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# How The Children's Online Privacy Protection Act Affects Online Businesses and Consumers of Today and Tomorrow

Rachael Malkin\*

## I. Introduction

Everyday after school, millions of children come home and immediately log onto the Internet. They happily click onto the websites of all their favorite TV shows and musical groups. As they surf these sites, the familiar fill-in-the-blank questionnaires pop up on the screen and request their names, ages, genders, addresses and phone numbers. Children plug in the necessary information and continue to click away. They have no idea they have just given out personal information that will ultimately be shared with dozens of other companies. They do not comprehend that they are entitled to certain privacy rights on the Internet. In fact, they may not even understand the concept of privacy.

In today's world, the Internet is the most popular and accessible way to communicate, conduct business and obtain information.<sup>1</sup> What was once considered merely a research tool has now become a substitute for our daily newspaper, our radio and our television.<sup>2</sup> We can log onto the Internet and do almost anything we want. We can check out tomorrow's weather forecast, order a new pair of running shoes, or email an old friend. Once we click onto a particular website, we are often required to give out personal information in order to receive the information and services we want. A growing number of websites are constantly asking customers to type in their names, birthdays, addresses, phone numbers and credit card numbers. The blank spaces that collect this kind of personal

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<sup>1</sup> Courtenay Youngblood, Case Notes and Comments, *A New Millennium Dilemma: Cookie Technology, Consumers, and the Future of the Internet*, 11 J. ART & ENT. LAW 45, 47 (2001).

<sup>2</sup> *Id.*

information are such a routine aspect of the Internet, we rarely think about where this information goes once we log off or click onto another site. Just where does this information go? Unfortunately, the answer is that it can go virtually anywhere.

Research has proven that children are generally not critical of the information they share online.<sup>3</sup> Although parents may be protective of their own privacy rights, this does not necessarily mean their children understand the concept of privacy.<sup>4</sup> This is an important concern because children make up a rapidly growing percentage of today's Internet users.<sup>5</sup> In years past, commercial websites took full advantage of this increasing group of users by collecting a shocking array of detailed personal information from and about children.<sup>6</sup> Websites were easily able to obtain such information through their registration pages, user surveys and online contests.<sup>7</sup> For the most part, parents had no idea this information was being collected from their children.<sup>8</sup> In 1998, Congress decided to prevent Internet businesses from further abusing the privacy rights of children by enacting the Children's Online Privacy and Protection Act ("COPPA").<sup>9</sup>

This article will first review the history and requirements of COPPA, and it will describe which companies must comply with the Act. Next, this article will address recent violations of COPPA, and how these violations have affected the information collection practices of today's Internet companies. The article will then discuss the various ways COPPA has impacted and will continue to impact both Internet businesses and Internet consumers.

## II. What is COPPA?

As the Internet becomes more and more a part of our daily lives, the body of law defining the rights of Internet users becomes

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<sup>3</sup> Paul A. Greenberg, *Money! I Spammed the Kids*, E-COMMERCE TIMES, Apr. 5, 2001, at <http://www.ecommercetimes.com/perl/story/8714.html>.

<sup>4</sup> *Id.*

<sup>5</sup> John Graubert & Jill Coleman, *The Impact of Technological Change in the Canada/U.S. Context: Consumer Protection and Antitrust Enforcement at the Speed of Light: The FTC Meets the Internet*, 25 CAN.-U.S. L.J. 275, 287 (1999).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 288.

<sup>9</sup> 15 U.S.C.A. §§ 6501-05 (West Supp. 1999).

increasingly more important. Currently, however, Internet regulations are only in their earliest stages of development.<sup>10</sup> A growing proportion of legislation introduced by senators and representatives continues to relate to consumer privacy rights on the Internet.<sup>11</sup> These legislative proposals have attempted to specifically define "consumer privacy" on the Internet.<sup>12</sup> While there are currently no general privacy laws enacted that apply to all websites, one piece of legislation in force that has been aggressively monitored by Congress is COPPA.<sup>13</sup>

In October 1998, Congress signed COPPA into law.<sup>14</sup> The Act passed due to increasing concern over certain commercial website operators that target children under 13 years old and collect personal information from them without any parental notification.<sup>15</sup> One section of COPPA required the Federal Trade Commission ("FTC") to create specific rules that would regulate the online collection of personal information from children under 13 years old.<sup>16</sup> The FTC's Final Rule became effective and enforceable April 21, 2000.<sup>17</sup>

Through the enactment and enforcement of COPPA, the government sought to prohibit unfair or deceptive acts and practices that relate to the collection, use or disclosure of personal information from and about children on the Internet.<sup>18</sup> COPPA applies to the kind of information collected from children that would allow them to be identified or contacted. This includes information such as a child's name, home address, email address and telephone number.<sup>19</sup> COPPA also covers information collected online that relates to a child's

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<sup>10</sup> Youngblood, *supra* note 1, at 61.

<sup>11</sup> *Id.* at 79.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 79-80.

<sup>14</sup> 15 U.S.C. A. §§ 6501-06 (West Supp. 2001).

<sup>15</sup> Laurel A. Jamtgaard, *Symposium on Internet Privacy: Big Bird Meets Big Brother: A Look at the Children's Online Privacy Protection Act*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 385, 387 (2000).

<sup>16</sup> FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (1999).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, citing 15 U.S.C.A. §§ 6501-05.

<sup>19</sup> Federal Trade Commission, *How to Comply With the Children's Online Privacy Protection Rule* (Nov. 1999), at <http://www.ftc.gov/bcp/conline/pubs/buspubs/coppa.htm> [hereinafter *Comply*].

hobbies and interests.<sup>20</sup> COPPA only applies to information collected from children who are under 13 years of age. The age distinction is used because it is commonly the standard for determining when children reach adolescence.<sup>21</sup> COPPA adopted the standard because younger children probably do not yet understand the safety and privacy concerns of giving out personal information online.<sup>22</sup>

One of COPPA's main objectives is to increase parental involvement of children's online activities in order to protect their children's privacy.<sup>23</sup> Another goal of the Act is to ensure children's safety when they participate in online activities such as chat rooms and message boards.<sup>24</sup> COPPA is also intended to safeguard any identifiable information that children have already posted online, and to prevent the collection of future information without valid parental consent.<sup>25</sup>

### A. Requirements of COPPA

There are five main requirements of COPPA.<sup>26</sup> First, the operator of an online service that is directed towards children must provide a privacy notice on its site that describes the type of information it collects from its users.<sup>27</sup> The notice must specify the operator's use and disclosure of this information.<sup>28</sup> It is required that the notice be clearly placed on the home page of the site, or in any area directed to children.<sup>29</sup> The notice must also be posted on any page where personal information is collected.<sup>30</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> Federal Trade Commission, *Frequently Asked Questions About the Children's Online Privacy Protection Rule* (Sept. 2000), at <http://www.ftc.gov/bcp/conline/edcams/kidzprivacy/resources.htm> [hereinafter Questions].

<sup>22</sup> *Id.*

<sup>23</sup> Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware"*, 47 A.F. L. REV. 125, 136 (1999).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 15 U.S.C.A. § 6502 (West Supp. 2001).

<sup>27</sup> *Id.*

<sup>28</sup> Jamtgaard, *supra* note 15, at 388.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

The second requirement is that the operator must obtain verifiable parental consent before collecting or using personal information from a child.<sup>31</sup> Before children are allowed to use online chat rooms and message boards, COPPA requires parents to “opt-in” to the site’s services.<sup>32</sup> The operator of the site must use “reasonable efforts” to ensure that they are receiving valid parental consent. The FTC suggests a variety of methods that are considered to be “reasonable efforts.” For instance, a website may choose to provide a formatted consent form that can be printed out by parents and returned by mail or fax.<sup>33</sup> An operator can also obtain parental consent by having parents use a credit card to verify adult status.<sup>34</sup> The operator can also require parents to call a toll-free number staffed by company employees who are trained to determine whether the caller is an adult.<sup>35</sup>

From the enactment of COPPA in April 2000 through April 2002, the FTC will apply a sliding scale mechanism to determine whether companies have properly obtained parental consent.<sup>36</sup> The sliding scale approach was originally intended to temporarily regulate operators until new technology created more advanced methods of obtaining verifiable parental consent.<sup>37</sup> The sliding scale approach allows satisfactory methods of consent to vary based on how the operator uses the child’s personal information.<sup>38</sup> When an operator uses a child’s information for internal purposes, the method of obtaining consent need not be as reliable or as strict as when an operator discloses the information to other companies.<sup>39</sup>

Currently, operators may use email to obtain parental consent if they are using children’s information for internal reasons, such as

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<sup>31</sup> *Id.* at 389.

<sup>32</sup> Heather Green, Mike France, Marcia Stepanek & Amy Borrus, *Our Four-Point Plan: E-Privacy and E-Commerce Can Coexist. Here’s How to Safeguard Both*, BUS. WK. (Mar. 20, 2000), available at 2000 WL 7825259.

<sup>33</sup> Jamtgaard, *supra* note 15, at 397.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Comply, *supra* note 19.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

responding to a child about promotional updates.<sup>40</sup> However, these companies must also take additional steps to increase the likelihood that it was actually the parent who emailed the consent.<sup>41</sup> For instance, these operators might send a delayed email to the parent to confirm parental consent. Alternatively, they could send a follow up letter or even call the parent in order to verify the consenting email.<sup>42</sup> If a company is going to disclose a child's information to other parties, or make the information available to the public through a message board or a chat room, then the sliding scale approach requires these companies to use more rigorous methods of obtaining parental consent.<sup>43</sup> For instance, companies disclosing information to others can meet this heightened standard by obtaining consent through a signed consent form, credit card verification or a personal phone call.<sup>44</sup>

Although the FTC intended to use the sliding scale for only the two years following COPPA's enactment, it has recently proposed to extend this time period for an additional two years.<sup>45</sup> Originally, the FTC believed that by April 2002, technology would have developed more reliable methods of obtaining parental consent, and the email plus additional steps approach would no longer be necessary. However, the expected progress of such advanced technology has not yet occurred.<sup>46</sup> Therefore, the FTC has proposed to extend its application of the sliding scale mechanism through April 2004.<sup>47</sup> This extension will allow operators using children's information for internal purposes to continue obtaining parental consent through the "email plus" method.<sup>48</sup>

The third requirement of COPPA is that an operator must provide a way for parents to review any information that has been

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Press Release, Federal Trade Commission, *FTC Seeks Comment on Amending Children's Internet Privacy Rule* (Oct. 26, 2001), at <http://www.ftc.gov/opa/2001/10/slidingscale.htm>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

collected about their child by its site.<sup>49</sup> If a parent wishes to review his or her child's information, the website must provide a reasonable procedure that does not unduly burden the parent.<sup>50</sup> Parents must be able to easily contact the operator in order to modify or prevent further use of their child's personal information.<sup>51</sup> If the parent has prohibited further use of the child's information an operator may refuse to provide its services to that child.<sup>52</sup>

The fourth requirement of COPPA limits the collection of personal information when a child participates in online games and contests.<sup>53</sup> A website cannot require that a child disclose more personal information than what is considered "reasonably necessary" for the child to participate in the activity.<sup>54</sup> The FTC's Final Rule does not expand on what it considers to be "reasonably necessary" information. Thus, operators must carefully determine that the type of information collected in connection with each offered activity is essential to the participation in a specific activity.<sup>55</sup>

The last requirement of COPPA is that websites complying with the Act must protect the confidentiality, security, and integrity of any personal information that is collected online from children.<sup>56</sup> To satisfy this obligation, many Internet businesses must drastically change their current practices. This includes restricting employee access to data, taking protective measures against hackers, and conducting thorough screenings of third parties with whom the information will be shared.<sup>57</sup>

## B. Who must comply with COPPA?

COPPA is intended to apply to: websites that are directed towards children under 13 years of age; "general audience" websites

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<sup>49</sup> 15 U.S.C.A. § 6502(b)(1)(B) (West Supp. 2001).

<sup>50</sup> *Id.*

<sup>51</sup> Jamtgaard, *supra* note 15, at 389.

<sup>52</sup> *Id.*

<sup>53</sup> 15 U.S.C.A. § 6502(b)(1)(C).

<sup>54</sup> Jamtgaard, *supra* note 15, at 389.

<sup>55</sup> 16 C.F.R. § 312 (1999), available at <http://www.ftc.gov/bcp/conline/edcams/kidzprivacy/resources.htm>. [hereinafter C.F.R.] (last visited Feb. 25, 2002).

<sup>56</sup> 15 U.S.C.A. § 6502 (b)(1)(D).

<sup>57</sup> Jamtgaard, *supra* note 15, at 390.



that have a section of their site directed to children; and general audience websites that have “actual knowledge” that a child is disclosing personal information on the site.<sup>58</sup> The Act also applies to foreign-run websites if they are directed towards children under 13 who live in the U.S., or if they knowingly collect information from children in the U.S.<sup>59</sup>

If a website targets children under 13 years old, the site must comply with COPPA’s regulations. When determining whether a website fits under this category, the FTC will analyze the site’s subject matter, audio and visual features, and language use. It will also consider the types of advertisements appearing on the site, as well as the use of any animated characters.<sup>60</sup> Any evidence of a website’s “intended audience” will be considered.<sup>61</sup> Due to the FTC’s scrutiny, many web companies will have to reevaluate every aspect of their sites to determine if any of their features directly or indirectly target children.<sup>62</sup>

A website intended for a “general audience” must still comply with COPPA if the site has a specific area designed just for children. These Internet operators can combine their child and adult practices in a single privacy policy, as long as they clearly direct visitors to the section of the policy that complies with COPPA.<sup>63</sup> Additionally, the link for the children’s privacy policy must appear on the home page of the children’s area, and in each area where personal information is collected from children.<sup>64</sup> General audience websites complying with COPPA will either refrain from asking the age of their users, prohibit membership of users under the age of 13, or require parental consent for those users who identify themselves as under 13 years old.<sup>65</sup> These companies must conduct a cost benefit analysis to determine the reorganization of their services.<sup>66</sup>

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<sup>58</sup> *Id.* at 391.

<sup>59</sup> Questions, *supra* note 21.

<sup>60</sup> Jamtgaard, *supra* note 15, at 391.

<sup>61</sup> *Id.* at 392.

<sup>62</sup> *Id.*

<sup>63</sup> C.F.R., *supra* note 55.

<sup>64</sup> *Id.*

<sup>65</sup> Jamtgaard, *supra* note 15, at 393.

<sup>66</sup> *Id.*

General audience sites that do not have a specific area directed towards children will only be obligated to comply with COPPA if they have “actual knowledge” of children using their site. If a general audience site does not ask its users to reveal their ages, then it technically will not have “actual knowledge” that children are using the site’s services.<sup>67</sup> However, if a child participates in a chat room and does not reveal his age, but reveals other information that indicates he is a child, then the site could be considered to have the “actual knowledge” required for COPPA to apply.<sup>68</sup>

### C. Safe Harbors

An Internet operator may be able to satisfy COPPA requirements by following alternative sets of self-regulatory guidelines that have been created by certain industry groups and self-regulatory programs known as “safe harbors.”<sup>69</sup> Safe harbors were intended to facilitate industry self-regulation as well as flexibility in developing various self-regulatory guidelines.<sup>70</sup> Organizations interested in becoming safe harbors must submit their self-regulatory guidelines to the FTC.<sup>71</sup> The FTC will then publish the guidelines for public comment, and then decide whether the guidelines meet the Rule’s criteria.<sup>72</sup> In order to be approved, the safe harbor’s guidelines must provide “substantially similar requirements” that grant the same or better protections as those requirements set forth in COPPA.<sup>73</sup> The safe harbor’s guidelines must also contain effective methods of independently assessing a website’s compliance with the guidelines.<sup>74</sup> The FTC has approved a number of safe harbors, such as the Children’s Advertising Review Unit of the Council of Better Business Bureaus (“CARU”), the Entertainment Software Rating Board, and

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<sup>67</sup> Questions, *supra* note 21.

<sup>68</sup> *Id.*

<sup>69</sup> Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.10(a) (2001).

<sup>70</sup> *See id.* at § 312.10.

<sup>71</sup> *Id.* at § 312.10(b).

<sup>72</sup> *Id.* at § 312.10(b)(2)(ii).

<sup>73</sup> *Id.* at § 312.10(b)(1).

<sup>74</sup> *Id.* at § 312.10(b)(2)(iv).

TRUSTe.<sup>75</sup> Companies will still comply with the law if they choose to follow the guidelines set forth by any of these groups.

### III. COPPA Violators

Since COPPA's enactment over a year and a half ago, the FTC has aggressively attempted to educate web businesses about the Act.<sup>76</sup> The FTC has published examples of satisfactory company guidelines, hosted seminars on how businesses can successfully comply with the Act, and emailed information about COPPA to children's websites.<sup>77</sup> Unfortunately, some websites that are directed toward children have chosen to ignore the FTC's efforts.<sup>78</sup> Although the regulations are fairly strict, many Internet companies have still not taken the law very seriously.<sup>79</sup> In a study of 162 popular children's websites, 107 sites collected personal information, and almost half of these 107 sites failed to clearly link users to their privacy policy.<sup>80</sup> Furthermore, those sites that did link users to their policy used vague and confusing language to describe their privacy practices.<sup>81</sup>

There are many ways the FTC can deal with companies who have ignored COPPA's regulations. For example, the FTC could further require all sites governed by COPPA to place a "K" somewhere on their home page so parents can instruct their children only to visit sites that display the "K."<sup>82</sup> By placing the "K" on their home pages, it's probable that the sites will be more willing to abide by COPPA's regulations. The "K" may also allow the FTC to more easily keep track of websites that should be complying with COPPA.

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<sup>75</sup> Press Release, Federal Trade Commission, *TRUSTe Earns "Safe Harbor" Status* (May 23, 2001), at <http://www.ftc.gov/opa/2001/05/truste.htm>.

<sup>76</sup> *FTC Announces Settlement With Websites That Collected Children's Personal Data Without Parental Permission*, available at <http://www.ftc.gov/opa/2001/04/girlslife.htm> (for release April 19, 2001) [Hereinafter *Settlement*] (last visited Feb. 25, 2002).

<sup>77</sup> *Id.*

<sup>78</sup> See Deborah Durham-Vichr, *Study: Privacy Violations Found on Kids' Web Sites*, NEWSFACTOR NETWORK, (Mar. 29, 2001), available at <http://www.newsfactor.com/perl/printer/8543> (last visited Feb. 25, 2002).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

Parents may feel more comfortable about the sites their children visit if they were assured the sites were regulated by COPPA. Another possibility is that the FTC could require children's websites to use a standardized format for posting their privacy policy.<sup>83</sup> By using a standard format, a company would not have to wonder whether they have satisfied COPPA's criteria. Furthermore, this format could prove to be easier and less costly than a company developing and using its own format.<sup>84</sup>

While the FTC continues to encourage more companies to comply with COPPA, it has demonstrated its serious commitment to punishing businesses that have violated the Act. In April 2001, the FTC charged Monarch Services, Inc. and Girls Life, Inc., operators of [www.Girlslife.com](http://www.Girlslife.com); Bigmailbox.com, Inc. and Nolan Quan, operators of [www.bigmailbox.com](http://www.bigmailbox.com); and Looksmart Ltd., operator of [www.insidetheweb.com](http://www.insidetheweb.com), for the unlawful collection of information from children under 13 years old.<sup>85</sup> The FTC alleged that all three defendants collected children's names, addresses, and telephone numbers, but failed to obtain parental consent before collecting the information.<sup>86</sup> It also alleged that the companies required more personal information than was reasonably necessary in order for children to participate in their online activities.<sup>87</sup> Furthermore, the three websites allegedly posted privacy policies that did not satisfy COPPA requirements.<sup>88</sup> The FTC also found that BigMailbox's privacy notice falsely claimed that it required parental consent before a child could open an email account.<sup>89</sup>

The three Internet companies agreed to pay a total of \$100,000 in civil penalties and to delete all applicable information that had been collected since COPPA's enactment on April 21, 2000.<sup>90</sup> The companies were each given two months to file an extensive report

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Settlement, *supra* note 76.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Tom Perrotta, *FTC Settles Privacy Suits with Sites for Kids*, NEWSPRO, Apr. 21, 2001, available at <http://www.coppa.org/newspro/index.shtm> (last visited Feb. 25, 2002).

with the FTC. This report required a copy of a new and improved company privacy policy; a description of the policy's exact location on the site; an explanation of which pages of the site collect information; a copy of the consent notice the company will send to parents; an explanation of the method chosen to obtain parental consent; and a description of how parents can review, modify or delete information collected from their children by the site.<sup>91</sup>

In October 2001, Lisa Frank, Inc., operator of [www.lisafrank.com](http://www.lisafrank.com), settled its FTC charges for violating COPPA.<sup>92</sup> Lisa Frank, Inc., a manufacturer of popular girls' toys and school supplies, has a website that is directed towards young girls and features these products, as well as "club" and "shop" areas, on the site.<sup>93</sup> CARU had evaluated the Lisa Frank website in 2000 and urged the company to modify the site in order to comply with COPPA.<sup>94</sup> When the company failed to make the necessary changes, CARU referred the matter to the FTC.

In its complaint, the FTC alleged that the Lisa Frank website required girls to fill out a registration form before they could access certain areas of the site. The form asked girls for their full name, address, phone number, email address, birthday, favorite color and favorite season.<sup>95</sup> The site did not obtain parental consent before collecting this information.<sup>96</sup> Additionally, it did not provide notice to parents about its privacy policies.<sup>97</sup> In fact, Lisa Frank's policy failed to comply with any of the requirements set forth in COPPA.<sup>98</sup> Furthermore, the FTC alleged that the privacy policy posted by [www.lisafrank.com](http://www.lisafrank.com) falsely claimed that the site required parental consent for users under 13 years of age.<sup>99</sup> The settlement of these charges restricts Lisa Frank, Inc. from violating COPPA in the future. If the company operates any other website or online service, it is

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<sup>91</sup> *Id.*

<sup>92</sup> News Release, Federal Trade Commission, *Web Site Targeting Girls Settles FTC Privacy Charges*, Oct. 2 2001, available at 2001 WL 1159644 (F.T.C.).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

required to include a hyperlink to the FTC's website pages that explains COPPA in the site's privacy policy and on any notices posted to parents.<sup>100</sup> The link will provide immediate access to information about privacy rights to the visitor. The company will also pay a civil penalty of \$30,000.<sup>101</sup>

These settlements demonstrate that the FTC is not afraid to impose strict penalties on businesses that choose to violate COPPA's requirements. In addition, the FTC charges may have encouraged other companies to start paying more attention to COPPA. In fact, a recent study confirmed that ninety-one percent of children's websites now post privacy policies.<sup>102</sup>

## IV. Impact Created By COPPA

### A. Negative Effects on Internet Businesses

As a result of COPPA's regulations, many websites must now jump over a new set of hurdles in order to collect and distribute customer information. One of the first obstacles websites must overcome is interpreting certain ambiguous COPPA requirements. For instance, websites that feature games and contests are only allowed to collect information that is "reasonably necessary" for a child to participate in the activity. It is likely that these websites will have many questions regarding exactly what information is considered "reasonably necessary."<sup>103</sup> The FTC does not specifically describe what information it believes to be reasonably necessary.

If a web company must comply with COPPA's parental consent requirement, it may wonder whether the method it chooses to obtain consent is considered to be a "reasonable effort." In order to comply with the parental consent requirement, a company may have to do a thorough cost benefit analysis of each possible method.<sup>104</sup> These analyses take a significant amount of time and money, and they may prove that many available methods are too costly.

In order to avoid compliance with the Act, sites that are directed towards children may simply stop collecting any information

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Settlement, *supra* note 76.

<sup>103</sup> Jamtgaard, *supra* note 15, at 389.

<sup>104</sup> *Id.* at 397.

at all about their visitors. Companies that have sites targeting teenagers, or that have features attractive to all ages, may fear that the FTC or a court will consider them to also be in the “targeted to children” category.<sup>105</sup> Therefore, businesses running these sites may decide to discontinue collecting information from their users as well. Once a company decides to stop collecting its own information about customers, it will be forced to rely on other companies for demographic data and customer profiles. In order to avoid violation of COPPA, Internet businesses may spend a considerable amount of money obtaining data that they could have collected on their own website.

To avoid violating COPPA regulations, “general audience” sites may change their programs so kids can no longer use their services. As a result, many kids will identify themselves as older in order to obtain access to these websites.<sup>106</sup> Thus, general audience sites will end up with incorrect data about their customers, which may ultimately affect many other businesses who also rely on this data for marketing purposes. Additionally, Internet businesses will experience a decrease in the availability of free information.<sup>107</sup> Therefore, it will become more difficult for companies to put together important demographic profiles that allow successful marketing towards certain consumers.

Another consequence of complying with COPPA’s parental consent requirement is that by requiring parents to mail or fax their consent forms, web companies create more hassle for parents. Often, parents do not have the time to write or fax their consent. Parents who do not want to deal with the process of “opting-in” may simply forbid their children from visiting that site. Additionally, children may decide to click onto another site or go watch TV instead of going through the tedious process of getting their parents to “opt-in.” In the long run, companies who have come to heavily rely on their websites for maintaining a percentage of their business may suffer greatly from losing these consumers. For instance, COPPA has already caused significant business loss for the San Francisco based [www.cyberkids.com](http://www.cyberkids.com), a site that targets 7-to-12-year-olds.<sup>108</sup> Julie Richer, president of the company, says that since the enactment of

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<sup>105</sup> *Id.* at 391.

<sup>106</sup> *Id.* at 393.

<sup>107</sup> Green, *supra* note 32.

<sup>108</sup> *Id.*

COPPA, message board and chat room traffic has plummeted by over forty percent.<sup>109</sup>

COPPA may also significantly affect the business of the online advertising industry. These Internet players should proceed with extra caution when advertising on sites or in areas of sites that are directed towards children.<sup>110</sup> COPPA could equally apply to businesses that advertise their services on various websites. Although ad companies are independent businesses, if their ads are placed on a site that must comply with COPPA, then they may be obligated to comply as well. As a result, advertising companies may decide to pull their ads from many sites, which would lead to a significant loss in revenue for the website operators.

Once a company determines that it must comply with COPPA, the company must then determine which internal employees and outside advisors should be involved in defining the company's approach to consumer privacy.<sup>111</sup> For larger companies, this can be a frustrating and problematic process. There may be hundreds of people who have design responsibilities for some part of the website, and hundreds more who have direct access to the personal information collected by the website.<sup>112</sup> Evaluating a company's policies and practices may involve marketing questions, business development issues, legal problems and information technology issues.<sup>113</sup> Therefore, many companies will have to invest a significant amount of time and money in order to improve their information collection practices.<sup>114</sup>

## B. Consumer Problems

Although COPPA's requirements seem to place substantial restrictions on businesses, complying with the law can still be avoided.<sup>115</sup> For example, companies can obtain valid parental consent through a credit card or through email, both of which can be forged

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<sup>109</sup> *Id.*

<sup>110</sup> Jamtgaard, *supra* note 15, at 392.

<sup>111</sup> *Id.* at 390.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Perrotta, *supra* note 90.

<sup>115</sup> *Id.*



electronically by kids.<sup>116</sup> Additionally, if a website is only responding to a child's email, contest entry, or newsletter subscription, COPPA does not require parental consent before the site collects the child's name and email address.<sup>117</sup> Thus, companies can still collect children's names and email addresses without abiding by the requirements of COPPA. Due to this loophole, sites with branded characters such as Barney and Ronald McDonald may be able to continuously correspond with children without violating COPPA.<sup>118</sup>

However, cooperation from Internet businesses is only half the solution to the problem of complying with the law. If websites require users to be a certain age, children can type in whatever age they want. If a 12 year-old child is visiting a website that requires him to be over 13 years of age, he can easily lie and say he is 15 years old in order to bypass COPPA restrictions. In fact, a child could type in that he is 18 years old, or even 21 years old. Despite the cooperation of web companies, children will still find many ways to circumvent COPPA regulations.

Another problem with COPPA occurs when companies use credit cards to attain verifiable parental consent. A recent comment to the FTC written by Aristotle International, Inc., an online authentication service, describes the growing concern over this currently acceptable method of obtaining parental consent.<sup>119</sup> Aristotle believes that credit cards should not be acceptable proof of adult status because minors can easily use their parent's credit cards or even obtain their own credit cards.<sup>120</sup> Major credit card companies like MasterCard and Visa have stated that card numbers should never be proof of a person's age because minors often use their parents' or have their own credit cards.<sup>121</sup> In fact, American Express has stated that it expressly markets to young adults in order to "build financial responsibility

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<sup>116</sup> Susan Gregory Thomas, *Junior's Got Mail-From a Pitchman Kiddie Marketing*, U.S. NEWS & WORLD REPORT, Nov. 15, 1999, available at 1999 WL 8433796.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> J. Blair Richardson, *Children's Online Privacy Protection Rule – Comment, P994504*, available at <http://www.ftc.gov/privacy/coppa2/comments/aristotle.htm> (last visited Feb. 25, 2002).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

when they shop online and in stores.”<sup>122</sup> Additionally, Visa has warned that using credit cards as proof of age could unintentionally result in criminal activity, since the unauthorized use of a credit card is a criminal offense.<sup>123</sup> For instance, a child may use his parent's credit card without his parent's knowledge. If the parent later reports unauthorized use of the card, a criminal investigation may be conducted before the parent discovers what actually happened.<sup>124</sup> Therefore, Aristotle has urged the FTC to discontinue the use of credit cards as an acceptable method of obtaining parental consent.<sup>125</sup>

Another potential effect on consumers may stem from the ability parents have to review, modify and delete their children's personal information. Allowing a parent to review his or her child's personal information may infringe on that child's First Amendment rights.<sup>126</sup> It's possible that parental consent and parental review of the interactions between children and websites may significantly interfere with a child's ability to freely ask questions and obtain information.<sup>127</sup> If a child uses a computer at school or at the library, he or she may have an even more difficult time exploring the Internet due to COPPA's regulations.<sup>128</sup>

### C. Positive Effects on Internet Businesses

Although COPPA's restrictions will undoubtedly increase the cost of maintaining and profiting from online businesses, the nature of our marketplace indicates that COPPA is also likely to yield some prosperous opportunities. For instance, companies may be able to use COPPA requirements to their advantage by offering free services and prizes if customers decide to “opt-in.”<sup>129</sup> In addition, if Internet

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Internet Privacy: Hearing Before the Senate Comm. on Commerce, Science, and Transportation Subcomm. on Communications*, 105th Cong., (1998), available at 1998 WL 18089331 (statement of Deirdre Mulligan, Staff Counsel, Center for Democracy and Technology).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Green, *supra* note 32.

companies outside the reach of COPPA see that consumers have become more critical of the online collection of information, they may begin to reevaluate their own use of consumer information and adopt more respectful privacy practices.<sup>130</sup> Parent consumers who are concerned with their children's privacy rights will appreciate Internet companies showing respect for customer privacy. Most likely, they will begin to use sites that show the same concern for their own privacy rights. As Internet businesses adopt more upfront and honest information collection practices, they may build a loyal clientele in the process.<sup>131</sup>

Once a company discovers it must change its ways in order to comply with COPPA, it will need new technology to help them along. We will also see more Internet businesses safeguarding their websites in case additional privacy protection laws are enacted. Thus, there will be an increased need for more technology companies to develop computer hardware and software that is aimed to protect consumer privacy.<sup>132</sup> Technology-based solutions to the privacy issues of the Internet may eventually help to provide all types of consumers with the confidence and security they need to productively use the Internet.<sup>133</sup>

Another potential result from COPPA relates to the FTC's use of its sliding scale approach. Many Internet companies hope that the FTC will extend the use of the sliding scale approach to obtaining verifiable parental consent. If the FTC grants the proposed time extensions, Internet businesses using children's personal information internally will be able to continue using the "email plus" method to verify parental consent. Many Internet operators believe the email plus method is the most convenient way for both websites and consumers to continue to protect the privacy rights of children.<sup>134</sup> Since COPPA's enactment, parents have been very slow to respond to tedious parental consent requests.<sup>135</sup> Companies have found that busy parents

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<sup>130</sup> Jamtgaard, *supra* note 15, at 400.

<sup>131</sup> Green, *supra* note 32.

<sup>132</sup> Graubert, *supra* note 5, at 290.

<sup>133</sup> *Id.*

<sup>134</sup> Parry Aftab & Nancy L. Savitt, *Children's Online Privacy Protection Rule Amendment - Comment, P994504*, available at <http://www.ftc.gov/privacy/coppa2/comments/aftab.htm> (last visited Feb. 25, 2002).

<sup>135</sup> *Id.*

appreciate the convenience of giving their consent via email and they are more willing to respond to websites that use this method.<sup>136</sup>

In various comments written about the proposed amendment, representatives of children's web businesses emphasize how companies would be significantly burdened if they were soon forced to use superior technology, such as digital signatures, to obtain parental consent.<sup>137</sup> Since digital signatures are not yet widely used by consumers, these kinds of methods will only annoy parents and deter them from giving verifiable consent. The proposed two-year extension of the email plus method would give technology companies more time to develop increasingly advanced ways of obtaining consent, and would also give consumers more time to adopt the new technology.<sup>138</sup>

Powerful companies such as AOL Time Warner, Sony, Walt Disney Company, Twentieth Century Fox, Vivendi Universal, and Viacom have expressed their strong support for extending the use of the sliding scale approach.<sup>139</sup> These companies have already invested considerable time and money in complying with the sliding scale system. They believe that the use of the sliding scale system adequately protects the interests of online child users.<sup>140</sup> These companies emphasize the many problems with using new technology such as digital signatures, since these advances are unstable, costly, and unfamiliar to consumers.<sup>141</sup> Furthermore, there is no evidence that indicates parents will be willing to invest in new technology like digital signatures so their children can provide online information.<sup>142</sup> Another issue relating to the sliding scale approach is that many companies have chosen not to implement currently acceptable methods of consent, since the system was only intended to be temporary. If the sliding scale mechanism continues to be enforced, more companies may decide to invest in expensive hardware because they will be confident that the email plus method obtains valid

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Elizabeth Frazee et al., *Children's Online Privacy Protection Rule Amendment -- Comment P994504*, available at <http://www.ftc.gov/privacy/coppa2/comments/aol.htm> (last visited Feb. 25, 2002).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

parental consent.<sup>143</sup> Thus, the computer hardware market could significantly increase business if the extension is granted.

#### **D. Positive Impact on Consumers**

The children of today will be tomorrow's generation of online adult consumers. Most of them do not understand their privacy rights now, but once they gain an understanding as adults, they will remember being taken advantage of online as children.<sup>144</sup> The government can continue to enforce COPPA to help protect children's online privacy rights, but it will be the participation of parents that ultimately determines whether our children's rights are fully protected.

Although parents want their children's privacy rights protected, they are often uneducated about the Internet and assume that protection is automatically built into a website.<sup>145</sup> However, if parents take the time to learn about the dangers of online information collection, they can teach their children about online privacy rights. If children learn at an early age how to protect themselves, they will be more responsible online consumers once they become adults.

If parents become educated about online privacy rights, they can participate more easily in their children's online activities. As parents become more involved in their children's daily online activities, they may be able to create better relationships with their children. Thus, instead of parents watching TV while their kids play on the computer, parents and children can participate in online activities together and spend more quality time with each other.

COPPA has successfully demonstrated that laws can be created to protect a specific group of individuals' privacy rights on the Internet. Once parents become more educated about their children's online privacy rights, they will begin to demand similar protections for themselves. Soon, all consumers will request the ability to limit the online use of their personal information. All consumers will want the opportunity to check the accuracy of personal data that has been collected about them and the power to modify or delete any of this information. This is especially true for Internet companies that collect more sensitive types of data, such as a person's financial or medical

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<sup>143</sup> *Id.*

<sup>144</sup> Greenberg, *supra* note 3.

<sup>145</sup> *Id.*

history.<sup>146</sup> Adult Internet users who know about COPPA's protection of children's information will soon expect the same protection for themselves.

## V. Conclusion

Children may be today's youngest consumers, but they represent a large and powerful part of our marketplace.<sup>147</sup> In fact, in today's marketplace, children spend billions of dollars a year, and have influenced their parents to spend as much as \$188 billion dollars.<sup>148</sup> Through the enforcement of COPPA, our society has been given the opportunity to help shape the futures of young Internet users in a safe and productive way. However, this opportunity does not come without consequences for both Internet businesses and online consumers.

Companies must continue to invest significant time and money towards developing safe and effective ways of complying with COPPA. Many companies will have to reorganize their entire Internet businesses to avoid violating the law. This means Internet businesses will be restricting employee responsibilities and restricting the exchange of information with other companies. Mid-sized or small Internet companies may invest their money in new information collection practices instead of putting more money in the pockets of their employees and business associates. However, many Internet companies will urgently need to implement better technology so they can more easily comply with COPPA. Thus, they will need to hire Internet development companies to create advanced methods of safely collecting information, obtaining parental consent, and allowing parental review and modification of information. Businesses will also need to purchase more sophisticated hardware and software for their websites. Therefore, COPPA will undoubtedly increase the business of

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<sup>146</sup> Jennifer Tanaka, *Guarding Online Privacy: Do You Know Who's Watching as You Surf the Web? The FTC and Software Developers are Looking for New Ways to Protect Users*, NEWSWEEK, June 5, 2000, available at 2000 WL 21083216.

<sup>147</sup> *Internet Privacy: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 105th Cong., (1998), available at 1998 WL 18089329 (statement of Robert Pitofsky, Chairman, Federal Trade Commission).

<sup>148</sup> *Id.*; see also James U. McNeal, *Tapping the Three Kids*, MARKET, AMERICAN DEMOGRAPHICS, Apr. 1998, at 38, 40.

Internet development companies, as well as stimulate the marketplace of online technology.

Parents play an equally crucial role in the effectiveness of COPPA. Parents must dedicate themselves to learning more about the Internet and the privacy policies of each site their children visit. This includes paying more attention to their children's online activities. Parents can no longer assume their children are protected when using the Internet. It is up to parents and companies to work together to protect the individual freedoms and rights of young consumers.

Children are fortunate enough to grow up in modern society with the world almost literally at their fingertips. With just a few clicks of a mouse, kids can learn about any person or place they wish. Through the Internet, they can ask questions about any culture, communicate with people from all over the world, and participate in educational as well as social activities. Soon, the children of today will be tomorrow's greatest leaders. Therefore, it is necessary to work hard at protecting them now, so they can grow up with the understanding that individual privacy is a fundamental right that must be protected, respected, and cherished.