

5Rights Foundation's submission to the COPPA Rule review 2019

December 2019

Overview

We welcome the Commission's recognition that the COPPA Rule requires fresh consideration in light of recent and ongoing changes to the digital environment. At a time when children's lives are increasingly augmented and mediated by digital technology, strengthening children and young people's data protection is timely and important.

5Rights Foundation has extensive experience advocating for children's privacy and other online rights in the UK and Europe, including our work on the UK's Age Appropriate Design Code ('The Code') currently being prepared by the Information Commissioner. The Code, set to become law in the coming months, provides age-appropriate protections to all children under 18, commensurate with their evolving capacities, and applies to all online services they are likely to access. As such, it reflects both the different needs of children and young people at different ages and the lived reality of their digital experience, serving them not just in 'child-only' spaces but throughout their digital interactions and childhood. In reviewing the COPPA Rule, we hope the Commission shares this ambition.

Our key recommendations are as follows:

1. The FTC should use its powers under Section 6(b) of the FTC Act to gather the information it needs to make an informed decision about whether or in what way to amend the COPPA Rule.
2. The COPPA Rule should be amended to clarify in what circumstances the Commission will determine that 'actual knowledge' has been established. This clarification should seek to capture as many of the online services that process children's data in practice, not just those that are 'directed to children', and should prevent the wilful disregard of child users.
3. The Commission should retain existing protections around child-directed content, but should strengthen its interpretation of actual knowledge so that operators cannot ignore child-directed content on their platforms.
4. To have a meaningful impact inferred data must be included in the COPPA Rule's definition of 'personal information'.
5. The scope of a school's authority to consent on behalf of parents should not be extended beyond defined educational purposes. Operators providing education technology in schools should be prohibited from seeking consent for purposes that are not directly necessary for the functioning of the educational service for which it is being sought.
6. The FTC should extend certain additional data protections to 13-17-year-olds, and provide guidance for operators to that effect.

The COPPA Rule has provided important protection to many under 13-year-olds for nearly 20 years, but many of its compromises continue to be inimical to the broader flourishing of children and young people in the digital age. This review is a chance for the Commission to

rectify these compromises and ensure that children's privacy and other rights are prioritised above all other considerations, both by the law and by the online services that children use.

Section 6(b) of the FTC Act

Service operators hold much of the information and evidence needed to ensure that any fresh consideration of the COPPA Rule is fully informed, practicable, mindful of unintended consequences, and accurately directed towards the best interests of children. This information is largely unavailable to regulators and policymakers, and to the public more broadly.

The FTC should therefore use its powers under Section 6(b) of the FTC Act to conduct a wide-ranging study of digital technologies that process children's data, and to request from individual operators the information it needs to understand current practice.

The Commission might find it useful to know that the UK's Centre for Data Ethics and Innovation (CDEI) is currently undertaking a review of online targeting, and states in its terms of reference:

*'The way targeting works is complex and levels of public understanding and scrutiny of targeting practices are generally low. It relies on complex and largely opaque flows of data which are difficult for individuals to understand, let alone control, and might risk undermining data protection and privacy rights.'*¹

The House of Lords Select Committee on Communications recently conducted a review and published a report on *Regulating in the digital world*, concluding that more transparency was needed from online services 'whose workings are mysterious; only inputs and outputs can be observed, but not the process in between.'²

The UK's Information Commissioner is currently undertaking a review of the real-time bidding and adtech sector 'due to its complexity and scale, the risks posed to the rights and freedoms of individuals and the concerns we've received.' In an initial report, the ICO explained that 'this is an extremely complex market involving multiple technologies and actors – and we will doubtless learn more going forward'.³

In sum, the consensus among policymakers and regulators in the UK is that the data practices of many online service operators are insufficiently transparent, and more evidence/access to data is needed if thoughtful, practicable and proportionate regulatory decisions are to be made. It will significantly enhance the ability of the FTC to make the required changes to the Rule if it is able to have clear sight of the data and design practices that impact on children and young people's digital interactions.

¹ Centre for Data Ethics and Innovation: [Review of Online Targeting](#), 2019

² [Regulating in a digital world](#), House of Lords Communications Committee, March 2019

³ [Update report into adtech and real time bidding](#), June 2019

Recommendation: the FTC should use its powers under Section 6(b) of the FTC Act to gather the information it needs to make an informed decision about whether or in what way to amend the COPPA Rule. Particular attention should be paid, to how services establish the presence of child users and what steps they take to protect children and their data when they do; methods of advertising to children and the associated data practices; and the use of student data by operators/providers of education technology.

Interpretation of ‘actual knowledge’

There is currently no definition of ‘actual knowledge’ in the Act or the Rule, and the guidance set out in the FAQs does not provide sufficient clarity either. As has been well-documented, this has led to a situation in which operators are able – indeed, are incentivised – to avoid gaining actual knowledge of child users on their services.

The COPPA Rule would benefit significantly from providing a clear interpretation of what is meant by actual knowledge. This interpretation should reflect the reality of children’s digital use and the recognition that it is necessary for children to receive COPPA’s protections for as much of their use as possible, not only on those services specifically directed to children. The importance of this is underlined by the established body of evidence indicating that a significant proportion of children’s time is spent on services that are not specifically ‘for children’. In the UK, 61% of children have a social media account before the age of 13.⁴ Research conducted in 2018 by the UK media and communications regulator Ofcom found that 47% of YouTube users aged 3 to 4 year-old and 60% of YouTube users aged 5 to 7 year-old access the main YouTube website or app, rather than YouTube Kids.⁵ Common Sense Media’s annual census reported similar findings for the next age-group up: ‘Despite the fact that YouTube says it is only for those age 13 and older, the platform dominated online viewing, with 76% of 8- to 12-year-olds saying they use the site. By comparison, only 23% report watching YouTube Kids.’⁶

In order to ensure that operators do not ignore the presence of millions of children on their services, the COPPA Rule should dictate that ‘actual knowledge’ will be established wherever an operator is deemed to have been ‘wilfully blind’. The doctrine of ‘wilful blindness’:

‘provides a means of attributing knowledge to a party whose strong suspicions have been aroused but who refrains from making inquiries to have those suspicions confirmed. The doctrine serves to override attempts to self-immunize against criminal liability by deliberately refusing to acquire actual knowledge.’⁷

⁴ Safety Net: Cyberbullying’s impact on young people’s mental health, Young Minds and The Children’s Society, 2017

⁵ Children and parent’s media use and attitudes: annex 1, Ofcom, 2019

⁶ Common Sense Census: Media use by Tweens and Teens, Common Sense Media, October 2019

⁷ R. v. Briscoe, [2008 ABCA 327](#) (CanLII) at para. 19

Encouragingly, this principle has now been adopted by the California Consumer Privacy Act 2018, which states that ‘A business that **wilfully disregards** the consumer’s age shall be deemed to have had actual knowledge of the consumer’s age.’

In determining whether actual knowledge and/or wilful blindness has been established, the Commission should consider evidence regarding audience composition, both of the specific service in question and of similar services both current and historic. As above, a Section 6(b) study to better establish the audience composition of different categories of service would be helpful.

Recommendation: the COPPA Rule should be amended to clarify in what circumstances the Commission will determine that ‘actual knowledge’ has been established. This clarification should seek to capture as many of the services that children access in practice, not just those that are ‘directed to children’, including by preventing instances of ‘wilful blindness’.

Presumption that all viewers of child directed content are children

Based on concerns that the current COPPA Rule may give operators of general audience platforms ‘an incentive to avoid gaining actual knowledge of the presence of child-directed content on their platform’, the FTC asks:

‘Should such platforms that identify and police child-directed content be able to rebut the presumption that all users of the child-directed third-party content are children thereby allowing the platform to treat under and over age 13 users differently?’

We share the Commission’s concern about the perverse incentive created by this aspect of the COPPA Rule. However, we question whether allowing operators to rebut the presumption is, at this point in time, the right approach – for two reasons.

First, it is not at all clear how general audience platforms seek to establish which of their users are children or how effective (and privacy-preserving) those efforts and methods are. Until operators are transparent about this and their mechanisms are clearly and independently judged to be effective, we cannot be confident that allowing operators to rebut the presumption will not result in a great many children inadvertently (or wilfully) being treated as adults.

Second, and in light of the above, it seems obvious that the most privacy-preserving way of mitigating the incentive to avoid gaining actual knowledge is *to make it harder to avoid gaining actual knowledge* (as we outline above). This approach may or may not reduce the ability of creators and/or platforms to *legitimately* monetize child-directed material, but the untrammelled monetization of content should not come before protection of children.

Again, a Section 6(b) investigation would help to inform a decision on this issue, as well as provide much-needed evidence on how child-directed content, and children’s presence more generally, are established online.

Finally, if operators are able to differentiate adult viewers from child viewers in relation to child-directed content, we see no reason they cannot do the same for other kinds of content. We know that children are viewing a range of content online, not just content that is directed to them. Permission to rebut the presumption for child-directed content should therefore be accompanied by obligations in relation to non-child-directed content too.

Recommendation: the Commission should retain existing protections around child-directed content, but should strengthen its interpretation of actual knowledge so that operators cannot ignore child-directed content on their platforms. A Section 6(b) investigation should be carried out before any decisions are made.

Inferred data

The FTC has asked if ‘personal information that is inferred about, but not directly collected from, children’ should be included in COPPA’s definition of ‘personal information’. We are clear that it should. Inferred data make up a significant proportion of all the data that are held on children and the processing of such data can subject children to all the same effects as the processing of data that are collected directly. Indeed, as Privacy International note, the process of inference means that ‘seemingly mundane or innocuous data’ can be used to ‘make surprisingly accurate predictions of highly personal, sensitive information.’⁸ Given this, there is no case to exclude inferred data from scope simply because the method of collection (or creation) is different.

We endorse the view of the UK Information Commissioner: ‘Inferred data *is* personal data... If inferred data is not personal data, it is completely unregulated.’⁹

Recommendation: inferred data should be included in the COPPA Rule’s definition of ‘personal information’.

COPPA and schools

The COPPA Rule and its FAQs currently allow schools to consent on behalf of parents only where the edtech operator/provider collects student data solely for the ‘use and benefit of the school’. We support this approach and would object to any extension of schools’ authority to consent to the processing of student data for commercial or other non-educational purposes. In order to ensure that schools and parents do not come under undue pressure, edtech operators and providers should be prohibited from seeking consent for these extraneous purposes.

In addition, the FTC could usefully clarify both the definition of ‘educational purposes’ for which consent can be sought, and the scope of purposes that are proscribed (including, but not limited to, direct marketing, behavioural advertising, and any profiling not necessary to the functioning of the service in question).

⁸ Examples of Data Points Used in Profiling, Privacy International

⁹ Elizabeth Denham CBE, House of Commons Select Committee on Digital, Culture, Media, and Sport, April 2019

The Commission asks:

Should the Commission consider a specific exception to parental consent for the use of education technology used in the schools?

And if so:

Should the scope of the school's authority to consent be limited to defined educational purposes? Should such purposes be defined, and if so, how? Should operators seeking consent in the school setting be prohibited from using information for particular purposes, such as marketing to students or parents?

As the Commission notes, the Statement of Basis and Purpose to the 1999 COPPA Rule 'does not preclude schools from acting as intermediaries between operators and schools in the notice and consent of process'. This is reflected in the FAQs accompanying the COPPA Rule, which permit schools to consent on behalf of parents if the operator only collects students' data for the 'use and benefit of the school, and for no other commercial purpose.'

We believe that this arrangement strikes the right balance.

Recommendations: Subject to a section 6(b) study, the scope of the school's authority to consent should be limited to defined educational purposes, and operators providing education technology in schools should be prohibited from using student information for purposes that are not strictly necessary to the **functioning** of the educational technology in question. Purposes necessary to the functioning of a service must not include broader commercial purposes, such as the funding of a service.

If the FTC allows student information to be used to improve educational products, that information must be both de-identified *and* de-identifiable, must not be shared with third parties, and permission must be limited to use for improving educational products only.

These safeguards should be written into the Rule itself, not just in the FAQs.

Protection for minors aged 13-17

While the definition of the child as 'an individual under the age of 13' is written into COPPA itself, we believe the Commission should recommend to both legislators and operators that extra protections be extended to 13-17-year-olds too. We note that FAQs already state that the FTC 'does believe that strong, more flexible, protections may be appropriate for this age group'. A 2012 report also explains that the FTC:

'believes that social networking sites should consider implementing more privacy-protecting default settings for teens. While some teens may circumvent these protections, they can function as an effective "speed bump" for this audience and, at the same time, provide an opportunity to better educate teens about the consequences of sharing their personal information.'

This approach has now been adopted by the California Consumer Privacy Act 2018, which sets out that:

*‘a business shall not sell the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, unless the consumer, in the case of consumers between 13 and 16 years of age, or the consumer’s parent or guardian, in the case of consumers who are less than 13 years of age, has **affirmatively authorized** the sale of the consumer’s personal information... This right may be referred to as the “right to opt in.”’*

While we would argue that teens should be given further protections beyond this specific ‘right to opt in’, the principle is the right one. The COPPA Rule would be greatly improved by introducing this ‘two-tier model’, in which protections for children and young people do not simply disappear the moment they hit 13.

Finally, we note that providing additional protection for teens would have the beneficial effect of protecting many under-13s, too, who routinely circumvent the age-gates on social media platforms, video-sharing platforms, online games etc.

Recommendation: the FTC should include additional guidance for operators in its FAQs about what protections 13-17-year-olds should receive for their data. These could include, for instance, high-privacy default settings, rules related to the collection or sharing of location data, limits on profiling for advertising or marketing purposes, and consideration of the particular needs of teens in relation to the presentation of information.

About 5Rights Foundation

There are over one billion children and young people online. Each day, another 170,000 go online for the first time. And yet, the digital world was never imagined as an environment in which childhood would take place. It was invented by adults, for adults and designed with the idea that all users are equal. But if all users are treated equally, then children and young people are treated as adult.

5Rights Foundation exists to make systemic changes to the digital world to ensure it caters for children and young people, by design and default. We work with and on behalf of children and young people to reshape the norms of the digital world in four priority areas: design of service, child online protection, children and young people’s rights, data literacy.

Our vision is for a digital world fit for children and young people, which they can access creatively, knowledgeably and fearlessly.

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