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## **“Protecting Children on the Internet – Warning for Webmasters!”**

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# Protecting Children on the Internet - Warning for Webmasters!

Charles R. B. Stowe and Keith Jenkins<sup>1</sup>

## Abstract

Building a web page is not only fun but for many, it is serious business. Under the Children's Online Privacy Protection Act, the Federal Trade Commission was authorized to write rules regulating the content and activity of web sites in order to protect children's privacy and safety. The Federal Trade Commission has issued its final regulations which were effective April 21, 2000.<sup>1</sup> This paper provides a brief overview of the regulations. Given the fact that over 40% of U.S. households are connected to internet and the www, those engaged in the design or operation of any type of website will find this article a useful overview. Of key importance is that the rules and related penalties are not simply aimed at web sites that are designed to market to children, but to any website that might be attractive to children.

## Scope

Webmasters and organizations that maintain web sites should consider the implications of the Children's Online Privacy Protection Act of 1998 and related Federal Trade Commission rules in designing their sites. The Children's Online Privacy Protection Act of 1998 (hereafter COPPA) carries both civil and criminal penalties of up to six months in jail and a fine up to \$50,000 per day when the violation is intentional. The Act provides for civil penalties of \$50,000 per violation and each day is considered a separate violation.<sup>2</sup>

The Children's Online Privacy Protection Act of 1998 addresses two separate issues: (1) providing information which may be considered harmful to children (pornography), and (2) the collection of data from children. Congress defined material that is harmful to minors as: "any communication, picture image, graphic image file, article, recording, writing or other matter of any kind that (a) the average person, apply contemporary community standards, would find, ... is designed to pander to, the prurient interest; (b) depicts, describes, or represents, in a manner patently offensive with respect to minors ... and (c) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."<sup>3</sup> What should be interesting is the issue of the application of "community standards" to a medium that is global and transitory by design. Minors under the Act are children under the age of 17.<sup>4</sup> This portion of the Act was successfully challenged on constitutional grounds in an action hereinafter referred to as Reno II.<sup>5</sup>

The other area of regulation is the collection of data from minors. COPPA requires that the operator of any website or online service that has actual knowledge that it is "collecting personal information from a child must provide notice on the website of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure

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practices for such information (to third parties).”<sup>6</sup> In this portion of the Act, the age of child means an individual under the age of 13.<sup>7</sup>

Congress specified that the Federal Trade Commission is authorized to promulgate rules and regulations and will have the responsibility for enforcement of the Act and directed the Commission to issue regulations on the collection of personal data within one year. Banks that operate web sites are regulated under the act by the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency or other appropriate agency. Certain types of information are not subject to the regulation such as when information is collected from a child and used only once to respond to the child with no archiving or storage of the data or “the collection of the data was necessary to protect the integrity of the website; to take precautions against liability; to respond to judicial process; or to the extent permitted under law to provide information to law enforcement agencies or for an investigation in a matter related to public safety.”<sup>8</sup> The Act also gives states the right to seek an injunction, enforce compliance or damages, restitution or other compensation or other relief granted by courts.<sup>9</sup> However, state attorney generals must give notice to the Federal Trade Commission by sending written notice of that action and a copy of the complaint for that action unless the state attorney general deems it not feasible to provide notice prior to filing the action. The Commission then has the right to intervene and organizations that sponsor self-regulatory guidelines are also permitted to submit amicus curiae.

### **Reno I and Reno II**

Congress had previously attempted to pass a law to shield children from allegedly pornographic sites in an earlier bill titled the Communications Decency Act.<sup>10</sup> However in *Reno v. American Civil Liberties Union*,<sup>11</sup> the Supreme Court struck down the federal statute that prohibited internet transmission to anyone under 18 of comments that were “obscene or indecent and of comments or pictures that were “patently offensive as measures by contemporary community standards.”<sup>12</sup> In striking down the “indecent” provision, the U.S. Supreme Court noted that the Internet is the “most participatory form of mass speech yet developed,” and is entitled to “the highest protection from governmental intrusion.”<sup>13</sup> The Supreme Court took the position that speech over the internet is to be afforded the highest protection similar to books and magazines as opposed to a lower standard which is applied to the broadcast media. As the Communications Decency Act did not give a definition of “indecent” and failed to cite the requirement that “patently offensive” material lack socially redeeming value, the Act was an unconstitutional attempt to control free speech. The Court also noted that the decentralized nature of the Internet made it particularly difficult to apply the “Community standards” test of obscenity law.<sup>14</sup>

The Children’s Online Protection Act<sup>15</sup> contained very similar language to the Communications Decency Act which the Supreme Court had found unconstitutional. Specifically, the Act defined material that is harmful to minors as “any communication, picture, image, graphic image file, article, recording, writing or other matter of any kind that is obscene or that (A) the average person, apply contemporary community standards...”<sup>16</sup> Apparently the legislative writers did not carefully study the Reno I decision closely enough to properly address the Supreme Court’s concerns. However, they did try to apply the law only to those who would be considered to make a “communication for commercial purposes” perhaps with the intention that under a challenge, a court would be more lenient toward government regulation of commercial speech. The Act stated that a person would be considered to make a “communication for commercial purposes “only if sch

person is engaged in the business of making communication . And the Act states that a person is deemed to "engage in the business" if that person "devotes times, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit... irrespective of whether a profit was actually made."<sup>17</sup> This strategy did not save COPPA.

The American Civil Liberties Union challenged the constitutionality of the Act on several grounds: (1) that its provisions violate the First Amendment in restricting free speech, that it is invalid on its face for violating First Amendment rights of minors, and that it is unconstitutional vague under the First and Fifth Amendments. Joining in the law suit were a number of sexually oriented web sites ranging from a Connecticut based site which provides information to handicapped people to gay-lesbian sites and the Electronic Privacy Information Center. The challenge was filed on October 22, 1998 seeking injunctive relief from enforcement of the act which was to go into effect on November 29, 1998. The district court did order a temporary restraining order to permit the parties to conduct accelerated discovery resulting in five days of testimony and one day of argument which ended January 27, 1999.<sup>18</sup> On February 1, 1999, the U.S. District Court for the Eastern District of Pennsylvania issued a 50-page Memorandum and Order granting plaintiff's motion for a preliminary injunction, effectively barring enforcement of the Act until the resolution of the case, either by appeal or by a trial on the merits. Though the memorandum is not binding, it cites prior cases and certainly helps to define or summarize legal arguments on the boundaries of state action in restricting access to the internet.

The court dispensed with the government's argument that the plaintiffs lacked standing on the basis that some of the plaintiffs faced certain punishment if the act were enforced. The court went on to deal with the plaintiff's allegation that the restrictions on free speech imposed by the acts would be financially devastating to some of the plaintiffs. The plaintiffs offered expert testimony that certain types of pre-screening techniques entailing a fee would dramatically reduce "visits" or "hits" and thus curtail free speech. After taking expert testimony, the court concluded: "there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors."<sup>19</sup> The court found that the plaintiffs established a substantial likelihood that they will be able to show that COPPA imposes a burden on speech that is protected for adults. The court also agreed that Congress has a valid compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards.<sup>20</sup>

The issue then was whether the terms of COPPA presents the least restrictive means of protecting children. The court cited *Elrod v. Burns* which states that to survive constitutional challenge the statute " must further some vital government end by a means that is least restrictive of (first Amendment freedoms) in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."<sup>21</sup> The Court drew an analogy between dial-a-porn regulations where the state attempted to require access codes as opposed to a less restrictive system of pre-blocking and the adult -oriented sites operated by some of the plaintiffs. While clever children could gain access to unblocked phones or an adult parent decides to unblock their phone for their own personal use of dial-a-porn services, the court noted that such a decision is similar to that of a parent placing sexual books or magazines on their bookshelves... "The responsibility for making such choices is where our society has traditionally placed it - on the shoulders of the parent."<sup>22</sup> The court

noted that "preventing a few children from accessing dial-a-porn messages does not justify a statute that has the invalid effect of limiting the content of adult telephone conversations."<sup>23</sup> While finding that Congress has a valid compelling interest in protecting minors from harmful materials, including material that may not be considered obscene by adult standards, it found that COPPA failed to use the "least restrictive means" to achieve its goal.<sup>24</sup> *Reno I* and *Reno II* both stand for the proposition that if government is going to regulate the internet to protect children from obscene materials, the law must be narrowly tailored and use the least restrictive means in achieving its purpose.

The defeat of the obscenity provisions of COPPA does not mean that society is defenseless against child predators and pedophiles if a New York law continues to be upheld. New York Penal Law provides for a criminal sanction against those who use the internet in the act of luring children into sex. Signed into law by Governor Pataki in 1996, the state law codified at 235.22 of the Penal Law survived constitutional attack. A defendant, Thomas R. Foley Sr., a 51 year old radio engineer from Buffalo, New York, became the target of an investigation after a State Trooper entered an Internet chat room called "KidsofFamilySex". Thinking he was communicating via internet with "Aimee a 15 year old who had sex with her father", Foley sent the trooper pictures of minors engaging in sexual acts and he arranged a liaison over Thanksgiving 1996. Police later obtained a no-knock warrant at Mr. Foley's residence where they found him busily typing at his computer. He was charged with tow counts of attempted first-degree disseminating indecent material to minors. In appealing the conviction, Foley's attorneys argued to the Court of Appeals that the New York law contains an unconstitutional blanket prohibition against free speech. In sustaining the conviction, the court found that the law was not directed at constitutionally protected behavior of free speech but against "The intentional dissemination of this type of material to a minor in connection with the sender's enticement or invitation to the child to engage in sexual activity - which is not constitutionally protected activity."<sup>25</sup>

The other provision of the Children's Online Privacy Protection Act dealing with the disclosure of personal information and the obligation for those obtaining such information from children to obtain parental consent was not at issue in *Reno II*.

### **Federal Trade Commission Rules Based on COPPA**

The unchallenged portion of the Children's Online Privacy Protection Act authorized the Federal Trade Commission to write publish rules designed to give parents notice and control of what information their children provide to web sites within one year of enactment of COPPA. Preceding the enactment of COPPA, the Federal Trade Commission conducted a random survey during the time period of March 9-20, 1998 of more than 1,400 commercial web sites. The Federal Trade Commission found that while 85% collected personal information from customers, only 14% provided any notice about how that information will be used and only 2% posted comprehensive policies. Three months later, the Direct Marketing Association responded with their own survey of the Kids Hot 100, Biz Hot 100 and Shopping Hot 100 Websites published by Web 21 magazine. The Association's survey showed that privacy notices were posted on 70% of Kids Hot sites, 64% of Biz Hot sites, and 51% of Shopping Hot sites.<sup>26</sup> While the industry preferred self-regulation, Congress felt the need to impose a legislative solution that does not preclude self-regulation, but does bring FTC into regulating content and disclosure of web sites. In November 1999 the Federal Trade Commission announced its rules after extensive public hearings and workshops.<sup>27</sup>

The Rules requires operators of website or online serviced directed to children under the age of 13 who have actual knowledge that the person from whom they seek information is a child to “(1) post prominent links on their websites to a notice of how they collect, use and/or disclose personal information from children; (2) with certain exceptions to notify parents that they wish to collect information from their children and obtain parental consent prior to collecting, using and/or disclosing such information; (3) not to condition a child’s participation in online activities on the provision of more personal information than is reasonably necessary to participate in the activity; (4) to allow parents the opportunity to review and/or have their children’s information deleted from the operator’s database and to prohibit further collection form the child; and (5) establish procedures to protect the confidentiality, security and integrity of personal information they collect from children.”<sup>28</sup> The Commission published a Notice of Proposed Rulemaking and Request for Public Comment in the Federal Register on April 27, 1999 and the 45-day comment period closed on June 11, 1999. They received 132 comments and because of particular interest in the issue of how to obtain verifiable parent consent under the Rule, FTC staff conducted a workshop that included 32 panelists and over 100 participants. That proceeding was transcribed and placed into the public record.

While the COPPA defined child for the portion concerning pornography as under 17, the definition of child for the portion concerning disclosure of information is only 13 years.<sup>29</sup> There are several ways in which personal information may be involved. One way is that the site asks the viewer to provide certain information before either playing a game or before seeing additional pages. However, the Act also covers general audience sites which have “chat rooms”. An operator of a chat room who has actual knowledge that a child is posting personal information on the site must provide notice and obtain verifiable parental consent if the child is to continue to post such information in that site’s chat room. Many operators do not spend all day reading everyone’s conversations so that they would not have requisite knowledge. Operators of sites that are directed to children that provide chat rooms and bulletin boards and who do not delete personally identifiable information from posting before they are made public must always provide notice and obtain parental consent. Sites that give children email accounts must provide parental notice and obtain consent. If a child sends an unsolicited email to a site, the operator may collect the child’s name and online contact information for the purpose of responding one time in response to a direct request. However, after the response, the site must delete the information and not pass it on to another operator or it must comply with notice and consent requirements. Website operators must establish and maintain reasonable procedures to protect the confidentiality, security and integrity of personal information collected from children. Entities that merely provide access to the Internet, without providing content or collecting information from children, would not be considered operators.

In determining whether a site is directed at children, the FTC rules state the Commission will look at the subject matter of the site, its visual or audio content, age of models, language or other characteristics of the website or online service as well as whether advertising promoting or appearing on the website or online service is directed to children.<sup>30</sup>

Personal information is defined by the FTC rules as any type of information that could be used to locate an individual either online or offline.<sup>31</sup> Personal information includes name, email addresses, phone number, non-individually identifiable information that is associated with an identifier.<sup>32</sup> Merely collecting the static IP address or processor serial number is not considered personal information unless it is attached to identifiers that would enable the operator to associate specific information with an individual.<sup>33</sup> In the event of a site that has one area for adults and one

for children, the notice and disclosures need only be placed in the children's area. FTC rules require that the notice be prominent and not require the viewer to scroll down pages to find the notice. Small print at the bottom of a web site will not comply with FTC rules. A box or link in a different color with a different font will fulfill the "prominent" category. The notice must be posted on the home page and at each area where personal information is collected from children. The notice may then be linked to a page where more detailed information on the operator's intentions regarding information collected from children, consent procedures, etc should be explained. The notice must be "clearly and understandably written .. Be complete, and... contain no unrelated, confusing, or contradictory materials."<sup>34</sup> The actual notice must include: (1) names and contact information for all operators; (2) the types of personal information collected through the site and how such information is collected; (3) how the personal information would be used; (4) whether the personal information would be disclosed to third parties, the types of businesses in which those third parties are engaged, whether the third parties have agreed to take steps to protect the information, and a statement that parents have the right to refuse to consent to the disclosure of their child's personal information to third parties; (5) that the operator may not condition a child's participation in an activity on the provision of more personal information than is necessary to participate in the activity; and (6) that the parent may review, make changes to, or have deleted the child's personal information.<sup>35</sup> The FTC comments explain that it is not necessary that the disclosure indicate all information that is being requested. Operators need only identify the types or categories of personal information being collected such as hobbies, etc.<sup>36</sup> The operator is required to explain how the information is collected – either directly in response to questions or passively through cookies. Parents need to know if the information will be provided to third parties and the general nature of their activities (book publishers, list retailing, etc).<sup>37</sup> The operator must disclose how the information collected from children will be used such as for notification purposes or merely as a participant in a public chat room.

The notice requirement is one of the tenets of COPPA. The other tenet is that parents must give operators their consent and they must have the option to limit that consent to the operator's use of the information thereby denying consent to the operator to provide the information to third parties. The issue of consent and the costs and benefits of differing technologies was the subject of many comments during hearings held by the FTC. Until April 2002, the FTC will use a sliding scale approach to parental consent. The required method of consent will vary based on how the operator uses the child's personal information. If the operator is using the information for internal uses, operators may use email to obtain consent. Internal purposes would include using information to communicate back to the child based on his/her preferences, or providing notice of site content changes. If the information collected from children is to be given to third parties, then more formal consent is required. There are several formats to fulfill the more formal notice requirement. Getting a signed form from the parent via postal mail or fax; accepting and verifying a credit card number in connection with a transaction; taking calls from parents through a toll-free telephone number staffed by trained personnel or receiving email accompanied by digital signature<sup>38</sup>. Given the fact that few children at the age of 13 have access to their parent's credit cards and that phone personnel can be trained to recognize young voices, such a policy was strongly favored by industry representatives. The operators must use reasonable procedures to ensure that they are dealing with the child's parent before they provide access to the child's specific information. These methods include obtaining a signed form from the parent, accepting and verifying a credit card number; taking calls from parents on a toll-free number, email accompanied by digital signature; email accompanied

by a PIN or password obtained through one of the verification methods. In October 2002, the FTC will seek public comment to revisit the issue of what methods are acceptable for obtaining and confirming parental consent. The FTC will seek comment on whether technology has advanced to the point of providing inexpensive and widely available electronic methods of providing secure consent.<sup>39</sup> Once consent is obtained, only a material change in the use of information or nature of information collected will trigger the need to ask for consent.

There are some specific exceptions to obtaining prior parental consent. It is not necessary to obtain parental consent to collect a child's or parent's email address to provide notice or to seek consent. An operator may collect an email address to respond to a one-time request from a child and then delete it. An operator may collect an email address to respond more than once to a specific request for a newsletter, for example. Or an operator may collect a child's name or online contact information to protect the safety of a child who is participating on the site. In this case, the operator must notify the parents to give them the opportunity to prevent further use of the site or to respond to law enforcement.<sup>40</sup>

In order to encourage self-regulation, trade organizations are encouraged to submit standards for FTC review. If the FTC approves industry-sponsored notification schemes consistent with COPPA, then members of the trade group who comply with the self-regulatory scheme may be deemed in compliance with COPPA and FTC's rules. The sponsoring organization must also provide for periodic random reviews of subject operators' compliance with the guidelines. These periodic reviews may be done by an independent agency or by the sponsoring organization. The creation of "safe-harbor" complies with Congressional intent to foster self-regulation. To assure effective incentives for subject operators' compliance with the guidelines, mandatory public reporting of disciplinary action taken against subject operators by the industry group promulgating the guidelines; consumer redress; voluntary payments to the United States Treasury in connection with an industry-directed program for violators of the guidelines; or referral to the Commission of operators who engage in violation of the guidelines.<sup>41</sup>

### **Taming the Wild West**

Just as more settlers moved out west and brought with them their demands for a safer, more civilized environment, the internet as mankind's next frontier is being invaded by greater numbers of people who are demanding new sets of rules to "civilize" the medium. While the buffalo of the first amendment rights has trampled the fences around pornography, the protections narrowly defined to protect children and their privacy against child predators may prove more durable. The notion that "anything goes" on the internet is simply no longer correct. With fines of \$11,000 per violation (and every day is considered a separate violation), COPPA and the related FTC rules represent an effort to bring consumer protection to the web. Though still in the pioneer days, those wanting to operate in the world wide web should be careful in constructing and maintaining web sites that are likely to have activities, content or graphics likely to attract children or used to "mine information" through tracking consumer preferences and linking those preferences to specific potential customer names.

### **Endnotes**



1. 16 CFR Part 312
2. 47 USCA Section 231 (a) (1-3)
3. 47 USCA Section 231 (3) (2) (B)
4. 47 USCA Section 231 (e) (7)
5. *American Civil Liberties Union v. Reno*, 31 F.Supp.2d 473, 1999 U.S. Dist. LEXIS 735; 27 Media L. Rep. 1449; 14 Comm. Reg (P&F) 1145
6. 15 USCA Section 6502 (b) (1)
7. 15 USCS Section 6501 Definitions (1)
8. 15 USCA Section 6502 (b) (2) (E) (i, ii, iii)
9. P.L. 105-277, Section 1305 and posted at [www.Ftc.gov/ogc/coppa1.htm](http://www.Ftc.gov/ogc/coppa1.htm)
10. The Communications Decency Act, 47 U.S.C. 223. See The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.
11. *Reno v. American Civil Liberties Union*, 521 U.S. 844
12. Reardon, Roy L. and McGarry, Elizabeth "New York's Law on Child Pornography on the Internet is Upheld" *New York Law Journal*, May 11, 2000 Thursday, p. 3.
13. Ibid.
14. *Reno v. American Civil Liberties Union*, 521 U.S. 844, at 898-99.
15. 47 U.S.C. 231 (1998)
16. 47 U.S.C. 231 (e) (6)
17. 47 U.S.C. at 231 (e)(2)(B)
18. *American Civil Liberties Union v. Reno*, 31 F.Supp.2d 473, 1999 U.S. Dist. LEXIS 735; 27 Media L. Rep. 1449; 14 Comm. Reg (P&F) 1145
19. Ibid.
20. Ibid. citing 492 U.S. at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968)).
21. Ibid. citing *Elrod v. Burns*, 427 U.S. 347, 362, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976).

22. Ibid. citing *Sable Communications v. FCC* 492 U.S. 115 at 788, 109 S.Ct. 2829, 2838, 2839, 106 L.Ed. 2d 93 (1989).

23. Ibid.

24. See also 21 Hastings Comm. & Ent. L.J. 583 Sinrod, Eric J., Reyna, Jeffrey W., Jolish, Barak D. "Eleventh Annual Computer Law Symposium: Enabling Electronic Commerce: Trademark, Privacy & Internet Business: The New Wave of Speech and Privacy Developments in Cyberspace

25. Caher, John "State Internet Porn Law Upheld; Luring Children into Sex is Not Protected Speech" New York Law Journal, April 12, 2000, p. 1.

26. Oberndorf, Shannon "FTC Reports on Privacy" *Catalog Age* Vol. 15 No. 8, July 1998.

27. 16 CFR Part 312 Children's Online Privacy Protection Rule: Final Rule.

28. Ibid.

29. COPPA, 15 U.S. C. 6501(1) See 64 FR at 22751, 22763.

30. 16 CFR Section 312.2

31. 64 FR at 22753-22753, 22764

32. Ibid.

33. 16 CFR Part 312, p. 59893.

34. 16 FR at 22754

35. 16 FR at 22754, 22765

36. 16 FR 22754

37. 16 FR 22755

38. [www.ftc.gov/bcp/online/pubs/buspubs/coppa.htm](http://www.ftc.gov/bcp/online/pubs/buspubs/coppa.htm)

39. Ibid.

40. Ibid.

41. 16 CFR Section 312.10 Safe Harbors