

# Legal considerations for online advertising to children

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As the Internet moves into a new era, knowledge of the legal guidelines that regulate online advertising – especially to children – is essential. Liisa Thomas and Melissa Dillenbeck outline the legal issues in the USA, European Union, Australia and Canada.

**T**HE INTERNET is entering into its second age. Gone are the plethora of dotcoms; now traditional companies are entering the online space. Included in their numbers are international companies that market and advertise products to children. As these companies utilise the Internet as an interactive medium to market to children, they must take special care to do so within the bounds of different national laws. Clearly, it is not possible for a responsible marketer to have an in-depth background of global advertising laws as they apply to children. Nevertheless, responsible marketers should have a good understanding of some of the more important issues that may arise in a given country, and the foresight to involve lawyers in the planning stages of their Internet activities.

Proper planning and a basic understanding of the legal issues can make marketing and advertising to children on the Internet feasible. To help companies achieve that goal, the child-marketer can read articles such as this one, and take advantage of the breadth of knowledge provided by industry groups in various countries. These groups, who seek to make Internet commerce easier, provide guidance on compliance with national laws and develop certain 'industry standards' while policing the Internet for violations.

The number of industry investigations vary from country to country, but where they exist, they can limit the number of governmental investigations. Furthermore, the industry

group shows the regulators that the industry is capable of self-policing. It is thus in the best interest of not just a given company, but the industry as a whole, that companies take care to follow national laws when hosting online marketing campaigns aimed at several different countries.

The first question to ask is what laws will apply. Clearly, for information that is being collected from children, and used to market directly to those children – or even used to aggregate and learn more about the demographics of the company's consumers – information collection and use laws are applicable. Once you have determined that a particular country's laws will apply to your site, the next step is to gain a good understanding of the general background of that country's laws. This article provides such an overview for several countries which our clients have wished to target, but is not meant to replace legal guidance from a US or a national expert in the legal field who is well-versed in children's advertising law.

## United States

Because it is one of the biggest markets in the world, many non-US companies find that they wish to expand into the North American market, and the United States in particular. The US has few laws that govern advertising and marketing to children or adults, but one of the laws that it does have is so sufficiently all-encom-

passing that most violations to a consumer can be covered under it. That act, the Deceptive Trade Practices Act, is used by the Federal Trade Commission (FTC) to pursue false advertising claims, deceptive pricing practices, and the like. It is also used to protect the personally identifiable information of individuals over the age of 13. For those under the age of 13, the US Congress passed a special law that requires companies to involve parents in their children's online activities. That law, and the rule that implements it (the Children's Online Privacy Protection Act (COPPA)) is also enforced by the FTC.

COPPA applies both to websites directed towards children and sites that are appealing to children. As such, many general interest and teen websites have found themselves unknowingly subject to the act. COPPA contains five basic requirements:

- (1) The site must provide notice to parents of the site's information collection practices. That notice must often be provided directly to the parent, and must always be accessible from a prominent link on the site's home page.
- (2) The site must obtain verifiable parental consent before collecting the child's information. There are some limited exceptions to this requirement, for example when collecting limited information to contact the parent to obtain consent.
- (3) The site must give parents the ability and opportunity to review the information collected from the child after consent is provided and, if desired, delete that information from the website's database.
- (4) The site may not force a child to provide more information than is necessary for the child to participate in the site.

- (5) The site must maintain the security of the information collected from the child. For example, employees who handle the information should receive special training, and third-party access to the information should be monitored and limited.

Although the federal government has not passed a law governing how and when a company can send unsolicited emails, also called 'spam', a growing number of individual states have enacted laws regulating spam. Most states define unsolicited messages as those sent to an individual with whom the company has no pre-existing relationship. However, a message that is sent to someone with whom the company has an existing relationship may be viewed as 'unsolicited' if the recipient did not expressly consent to receive messages from the company.

Certain requirements are common to most of the state anti-spam laws. A company sending out bulk messages may not misrepresent the sender of the message. Such a misrepresentation is common with mass messages, where the sender is trying to maintain the confidentiality of the recipient.

Companies should also provide contact information, including an email address or toll-free phone number, where an individual can opt out of future receipt of unsolicited messages. If individuals decline to receive future email messages, companies should ensure that no further messages are sent to those individuals. Moreover, when sending out a mass emailing, companies should indicate in the subject header that the message contains advertising.

The FTC has been joined in its enforcement efforts by a prominent industry group, the Children's Advertising Review Unit (CARU). This well-known American industry group -

whose members include many of the pre-eminent children-oriented companies in the country – reviews websites for compliance with its own guidelines. The CARU guidelines were the model on which COPPA was based. The guidelines provide additional, useful guidance for companies who are developing an Internet campaign, often addressing issues that COPPA fails to cover.

For example, the CARU guidelines, like COPPA, contain a notice requirement, but the guidelines also discuss in greater detail how that notice should be drafted. It must disclose, in language easily understood by a child, why the information is being requested.

Rather than state ‘submission of your information constitutes your consent to our use of that information for entry into the specific contest for which you have registered, but also your consent to inclusion in our global mailing database’ the disclosure should read, ‘if you give us your name and email address, we’ll use it to enter you in this contest and we’ll add you to our mailing list and send you information from time to time’.

CARU actively enforces its guidelines by doing website ‘sweeps’, and working with companies to remedy violations of the guidelines. CARU has focused much of its recent effort on including adequate age-screening mechanisms on sites that may be appealing to children. Such sites, although not necessarily intended for children under 13, do receive many visitors who are under 13, and should reasonably presume that, given the nature of their sites, younger children will visit. These sites must therefore include adequate age screening to ensure that information is not collected from children under 13 without prior parental consent.

CARU is not the only US organisation that examines the industry practice of those who

market to children online. The Direct Marketing Association (DMA) has also issued marketing guidelines that address online campaigns directed to children under 13. Like COPPA and the CARU guidelines, the DMA guidelines emphasise the need for *online* marketers to offer notice, choice, access, security, accountability, and protection to children under 13 years of age. Likewise, the DMA stresses the need for prior parental consent before collecting information from children, and the need for companies to develop an effective procedure whereby an organisation can show that it complies with its stated online practices. This procedure could be self- or third-party verification and monitoring, complaint resolution, or education and outreach.

Generally, it is clear that when advertising online to children in the USA, companies should make sure they involve the parents, and take reasonable measures to ensure they have received consent from the parent, not the child masquerading as the parent.

## The European Union

In Europe, each country has enacted several different laws that work together to protect consumers’ information. Two Europe-wide directives – which direct the member states to enact national laws that conform to the specifications of the directive – are of particular importance when developing an online marketing campaign to children. The first is the EU Data Protection Directive; the second is the EU Communications Data Protection Directive.

Under the EU Data Protection Directive, each member state was directed to enact national laws protecting a consumer’s personally identifiable data. There are seven requirements that each national law must

incorporate, some of which overlap with the FTC's Fair Information Practices. These requirements include provision of notice to the consumer, allowing consumer choice over how information is used, providing notice regarding any onward transfers of personal information that has been collected, adequately maintaining the security of the information collected, maintaining the integrity of the data collected, providing the consumer with access to his or her information, and developing internal mechanisms to ensure the enforcement and adherence to the proceeding requirements. This directive does not specifically address collection of information from children. However, the Federation of European Direct Marketing Associations (FEDMA), which represents the direct marketing sector at the European level, including 12 national Direct Marketing Associations in the European Union and those of Switzerland, Hungary, Poland, the Czech Republic, and the Slovak Republic, has provided guidance to members of the industry when they have created online marketing campaigns directed at children.

The FEDMA guidelines are very similar to those of CARU and DMA in the United States, and like the US guidelines, mirror the requirements of COPPA. However, unlike the USA, the term 'child' is not defined, and thus not limited to those under 13. FEDMA states that marketers should not use or disclose personally identifiable information about children without the prior written consent of a parent, guardian, or teacher.

A child should be required to give his or her age before any further personal information is requested from the child. Parents should also have the right to object to the disclosure of their child's information. Marketers should not collect more personal information than is nec-

essary for the child to participate in website activities, and should not make access to a website dependent on the collection of personal information. Incentives such as prizes and games should not be used to lure children into giving out personal information to websites. Moreover, the website should post notices that encourage children to ask their parents or guardians before entering personal information on a website. These notices need to be prominently placed where the information is requested, and be easily understood by children.

The country-level Direct Marketing Associations of various European states have enacted similar guidelines, but some countries, such as the UK, have defined 'children' as those under 14. Under the UK guidelines, websites cannot collect personal data from children under 14 without a parent or teacher's verifiable and explicit consent. Age must be asked before information is collected, notice must be provided where information is requested, and the notice must be in clear, plain language that can be easily understood by children.

The notice must include information to the parent about how consent can be given. As under COPPA, advertisers cannot make a child's access to a website dependent on the collection of personal information. Advertisers should also not entice a child to give out personal information in exchange for a prize or other offer.

Of particular importance for non-European companies who wish to enter the European market, the Data Protection Directive required that, as part of the national law, member states made it a violation for data to be shared with any entity residing in a country that did not have laws equivalent to the Data Protection Directive. Originally, the United States was

deemed not to have equivalent laws, but the US Department of Commerce and the European Union eventually compromised with a Safe Harbor Program. Under this Program, US companies that comply with the Safe Harbor Privacy Principles will be deemed to be in compliance with the Directive, as well as with the laws of the individual member states. Thus, if a company wishes to collect personal information from EU residents, it need only comply with the Safe Harbor Privacy Principles, and not with individual European state laws enacted in compliance with the Directive. Under the Program, companies are not required to register with any governmental body, but must make a public statement that they are in compliance with the Program. Once a company makes such a public statement, the FTC is able to enforce the company's compliance with the Program under the Deceptive Trade Practices Act.

In addition to the EU Data Privacy Directive, the European Union also issued a Telecommunications and Privacy Directive, which, among other things, applies to the sending of unsolicited email messages and faxes, the placing of unsolicited automatic calls to consumers, and the use of cookies. Under this directive, recently amended on 31 May 2002, companies may not send unsolicited email messages unless consumers have consented to such use.

Consent can be implied. The requirement does not apply to existing customer relationships; however, all electronic communications will need to provide the consumer with the opportunity to opt out of receipt of future messages.

With respect to cookies, the amendment clarified that companies must provide consumers with information about how and why

cookies are used, and give consumers information regarding how to opt out of the future use of cookies.

## Australia

Australia, like the European Union, has also passed a general privacy law, which, although originally directed to governmental agencies, was amended in 2000 to apply to the private sector. The Australian Privacy Act governs the collection, storage, use, and disclosure of a consumer's personal information. Companies that hold personal information about an individual must provide that individual with access to the personal information upon request.

The act further provides that organisations be open about their information collection policies, and must take reasonable steps to let website visitors know what personal information it collects, for what purposes, and how it collects, holds, uses, and discloses that information. Moreover, the act created the Office of Privacy Commissioner. The Commissioner must be consulted on any privacy codes and standards, and has jurisdiction over such areas as disclosure of customer information by telecommunications providers, handling of credit information, and online data collection.

Like the EU Directive, the Australian Privacy Act is silent as to the collection of information from children. However, as in Europe, the Australian Direct Marketing Association (ADMA) has provided guidelines that contain special provisions for marketing and advertising to children. The ADMA directs marketers to take into account the age, knowledge, sophistication, and maturity of the advertisement's intended audience. Unlike COPPA, CARU, and the FEDMA, the ADMA

does not require prior parental consent before collecting information from children. Instead, it directs marketers to encourage children to consult with their parents before giving any information: 'your mum or dad should say it's OK for you to answer these questions'. The Association encourages marketers to support the ability of parents to limit online data collection from kids through notice and opt-out provisions, and encourages websites to participate in parental education about privacy protection by including a link on their sites to the 'Children and the Internet' section of the ADMA website.

There are other industry groups in Australia concerned with the collection of information from children. For example, the Internet Industry Association (IIA), whose members include ISPs (Internet service providers), Internet law firms, telecommunications carriers, and web developers, recently created a 'Family Friendly ISP' Seal Programme to ensure the protection of children online. ISPs that earn this seal have agreed to assist families with the information and tools to make the Internet safer for children, such as an IIA content filter. Participants can place the seal symbol (a Ladybird) on their website to notify parents and children of their commitment to privacy protection. The IIA has stated that it will pursue a non-compliant ISP who bears the seal. This programme was launched in March 2002.

## **Canada**

In the wake of the EU Data Privacy Directive, and its requirement that data could not be transferred outside of a member state unless it was going to a country whose data privacy laws were at least as stringent as the terms of the

Data Privacy Directive, Canada enacted its own data privacy law. This law currently applies to the federally regulated private sector, such as airlines and banks, and also to all organisations that disclose personal information for consideration outside a province or outside of Canada.

After January 1 2004, the law will extend to all organisations that collect, use, or disclose personal information while engaging in commercial activity in a province. Like the EU and Australian laws, the Canadian law has no specific provisions that apply to the collection of information from children. However, Canada also has an active direct marketing association, the Canadian Marketing Association, which has promulgated industry guidelines (Code of Ethics and Standards of Practice) that include a section on marketing to children.

As in the USA, the CMA defines a child as someone under 13. Online marketers are encouraged to use age-appropriate language when marketing to children, and not to accept any orders from children without parental consent. Similar to the CARU guidelines, the CMA discourages companies from pressuring children to purchase a product or service.

Mirroring the COPPA requirements, the CMA also directs marketers that host online advertising campaigns to children which involve the collection, transfer, or request for personal information to obtain the express consent of a parent or guardian. Express consent is 'given explicitly, either orally or in writing'.

When hosting an online sweepstakes or promotion, the CMA does allow websites to collect information from children without parental consent only if the website:

- (1) Collects minimal information, sufficient to determine the winner.
- (2) Does not contact the child winner, but deals only with the parent or guardian.
- (3) Does not retain the child's personal information after the contest is over.
- (4) Makes no use of the personal information other than to determine the winner.
- (5) Does not transfer the information or make it available to other parties.

## Conclusion

Online advertising and marketing to children may seem intimidating given the complex legal environment surrounding such multi-jurisdictional activities. However, a company that is armed with a solid knowledge of the various state requirements can make such an advertising campaign not just possible, but successful. The outline above is intended as an introduction to such requirements, but should not replace legal advice from a lawyer who is well versed in online advertising laws.

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