

FTC Shifts Heat To Mobile Apps With Kids' Privacy Actions

By Allison Grande

Law360, New York (September 19, 2014, 3:22 PM ET) -- The Federal Trade Commission recently targeted mobile apps run by Yelp Inc. and TinyCo Inc. in enforcement actions under the Children's Online Privacy Protection Act, showing that the agency won't hesitate to apply the privacy rules it has traditionally enforced for websites to the mobile space, even with apps that aren't directed to children.

In separate stipulations filed Tuesday in the Northern District of California, online review site Yelp and mobile game company TinyCo agreed to settle the commission's claims that the duo had failed to follow the COPPA rule's stringent parental notice and consent requirements even though they had actual knowledge that they were collecting personal information from children under 13.

While the regulator's previous COPPA actions have primarily focused on website operators that collect personal information from users under 13 without proper parental notice and consent, the newest suits deal only with the way that the companies' mobile apps swept up information on users who claimed to be under 13.

"The two settlements make it abundantly clear that the FTC is making it a priority to ensure that the privacy standards that apply to websites through COPPA extend to mobile apps that collect information from children under 13," said Reece Hirsch, a co-head of Morgan Lewis & Bockius LLP's privacy and cybersecurity practice.

The enforcement actions mark the first brought by the regulator since a revised version of the COPPA rule that broadened the 13-year-old regulation's scope to include technologies like device identifiers as well as third-party services that have actual knowledge they are collecting personal information from children went into effect on July 1, 2013.

While attorneys agreed that the commission did not need the expanded rule to bring the latest actions, both of which hinged on actual knowledge principles embodied in the older version of the regulation, they noted that the agency's decision to center its first enforcement move under the revised rule on clear-cut violations of COPPA in the mobile app environment sends a resounding message that no company can afford to ignore the children's privacy rule.

"The commission has had 15 months to decide what cases to bring under the new rule, and likely had dozens of cases it could have brought, but it picked these two cases to send a couple of messages about compliance and their focus on the app environment," BakerHostetler partner Alan Friel said.

The suits build on the commission's steadily growing interest in the way that mobile apps protect children's

personal information, which it had previously highlighted in a February 2013 enforcement action accusing social networking app Path of unlawfully collecting information from underage users through both its website and mobile app as well as a December 2012 staff report that criticized app developers for falling short in disclosing how apps for children are sharing and collecting information.

“Clearly, apps are an area that are of concern to the FTC and they think that there's much less compliance going on in the mobile app world than there is in the website world, so it's not surprising to see this type of enforcement action based on traditional COPPA principles being taken against an app publisher,” Friel said.

Both enforcement actions allege that Yelp and TinyCo violated COPPA by collecting information such as names, ZIP codes, email addresses and device identifiers through their apps from children under 13 without providing sufficient notice either publicly or directly to parents of its data collection, use and disclosure practices and without obtaining verifiable parental consent before scooping up the information.

In both suits, the FTC ended up with the conclusion that the companies had an obligation to comply with COPPA because they had actual knowledge through data solicited or provided by its users that they were obtaining information from minors.

“A lesson from both the Yelp and the TinyCo enforcement actions is for companies to pay attention to what their customers are telling them,” said Melissa Krasnow, aDorsey & Whitney LLP partner.

However, while the suits were based on similar end points, the FTC relied on slightly different reasoning about how each company learned about minors' presence and appealed to children to reach the finish line, offering multiple additional lessons for a wide range of app developers, attorneys say.

In the case against Yelp, which agreed to pay a \$450,000 civil penalty, the commission alleged that, while the app is clearly intended for general audiences and not directed to children under 13, it had an obligation to comply with COPPA because it screened users' ages without excluding minors, thereby giving it actual knowledge that children under 13 were using the app.

While general audience sites can escape COPPA's grasp by turning away users who claim to be under 13, the faulty age-screen mechanism employed by the Yelp app failed to prohibit minors from using the site, even though the website maintained by Yelp properly rejected users who said they were under 13.

“The reason that the Yelp case is interesting is that it's not a site that is targeted to children, so it puts companies on notice that they really should keep COPPA in mind as they're building out their sites and be aware that they might find themselves in possession of data that gives them actual knowledge that children are trying to use their site,” Reed Smith LLP partner John Feldman said.

The FTC sent a similar message to companies in a blog post Wednesday about the case, in which senior attorney Lesley Fair warned that COPPA “isn't just for kids' sites.”

“If you've disregarded COPPA compliance because your business isn't child-related, it's time for a rethink,” she said.

Fair as well as attorneys advised companies to conduct privacy assessments of their mobile apps to help ensure that they are in compliance with COPPA.

According to the commission's complaint, Yelp attempted to take this precaution by hiring a third party in 2010

to perform a privacy review of the Yelp app as part of a mobile certification process.

However, the commission alleged that the third-party test erroneously concluded that the iOS version of the application prohibited registrations from users under age 13 and that Yelp had failed to test the age-restriction aspect of the registration feature in the Android version of the app at all.

“The case is a reminder that COPPA is a strict liability statute,” Morrison & Foerster LLP of counsel Julie O’Neill said. “The FTC’s action sends a strong signal that inadvertent noncompliance is no excuse and that it’s not enough to try to comply. In the case of age-screening systems, this means regularly testing and re-testing them to be sure that they do, in fact, work.”

In the case of TinyCo, which agreed to pay a \$300,000 civil penalty, the FTC alleged that the company had actual knowledge that children under 13 were using its various mobile apps, which include Tiny Pets, Tiny Zoo, Tiny Monsters, Tiny Village and Mermaid Resort, because it was receiving complaints from parents whose children were using the app.

“This may be a new way of asserting actual knowledge, as the actual knowledge cases the FTC has brought in the past have typically involved sites that requested a user’s age,” O’Neill said.

The case is also likely to prompt many apps that don’t believe they appeal to children to re-evaluate their public persona, given the FTC’s assertion that TinyCo mobile apps, unlike the Yelp app, are directed to children because of their use of themes appealing to children, brightly colored animated characters and simple language.

“By clearly saying that bright colors, small animals and simple language are elements of a child-directed sites, it’s putting the publishing community on notice that if those are elements of their games, they better be at least mixed use,” Friel said. “A lot of publishers have decided to take the position that they don’t have to comply with COPPA because they’re not directed toward children, but the commission’s assertion is likely going to cause publishers to re-evaluate their risk decisions.”

Attorneys added that taking a closer look at how apps are being presented to the public and what information they are collecting from users now is vital, given that the FTC’s interest in mobile apps and children’s privacy is unlikely to wane anytime soon.

“I would expect more settlements along these lines,” Hirsch said. “Given the sensitivity of minors’ privacy issues and the huge proliferation of mobile apps, this is a rich area for future enforcement.”

Yelp is represented by Marc Zwillinger of ZwillGen PLLC. TinyCo is represented by Lewis Rose and Christopher Loeffler of Kelley Drye & Warren LLP.

The FTC is represented by Maneesha Mithal, Christopher Olsen, Melinda Claybaugh and Nithan Sannappa of the FTC and Joyce R. Branda, Jonathan F. Olin, Michael S. Blume, Andrew E. Clark and James W. Harlow of the U.S. Department of Justice.

The cases are United States of America v. Yelp Inc., case number 3:14-cv-04163, and United States of America v. TinyCo Inc., case number 3:14-cv-04164, both in the U.S. District Court for the Northern District of California.

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