



Podcast Transcript

AD Nauseam: Children, They are Indeed Our Future – COPPA Developments

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues, with an

emphasis on the FTC and the NAD. I'm Leah Brave and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman. Two partners from BakerHostetler's Advertising, Marketing and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. And today, Amy and Daniel are joined by Carolina Alonso, a senior associate in BakerHostetler's New York office.

On today's episode of AD Nauseam, Amy, Daniel, and Carolina talk about the latest on COPPA, including a new proposed rule and recent enforcement actions. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Carolina.

Kaufman: And welcome back to AD Nauseam, everyone. We are always happy to have special guests on our podcast, and today from our New York City office, we have Carolina Alonzo, a resident expert on gaming and COPPA, and also, the leader of our Interactive Entertainment and Video Game team. Caro, it is great to have you here today.

Alonso: Thanks so much for having me. It's been so great working with both of you on children's issues, especially when there is a nexus between privacy and advertising.

Mudge: Daniel and I do get sick of each other on occasion, so it is always lovely to have somebody else to chat with and get to know. And particularly timely to have you here today, Caro. We are focusing on COPPA, Children's Online Privacy Protection Act, including the recent FTC-proposed changes to that rule that's got everyone abuzz, and some recent COPPA cases, and also why COPPA is so important to advertisers and not just privacy wonks. But first, let's turn it back in time, how many decades, of course, for me and Daniel, a few less for Caro, but everybody, what is your favorite childhood memorabilia?

Kaufman: So, I got to confess, Amy and I were recently talking about this issue and we found out that we shared an important piece of '70s' memorabilia. We were talking lunch boxes because, of course we were, and we found out that we both, as kids, had a Sigmund and the Sea Monsters lunch box. Now this, of course, was not one of the most popular shows out there. But for those who didn't get to experience Sigmund and the Sea Monsters, he was a, he or a she? I'm not sure what Sigmund was. Or they...

Mudge: I don't think it matters, Daniel. I don't think it matters.

Kaufman: ...I'm not, I don't know. But Sigmund was a sea monster who had been kicked out of his or her family because of his inability to scare people. And I just happened to see that the lunch box that Amy, you and I both had, you can now buy it online, \$300.

Mudge: Okay, I got to go find mine. Sorry, guys. No. Alright. So, favorite memorabilia for me, it is probably my beloved posters. Some of which I bought at the record store, some of which I got from Scholastic books. But I had a Johnny Whitaker poster, and I actually saw him in concert at a mall. Johnny Whitaker sang a classic song, You Gotta Have Friends, and it was also the Sigmund and the Sea Monsters theme song. I had that before I had my beloved Sean Cassidy records and posters. And immediately after my obsession with Free To Be... You and Me, the Marlo Thomas hippie children's albums. So, Caro, what about you?

Alonso: So admittedly, I'm a big child at heart so there is a lot of ways to answer this question, but something that happened recently is that a favorite childhood online virtual pet world of mine, Neopets, was acquired by a new company and they're releasing a ton of new merch. So, I now have a new 2024 Neopets calendar. I think a lot of early 2000s kids will know exactly what I'm talking about. I remember being paid in Pokémon cards to babysit other kids' Neopets. So, I recently found out that my Shadowless first editions Zapdos card is worth also around \$300. So, virtual pet babysitting is a pretty good gig.

Mudge: Alright, Daniel, how did we manage to skip two whole generations here?

Kaufman: I understood every other word Caro was saying there, so I'm a little bit confused.

Mudge: Mental note, we need some guests who were in elementary school in the '80s and the '90s.

Kaufman: Okay, so let's get back to the 2020s and today, it is all about COPPA. And let's start just with the basics. So, Caro, what is COPPA? What does it do? Why do people care about it?

Alonso: So, COPPA is the Children's Online Privacy Protection Act. It is a FTC statute and set of regulations. I was actually seven when COPPA first got passed and I was nine when it became enforceable, so I actually...

Mudge: Alright, stop bragging. Stop bragging.

Alonso: Yeah, I remember we were all, like, the millennials are Internet kids. I remember getting my online experience interrupted because all these websites all of a sudden want to know what age I am, which at the time, did feel a little weird as a nine-year-old. So, basically, what COPPA does is that it mandates online services that collect personal information from children under the age of 13 to get verifiable parental consent along with a couple of other limitations. The FTC is very active in enforcing COPPA and there are quite large penalties attached to when there is an enforcement, and something to note is that it is not just online services directed towards children, that children would want to be on, but it applies to any online service that may have what is called actual knowledge, that term is fairly broad, as we'll discuss later, when they know that there is a child under 13 on the website.

Mudge: Alright, so not just kid websites. I think that absolutely is really key. If you got a website, you got a app, you got to at least think about COPPA. And I think of, again, I said, I think of COPPA as an advertising law. It started before there was Division of Privacy at the FTC. It was enforced out of the Advertising Practices division. People do think of it as a privacy law and it does have data security components, but it's always been a really important consideration for an advertiser since so much of the data collection that we talk about is focused on use for advertising.

Kaufman: Yeah, Amy, we talk a lot about the intersection of advertising and privacy, and it is really apparent when you look at COPPA and that is becoming even more clear when we look at the recent proposed changes to the COPPA rule. So, just backing up a little bit, Congress passed COPPA, but also gave the FTC some rulemaking authority. And, over time, the FTC has done some rule making here. Back in 2019, they opened COPPA for comments again to consider changes and they just recently announced sort of proposed changes to the COPPA rule. Huge outpouring of comments. There were 175,000 comments filed, which is enormous from an FTC perspective. But, Caro, let's talk a little bit about the first big change that the agency is proposing.

Alonso: Yeah. So, there is two big proposals. The first is really focused on your area, advertising. COPPA currently requires a single consent for collection and use and disclosure of kids' information. So, under this new proposal the consent would be bifurcated. There would be separate parental consent for the disclosure, the, specifically the disclosure of personal information. To be clear, this is more focused on limiting disclosures to third parties for advertising purposes, and if that is hard to wrap your head around, a good example would be a product, let's say it is an online video viewing platform. Under the current COPPA regime, if the only personal information collected is persistent identifiers such as IP addresses or device identifiers, that is specifically tied to the video viewing data and the data is only being used to what the FTC defines as internal operations, which does, by the way, include contextual advertising, verifiable parental consent is not required. However, if the data is being used for specifically targeted advertising, which is not the same as contextual advertising, those same tracking technologies that might be collecting IP address, device identifier, even to make the video work and function, if it is being used for targeted advertising, you would not only have to get verifiable parental consent for the collection of those persistent identifiers, but also the disclosure to those third parties that help facilitate the targeted advertising.

Mudge: Alright. Well, one verifiable parental consent caused a lot of agita. I'm sure two is not going to be super popular, but alright. What is number two?

Kaufman: So, the second new provision would further limit how persistent identifiers can be used for internal operations. So, you can collect persistent identifiers without verifiable parental consent if you don't collect other personal information, and it is only used for internal operations. So, the FTC wants to limit that internal operation. And here for example, you may have information that is collected in order to recognize a kid player when they return to a game, so they can pick up

where they left off. And the proposal that the FTC has put out there states that the internal operations exemption would not cover uses that are focused on encouraging or prompting use of a website or online service. And in the Federal Register Notice, they focus on look, if you're using that persistent identifier in order to maximize user engagement with a website or online service, that would no longer be covered by the internal operations exception.

Mudge: And we saw that in the press from the FTC touting these new rules, which five years in the making, Daniel, 2019 to now, okay.

Kaufman: There is a story behind that, I'm sure.

Mudge: That might be, that, I'm sure you have the story, whether you can share it or not is another matter, but that might be a record. But, in any event, the press certainly came out with a big bang and the FTC is really focused on saying, we are protecting kids from being online too much or getting addicted to their devices, or if they're online at all, protecting them from targeted advertising.

Alonso: Yeah, that is a really, really good point, Amy. All these concerns that are coming up in the COPPA amendments, the proposed COPPA amendments, are consistent with concerns that have been brought up in past FTC workshops as well as what we've been seeing in age-appropriate design codes. These design codes do copy a United Kingdom law. They're very similar. So, for example, let's say the online service is a mobile app game and the persistent identifier is used to create this behavioral profile that indicates that the player, to what Daniel was discussing, logs in and maybe plays in the morning, but the player hasn't logged in for a week. This data then can be used to send a push notification saying something like squeeze in some gameplay before school. It is important to know that the amendment is content neutral. So, this sort of pushing, these notifications, that might be great on an ed tech platform, on an app that is supposed to help the kid learn a particular language, for example, the application of the restrictions would be the same between an ed tech platform and your standard entertaining video game.

Mudge: Okay. So, well, that is, we're going to explore a little bit more. I'd like to explore the issue with educational online applications, because certainly those were a blessing and a godsend during COVID, and are really important. Alright, those are the two big ones. What are some of the other changes, just briefly, Caro, that the FTC is proposing?

Alonso: Oh, my, there is a lot going on here. There is several additional changes, including updated notice and consent requirements, revised definitions, also, new security requirements and new approved consent methods, including getting consent through text messages.

Mudge: Alright, so let's go back to number two. Unless I'm missing something, maximizing engagement isn't a privacy issue at its core at all. I know there are lots of concerns about design features that are designed to keep kids online, but how does this fit within COPPA?

Kaufman: So, really good question. Now of course the comment period is open, I think it is open until about mid-March, but look, the FTC does try to cap in this a little bit, it is not, they're focused on how a company can't use the data that they're collecting from kids in order to maximize engagement. So, the statute is a bit neutral about purpose, but clearly, from the FTC perspective at the moment, one of these purposes that they don't want data used for is for maximizing engagement. But, look, it is a really good question and we're certainly seeing lots and lots of state laws that are more directly getting at these issues.

Mudge: Yeah, I mean, look, those emerging state laws may take over all of this and is probably very worthy of another podcast. But, as Caro noted, currently COPPA applies to youth 13 and those state laws may broaden this, but sticking with COPPA, let's talk a little bit about enforcement and where it was heading. So, COPPA was passed in 1998, takes effect in 2000, and the FTC really quickly starts bringing cases. Back in the day, in my day, those were really straightforward cases. These were just companies that were totally blowing off COPPA, making no attempt to comply. But certainly, the cases we're now seeing are a little bit more nuanced and raise questions about what is and is not covered.

Kaufman: Yeah. Look, when a statute is first promulgated, it is pretty easy to find targets that just are ignoring it or haven't paid attention. Well, one of the more interesting cases out there is *Google YouTube*, a case from about 2019, and the FTC and the state of New York got a lot of money in that case. And the case there focused on the existence of kid-directed channels on the general audience platform that is YouTube, and it raised the question of, what is a platform supposed to do in those situations? And there, the FTC was alleging that it was a COPPA violation for YouTube to collect personal information in the form of persistent identifiers from the viewers of child-directed channels without first notifying parents and getting consent. It was a big deal case, and the complaint emphasizes that the defendants there knew, and again, it becomes about knowledge, they knew that the YouTube platform had a lot of child-directed channels on it.

Alonso: Yeah, knowledge is really big, important detail to think about, especially noting that the knowledge standard is broadening with these state laws, including definitions such as actual knowledge is now possibly turning into more of a constructive knowledge standard. We have seen a number of cases that the FTC has gone after somewhat surprising targets for COPPA because of this broadening knowledge standard, even under the FTC. A recent example is an ad tech platform, OpenX. It is a real-time bidding platform that monetizes websites and mobile apps by selling ad space. The FTC's investigation found that OpenX had knowledge that hundreds of child-directed apps participated in the ad exchange. So, the FTC alleged that OpenX violated the COPPA rule, and that OpenX passed this personal information to third parties, and it used it for targeted advertising to the users of these child-directed apps, which of course, are probably children.

Kaufman: And, of course, the FTC got \$2,000,000 settlements in that case so...

Alonso: Right.

Kaufman: ...we're seeing more and more seven- and eight-figure settlements.

Mudge: Hmm, so the middlemen or middle people are a big part of this as well. The proposed new rule also incorporated some of the stuff that the FTC's actually told us over the years, since they last updated the rule, including that voice recordings are PII, and really, particularly the application to schools. And obviously, as the only one who had children who were being educated during COVID online, that online school is critical. But, Caro, talk to us about some of the limits there.

Alonso: Yes. So, what is interesting about some of these COPPA amendments is not necessarily that it is not all just trying to broaden COPPA and its interpretation or trying to redefine things. Some of it, such as this ed tech issue, is just solidifying in the text, guidance that the FTC has come out over the years for parental consent for ed tech online services that kids might use in school context. It is really hard to get verifiable parental consent in those contexts. So, what the FTC did, and you can see this in their FAQs, they're publicly available, they allow schools to consent to the online service on behalf of the parents. So, this is now going to be in the text in the proposed amendments. However, something to note is it is still consistent with the guidance and that the data can only be used for educational purposes that benefit the school.

Kaufman: Yeah. You know, Amy, it reminds me a little bit of what we saw in the endorsement guides, a lot of the FAQs and concepts that the FTC had been incorporating over time were then formally incorporated into the endorsement guides that we saw not too long ago. And another example in COPPA there that you see is biometrics as personal information. Over time, we've seen that that is certainly the case, and it is more formally being put forth in the proposed rule as personal information that requires VPC.

Mudge: Alright. I'm going to look into my crystal ball though, and I think that this proposed rule that we see now is not going to be the final rule that we see. And I'm throwing that out there because I think some of the most interesting stuff was not in that proposed rule itself, but in the questions that the FTC specifically asked for comment on. Seems to me there is a lot that is up in the air. And I, the examples really that popped to me, a couple of them, the FTC is asking whether player username can be PII, or whether designing avatars, the little Lego people, whether those people look like players can be PII. Those things like that would also be really, really seismic. So, if they make some sort of big change in the final, can they just dump that on us, or is there more process involved?

Kaufman: So, the point you're really making, Amy, and I think it is a really good point, is it is really not a best practice to sort of take four and a half years to look at comments and come out with a proposed rule because the market has changed so much, and the issues and the concepts have changed so much. I think that is part of what we're seeing, issues from five years ago. These things weren't necessarily issues then, they're more issues now. So, not an ideal practice, but there also,

there are limits to what the FTC can do. They can't recreate COPPA, that is up to Congress. Congress gave them specific areas of rulemaking authority, and that is what the FTC is focused on. I think also part of the reason I think the rulemaking process just took so long, it's just been so much talk about Congress amending COPPA and doing COPPA 2.0. I think the FTC was hoping that Congress would take a big leap forward instead of the sort of...

Mudge: Yeah.

Kaufman: ...smaller incremental leaps that the FTC can take now.

Mudge: There is a big game of chicken going on with those kids in the middle.

Kaufman: Yes, yes.

Mudge: Alright, so we have a rule that is in flux and the rule that the FTC is still actually using a lot right now, and COPPA is one of those few tools in the FTC's tool belt that allows it to get money, specifically penalties for violation. So, this is going to continue, but what are some of the additional things that we should be watching for?

Kaufman: So, I would point out a few things. Look, the rulemaking is pending. Comments are being prepared as we speak. So certainly, if you have a service that is popular with kids, you really need to do deep dive into the proposed changes and consider whether you or your trade association should be commenting and raising issues and concerns about these changes. Second thing, and Caro made a really good point to this, COPPA isn't just about kid-directed services. Anytime an online service is collecting information from users, that can be a big problem if the company has knowledge that you've got users under 13. So, make sure you understand the information you're collecting from users, and what processes you have in place if you discover that you have users under 13. You do not want to be collecting personal information from them without verifiable parental consent. Another point, if you are a mixed-audience site and you have an age gate, make sure it is a neutral age gate. We see this fairly frequently. If you are in any way subtly encouraging kids to lie about your age, you need to fix that quickly.

Mudge: Daniel, kids need no encouragement to lie...

Kaufman: I was pretty good at that when I was a kid, too.

Mudge: I'm just throwing that out there, but...

Alonso: Yeah. That was my bread and butter.

Kaufman: Okay, clearly I'm learning a lot about both of you, but actually the final point and we didn't do a deep dive into this, is safe harbors. They play a really important role here. If you have a service that is at all popular with kids, you really should look into joining a safe harbor. There are several that have been approved by the FTC and they can provide you both with really important and helpful guidance on being compliant with COPPA, but also real protections when it comes to avoiding

COPPA liability. So, safe harbors could be another podcast, another day, but really worth a close look.

Mudge: That is food for thought, Daniel. Food for thought. But with that, I want to thank Caro so much for joining us, helping us unpack what is going on with the COPPA rule making. And with that, thank you very much, as always, for joining us on another episode of...

Kaufman: AD Nauseam.

Mudge: AD Nauseam.

Brave: Thank you, Amy, Daniel, and Carolina. If you have any questions for Amy, Daniel, or Carolina, their contact information is in the show notes. For more information on the latest development and ad law, visit our ADventures Law blog at www.adventures-in-law.com and check out all AD Nauseum episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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