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The Costs of Compliance with Privacy Legislation: The COPPA example

While much is unknown as to what benefits will come from regulating privacy, there is already evidence of harm. The FTC concluded in its certification to avoid a Regulatory Flexibility analysis that, any additional costs of complying with the Children's Online Privacy Protection Act (COPPA) Rule, beyond those imposed by the statute or otherwise likely to be incurred in the ordinary course of business, are expected to be comparatively minimal. Were they ever wrong.

Each and everyday, small IT companies make decisions critical to their survival. The complexity and costs associated with a regulatory scheme such as COPPA force these companies to forgo other needed investments or incur significant additional costs. For example, Wall Street Journal Interactive reported that FreeZone, a web portal for kids between 8 and 14, estimates it will spend about \$100,000 per year to comply with COPPA. Another company, Zeeks.com, pulled all of its interactive content because the \$200,000 per year cost to employ chat-room supervisors, monitor phone lines to answer parents' questions, and process COPPA permission forms was "the straw that broke the camel's back."

ZDNet News has reported that complying with COPPA could cost as much as \$500,000. One of our members tells us that they spend 10% of their total resources complying with COPPA requirements. The brunt of the costs mentioned above are associated with hiring and continually training personnel to program and monitor the site as well as to answer parents' questions and requests for access. There are also direct costs, including ongoing programming and tracking to meet the notice, consent and access provisions of the Rule.

It is also worth noting that not all of the COPPA requirements, as interpreted by the FTC, seem to flow directly from the legislative language. For instance, the COPPA legislation generally prohibits Web site operators and online service providers from collecting personally identifiable information from children without parental consent. I am not a lawyer, but to me, this general rule makes sense if you are a business and you affirmatively and actively are trying to gather information from children. ACT believes that is what "collecting" information means.

However, under Section 312.2 of the Federal Trade Commission (FTC) Rule, the act of collecting includes “enabling children to make personal information publicly available through a chat room, message board or other means” (except where the operator deletes any personal information before it is made public). This is an extraordinarily broad definition of what it means to “collect” information. Taken to its extreme, it means that every Web site that offers a bulletin board service or a chat room is collecting information about its visitors (even if the site operator never stores or, let alone, looks at the information). It also means that, under the COPPA rule, all those sites arguably would have to institute blocking or monitoring and parental consent mechanisms if the operator learns that a single child has used the bulletin board service or chat room. To address this possibility, the FTC has said that “the Commission likely will not pursue an entity that is an [O]perator, but has not facilitated or participated in, and has no reason to know of, any Rule violation.” But even that statement does not alter the fact that COPPA could affect every site on the Web that offers some form of bulletin board service. This outcome is all the more troublesome when, in my mind, it is not at all clear that that is what Congress intended.

Moreover, any site that implements a parental consent mechanism must also have a means for authenticating children and their parents; otherwise, the site has no way of knowing either who a child is or who is granting consent on behalf of this child or seeking access to the child's personal information. Indeed, authentication is essential to the COPPA compliance scheme since nothing could be more detrimental to children's' on-line privacy than allowing the wrong person to gain access to a child's data. As noted in the “Final Report of the FTC Advisory Committee on Online Access and Security,” however, authentication always involves a tradeoff between security and ease of access--strong authentication often makes it burdensome and difficult to establish an account or set up a profile. In complying with COPPA, therefore, sites that do not ordinarily "collect" personal information about children must also take on the additional burden and costs of implementing appropriate authentication techniques.