July 2020
MPT-2 Point Sheet

Fun4Kids Terms of Service Agreement

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

Fun4Kids Terms of Service Agreement

DRAFTERS' POINT SHEET

In this performance test item, the examinee is an associate in the law firm of Weiss & Briotti, which represents Fun4Kids Inc., a client planning to start a commercial internet service designed to provide educational games for children ages 11 through 14. The client's owner, Jan Morrison, is aware that there are both federal and Franklin state laws and regulations governing websites aimed at children, and she seeks legal help. Specifically, she asks that counsel advise on particular issues relating to the appropriate "terms of service" agreement, which would bind those using the service.

The issues that the examinee is to address are set forth in the transcript of an interview between Tony Briotti, the supervising partner, and Ms. Morrison. The examinee has been asked to (1) identify the issues presented in that interview and (2) make recommendations as to how to address those issues, based on an analysis and explanation of the law and the facts. (The examinee is instructed not to draft the provisions of the terms of service agreement.)

The File contains (1) the instructional memorandum, which includes a template for the examinee to use in completing the task; (2) the transcript of the client interview; and (3) excerpts from a Federal Trade Commission press release concerning a fine levied on Persimmon Inc., an online service for children, to settle a complaint alleging violation of the law. The Library contains (1) excerpted provisions of the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 *et seq*.; (2) excerpted provisions of Federal Trade Commission regulations under COPPA, 16 C.F.R. §§ 312.3–312.7; (3) a provision of the Franklin Civil Code dealing with disaffirmance of contracts; (4) excerpted provisions of the Franklin Children's Protection on the Internet Act (CPIA) dealing with prohibited online advertising for children; and (5) *Sampson Scientific Foundation, Inc. v. Wessel*, a Franklin Court of Appeal case addressing the difference between "browsewrap" and "clickwrap" terms of service agreements.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts as revealed by the interview transcript and specifically identify the five issues that must be addressed. Second, the examinee must analyze the law, as set forth in the statutes, regulations, case law, and other materials; apply the law to the facts for each issue; and make a recommendation as to how to address each issue. As noted in the instructional memorandum, the examinee need not draft the relevant provisions of the terms of service agreement; rather, the partner will undertake that drafting based on the examinee's analysis and recommendations.

The examinee should address each of these five issues, making a recommendation for each:

(1) Browsewrap or Clickwrap Terms of Service Agreement: The question is whether, given the provisions of COPPA, the regulations under it, and the holdings in *Sampson Scientific Foundation* and *Hartson v. Hobart*, discussed within *Sampson*, a browsewrap terms of service agreement would suffice or a clickwrap terms of service agreement is necessary.

(2) Parental Consent: The question is whether verifiable parental consent to use the website is necessary, given the age of the children it purports to engage and the provisions of COPPA and the regulations under it; and if so, how to obtain such consent. An additional question is whether agreements made by those minors for whom parental consent is not necessary under COPPA may nevertheless be disaffirmed by parents under Franklin law.

(3) Use of Credit Cards: The question is whether, and under what circumstances and limitations, credit cards may be used to pay the fees the website is planning to charge. Here, the FTC press release provides information on what is and what is not allowable.

(4) Gathering Information on Users and Providing It to Advertisers: The question is whether the Fun4Kids website may gather the information it would like from users and provide that information to advertisers, and if so, under what conditions.

(5) Limitations on Advertising: The question is whether the website may allow certain advertising for *all* users, under the Franklin Children's Protection on the Internet Act.

II. DISCUSSION

A. FACTS

The key facts, gleaned from the transcript of the interview with Ms. Morrison, are as follows:

- Fun4Kids will offer educational games for children ages 11 through 14 on its website and related mobile app. These games have been created after considerable research on the approaches that best educate and appeal to children in that age group.

- The client needs to know if there are legal limitations, under statutes or regulations, that affect the intended use of the website.

- The client would like to use a browsewrap terms of service agreement, in which the mere use of the site indicates agreement with the terms of service provisions. If that is not possible, the client would use a clickwrap agreement, in which the user must take action to signify agreement with those terms.

- The client needs to know if verifiable parental consent to use the website is required, and if so, how to secure it. The client also needs to know if the agreement to use the service made by minors who are not covered by COPPA may nevertheless be disaffirmed by parents.

- The client plans to charge a monthly fee to use the service and a fee for each game used. The client needs to allow for payment of those fees by credit card.

- In addition to those fees, the client plans to earn revenue by allowing advertising on the site. As that advertising will be individually targeted at users of the website, the client would like to collect information on the users, including each user's name, home address, gender, age, and email address, and furnish that information to advertisers. All those items of information are necessary for the delivery of the educational content of the games except for home and email addresses.

- The client needs to know if there are any limitations on advertisers on the website.

B. SUMMARY OF APPLICABLE LAW

COPPA and the FTC regulations under it apply only to the collection, use, and disclosure of personal information from users who are under the age of 13. COPPA requires verifiable parental consent in such circumstances for any user who is a "child." 16 C.F.R. §§ 312.3(b), 312.5(a). COPPA defines a "child" as an individual under the age of 13. COPPA § 6501(1). That means that half the intended users of the website (those children ages 11 and 12, but not those ages 13 and 14) come within the definition, and so COPPA applies to the website for those children. Hence, the answers to all the following issues regarding COPPA and the regulations under it apply only to those users. The Franklin state statutes (Fr. Civ. Code § 200.1 and CPIA) apply to users under the age of 18 and hence apply to *all* users of the website.

C. ANALYSIS

The examinee should follow the template given, identify and analyze each issue, and make a recommendation as to each, as follows:

1. Issue: May the client use a browsewrap agreement, or should a clickwrap agreement be used?

Analysis and Recommendation: The client should use a clickwrap agreement. Given the many requirements in COPPA and the FTC regulations for verifiable informed parental consent and disclosure (e.g., COPPA §§ 6501(4) and 6501(9), 16 C.F.R. §§ 312.3(b), 312.4, and 312.5, and the FTC press release), and the holding in *Sampson Scientific Foundation, Inc. v. Wessel*, a positive action connoting agreement with the terms of service, as would be had in a clickwrap agreement, is a necessity.

In *Sampson*, the court defined a "browsewrap agreement" as one in which "the user's consent is deemed given by the mere use of the website, without the need to click an 'Agree' or 'Disagree' button." By contrast, a "clickwrap agreement" requires a user to click a button to "Agree" or "Disagree" with the terms of service before the user obtains access to the website. The website at issue in *Sampson* had a clickwrap agreement. Citing *Hartson v. Hobart* (Fr. Ct. App. 2011), the defendant in *Sampson* argued that the plaintiff's terms of service agreement should not be enforced. The court disagreed, noting that the browsewrap agreement in *Hartson* was not binding on the user of a commercial loan website because there was no evidence that the user had actual knowledge of or assented to the website owner's terms. Determining the validity of a browsewrap agreement required a fact-specific inquiry into whether or not the user had actual or constructive notice of the agreement's terms. By contrast, the defendant in *Sampson* had taken the affirmative action of clicking the "Agree" button. Therefore, the defendant had adequate notice of the website's terms of service, which included a pledge to maintain the confidentiality of information posted on the website. In sum, a clickwrap terms of service agreement makes it more likely that the agreement will be enforceable.

2. Issue: Is verifiable parental consent for all users of the service necessary? If so, how should it be obtained?

Analysis and Recommendation: As noted above, COPPA and the FTC regulations under it require verifiable parental consent before a website user may collect personal information about children under the age of 13 who use the website. As Ms. Morrison noted in the interview, the website intends to gather personal information about its users. As also noted in the interview, the website is aimed at children ages 11 through 14. Because the client aims to collect personal information about the children who use the website and COPPA and the FTC regulations apply to at least half the intended users of the website, verifiable parental consent for those users under the age of 13 is necessary. 16 C.F.R. §§ 312.3(b) and 312.5. COPPA defines obtaining verifiable parental consent as making a "reasonable effort" to obtain it. COPPA § 6501(9). The FTC regulations specify acceptable forms of verifiable parental consent as including returning a consent form; requiring a parent to use a credit card that provides notification of each discrete use; having a parent call a toll-free number staffed by trained personnel; having a parent connect to trained personnel via videoconference; and checking the parent's government-issued identification against an appropriate database. 16 C.F.R. § 312.5(b)(2). The client should use one or more of these forms of obtaining consent. Astute examinees will note that, as credit card use is also to be required by the website, that would be the best (and need be the only) way to obtain verifiable parental consent.

In addition, the client must be informed that the Franklin Civil Code allows disaffirmance of contracts (including the terms of service agreement to use the website) for minors under the age of 18, and hence parental consent for all children using the website would be necessary unless the client is willing to run the risk of disaffirmance.

3. Issue: May the owner of the website require users to employ credit cards to pay fees? If so, should any safeguards be imposed on the use of credit cards by users?

Analysis and Recommendation: The website may have fees paid by credit cards. However, it must take steps to ensure that it obtains informed parental consent for credit card use. Specifically, as revealed by the FTC press release concerning its settlement with Persimmon, the website must obtain express informed consent before credit card charges may be made. That consent must include notice to the parent of what the charges may be and the uses for which they may be incurred, an explanation to the parent that the use of a password will make the charge final, and the option for the parent to withdraw the consent at any time. *See* FTC press release.

4. Issue: May the website obtain the personal information on users it desires to obtain and provide that information to advertisers? If so, under what conditions?

Analysis and Recommendation: The website may obtain all the personal information it would like for those users who are 13 and 14 years old. It may obtain certain, but not all, of the personal information it would like for those users who are 11 and 12 years old. According to the interview with Ms. Morrison, the website would like to obtain the following personal information: the user's name, home address, gender, age, and email address. COPPA lists all those items of information as "personal information" subject to its provisions. COPPA §§ 6501(8)(A), (B), (C), and (G). COPPA further requires that any collection of such information regarding a "child" (i.e., a user under the age of 13) is subject to FTC regulations. *Id*. § 6502(a)(1). The FTC regulations require that a child's parent must be given the opportunity to withhold consent to the collecting of information and also to withhold consent to the disclosure of that information to third parties. 16 C.F.R. §§ 312.5(a)(2).

Further, the FTC regulations allow collection only of personal information that is "reasonably necessary to participate in [the] activity [of the website]." *Id*. § 312.3(d). As Ms. Morrison's interview states, there is no need to gather the users' home and email addresses to allow participation in the website's activities, whereas the other items of personal information are necessary for pedagogical reasons relevant to the website's activities. Hence, for those users under 13 years old, the website may collect information on the user's name, gender, and age, but *not* home and email addresses. And the website must provide notice to the parents that such information is being gathered and made available to third-party advertisers. Provided the child's parent has not withheld consent to its disclosure to third parties, the client may then share that information with advertisers.

5. Issue: Are there any limitations on advertising on the website? If so, what are those limitations and how should they be addressed?

Analysis and Recommendation: The Franklin Children's Protection on the Internet Act (CPIA) limits the type of advertising that may be used on websites aimed at minors. A "minor" is defined as "an individual under the age of 18 years." CPIA § 18(a). As the website will be aimed at children from 11 to 14 years old, CPIA applies to all users of the website. CPIA lists eight types of products and services that may not be advertised on websites directed to minors. CPIA § 18(h). Advertisers of those products and services may not employ the website.