

**2024 ANA Masters of Advertising Law Conference**

## **Thriving in the Evolving Children's Advertising and Privacy Landscape: Best Practices to Navigate with Confidence**

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**I. INTRODUCTION AND OVERVIEW: REGULATION AND SELF-REGULATION OF CHILDREN’S ADVERTISING AND PRIVACY**

**A. Federal Trade Commission (FTC)**

The FTC has the authority to bring actions against children’s advertisements that are unfair or deceptive in violation of Section 5 of the FTC Act. The FTC also can bring actions for violations of the Children’s Online Privacy Protection rule (COPPA ), which generally requires that online services (including web sites and apps) obtain verifiable parental consent before collecting personal information (*e.g.*, first and last name, email address, telephone number, home/physical address, social security number etc.) from children under 13 years of age. An update in 2013 expanded COPPA to prohibit the collection of geolocation information and videos or photos that contain a child’s image or voice without verifiable parental consent. Updated COPPA also restricts the use of persistent identifiers, such as cookies, to engage in behavioral advertising to children. ([See Section III](#) for more information regarding COPPA).

**B. Federal Communications Commission (FCC)**

The FCC enforces a series of rules and guidelines implementing the Children’s Television Act (CTA), which Congress enacted to increase the educational programming for children on television. Pursuant to the CTA, the FCC requires broadcast television stations to include core programming to serve the educational needs of children 16 years of age and under. The FCC rules also limit the amount of commercial matter that can be aired during children’s programming, and prohibit the practice of “host-selling,” where a program character is used to sell products in commercials during or adjacent to the show in which the character appears. The FCC also restricts host selling in websites where the website address is displayed in a children’s program.

**C. The Children’s Advertising Review Unit (CARU)**

CARU is a self-regulatory program that was established to promote responsible children’s advertising. CARU is administered by BBB National Programs, Inc. (BBB NP) and is funded by members of the children’s advertising industry. CARU monitors and reviews all aspects of “national advertising” primarily directed to children. CARU enforces its Self-Regulatory Guidelines regardless of whether or not the advertiser is a member of CARU. The revised CARU Self-Regulatory Guidelines went into effect on January 1, 2022 and provide guidance for all aspects of children’s advertising, including with respect to deception, claim substantiation, material disclaimers, unsafe and inappropriate advertising, endorsers and influencers, the blurring of advertising and editorial/program content, premiums, sweepstakes, contests, loyalty programs, online sales, sales pressure, and online privacy protection. CARU’s jurisdiction covers television and radio commercials, print and online advertisements, promotions, labeling, influencer content, event-based media, advergames, and advertising trailers, as well as web sites, apps and social media channels directed to children. As an

extension of its mission to help companies comply with COPPA and properly address the collection and retention of children’s data in an online environment, CARU established its COPPA Safe Harbor Program to provide guidance to companies on how best to comply with COPPA and the CARU Guidelines. Program participants who adhere to CARU’s Guidelines are deemed in compliance with COPPA and essentially insulated from enforcement actions by the Federal Trade Commission (FTC). (See [Section II](#) for more information regarding the CARU Guidelines).

**D. Television Network Guidelines**

The television broadcast networks (*i.e.*, ABC, CBS, FOX, NBC, and most child-directed networks such as Nick and Cartoon Network) require that all advertisements directed to children comply with their self-regulatory guidelines with respect to advertisements directed to children under 12. The network guidelines typically mirror the CARU Self-Regulatory Guidelines.

**E. Children’s Food and Beverage Advertising Initiative (CFBAI)**

The CFBAI, also administered by BBB National Programs, Inc., is a self-regulatory program that is comprised of the top 21 children’s food and beverage advertisers (*e.g.*, Campbell Soup, Pepsico, Coca-Cola, Unilever, General Mills, Post Foods, Kellogg Company, Nestle USA, Mars, The Hershey Company, McDonald’s, Burger King etc.), whose members have voluntarily agreed to not market any of their food products to children under 13 or only products that meet certain nutritional criteria. This is a voluntary group that was created to address concerns about childhood obesity in the United States.

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**II. THE CHILDREN’S ADVERTISING REVIEW UNIT’S SELF-REGULATORY GUIDELINES**

**A. The Children’s Advertising Review Unit’s Self-Regulatory Guidelines (“CARU Guidelines”) cover the following areas of concern:**

- i. Deception
- ii. Product Presentations and Claims
- iii. Making Material Disclosures to children
- iv. Endorsers and Influencers
- v. Blurring of advertising and content
- vi. Premiums, Loyalty Programs, Sweepstakes and Contests

- vii. Online Sales
- viii. Sales Pressure
- ix. In-app or In-game advertising and purchases
- x. Unsafe and inappropriate Advertising to Children

**B. The Revised CARU Guidelines**

On January 1, 2022, the revised CARU Guidelines (the “Revised CARU Guidelines”) went into effect. The Revised CARU Guidelines address the new media formats directed to children, including digital media, influencer marketing, apps, in-game advertising and social media. Despite these changes, the CARU Guidelines’ core principles, including ensuring advertising directed to children is truthful and not misleading, remain the same. Key changes include:

- i. **Age of a Child:** Applying the CARU Guidelines to children under the age of 13, while the previous CARU Guidelines applied to children under the age of 12.
- ii. **Primarily directed to children:** Replacing the television-centric factors for determining whether an ad is “primarily directed to children” with the following factors that more aptly reflect the digital advertising environment:
  - a) the subject matter and content of an advertisement;
  - b) use of child-oriented animated characters;
  - c) child-oriented activities or incentives;
  - d) age of models;
  - e) presence of child celebrities or celebrities who appeal to children;
  - f) language or other characteristics;
  - g) competent and reliable empirical evidence regarding audience composition; and
  - h) evidence regarding the intended audience.

- iii. **Diversity and Inclusion:** Encouraging advertisers to create content that is welcoming to children of all races, religions, cultures, genders, sexual orientations, and physical and cognitive abilities and prohibiting advertising that encourages negative social stereotyping, prejudice, or discrimination.
- iv. **Blurring:** Ensuring that advertisements integrated into the content of a game or activity on digital media are easily identifiable as advertising in light of children’s limited sophistication, experience and maturity.
- v. **Endorsers and Influencers:** Emphasizing the importance of having clear and conspicuous disclosures when influencers are being paid or receive free product in return for promoting products or services in language that children can easily understand.
- vi. **In-App and In-Game Advertising and Purchases:** Prohibiting unfair or manipulative advertising in in-app and in-game advertising and purchases, including with respect to deceptive door openers, social pressure or validation to encourage ad viewing or purchases, and ensuring that methods to dismiss or exit an ad are clear and conspicuous to children.
- vii. **Material Disclosures:** Clarifying the clear and conspicuous disclosure requirement in the context of different advertising formats, including when advertisers should make such disclosures in both audio and video form and when advertisers should repeat disclosures so that children are more likely to receive their messages.

### C. CARU’s Metaverse Guidelines

Last year, CARU announced guidelines for child-directed advertising and privacy in the metaverse ([the Metaverse Guardrails](#)). According to CARU, the Metaverse Guardrails are a set of “realistic, actionable recommendations” and best practices intended to help companies engage with children responsibly in the metaverse.

The Metaverse Guidelines provide the following best practices:

- **Be Transparent:** Do not present advertising in a manner that blurs the distinction between advertising and content. Use design techniques, such as contextual cues, to distinguish ads from content.
- **Define Ad Content:** Understand when content is and is not advertising.

- **Make Disclosures:** Know when, how and how often to properly disclose advertising, including content from influencers and endorsements. Disclosures should be made in easy-to-understand language (e.g., “Ad” or “This is an “Ad”), be unavoidable and appear with sufficient frequency so that children are likely to see, hear and understand them. Using both audio and visual disclosures is a best practice.
- **Protect Children’s Privacy:** Get to know and ensure compliance with COPPA, the Children’s Online Privacy Protection Act.
- **Understand Privacy Policies:** Brands must ensure that the privacy practices on each chosen platform are COPPA compliant. If the platform does not comply with COPPA, the brand’s presence on the platform may not comply with COPPA.
- **Stay Abreast of Privacy Regulations:** Brands should stay aware of ever-evolving relevant state, federal and international privacy regulations and legislation in connection with the metaverse.

#### D. Social Media and Children

As a general rule, most social media sites (*e.g.*, Facebook, X (formerly known as Twitter), Instagram, and Pinterest) are considered inappropriate for children, as they are intended for users who are at least 13 years of age and older. It is important to be mindful of this provision when building campaigns that may be promoted via television and social media, particularly when using social media sites that do not implement an age-gate to prevent access by children. In situations where the site is intentionally directed to children, the site may have specific guidelines for advertisers that a general audience site does not. (*See, e.g.*, YouTube Kids, Advertising Policy available at <https://support.google.com/youtube/answer/6168681?hl=en>.) Advertising that appears on child-directed sites must comply with the site’s policies as well as COPPA .

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### **III. COPPA AND THE COLLECTION OF PERSONAL INFORMATION FROM CHILDREN**

The Children’s Online Privacy Protection Act (COPPA) applies to online services, including mobile applications, that are “directed to children” under the age of 13. COPPA requires these services provide notice and obtain prior parental consent before collecting, using, or disclosing “Personal Information” from children with limited exceptions. The definition of “Personal Information” under COPPA is broader than name, email address and phone number and includes geolocation data and videos and recordings that include a child’s image or voice. Although there is an exception for the collection of persistent identifiers (such as cookies, device identifiers and IP addresses) to support the internal operations of a site or service, COPPA explicitly prohibits the use of personal information for behavioral advertising, profile building, and any other purpose not stated in the law.

Operators have strict liability for all data collected through a child-directed website or app, including data collected through third party plug-ins and analytics providers. Third parties also may be liable when they have actual knowledge they are being used on a child-directed service or they are collecting Personal Information from a child under 13.

When designing online services (including apps) that are “directed to children” under the age of 13, a number of factors can contribute to a determination of whether or not an online service is “directed to children” including but not limited to:

- Subject matter
- Visual content
- Use of animated characters or child-oriented activities
- If it looks like a cartoon
- Music or other audio content
- Age of models
- Presence of child celebrities or celebrities who appeal to children
- Language or other characteristics
- Whether child-directed advertising appears on the site



If a service is directed to children and requires the submission of personal information from the children using it, the FTC requires that it obtain “verifiable parental consent” before such collection unless it falls into an exception (*e.g.*, one-time response exception (16 C.F.R. § 312.5(c)(3)).

The FTC has strict requirements for obtaining “verifiable parental consent”, including the specific disclosures which need to be included in the notice sent to the child’s parent. Some of the approved methods for obtaining verifiable parental consent are set forth below:

- Providing a consent form to be signed by the parent and returned by mail, fax, or electronic scan;
- Requiring the parent, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;
- Having the parent call a toll-free telephone number staffed by trained personnel who ask questions to determine they are talking to a parent, or have the parent connect to trained personnel via video-conference; or
- Verifying a parent’s identity by checking a form of government-issued ID against databases of such information.

If the site or app is using children’s Personal Information only for internal purposes, “email plus” is another method of requesting parental consent. As the name suggests, this involves emailing the parent for consent, and then taking an additional confirming step after receiving the parent’s reply – a follow up email, call, or letter.

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## **IV. RECENT DEVELOPMENTS IN CHILDREN’S ADVERTISING AND PRIVACY**

### **A. Davis+Gilbert**

- [New Laws Protecting Child Influencers: What Marketers and Influencers Need to Know – Davis+Gilbert LLP \(dglaw.com\)](#)
- [Children’s Privacy Roundup: U.S. vs. TikTok and Federal and State Legislation Updates – Davis+Gilbert LLP \(dglaw.com\)](#)
- [New York Adopts Legislation to Protect Kids’ Privacy – Davis+Gilbert LLP \(dglaw.com\)](#)

- [This Content is Not Intended for Mature Audiences: CARU Investigates Disclosures on the Vlad and Niki YouTube Channel – Davis+Gilbert LLP \(dglaw.com\)](#)
- [Unwrapping the FTC’s Proposed Updates to the COPPA Rule – Davis+Gilbert LLP \(dglaw.com\)](#)

**B. Children’s Advertising Review Unit (CARU)**

- [Compliance Warning Regarding the Use of AI in Advertising and Online Data Collection Practices Directed to Children – BBB National Programs Children’s Advertising Review Unit \(bbbprograms.org\)](#)

**C. SuperAwesome**

- [B.Y.O Compliance: Recent Cases Show Why Brands Can’t Rely on Platform Compliance When Engaging with Kids and Teens – SuperAwesome \(superawesome.com\)](#)
- [How Recent Kids’ Privacy Legislation Changes and Applications Could Affect the Way You Engage with Youth Audiences – SuperAwesome \(superawesome.com\)](#)

**V. ROBLOX’S POLICIES<sup>1</sup>**

Last year, Roblox updated its Community Standards and introduced new Advertising Standards which had a significant impact on brands’ efforts to reach children under 13 on the platform. The updated standards require that all advertising content be hidden from users under age 13. For users who are 13 and over, advertising content in experiences must be disclosed with “simple and understandable language,” such as “ad,” “paid,” or “sponsored,” to inform users that content is an ad.

Roblox also updated its standards to prohibit the following advertising content to users under 13:

Child Endangerment	Sexual Content
Threats of Violence	Violence or Gore
Bullying or Harassment	Illegal and Regulated Goods
Suicide or Self-harm	Cryptocurrency and NFTs

<sup>1</sup> [Faced with Increasing Pressure, Roblox Adopts New Advertising Standards | Davis+Gilbert LLP \(dglaw.com\)](#)

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## VI. YOUTUBE'S POLICIES

### A. Determining whether Your Content Is Made for Kids

Since YouTube's 2019 settlement with the FTC and New York for violations of COPPA, YouTube content creators are required to inform YouTube whether their videos are made for kids<sup>2</sup>:

i. Made for Kids

If the video features actors, characters, activities, games, songs, stories, or other subject matter that reflect an intent to target children, it's likely made for kids.

ii. According to the FTC's guidance on COPPA, a video is "made for kids" if:

a) Children are the primary audience of the video.

b) Children are not the primary audience, but the video is still directed at children because it features actors, characters, activities, games, songs, stories, or other subject matter that reflect an intent to target children.

Simply because content may include some of these factors does not automatically mean it's made for kids. YouTube suggests carefully consider who you're trying to reach with your videos as you evaluate your content and the factors above.

Once a video or a channel is tagged "made for kids", YouTube limits the collection or use of personal information of visitors. In practice this means it will not serve behaviorally-targeted advertising (though contextually-targeted advertising will still be served), and it will disable certain features that made use of personal data, including comments and notifications, save to playlist, and mini-player.<sup>3</sup>

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<sup>2</sup> <https://support.google.com/youtube/answer/9528076?hl=en>

<sup>3</sup> [https://support.google.com/youtube/answer/9527654#what\\_happens&zippy=%2Cif-you-set-a-video-or-live-stream-as-made-for-kids](https://support.google.com/youtube/answer/9527654#what_happens&zippy=%2Cif-you-set-a-video-or-live-stream-as-made-for-kids)

**B. Advertising on YouTube Kids**

All advertisements sold in the YouTube Kids app must comply with YouTube’s additional advertising policies outlined below, as well as YouTube’s general advertising policies.<sup>4</sup> All YouTube Kids Paid Ads must be pre-approved by YouTube’s policy team prior to being served in the YouTube Kids app. Advertisers must also comply with applicable laws and regulations (including any relevant self-regulatory or industry guidelines).

YouTube prohibits interest-based advertising in YouTube Kids and Paid Ads with remarketing or other tracking pixels on YouTube Kids.

The content of the advertisement and the type of product marketed is also regulated by YouTube. The following are examples of restricted and prohibited products and ad content.

- i. Paid Ads for the following products are prohibited.

Age Sensitive Media Content	Online or Virtual Communities
Beauty and Fitness	Political Ads
Dating or Relationship	Religious Ads
Food and Beverages	Video Games
Illegal or Regulated Products	

- ii. Paid Ads that feature or promote any of the following content are strictly prohibited.

Adult and Sexually Suggestive Content	Incitement to Purchase
Branding	Misleading and Deceptive Claims
Contests	Violent Content
Dangerous Content	

<sup>4</sup> <https://support.google.com/youtube/answer/6168681?hl=en>

**C. Updated Google Policies 2022**

Advertising on Google that is intended for children must not be deceptive, unfair or inappropriate for its intended audience, must not make use of any third party trackers or otherwise attempt to collect personal information without first obtaining parental consent, and must otherwise comply with all applicable laws and regulations. The following categories are restricted<sup>5</sup>:

Adult and Sexually Suggestive Content	Gambling
Age Sensitive Media Content	Health and Wellness
Alcohol/Tobacco/Recreational Drugs	Mobile Subscriptions
Astrology/Occult/Paranormal	Online or Virtual Communities
Beauty and Cosmetics	Pharmaceuticals and Supplements
Contests and Sweepstakes	Political Ads
Dangerous Content	References to Death
Dating and Relationships	Religion
Fight Sports	Spray Paint and Glass Etching
Food and Beverage	Video Games

Prohibited content includes:

Violent and Graphic Content	Significant Skin Exposure
Scary Imagery	Incitement to Purchase
Crude Humor	Misleading or Deceptive Claims
Profanity and Sexual Innuendo	

As of August 2022, Google’s Ad-serving Protections for Teens policy implements safeguards for those above the digital age of consent but under 18. For such users, Google disables ads personalization and restricts sensitive ad categories. Now, the following categories are filtered for those above the digital age of consent but under 18 on Google products<sup>6</sup>:

<sup>5</sup> <https://support.google.com/adspolicy/answer/9683742?hl=en#>

<sup>6</sup> [https://support.google.com/adspolicy/answer/12205906?hl=en&ref\\_topic=1626336](https://support.google.com/adspolicy/answer/12205906?hl=en&ref_topic=1626336)

Adult and Sexually Suggestive Content	Gambling and Casino Games
Alcohol/Tobacco/Recreational Drugs	Pharmaceuticals and Supplements
Body Modification and Weight Loss	Shocking Content
Contests and Sweepstakes	Speculative Financial Products
Dating and Relationships	Spying and Arrest Records
Dangerous Content	Virtual Worlds and Chat Rooms Intended for Adults

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## VII. ADDITIONAL RESOURCES

For more information regarding children’s advertising and privacy, see below:

<b>FTC COPPA FAQs</b>	<a href="https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions">https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions</a>
<b>COPPA Rule</b>	<a href="https://www.ftc.gov/system/files/documents/federal_register_notices/2013/01/2012-31341.pdf">https://www.ftc.gov/system/files/documents/federal_register_notices/2013/01/2012-31341.pdf</a>
<b>CARU Guidelines</b>	<a href="https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/caru/caru_advertisingguidelines.pdf">https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/caru/caru_advertisingguidelines.pdf</a>