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Video Game Content Creators Face COPPA Liability Hazards

By Matthew Woods and Austin Miller

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Content creators on live streaming platforms that draw a preteen audience—like YouTube Gaming and Twitch—need to be aware of potential liability pitfalls under the Children’s Online Privacy Protection Act, say Robins Kaplan attorneys Matthew Woods and Austin Miller. Congress or the FTC could clarify the act, but show no signs of doing so at this time, they say.

The number of YouTube and Twitch channels devoted exclusively to streaming popular video games continues to rise. In 2020, YouTube’s users watched 100 billion hours of gaming content, of which 10 billion hours were of YouTube Gaming live streams.

One popular draw for content creators to stream live from their channels is the ability to receive donations from fans in real time. Unsurprisingly, these platforms collect viewers’ personal information, as do the service providers that facilitate viewer donations.

Additionally, live streaming platforms allow content creators to interact with their viewers, making them feel more involved in the community. Although they may not realize it, content creators may be collecting the personal information of their preteen viewers, and thus subjecting themselves to liability under the Children’s Online Privacy Protection Act (COPPA).

The Federal Trade Commission views individual content creators, in addition to platforms like YouTube, as being subject to COPPA liability if an ad network collects personal information from viewers of that channel, such as through a review or subscription.

Content creators should understand the scope of COPPA as applied to these common situations.

What Is COPPA?

COPPA generally requires websites and apps to obtain verifiable parental consent before collecting personal information from children under the age of 13. The FTC has the authority to issue regulations and enforce COPPA, and the commission has issued a laundry list of requirements for operators to comply with the law.

COPPA violations can result in up to \$43,280 in civil penalties for each violation. As of 2020, the FTC has brought close to 30 cases against companies for violating COPPA, including YouTube.

While there is no private right of action for COPPA violations, parents of children under 13 may still assert violations of common-law privacy-related torts and various state consumer protection statutes, such as the numerous putative class actions against gaming and mobile app developers, alleging breaches of privacy and unfair competition laws. A COPPA violation may be an underlying factual predicate to support one of these causes of action.

The FTC Goes After YouTube

In 2019, the FTC, in conjunction with the New York attorney general, brought suit against YouTube, alleging the company collected childrens' personal data without parental consent in violation of COPPA. YouTube allegedly collected persistent identifiers that tracked users across the internet, including from viewers of child-directed channels.

YouTube settled the case for \$170 million, and agreed to take several actions to mitigate against the inadvertent disclosure of a child's personal information.

For example, YouTube now requires that content creators designate their content as made for children or not made for children. YouTube has issued seven separate factors for content creators to consider when determining whether their videos are made for children, such as whether they are the intended audience, or whether a video includes characters or toys that appeal to children.

Unfortunately, while superficially appealing, these guidelines effectively shift the burden onto content creators.

The lack of clear guidance from the FTC has creators concerned. Many have even expressed fear that the FTC will target creators directly for violating COPPA if a video is not properly designated "not for children." And those creators are right to be concerned, especially given that Congress drafted COPPA broadly to prevent any "operator" of a website from collecting personal information from children without parental consent.

This provision poses a real hazard for content creators. For example, a YouTube channel that streams Minecraft videos—that has no intention of attracting a child audience—may run afoul COPPA if a child leaves a comment that discloses their user name or other personal information linked to that account.

Proposed Revisions to COPPA

Both the FTC and Congress can mitigate the risk to content creators and better align COPPA regulations with the 21st century following the proliferation of live streaming services.

One easy solution involves the FTC creating a rule that clarifies an “operator” of a website under COPPA as someone who actively seeks or encourages the disclosure of a child’s personal information, who will then affirmatively use that personal information for their own benefit. This is seemingly more in line with Congress’s intent of enacting COPPA than enforcing the act for run-of-the-mill comments and donations on YouTube and Twitch.

Separately, Congress can amend COPPA to expand its safe harbor provisions. As it stands, industry groups are able to submit for FTC approval self-regulatory guidelines that implement the protections of the commission’s final rule.

To date, only seven safe harbor organizations are approved, none of which seemingly relate to individual content creators. Congress could amend the safe harbor program to exclude routine commercial transactions where the website operator does not benefit from having a child’s personal information.

These proposed fixes could ameliorate the concerns of several content creators, but there is no indication that either the FTC or Congress intends to clarify the scope of potential liability by content creators. Rather, the opposite appears true, as the Senate approved an amendment to COPPA in 2021 that would make it easier to impose liability where an online operator should have “reasonably known” that children under 13 are accessing their content.

Absent further amendment or regulation—or clarification from the courts—content creators should be alert of these potential pitfalls when sharing their content on streaming platforms.

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