



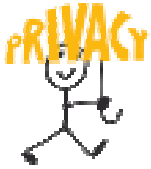
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Protection of Children's Data: An American Perspective

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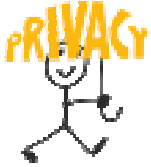


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- Nature of the American perspective
 - Sectoral nature of U.S. approach to data protection has led U.S. regulatory efforts to focus on areas of highest perceived risk of abuse of personal data
 - Increasing commercial use of Internet in latter part of 1990s gave rise to a concern that the ability of parents to control interactions by strangers with their children could be compromised in a new and unprecedented fashion
 - Response to this concern was U.S. enactment in 1998 of Children's Online Privacy Protection Act ("COPPA")
 - COPPA thereby became the first international effort to formulate a precise and comprehensive set of binding regulatory rules for online collection of personal data from minors

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- Value of the American perspective
 - COPPA offers data controllers, minors and parents clear, predictable and appropriately flexible rules as to when minors may make decisions about their personal data
 - Fixes minimum age of competency to consent to processing of personal data with focus on specific capacities of minors to make such judgments
 - Doesn't require reference by analogy to general or irrelevant legal presumptions as to minors' competence to make decisions about their rights (e.g., right to contract, right to consent to medical care, right to make decisions about sexual life, etc.)
 - Doesn't require determination as to individual capabilities of any particular minor

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- Provides clear rules as to:
 - Determining when “age-anonymous” users must be presumed to be incompetent minors
 - Methods by which valid parental consent may be obtained with respect to incompetent minors
- Differentiates between risks involved in various types of processing of children’s data and adjusts constraints on collection and use according to the degree of risk involved in each type of processing (e.g., internal use by Web site operator vs. operator’s disclosure of personal data to third parties)

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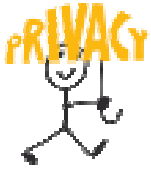


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- Transferability of the American perspective
 - By incorporating familiar fair information principles, COPPA offers a template adaptable to other national and transnational data protection regimes
 - Robust notice concerning nature of data collection, use and disclosure
 - Consent of appropriate representative (i.e., parent or guardian) for incompetent data subjects
 - Data access and rectification procedures
 - Substantive limitations on collection of personal data, including incorporation of principle of proportionality
 - Data security and integrity requirements

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- History of COPPA
 - Statute enacted in 1998; regulations adopted by Federal Trade Commission in 1999; regulations effective April 21, 2000
 - 15 U.S.C. §6501 et seq.; 16 CFR §312 et seq.; 64 Fed. Register 59887 et seq. (Nov. 3 1999)
 - Regulations subject to comprehensive Federal Trade Commission review in 2006
 - Significant Federal Trade Commission enforcement of COPPA

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- Scope of COPPA
 - Online collection, use, and disclosure
 - Of “personal information”
 - From children under the age of 13
 - By
 - Websites or online services directed to children
 - General audience websites or online services that have actual knowledge that they are collecting personal information from children

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- Identifying incompetent minors
 - General audience website with “actual knowledge” data is collected from child
 - No duty to request age of users, but no “veil of ignorance” by using proxy questions for specific age
 - “Website or online service directed to children”
 - Multifactor, impressionistic test
 - Considers Website’s subject matter, visual or audio content, age of models, and language, as well as empirical evidence regarding audience composition and intended audience for the Website
 - Applies to distinct child-oriented portion of general audience website

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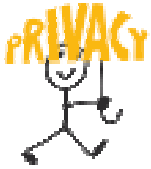


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- Mixed-audience Websites
 - Websites with substantial numbers of child users, but not sufficient numbers to be considered to be “directed to children”
 - “Age-gating” used to differentiate children from other users
 - Birth date requested from all users
 - No advance warning of consequences of declaring age under 13
 - Neutral statement as to reason for blocking based on age
 - Session cookie used to block child user’s “back buttoning” to change age to 13 or over

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- Concept of “personal information”
 - Includes:
 - Full name, physical address, email address, telephone number, SSN
 - Last name or photograph where coupled with additional data that would permit online or offline contacting
 - “Persistent identifier” where actually associated with PII
 - Any other data regarding the child or parents that is combined with other “personal information” (e.g., child’s hobbies, interests, clickstream data, etc.)

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- Concept of “personal information”
 - Excludes:
 - IP address or processor serial number unless actually associated with PII
 - Screen names or self-selected user ID
 - Operator has no duty to investigate whether screen name contains personal information
 - Federal Trade Commission notes that operators may give children warnings about including such information, particularly if screen name would be used in public postings

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- Concept of “collection” of personal information
 - Includes:
 - “Requesting that children submit personal information online”
 - “Enabling children to make personal information publicly available online”
 - “Passive tracking or use of any identifying code linked to an individual, such as a cookie”
 - COPPA applies only to data collected from a child, not to data about a child
 - COPPA applies only to online collection of data, not online solicitation of data

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- Concept of “disclosure” of personal information
 - Includes:
 - “Releasing” any personal information collected from a child to a third party, except to a technical service provider
 - “Making personal information collected from a child publicly available” (e.g., through a home page, chat room, message board, pen pal service or email service)
 - Message boards, chat rooms, etc. on sites directed to children must review postings to detect personal data, and then strip and delete such data prior to posting, in order to avoid “collecting” and “disclosing” data
 - General audience sites must review, strip and delete personal data only if they have knowledge that user posting data is a child

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- Concept of “operator of Website”
 - Concept similar to data controller
 - “Operator” determined by multi-factor test, including:
 - Ownership or control of data
 - Payment for collection and maintenance of data
 - Pre-existing contractual relationship regarding access to data
 - Corporate affiliates are not necessarily joint “operators”

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- Right to notice
 - Contents of notice to parent
 - Identification of operator, including telephone number
 - Types of personal information collected from children, and whether actively or passively collected
 - Operator's intended uses of personal information
 - Any "disclosure" of personal information, including types of third parties to which data will be disclosed, general purposes of third party use, existence of confidentiality agreements with third parties
 - Parent's right to prohibit disclosure of personal information

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- Contents of notice to parent (continued)
 - Prohibition against operator conditioning child's participation in activity on child's disclosing more information than necessary to participate in activity (i.e., proportionality)
 - Parent's right to review and have deleted child's information, and description of procedures for doing so (i.e., access and rectification rights)

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- Right to consent
 - COPPA generally requires “verifiable parental consent”
 - Form of required consent depends upon whether “disclosure” of data to third parties will occur (Federal Trade Commission’s “Sliding Scale”)
 - For data not disclosed: “Email plus”
 - Email to parent requesting consent, express consent by parent relayed to operator by email or other means, delayed confirmation of consent sent to parent by email or other means
 - For data disclosed: Print, sign and mail/fax forms; credit card verification; trained telephone operators
 - Does not require further verifying relationship of adult to child

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- Exception to parental consent requirement
 - Collection of child or parent's name and online contact information for sole purpose of:
 - Obtaining parental consent
 - Making one time response to specific request from child (e.g., response to child's request for homework assistance), provided data is promptly deleted following response
 - Making multiple responses to specific request from child (e.g., delivery to child of periodic email newsletter)
 - Parent must have notice and "reasonable" opportunity to object immediately after first response to child
 - Safety, judicial process and law enforcement

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- Right to proportionate data collection
 - Operators prohibited from conditioning participation in a Website activity on the child providing “more information than is reasonably necessary to participate in such activity“
 - Example: Operators prohibited from requiring child to submit telephone number in order to receive postal mail subscription to children’s magazine
 - Operators prohibited from requiring parent to consent to “disclosure” of child’s personal information as condition to allowing child to participate in activity that merely requires operator’s internal use of child’s personal information
 - Example: Operators prohibited from requiring parent to consent to allowing child to use message board as a condition to allowing operator to collect child’s postal address to send child postal mail subscription to magazine

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- Parent's Right to Access/Rectify Child's Personal Information
 - Right to demand deletion of existing data and prohibit future collection of data, but not a right to edit or amend data
 - In providing copy of personal information, operator must:
 - Ensure requestor is child's parent "taking into account available technology"
 - Not make process "unduly burdensome"
 - Preemption of federal and state statutory and common law liability for erroneously making personal information to imposter, provided
 - Operator acts in "good faith," and
 - Operator follows "reasonable procedures"

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- Right to data security and integrity
 - Operator must “establish and maintain reasonable procedures” to protect security and integrity of data

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- Federal Trade Commission Penalties
 - Violation treated as “unfair or deceptive act or practice” under Federal Trade Commission Act
 - Example of Federal Trade Commission enforcement
 - Sony BMG Music Entertainment (December 2008)
 - Allegations: Sony collected personal information on Websites with a privacy policy that stated that users under age 13 would be “restricted from participating” in the Website activities, but such restrictions were not put in place; users who declared that they were under age 13 were nonetheless permitted to register on the sites, as well as to create personal fan pages through which they were able to interact with other users, including adult users
 - Consent decree remedies: \$1 million civil penalty, plus deletion of improperly gathered data and future compliance reporting obligations
 - No private right of action

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- Conclusion

- U.S. experience with COPPA may offer transferable insights with respect to successful regulatory protection of children's personal data
- Although COPPA is limited to online collection of personal data, its approach is adaptable to offline data collection
- COPPA offers relative certainty and predictability as to legal requirements, and is flexible and responsive in its approach to addressing specific risks to children's data protection rights

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Thank You

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