

## New Enforcement Actions For COPPA's 20th Anniversary

By **Sheila Millar and Tracy Marshall** (January 3, 2019, 1:17 PM EST)

The 20 years since enactment of the Children’s Online Privacy Protection Act have been marked by a number of important evolutions in the implementing rule, as well as a variety of enforcement actions from the Federal Trade Commission and state attorneys general. The last major rule change in 2013 addressed, among other things, online behavioral advertising targeted to children under 13.

On Dec. 4, 2018, New York Attorney General Barbara D. Underwood announced that Oath Inc., the Verizon-owned company formerly known as AOL, **agreed to** a record \$4.95 million penalty for its role in allegedly helping advertisers track and target ads to children in violation of COPPA. In addition to paying the nearly \$5 million fine, Oath agreed to implement a comprehensive COPPA compliance program and destroy all personal information collected from children.

While this is the largest COPPA settlement since the law was enacted in 1998, it is not the first. Federal and state agencies continue to vigorously enforce the law to safeguard children’s privacy and protecting children’s privacy is likely to remain high on the agenda for both the FTC and state AG’s. As we begin 2019, it therefore is worth reviewing the COPPA framework and implications for online service providers and advertising technology businesses.

### **COPPA: A Framework Safeguarding Children’s Privacy**

COPPA[1] applies to all online services that collect “personal information” (individually identifiable information) from children under the age of 13, including through websites, apps and connected kids' products. Although the principal compliance obligations fall on the actual operators of websites and other online services directed to children, COPPA also applies to entities with actual knowledge that they are collecting personal information from children. As a result, third-party advertising technology companies that interact with known children’s websites, including ad exchanges such as Oath, must also comply.

COPPA imposes a number of specific obligations on online service providers that either direct services to children or have actual knowledge that they are collecting personal information from children:

- Minimizing data collection;



Sheila Millar



Tracy Marshall

- Posting privacy notices;
- Directly notifying parents and obtaining verifiable consent from parents before collecting, using or disclosing the personal information of children under 13 online; and
- Implementing reasonable safeguards to protect children's data.

The FTC updated the COPPA rule in 2013 to reflect changes in technology, including expanding the definition of “personal information” to include cookies, geolocation data and other persistent identifiers that can be used to recognize a user over time and across websites. While operators of child-directed online services are permitted to use persistent identifiers solely to support internal operations, use for behavioral advertising purposes is not covered by this exception.

The FTC has initiated some 30 COPPA enforcement actions, but state AGs also have authority to enforce COPPA, and there have been several such actions over the past 20 years. The Oath settlement is the second case taken by the New York attorney general that takes aim at technologies that might be used for online behavioral advertising.

### **Oath’s Alleged Violations of COPPA**

The AG’s complaint is notable not only for the size of the fine levied, but because the target is a non-consumer-facing, third party that did not directly operate a child-directed website. According to the complaint, AOL operates several ad exchanges where bidders buy ad space in real-time auctions. The New York attorney general’s detailed press release[2] states that while AOL had notice that several of its clients’ websites were directed to children under 13 and thus subject to COPPA, it failed to comply. The New York attorney general alleges that AOL conducted at least 1.3 billion auctions for ad space between October 2015 and February 2017 on hundreds of child-directed websites, collecting and sharing personal information of users, including young children, in violation of COPPA.

AOL’s own policies reportedly prohibited COPPA-covered websites from using its display ad exchange to auction ad space. Indeed, Oath’s privacy policy states that it does not “knowingly collect, use or share information that could reasonably be used to identify children under the age of 13 without prior parental consent or consistent with applicable law.” Nonetheless, the New York attorney general’s press release indicated that documents obtained during the investigation revealed that AOL knew that its actions violated COPPA. The New York attorney general contended that the company carried out some 750 million auctions for ad space on COPPA-covered websites.

### **Children’s Privacy: Expectations for 2019**

This past year has seen seismic shifts in data privacy with the entry into force of the EU General Data Protection Regulation, or GDPR, in May and enactment of the California Consumer Protection Act, or CCPA, in July. The CCPA, which will not go into effect until 2020, offers enhanced rights for consumers, as well as a private right of action for security breaches, but there is much debate about the CCPA framework and whether its burdens are appropriately tailored to potential privacy harms.

While there is currently no overarching federal privacy law in the United States, children’s privacy, health privacy and financial privacy are covered by sectoral privacy legislation. Due to perceived gaps, however, privacy issues loom large on the Congressional agenda for 2019, with many expecting the introduction of national privacy legislation in the next session. With more than 30 privacy bills

introduced since the beginning of the last legislative session, the Senate Commerce Committee held a hearing on data privacy on Sept. 26 focusing on the potential for a federal privacy law and the role of FTC regulation. And, while Congress starts over with a new session in 2019, privacy legislation will continue to generate discussion and debate. In the meantime, both the National Telecommunications and Information Administration and the FTC have invited comments on possible contours of privacy legislation, and these agencies are likely to share their views on potential federal privacy legislation with members of Congress.

Thus, in the year that marks the 20th anniversary of COPPA, it is helpful to review the evolution of the COPPA rule over the years, including guidance from the FTC and enforcement actions from the FTC and state AGs.

The COPPA framework still works well to safeguard children's privacy. The complaint against Oath is the second complaint brought by the New York attorney general in the last two years for alleged COPPA violations; in 2016, the New York attorney general concluded a two-year investigation<sup>[3]</sup> into the tracking practices of four online publishers that allowed third parties to track children's online activity without obtaining verifiable parental consent. All the companies were required to adopt several COPPA compliance measures and three were required to pay a fine. Other state AGs have likewise previously acted in response to potential COPPA violations. As recently as September of this year, the New Mexico AG filed a lawsuit<sup>[4]</sup> for alleged COPPA violations against a children's game app company, Tiny Lab Productions, and the online ad companies that work within Tiny Lab, including those run by Google and Twitter. The New Mexico AG alleged that the apps were targeted to children and contained illegal tracking software; the case is still pending.

At the federal level, the FTC continues to vigorously enforce COPPA, closing out investigations of alleged COPPA violations against smart toy manufacturer VTech and online talent search company Explore Talent just this year. The FTC charged Vtech with failing to provide notice and obtain parental consent required under COPPA and neglecting to implement reasonable security in the first-ever COPPA complaint involving a connected children's product. The FTC charged Explore Talent with several COPPA violations, including requiring children to create an account by submitting personal information that was subsequently made available to other users and failing to obtain parental consent. This latest action brings a total of 28 FTC enforcement proceedings since the COPPA rule was issued in 2000.

In general, the level of compliance with COPPA is high, but the complexity of the ad tech landscape adds new challenges. As the FTC and state AGs continue to scrutinize compliance, it remains more important than ever for businesses to remain vigilant about safeguarding children's privacy. With potential legislative changes on the horizon, it will also be important to keep an eye on the evolving privacy landscape in 2019.

---

*Sheila A. Millar and Tracy P. Marshall are partners at Keller and Heckman LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <https://www.law.cornell.edu/uscode/text/15/6502>

[2] <https://ag.ny.gov/press-release/ag-underwood-announces-record-coppa-settlement-oath-formerly->

aol-violating-childrens

[3] <https://www.khlaw.com/9551>

[4]

[https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG\\_Balderas\\_Announces\\_Lawsuit\\_Against\\_Tech\\_Giants\\_Who\\_Illegally\\_Monitor\\_Child\\_Location\\_\\_Personal\\_Data\\_1.pdf](https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Announces_Lawsuit_Against_Tech_Giants_Who_Illegally_Monitor_Child_Location__Personal_Data_1.pdf)