

# Kids' privacy under scrutiny

Children's privacy is back on the agenda. The Federal Trade Commission is imposing record penalties, consumer groups are on the warpath, and lawyers are sharpening their knives. By Alan Pedersen.

At the end of February this year, the Federal Trade Commission (FTC) announced settlements with two major US snack retailers - Mrs Fields Cookies and Hershey Foods. For years, the two companies had allegedly built up databases containing thousands of records on children under the age of 13.

While collecting this kind of information is perfectly legitimate, the Children's Online Privacy Protection Act (COPPA) requires that certain safeguards are met (see box on p.17).

In the case of Mrs Fields and Hershey Foods, the FTC alleged that the companies had breached COPPA rules by failing to obtain verifiable parental consent before collecting information through their kids-orientated websites. The FTC also cited deficiencies in their privacy policies, stating that they had not sufficiently explained to parents how their children's details would be used.

## RECORD PENALTIES

Mrs Fields and Hershey Foods agreed to pay civil penalties of \$100,000 and \$85,000 respectively, and delete thousands of records dating back to the introduction of COPPA in April 2000. They were also ordered to document their privacy practices and make them available for inspection by the FTC on request.

Parry Aftab, executive director of kids consumer group Wired Safety and a leading COPPA lawyer, says the recent settlements are especially significant because of the approach taken by the FTC on COPPA compliance. "It has always been their intention to get people to comply, not to hit them with penalties," she says. "That's why you see so few actions. So when you see them, they mean a lot more than people realise. For a site to be actually hit with penalties, and these are hefty penalties here, the FTC really had to think there was no better way of dealing with this."

In the case of Mrs Fields and Her-

shey Foods, it could be that the severity of the penalties was less to do with the specific violations, but rather a failure to respond to initial approaches by the FTC. One case last year - involving the Ohio Art Company, manufacturer of the Etch-A-Sketch drawing toy - involved similar COPPA violations, yet resulted only in a \$35,000 penalty.

On the other hand, it could simply be that the FTC had decided that bigger penalties will encourage greater compliance. But the FTC does appear to be willing to take a more business-friendly line. Although we do see the occasional enforcement action from time to time, there is work going on behind the scenes. In April last year, for example, the FTC sent out 50 warning letters to companies whose websites had failed to meet the grade.

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## EVERYONE IS OUT TO GET YOU

It is not just the FTC that website operators need to worry about. Privacy is somewhat in fashion at the moment and there are a whole host of eager journalists, consumer groups, state regulators and lawyers on the lookout for flaws in your privacy practices.

When the Lisa Frank website was reprimanded back in October 2001, it was not the result of a proactive investigation by the FTC, but was in fact brought to its attention by the Children's Advertising Review Unit (CARU), a division of the Better Business Bureau.

Just last month, the Unit secured its own settlement against Powerpets.com, a virtual pets website directed at children. And, sometime in the not too distant future, Parry Aftab's Wired Safety group will be naming and shaming COPPA offenders on its website.

Businesses should also be concerned about private lawsuits. Aftab says that there will be "a lot more private actions brought by individuals and consumer groups. Once some of the class action lawyers in this country realise how much they can make on privacy litigation, you are going to see a lot more of it. There is a lot less being brought on in securities litigation or breast implant litigation, but privacy is a brave new world for lawyers."

## CONSUMER/BUSINESS AWARENESS

Aftab says that parental awareness of kids' privacy issues is pretty high. "Although they are not familiar with privacy laws, they are very familiar with privacy issues. Surprisingly, privacy comes out higher on parents' concerns than predators. Privacy is number one when it comes to parents. They are concerned about their kids filling out forms, about their credit cards being used, and I think they are paying greater attention to [privacy] seal programmes."

Rebecca Richards, director of compliance at TRUSTe, which runs a number of privacy seal certification programmes, agrees that consumers are paying greater attention to third party privacy seals. "Consumers are definitely looking for seals, they are looking for third party verification...roughly 80 per cent of consumers would prefer to have a privacy statement that has been verified by a third party."

Consumers are not just looking to see if websites have a privacy seal, they are actively clicking on these seals to verify their authenticity. Gary Laden, privacy director at BBBOnline, another seal provider, says that "some companies

get 6-7,000 click-throughs a month. So it shows that consumers are looking at the seal, clicking on it to see if it is legitimate or if it has expired. So people are paying attention."

Although consumers may be increasingly turning to third party seals, both BBBOnline and TRUSTe admit that there has been little corporate interest in their kids' privacy seal programmes. Becky Richards suggests that there tends to be more activity whenever enforcement cases come to light. "We have had some interest, and I think that has been spurred by some of the more recent cases from the FTC," she says. "We certainly saw some interest when they did some actions last year."

But while businesses may not be rushing to sign up to the kids' seal programmes, the signs are that the level of privacy has improved since the introduction of COPPA. A survey published by the FTC in April 2001 revealed that around 90 per cent of websites collecting information from under-13s had posted a privacy policy on their site. This compares to just 24 per cent in 1998. Sites are also limiting the amount and type of data collected - only 9 per cent, for example, were collecting phone numbers.

According to Richards, the companies that have the most difficulty complying are the general audience websites - sites not specifically targeted at children, but knowingly collecting information from them.

#### GLOBAL IMPLICATIONS

COPPA also has the potential to reach outside US borders. A European-based website, for example, that advertises in US magazines, lists itself in US search engines and actively seeks to collect information from American children, could feasibly be subject to COPPA. In reality the jurisdictional question of whether COPPA would apply outside US territory is a difficult one, says Julia Hörnle, solicitor and research fellow at Queen Mary University, London. "I think in practical terms it depends upon the cooperation between the [specific] national data protection authority and the FTC. The legal situation is not that different. The EU Data Protection Directive (95/46/EC) is not as detailed as COPPA, but the implementing legislation may impose similar standards - so cooperation is not that unlikely."

#### WORRY ABOUT THE MEDIA, NOT THE FINES

Despite tougher sanctions from the FTC, financial penalties are not the main incentive for getting COPPA compliant. \$100,000 will not hurt the likes of Hershey Foods and Mrs Fields, but media exposure could be devastating. Aftab offers these words of caution. "If you violate the law, you are going to be in a newspaper somewhere, and they are going to say 'you didn't care about kids' privacy'. And that's the real power of all the privacy laws. It is not the enforcement, it is the media and public's insistence that you respect their privacy, and especially their children's privacy."



**FEDERAL TRADE COMMISSION:** Details on COPPA, the FTC settlements and its compliance survey can be found at: [www.ftc.gov/privacy/index.html](http://www.ftc.gov/privacy/index.html)

**CONSUMER GROUPS:**  
Wired Safety - [www.wiredsafety.org](http://www.wiredsafety.org)  
CARU - [www.caru.org](http://www.caru.org)

**KIDS' PRIVACY SEALS:**  
TRUST-e - [www.truste.org](http://www.truste.org)  
BBBOnline - [www.bbbonline.org](http://www.bbbonline.org)

## The Children's Online Privacy Protection Act

### SCOPE OF COPPA

The law applies to any websites that are targeted towards children under the age of 13, or sites which knowingly collect information from under-13s. General audience websites (gaming, music, snack foods etc.) collecting ages or dates of birth from visitors could, therefore, be brought under the scope of COPPA.

### PARENTAL CONSENT

Websites must get 'verifiable' parental consent when collecting data. This is where many companies run into difficulties. Getting parents' permission via a tick-box or submit button on a web page is not considered good enough. Verifiable consent is defined as taking a "reasonable effort" to ensure that a parent has authorised the collection of their child's details. Reasonable methods include consent forms delivered via post or fax, digital signatures or PIN/password-protected e-mails.

To help companies cope with the burden of compliance, the FTC has relaxed the rules on gaining verifiable consent. Until April 21st 2005, companies can rely on regular e-mail as a means for obtaining parental consent. However, this applies only to internal use of data. If the information is to be shared with third parties or posted up on a website, then more reliable methods will be required.

There are situations where parental consent is not required. Companies can collect children's e-mail addresses in order to respond to one-off requests. They can also enter children into competitions or send them newsletters, provided that parents are kept informed.

### PRIVACY POLICIES

Kids' websites are required to post a privacy policy stating the name and contact details of the organisation operating the website, what type of information is being collected, what it will be used for and whether it will be passed on to third party organisations. A hyperlink to the policy must be posted on the home page of the website and any pages which collect information.

### THIRD PARTY DISCLOSURE AND ACCESS RIGHTS

Parents can demand that their children's details are not passed onto third party organisations. Additionally, they have the right to review their children's details, have that information deleted, and prevent any further collection.

### COLLECTION LIMITATION

Website operators should not persuade children into giving up excessive personal information in order to access games or other such activities. Asking for mobile phone numbers or postal address before allowing children into restricted areas would not be considered acceptable.