

[GDPR: Practitioner Commentary and Insights, Baker Botts: Social Music with Geolocation \(otherwise known as TikTok\) Slapped with the Largest COPPA Fine to Date, \(Mar. 22, 2019\)](#)

GDPR: Practitioner Commentary and Insights

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The US data privacy landscape complicates daily as more local jurisdictions enter the field and the Federal Trade Commission timidly turns up the gas on fines and sanctions. The General Data Protection Regulation (the "GDPR") establishes privacy as a fundamental human right in the European Union and in the United States privacy rights groups reach for disparate statutes while companies clamor for federal preemption.

How can US companies tie it all together in order to protect themselves, their reputations and their shareholders?

The Children's Online Privacy Protection Act ("**COPPA**") requires that companies determine if COPPA applies to their application or service and if so, 1. post a clear and comprehensive privacy policy 2. provide direct notice to parents and 3. obtain parents verifiable consent. If, preliminarily, the company decides that the application or service is not directed to children under 13 or does not collect personal information about them or if the application or service is not directed to children under 13 and the company has no actual knowledge of children using the application or service, then the company may choose to skip the latter steps.

On February 27, 2019, the Federal Trade Commission (the "**FTC**") announced a \$5.7 million fine against Music.ly (now known as TikTok) for "disturbing" violations of COPPA.^[1] This is a record setting penalty issued under the COPPA, exceeding the \$5 million settlement reached by Oath (the owner of AOL and Yahoo) and the New York attorney general for violations of COPPA in December 2018. Prior to the settlement with Oath, the largest fine under COPPA was in 2011 where Playdom, Inc was fined \$3 million. By way of comparison, in 2014, YELP was found in violation and was fined \$450,000. At the time of the fine, YELP's net revenue was \$377.5 million.

Music.ly is a popular video-sharing app acquired by ByteDance in November 2017 for almost \$1 billion. Music.ly was merged with Bytedance-owned TikTok in August 2018. The FTC began investigating TikTok back when it was known as Musical.ly, and the ruling itself is a settlement with Musical.ly.

The FTC's complaint alleges that Musical.ly was aware that a significant percentage of users were younger than 13, and that Musical.ly violated COPPA by:

1. Failing to provide notice on their site of the information they collect online from children, how they use it, and their disclosure practices,
2. Failing to provide direct notice to parents,
3. Failing to get consent from parents before collecting personal information from children,
4. Failing to honor parents' requests to delete personal information collected from kids, and
5. Retaining that personal information for longer than reasonably necessary.^[2]

In general, a company can choose to apply COPPA protections only to users under age 13. However, to do so the company cannot collect personal information from any users without first collecting age information. For users under age 13, the company cannot collect personal information until verifiable parental consent has been obtained. Musical.ly did not.

The FTC determined that the failures to comply with COPPA were systemic and egregious. To register for Musical.ly app, a user must provide their email address, phone number, name, username, a profile picture, and a short bio. However, Musical.ly, since its launch in 2014, didn't ask for a user's age during registration. In July 2017, soon before its acquisition by ByteDance, Musical.ly began asking user's ages and prevented under 13 from creating accounts. However, Musical.ly did not revisit the accounts of those who had already registered to verify their age. Additionally, by default, user accounts (including profile bios, usernames, pictures, and videos) were public – even if the account belonged to a child. Even if a user set their account to private, profile pictures and bios remained public, and users could still receive direct messages from the general public. Troublingly, the FTC complaint makes note of public reports of adults trying to contact children via the Musical.ly app. Additionally, until October 2016, the Musical.ly app also allowed users to view other users in a 50-mile radius of their location.

"The operators of Musical.ly—now known as TikTok—knew many children were using the app but they still failed to seek parental consent before collecting names, email addresses, and other personal information from users under the age of 13," said FTC Chairman Joe Simons. "This record penalty should be a reminder to all online services and websites that target children: We take enforcement of COPPA very seriously, and we will not tolerate companies that flagrantly ignore the law."^[3]

The FTC's fine of Musical.ly contains several key takeaways for companies.

First, companies must be diligent in understanding the patchwork of state, federal and international data privacy laws as they now face heightened scrutiny in a post-GDPR world – and increased penalties — for non-compliance. Further, GDPR and grassroots privacy organizations are gaining political leverage that is spurring US lawmakers and commissions to act with more targeted and expensive fines.

In the U.S., there has been a shift to more robust state data privacy laws, with recent notable legislation in California, Colorado, Washington, New Jersey and others. Additionally, fines for non-compliance have increased both in the U.S. and abroad. In the last three months, the two largest COPPA fines to date have been handed down. On January 19, 2019, the *Commission Nationale de l'Informatique et des Libertés* issued a record fine of €50 million against Google for violations of the GDPR. This is the first significant fine issued under the GDPR and only 8 months after its entry into effect.

Second, acquisitive companies must undertake direct and persistent diligence with a robust knowledge of data privacy laws to understand the potential liabilities of their target. Musical.ly was acquired by ByteDance in November 2017. The FTC began investigating the company when it was known as Musical.ly, and the ruling itself is a settlement with Musical.ly for violations that occurred before the company was acquired by ByteDance. Data Privacy is not for the faint of heart and companies need to be properly advised as to the risks and the complexities of the overlay of multiple local, state, national and specialty data privacy laws that currently co-exist in the United States.

Footnotes

- 1 Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter, dated as of February 27, 2019, https://www.ftc.gov/system/files/documents/public_statements/1463167/chopra_and_slaughter_musically_tiktok_joint_statement_2-27-19.pdf.
- 2 Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief, filed February 27, 2019 <https://www.ftc.gov/enforcement/cases-proceedings/172-3004/musically-inc>.
- 3 Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law, dated February 27, 2019, <https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc>.