

Privacy Laws & Enforcement

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How Does the FTC Protect Consumer Privacy & Promote Data Security?

- ▣ The FTC's primary legal authority comes from Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive practices in the marketplace.
- ▣ The FTC's principal tool is to bring enforcement actions to require companies to remediate the unlawful behavior: implementation of comprehensive privacy and security programs, biennial assessments by independent experts, monetary redress to consumers, disgorgement of ill-gotten gains and deletion of illegally obtained consumer information.
- ▣ The FTC's other tools include: conducting studies and issuing reports, hosting public workshops, developing educational materials for consumers and businesses, testifying before Congress and commenting on legislative and regulatory proposals that affect consumer privacy, and working with international partners on global privacy issues.

A Few FTC-Promulgated Rules

- The Health Breach Notification Rule requires certain web-based businesses to notify consumers when the security of their electronic health information is breached.
- The Red Flags Rule requires financial institutions and certain creditors to have identity theft prevention programs to identify, detect, and respond to patterns, practices, or specific activities that could indicate identity theft.
- The Gramm-Leach-Bliley Act (“GLB”) Safeguards Rule requires financial institutions over which the FTC has jurisdiction to develop, implement, and maintain a comprehensive information security program that contains administrative, technical, and physical safeguards.
- GLB Privacy Rule sets forth when car dealerships must provide consumers with initial and annual notices explaining the dealer’s privacy policies and practices and provide a consumer with an opportunity to opt out of disclosures of certain information to nonaffiliated third parties.
- The Disposal Rule under the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”), requires that companies dispose of credit reports and information derived from them in a safe and secure manner.

Canadian Privacy Landscape



Children's Privacy - COPPA

The Children's Online Privacy Protection Act of 1998 ("COPPA") generally requires websites and apps to obtain verifiable parental consent before collecting personal information from children under 13.



Children's Privacy – COPPA – Enforcement

- ▣ COPPA is enforced by the FTC.
- ▣ No private right of action is provided by COPPA.
- ▣ **HOWEVER**, in recent years plaintiffs' attorneys have brought cases alleging COPPA violations under state consumer protection statutes that do provide a private right of action.

VTech Case

- ❑ VTech collected personal information from parents on its online platform, where the Kid Connect app was available for download, and also through a web-based gaming and chat platform called Planet VTech.
- ❑ Before using Kid Connect or Planet VTech, parents were required to register and provide personal information including their name, email address as well as their children's name, date of birth and gender. VTech also collected personal information from children when they used the Kid Connect app.
- ❑ In November 2015, VTech was informed by a journalist that a hacker accessed its computer network. and personal information about consumers including children who used its Kid Connect app.



VTech Case: FTC Enforcement Action & Settlement

- First children's privacy enforcement case involving internet-connected toys.
- In Complaint filed in Northern District of Illinois, FTC alleged that the Kid Connect app used with some of VTech's electronic toys collected the personal information of hundreds of thousands of children, and that the company failed to provide direct notice to parents or obtain verifiable consent from parents concerning its information collection practices, as required by COPPA.
- FTC also alleged that VTech failed to use reasonable and appropriate data security measures to protect personal information it collected.
- The FTC also alleged that VTech violated the FTC Act by falsely stating in its privacy policy that most personal information submitted by users through the Learning Lodge and Planet VTech would be encrypted.
- VTech will pay \$650,000 as part of the settlement with the FTC. VTech is permanently prohibited from violating COPPA in the future and from misrepresenting its security and privacy practices as part of the proposed settlement. It also is required to implement a comprehensive data security program, which will be subject to independent audits for 20 years.

The Office of the Privacy Commissioner of Canada's approach to Children's Privacy

Guidelines & Significant Cases

- VTech
- Ganz



Private Actions For Violations of COPPA
In re VTech Breach Litig.,
2018 U.S. Dist. LEXIS 65060 (N.D. Ill. 2018)

- ❑ Class action asserting breach of contract, breach of implied warranty of merchantability, violation of Illinois Consumer Fraud and Deception Act, and unjust enrichment.
- ❑ Court dismissed claims for failing to state a claim.
- ❑ HOWEVER, Court noted that Illinois law allows plaintiffs to predicate consumer fraud claims on violations of other statutes, even if those other statutes do not provide for a private right of action. BUT, such claims must meet the heightened pleading requirements required of fraud. Plaintiffs did not sufficiently plead that VTech violated COPPA nor did they plead with the necessary particularity.
- ❑ Court provided a chance to replead and encouraged the parties to try to settle the case. The case was voluntarily dismissed with prejudice months later. Not clear if the dismissal resulted from settlement.

Private Actions For Violations of COPPA

In re Nickelodeon Consumer Privacy Litig., 877 F.3d 262 (3d Cir. 2016)

- Plaintiffs are children younger than 13 who allege that the defendants, Viacom and Google, unlawfully collected personal information about them on the Internet, including what webpages they visited and what videos they watched on Viacom's websites.
- Nickelodeon website read “HEY GROWN-UPS: We don’t collect ANY personal information about your kids. Which means we couldn’t share it even if we wanted to!”



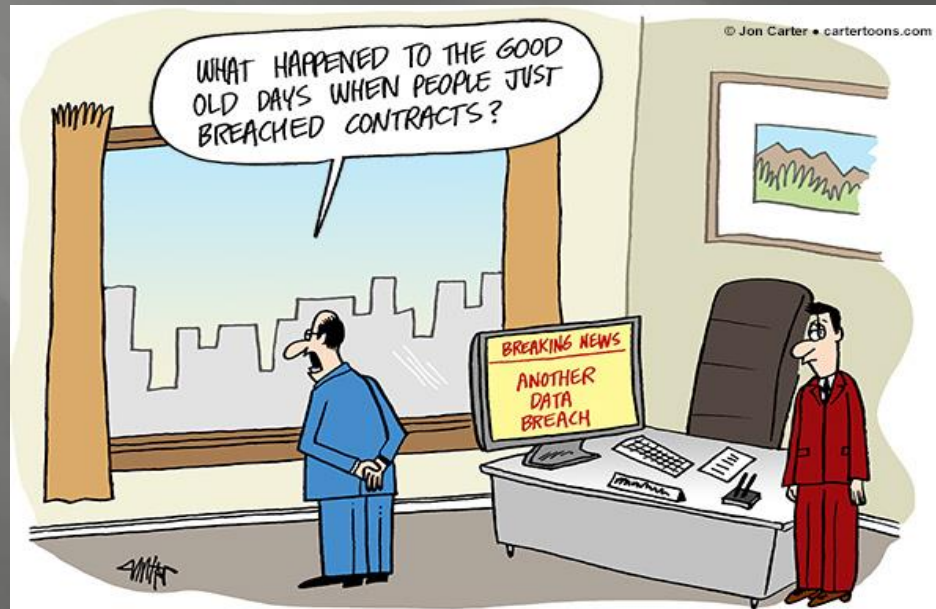
Private Actions For Violations of COPPA

In re Nickelodeon Consumer Privacy Litig., 877 F.3d 262 (3d Cir. 2016)

- Plaintiffs claim that Viacom and Google invaded their privacy by committing the tort of intrusion upon seclusion.
- Court held that the children had standing to assert claims that a website with video streaming and an Internet advertising company unlawfully collected personal information about the children. “[W]hen it comes to laws that protect privacy, a focus on ‘economic loss is misplaced’. Instead, in some cases an injury-in-fact ‘may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.’”
- Court dismissed claims grounded in the Federal Wiretap Act, California Invasion of Privacy Act, New Jersey Computer Related Offenses Act and Video Privacy Protection Act.
- New Jersey claim of intrusion of seclusion was not dismissed. Court held that COPPA does not preempt the plaintiffs' state-law privacy claim. COPPA “says nothing about whether such information can be collected using deceitful tactics ... COPPA leaves the states free to police this kind of deceptive conduct.”

Private Actions For Violations of Privacy Not Limited to COPPA

- In re Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 150 (3d Cir. 2015) (invasion claim allowed where alleged that Google overrode the plaintiffs' cookie blockers, while announcing in its Privacy Policy that internet users could reset their browser to refuse cookies).
- In re Vizio, Inc., Consumer Privacy Litig., 238 F. Supp. 3d 1204, 1233 (C.D. Cal. 2017) (claim permitted where “even if consumers believed they had opted out of Vizio’s data collection practices, Vizio was still collecting their data”).



Privacy Litigation in Canada

- Privacy Torts
- Class Action Litigation

