometrix" From Selling Children's Private Online Conversations To Marketers* (Sept. 15, 2010), <http://www.ag.ny.gov/press-release/cuomo-announces-agreement-stopping-software-company-echometrix-selling-childrens>.

³⁰ Press Release, FED. TRADE COMM'N, *FTC Settles with Company that Failed to Tell Parents that Children's Information Would be Disclosed to Marketers* (Nov. 30, 2010), available at <http://www.ftc.gov/opa/2010/11/echometrix.shtm>.

³¹ *Id.*

³² Assurance of Discontinuance, *State of New York Office of the Attorney General, In the Matter of Facebook, Inc. d/b/a/ Facebook.com* (Oct. 15, 2007), <http://www.ag.ny.gov/sites/default/files/press-releases/archived/Executed%20Facebook%20AOD.pdf>.

³³ *Id.*

³⁴ *Joint Statement on Key Principles of Social Networking Sites Safety (MySpace)* (Jan. 14, 2008), available at <http://www.privo.com/privoPDF/Myspace%20and%20State%20AG%20agreement.pdf>.

³⁵ *Id.*

³⁶ *Id.*