

FTC To Crack Down On Privacy Policies In Mobile Apps

By **Allison Grande**

Law360, New York (August 15, 2011) -- Mobile app developers can expect increased scrutiny of their privacy practices in the wake of the Federal Trade Commission's fine Monday of W3 Innovations LLC, which highlights the agency's intention to apply traditional online privacy rules to the mobile realm, attorneys say.

In ending the agency's first case involving mobile apps, W3 Innovations agreed to pay \$50,000 to settle FTC allegations that it had violated the Children's Online Privacy Protection Act by illegally collecting and disclosing personal information from tens of thousands of children younger than 13 without their parents' consent.

By pursuing the case, which attorneys long anticipated given the agency's desire to regulate mobile apps, the FTC officially expanded its enforcement authority and sent a message to developers that they should follow the same rules that apply to Internet privacy.

"I think you have to assume that the FTC and the Federal Communications Commission and state regulators are going to be looking at the mobile application environment as just an extension of the Internet environment, so companies are going to have to apply the same degree of caution to mobile app privacy as they do to privacy on the web," Reed Smith LLP data privacy and security attorney Amy Mushahwar told Law360 Monday.

"It's important that all of the good privacy practices that most companies have in the online space be translated to mobile web apps and formatted accordingly," Mushahwar said.

Federal regulators have been gearing up to police privacy controls in the mobile app space during the past several years, and recent developments suggest they could start to crack down, according to attorneys.

"Both the FTC and the FCC have collectively been really zeroing in on privacy and data security issues," Edwards Angell Palmer & Dodge LLP partner Larry Freedman said. "The agencies are trying to collaborate with the industry, but they are probably going to start to get impatient and push the envelope a little more moving forward."

In testimony before the Senate Committee on Commerce, Science and Transportation on May 19, FTC Director David Vladeck told senators that the agency was “committed to protecting consumers in the mobile marketplace” and had hired technologists to conduct research; monitor various platforms, app stores and applications; and train other agency staff on mobile issues.

Vladeck also testified that the agency believed that “the COPPA statute and the rule was written broadly enough to encompass most forms of mobile communications without the need for statutory change.”

The commission echoed this belief to its enforcement action against W3 Innovations, stating in its settlement announcement that mobile apps are online services covered by the COPPA because these programs send and receive information over the Internet.

“It's no surprise that the FTC would enforce COPPA without regard to how information is being made available to kids,” said Chris Wolf, the privacy and information management practice group director at Hogan Lovells. “What the FTC cares about under COPPA is that appropriate disclosures and permissions take place, not the exact technology that is being used to obtain information from kids.”

The FTC's decision to bring its action against a smaller company like W3 Innovations — a startup founded in 2009 which does business as Broken Thumbs Apps — also signals that developers at smaller outfits should be concerned about potential enforcement action.

“It's one thing to go after the Googles and Apples of the world, but it's another thing to go after app developer entrepreneurs who are not situated with teams of specialists and attorneys and will have a harder time complying,” Freedman said. “Smaller app developers need to get on top of this and learn these laws as they evolve in order to stay in compliance.”

The terms surrounding the resolution of the W3 Innovations case could provide some guidance for mobile app developers both big and small that are scrambling to decode the agency's intentions, according to attorneys.

The FTC alleged in its complaint that the company and its president, Justin Maples, violated the COPPA by failing to provide notice of the company's information collection practices, failing to obtain parental consent before collecting or disclosing personal information from children and allowing the youths to publicly post personal information on message boards through its kid-targeted apps.

There have been more than 50,000 downloads of the apps, which include Emily's Girl World, Emily's Dress Up, Emily's Dress Up & Shop and Emily's Runway High Fashion. The games, which were listed in the Kids section of Apple Inc.'s App Store, encourage children to email their comments to “Emily” and submit posts to “Emily's Blog” through email.

In addition to the \$50,000 penalty, the settlement bars the defendants from future violations of the COPPA and requires them to delete all personal information collected in violation of the act. The COPPA requires website operators to notify parents and obtain their consent before they collect, use or disclose children's personal information and to post a privacy policy that is “clear, understandable and complete.”

But the settlement's lack of a consumer education remedy provision may signify the FTC's willingness to modify its enforcement actions to take into account the unique demands of the mobile app space, where there is less room to include traditional disclosures. Previous COPPA actions involving online privacy, such as the \$3 million settlement against online game developer Playdom Inc. in May and an October 2009 settlement with clothing company Iconix Brand Group Inc. had included such a provision.

“This could portend a shift in the FTC in the sense that old remedies that were always around in previous cases will not be part of the new media expansion in this area, but instead different obligations will apply,” said Andy Serwin, the founding chair of Foley & Lardner LLP’s privacy, security and information management practice.

The agency’s flexibility on the consumer education remedy could also shed some light on the form that the agency’s review of the COPPA rule will likely take, Serwin added. The agency’s review of this rule began in April 2010 and is expected to be released soon.

Another notable term of the W3 Innovations settlement is that it names not only the company but also holds its president liable for the alleged COPPA violations, according to Winston & Strawn LLP partner Anthony DiResta said.

“It seems that, like with advertising and debt collection and other cases, the FTC is interested in spreading liability beyond corporate boundaries and identifying corporate principals that have an involvement in the operation of a company,” DiResta said.

The W3 Innovations case provides a fairly obvious violation of the COPPA — a company that targets children failing to collect proper consent — but the FTC will most likely choose a less obvious COPPA violation for its next enforcement proceeding, Proskauer Rose LLP privacy and data security group head Kristen Mathews said.

“It’s typical for the agency to choose obvious examples for its first case, but for its next case they are likely to pick a less obvious example, such as a mobile app developer that violates the statute not by targeting kids but by collecting age information, to catch people off guard,” Mathews said.

The FTC has also been looking closely at mobile apps that collect geolocation data, which could also be the subject of enforcement proceedings in the near future, DiResta said.

In light of Monday’s settlement, attorneys recommend that any mobile app privacy policy take a similar form as the company’s existing online privacy policy, since the agency seems to view the mobile app realm as an extension of these online services.

“The real takeaway is that when companies consider their privacy compliance, they really want to be transparent and make sure that they are giving users some control over their information,” DiResta said. “These themes of transparency and control seem to be overriding principles in the FTC’s recent testimony and guidance.”

W3 Innovations is represented by Barry J. Reingold of Perkins Coie LLP.

The case is United States of America v. W3 Innovations LLC et al., case number 5:11-cv-03958, in the U.S. District Court for the Northern District of California.

--Editing by Jocelyn Allison and Andrew Park.