



September 24, 2012

FILED ELECTRONICALLY

Federal Trade Commission

In the Matter of COPPA Rule Review, P104-503

Comments of NetChoice on the Children’s Online Privacy Protection Rule Review

NetChoice welcomes this opportunity to comment on the Children’s Online Privacy Protection Act (COPPA) Rule and its implementation by the Federal Trade Commission. As we explain below, NetChoice believes that the present COPPA Rule generally serves the interests of children, parents, and online services. Our comments reflect concerns about how some of the proposed changes to the COPPA Rule would undermine online services now available to children.

NetChoice is an association of online services and e-commerce companies working to promote the integrity and availability of the global Internet. NetChoice is significantly engaged in privacy and safety issues in state capitals, Washington DC, and international Internet governance organizations.

We focus our response to the request for comments in the following areas through real-life and demonstrative examples of some of the unintended harms caused by the NPRM. We then include our recommended changes.

- 1. Potentially thousands of sites and third-parties will now become subject to COPPA regulations and liability through an unauthorized expansion of “online service directed to children”**
- 2. The FTC should not require parental consent when there is passive tracking of children without the collection of personal information**
- 3. The FTC should clarify that contextual advertising is not limited to the immediate context**
- 4. Personal information collected for internal operations may be needed for purposes other than those delineated by the FTC**
- 5. A photo or video should be considered personal information only if it includes some other data that enables the contacting of a child**
- 6. Do not include screen names, user names, or identifiers used to link a child’s activities across identified sites in the definition of personal information, since this could discourage parents from granting consent**
- 7. “Prompting or encouraging” could force teen oriented websites to remove social networking functionality**

1. Potentially thousands of sites and third-parties will now become subject to COPPA regulations and liability through an unauthorized expansion of “online service directed to children”

NPRM language:

“*Website or online service directed to children* means a commercial website or online service, or portion thereof, that: ...

(b) based on the overall content of the website or online service, is likely to attract children under age 13 as its primary audience; or,

(c) based on the overall content of the website or online service, is likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population; ...

(d) knows or has reason to know that it is collecting personal information through any website or online service covered under paragraphs (a)-(c).”

In this latest NPRM, the FTC creates an unauthorized expansion of which sites are subject to COPPA by significantly expanding what constitutes a site targeting children and by changing the *mens rea* from a “specific intent” standard to a very weak “reason to know” standard.

The FTC estimates that 500 existing operators will fall under COPPA for the first time and 125 new operators each year (over three years) will fall under COPPA due to the new proposals.¹ However, mixed-audience sites that never intended to target children, and content independent third-party sites, will become subject to COPPA.

Moreover, such an expansion by the NPRM may be outside the statutory authority of the FTC.

When Congress enacted COPPA, it was careful to reserve COPPA’s verifiable parental consent and other requirements for “operator[s] of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child.”² The term “operator” is defined in relevant part as:

“ . . . any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service . . .³

But the FTC goes further in its definition. Instead of making these changes, the FTC should pull back from its likely unauthorized expansion of the COPPA regulations.

Expansion of which sites are “targeting children”

Today, sites know if they are subject to COPPA since COPPA only applies to sites that target children or have actual knowledge that children were using the site. But under the NPRM just having content “likely” to attract a greater percentage of children than in the general population is enough to impose

¹ COPPA Rule Review, 16 CFR Part 312, Project No. P104503 p. 31 (Aug 2012) (hereinafter COPPA NPRM 2012).

² 15 U.S.C. § 6502(a)(1).

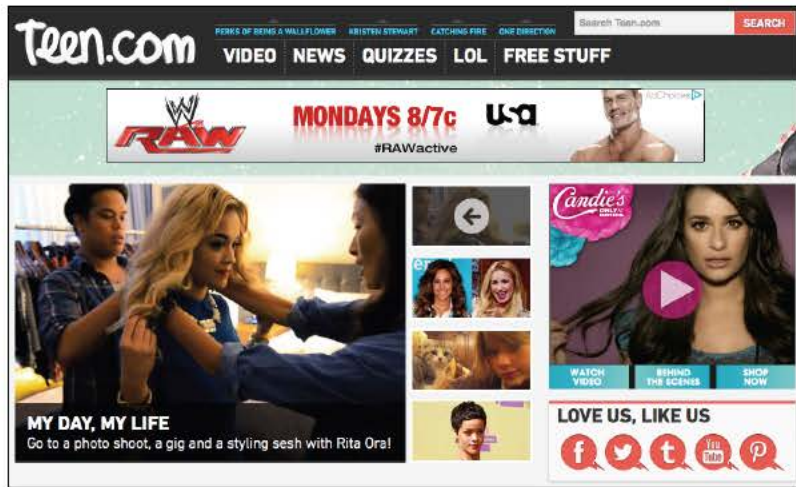
³ *Id.* § 6501(2)(A).

COPPA compliance burdens. By creating uncertainty, sites that are suddenly in danger of being subject to COPPA might need to remove features or forgo the creation of new features.

Example:

Teen.com is a “hidden gem” site according to Common Sense Media.⁴ However, by targeting teens and not children teen.com is not required to limit collection of identifiers or obtain parental consent.

Despite being named and oriented towards a teen audience, teen.com’s content appeals to those under thirteen. Teen.com has interviews with celebrities who appeal to pre-teens like Selena Gomez and Justin Bieber. Also, teen.com has pre-teen oriented language. With this type of content, despite its name and its target audience, teen.com is “likely to attract” users under 13.



This means that after passing the NPRM, the FTC could later consider teen.com a site directed towards children. To avoid this risk teen.com might remove functionality like social networking and comments.

Example of e-commerce websites considered “targeting children” under NPRM

e-Commerce sites whose target audience is adults and not children, may, be considered a site “directed towards children.”

Learning Express sells educational toys for children. Their target audience is parents who purchase these educational toys. In fact, rather than discriminating between users under and over thirteen, Learning Express has a section of toys for those “12 & over.” Clearly, Learning Express never expected or intended to be a site “directed to children.”



However, the presence of “toys,” child-oriented characters, and the ability to create a “wish list” could likely attract a majority of users under 13. We are sure that the FTC did not intend to force e-commerce sites (who can only really sell to teens and adults), to be considered websites directed to children.

⁴ Kids-Websites, available at http://www.common sense media.org/reviews?media_type=29234&recommended_age=12.

Subjects unwitting third-parties to COPPA restrictions and liability

The new *mens rea* set forth in the NPRM applies not only to the first-party sites, but also to third-party sites that interact with them.⁵ Rather than knowing, or actually directing content towards children, a third party need only have a “reason to know” that it is collecting information from a website “likely to attract children.”

This means that third-parties collecting identifiers for product development, intellectual property protection, spam detection, and advertising could become subject to COPPA just by interacting with sites subject to COPPA.

So, a “website directed to children” would be applied to any business that collects personal information from a website the third-party has “reason to know” is “likely to attract children.” This means that when businesses place interest-based ads on sites like JustinBieberMusic.com, the ad company may become subject to COPPA since it is placing an ad on a site “likely to attract children.” This exposes the advertising business to significant legal liability.⁶

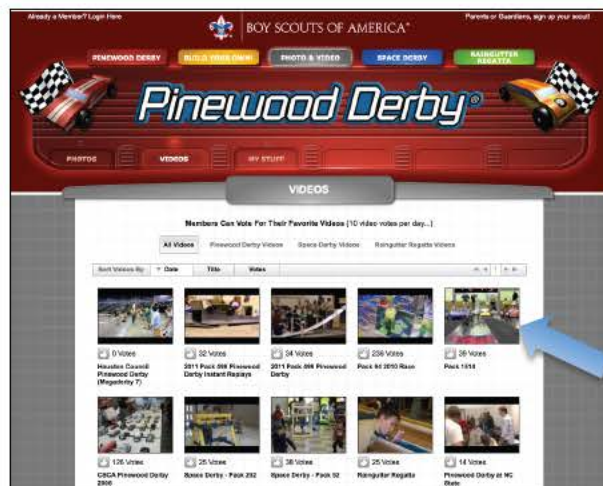
If the NPRM is adopted, would third-parties continue providing and adding content to mixed-use sites and risk legal liability, or would they remove these features and limit future educational tools and services for children?

Example:

Pinewoodderby.org allows Cub Scouts to learn more about this classic wood-car race. The website also includes embedded YouTube videos of various races. This helps Cub Scouts, most under thirteen, watch races, learn new ways to build faster cars, and share accomplishments.

However, if YouTube has a “reason to know” that its videos are imbedded on pinewoodderby.org then YouTube could be subject to COPPA. And if YouTube collects any identifiers when these videos are run, such as an IP address, YouTube would be in violation of COPPA.

Rather than risk violating COPPA, YouTube could simply remove all videos related to Cub Scouts or Pine Wood Derby races – not the likely goals of the NPRM.



Ambiguity of “disproportionately large percentage of children”

The FTC creates complexity and uncertainty for operators by determining if a site is directed towards children based on the “disproportionately large” standard. Unless an operator required every user to disclose their age before viewing the site, how would an operator know how many children it is actually attracting? This could require sites to begin collecting otherwise unnecessary information about their users’ ages to determine which visitors are children.

⁵ COPPA NPRM 2012 “knows or has reason to know that it is collecting personal information through any website or online service covered under paragraphs (a)-(c).”

⁶ As we have seen in recent COPPA enforcement actions, the cost of non-compliance is very high.

This is confusing because the FTC does not explain how to determine if a site attracted a disproportionate number of children. Because content changes continuously, would the FTC assess the likely audience of a site over several months, or at a single point in time?

Another question is whether “children in the general population” includes only children with internet access, or all children reported in the most recent US Census?

Before the FTC begins changing the *mens rea* for when an operator is “directed to children” it must first clarify these questions.

Example:

NBCNews.com is, for all intents, an adult website. Nonetheless, NBCNews.com occasionally has content that is directed towards children. Recently, the Sesame Street character Elmo appeared on NBCNews.com to talk about the space shuttle.

At that moment in time, NBCNews.com likely had a disproportionately large number of children viewing its website based on the content.



While it would be ridiculous for the FTC to characterize NBCNews as a site directed towards children, the uncertainty created by this new standard would conceivably give the FTC the authority to make such a determination.

Recommended Action

This expansion of “websites directed towards children” represents a new burden on sites that unintentionally collect information from children. However, this expansion may also result in loss of teen oriented content since such websites may remove or curtail development of new services. This expansion may also make it difficult for teen oriented sites to monetize since third party advertisers may avoid advertising for risk of violating COPPA.⁷

We suggest that the FTC not change the scope of COPPA applicability, but instead include the proposed clarity as to what makes a site “directed to children.”

Suggested Change to NPRM:

We recommend the FTC preserve and maintain the current definition of “*website or online service directed to children*”:

Website or online service directed to children means a commercial website or online service, or portion thereof, that is targeted to children. Provided, however, that a commercial website or online service, or a portion thereof, shall not be deemed directed to children solely because it refers or links to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link:

⁷ The FTC says “The Commission believes that this proposed modification to the definition of website or online service directed to children, along with the proposed revisions to the definition of operator that would hold the child-directed property to be a co-operator equally responsible under the Rule for the personal information collected by the plug-in or advertising network, will help ensure that operators in each position cooperate to meet their statutory duty to notify parents and obtain parental consent.” COPPA NPRM 2012 at p.11.

- ~~(a) knowingly targets children under age 13 as its primary audience; or,~~
- ~~(b) based on the overall content of the website or online service, is likely to attract children under age 13 as its primary audience; or,~~
- ~~(c) based on the overall content of the website or online service, is likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population; provided however that such website or online service shall not be deemed to be directed to children if it: (i) does not collect personal information from any visitor prior to collecting age information; and (ii) prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first obtaining verifiable parental consent; or,~~
- ~~(d) knows or has reason to know that it is collecting personal information through any website or online service covered under paragraphs (a) (c).~~

2. The FTC should not require parental consent when there is passive tracking of children without the collection of personal information

NPRM Proposed Addition To Collection:

§ 312.2 Definitions.

Collects or collection means the gathering of any personal information from a child by any means, including but not limited to: ...

The passive tracking of a child online.⁸

Personal information means individually identifiable information about an individual collected online, including:

- (g) A persistent identifier that can be used to recognize a user over time, or across different websites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the website or online service. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;

The passive, anonymous tracking of children through unique identifiers benefits parents and teachers. By using these unique identifiers, parents can more easily tell which sites their child visits and for how long. Teachers can use these identifiers to see if a student did proper online research or to see if students completed their online homework.

Passive, anonymous tracking allows for better content for children since it helps sites to support their ad-supported content. With this ad revenue, sites directed to children can build more and better content and features. Without the ability to use passive tracking to support content, sites would provide less content, erect pay-walls, or simply abandon their child-oriented businesses. To dismiss a business model without justification is arbitrary and capricious.

The use of anonymous passive tracking to deliver ads to kids is about the same as delivering TV ads to children based on program content, time of day, geographic location, and channel -- a practice the FTC

⁸ COPPA Rule Review, 16 CFR Part 312, Project No. P104503 p.22 (Sept. 2011) (hereinafter COPPA NPRM 2011).

has long allowed.⁹ The only meaningful difference between TV ads and anonymous passive internet tracking is that the internet allows the equivalent of tracking which programs were previously watched on a given TV.

Moreover, the prohibition against collecting a passive, anonymous identifier is outside the scope of FTC authority in the COPPA statute. "Personal information" was defined by Congress as specific data elements or "any other identifier that the Commission determines permits the physical or online contacting of a specific individual,"¹⁰ or information concerning the child or the parents of the child that is combined with one of those data elements. So the prohibition of collecting a passive identifier extends the COPPA regulations beyond the FTC's statutory authority.

Recommended Action

Because of the benefits of passive tracking, and lacking the necessary statutory authority to prohibit such actions under COPPA, the FTC should allow tracking of children where no personal information is involved.

Suggested Change to NPRM:

Collects or collection means the gathering of any personal information from a child by any means, including but not limited to:

~~(c) Passive tracking of a child online.~~

Personal information means individually identifiable information about an individual collected online, including:

(g) A persistent identifier that can be used to recognize a user over time, or across different websites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the website or online service and where such identifier alone permits the knowing contacting of a child. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;

3. The FTC should clarify that contextual advertising is not limited to the immediate context

We appreciate the FTC's addition of "contextual advertising" to "support for internal operations." However, we ask the FTC for clarity on their definition of "contextual advertising."

NPRM Language:

Support for the internal operations of the website or online service means those activities necessary to: ... (d) serve contextual advertising on the website or online service;

The definition of support for internal operations allows the serving of "contextual advertising," but we would like to clarify that the FTC meant to include ads served because of interests determined from *previous* content and context – i.e., allowing a site to use a persistent identifier to serve a contextual ad that links today's visitor with the context of their previous visits.

⁹ See FTC, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present* (2004), available at <http://www.ftc.gov/speeches/beales/040802adstokids.pdf>.

¹⁰ 15 USC § 6502(8)(c).

We think the FTC meant the serving of an ad based on immediate and prior content that the user viewed when adding “contextual advertising.” Moreover, since the use of contextual ads is not for the purpose of contacting a child directly, this interpretation is in the spirit of the COPPA statute.

Example:

Fanpop.com allows users to create fan pages for their favorite things. This helps Harry Potter fans find like-minded people and other kids learn more about favorite baseball players, and discover new interests.

FanPop.com includes a fan page for Disney as seen in the first screenshot.

After visiting the Disney FanPop fan page, a visit to the FanPop home page resulted in an advertisement for a trip to Walt Disney World. This is an example of an ad delivered based on the *prior* context viewed on FanPop.

This makes sense since, if I am a fan of Disney, I am likely to be interested in a trip to Disney World. This “contextual advertising” was based entirely on my interactions with the FanPop website.

Recommended Action:

The FTC should add language to the ruling that clarifies that contextual based advertising is not limited to the immediate context of the page, but can also include the context of prior viewed pages.

4. Personal information collected for internal operations may be needed for purposes other than those delineated by the FTC

NPRM Language:

*"Support for the internal operations of the website or online service means those activities necessary to ... so long as the information collected for the activities listed in (a)-(f) is not used or disclosed to contact a specific individual or for any other purpose."*¹¹

The FTC’s intent is already achieved through the “is not used or disclosed to contact a specific individual” language. So, the “for any other purpose” language is unnecessary.

We appreciate the FTC’s improvements to the “support for internal operations” language, unfortunately, by adding “for any other purpose” the FTC effectively limits the exception to *only* the features listed. Sites serving children use features for which they must collect and share identifiers for purposes outside the scope of the “internal operations” defined in the NPRM. Because the online environment is constantly evolving to add new features, the FTC’s delineated list in the NPRM may curtail growth for children’s content.



Disney FanPop Page



FanPop home page after visiting Disney Fan page

¹¹ Emphasis added.

Example:

Kidz.ex provides users a forum where they play HTML5 apps. Apps on Kidz.ex come from third-party developers – the website is merely a platform for the apps.

Kidz.ex shares unique identifiers with the apps and the apps share unique identifiers with Kidz.ex. These unique identifiers allow Kidz.ex to know which apps a child likes, how long they play, and which apps Kidz.ex should recommend. Neither Kidz.ex nor the apps on its platform use the unique identifiers to attempt to contact a child.

However, the internal operations exception may only apply to operations within the app. So hosted apps could not share identifiers with Kidz.ex.



Moreover, if the app shares an identifier with Kidz.ex, then the app might lose its internal operations exception since the identifier is being used for an “other purpose.”¹²

Sites may violate COPPA by trying to improve their services – without ever attempting to contact a child.

Recommended Action

Suggested Change to NPRM:

"Support for the internal operations of the website or online service means those activities ~~necessary~~ to: (a) maintain or analyze the functioning of the website or online service; (b) perform network communications; (c) authenticate users of, or personalize the content on, the website or online service; (d) serve contextual advertising on the website or online service; (e) protect the security or integrity of the user, website, or online service; or (f) fulfill a request of a child as permitted by §§ 312.5(c)(3) and (4); so long as the information collected for the activities listed in (a)-(f) is not used or disclosed to contact a specific individual ~~or for any other purpose.~~"

5. A photo or video should be considered personal information only if it includes some other data that enables the contacting of a child

NPRM Language:

"(h) A photograph, video or audio file where some file contains a child's image or voice;"

Sites created for children sometimes allow kids to engage in creative activities with photographs. For example, some sites allow children to upload a drawing or photo and then apply stickers, badges, change the colors, and add filters. But the NPRM would make a photograph alone – without any other data – personal information.

However, the FTC appears to counter its own recommended change. The NPRM states, “photographs of children, in and of themselves, *may contain* information, *such as embedded geolocation data*, that permits physical or online contact.”¹³ This statement implies that without the embedded data, no

¹² The exception only applies so long as the personal information is not used “for any other purpose.”

¹³ COPPA NPRM 2011 at p. 38-39 (emphasis added).

physical or online contact is possible with just a picture. So, the FTC acknowledges that something more than just a photograph, video, or sound recording is needed to contact a child.

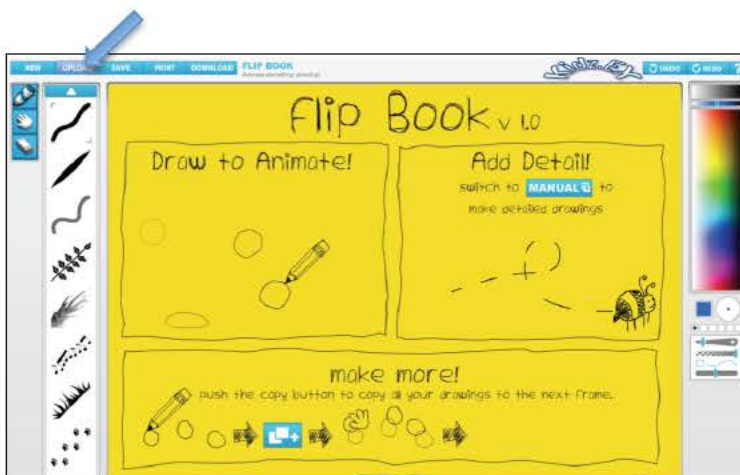
By considering all photographs, videos, or sound recordings personal information because *some may* contain additional information, the FTC creates an unnecessarily broad definition for personal information.

Moreover, “personal information” was defined by Congress as specific data elements or “any other identifier that the Commission determines permits the physical or online contacting of a specific individual,”¹⁴ or information concerning the child or the parents of the child that is combined with one of those data elements. So the inclusion of photographs and video alone as personal information extends beyond the FTC’s statutory authority.

Example

Consider the example shown below from our demonstrative website Kidz.ex. In this example, a child can upload a photograph of their dog, their cat, or possibly themselves. The child can then edit the image, and download or print it.

However, Kidz.ex does not give the child any means to share the photograph. And once the child closes the window, Kidz.ex deletes the image.



Nonetheless, this site was “encouraging children to submit personal information”¹⁵ (a photograph¹⁶). So, under the latest round of proposed rule changes to COPPA, Kidz.ex could be in violation of COPPA.

If Kidz.ex attempted to comply with new COPPA regulations, it would need to add complex and costly functionality to analyze any image uploaded by a child to ensure it does not contain an image of a child.

All this added complexity might lead Kidz.ex to remove any image tools for children or place this functionality behind a pay-wall – not a likely goal of the COPPA statute.

Recommended Action

The limitations on sharing of photographs or videos do not stop for sites like Kidz.ex. Because of the expanded definitions of “website or online service directed to children”¹⁷ even some mixed-use sites might become regulated under COPPA (see our discussion above). This could discourage such sites from allowing any photo functionality on their sites.

Instead of prompting websites to remove features, we suggest that the FTC consider a photograph, video, or sound recording that includes a child as personal information only if it also includes some other data that enables the contacting of a child.

¹⁴ 15 USC § 6502(8)(c).

¹⁵ COPPA NPRM 2011 at p. 19.

¹⁶ *Id.* at p. 39.

¹⁷ COPPA NPRM 2012 at p. 10-12.

Moreover, the existing rules already address the FTC's concerns (pairing a photograph with information necessary to contact a child) and since the FTC would exceed its statutory authority. The FTC should alter the NPRM's proposed definition concerning photographs, video, and audio content that include a child to the following:

Suggested Change to NPRM:

Personal information means individually identifiable information about an individual collected online, including:

A photograph, video, or audio file where such file contains a child's image or voice that contains other identifiers which permit the online contacting of that child;

6. Do not include screen names, user names, or identifiers used to link a child's activities across identified sites in the definition of personal information, since this could discourage parents from granting consent

NPRM Language:

(d) A screen or user name where such screen or user name is used for functions other than or in addition to support for the internal operations of the website or online service.¹⁸

The NPRM proposes adding screen and user names to the definition of "personal information," even when they can't be used to contact a child. Moreover, the NPRM includes identifiers that link a child's activities across several sites in the definition of "personal information."

Unfortunately, these changes would discourage parents trying to grant consent by forcing even related sites to each obtain their own verifiable parental consent. Thus, parents could spend hours trying to grant parental consent to only a handful of sites, when, if sites were allowed to share screen and user names, one set of parental consent could be enough.

For example, if a child has a Scallyroo.com account,¹⁹ this account could be used to login on other sister-sites (much like the Google login is used for both Gmail and Google Reader). This unified login across sites eases the process for obtaining parental consent and reduces the number of sites storing a child's information.

In addition, the inclusion of user names alone as personal information extends beyond the FTC's statutory authority where Congress defined "personal information" as specific data elements or "any other identifier that the Commission determines permits the physical or online contacting of a specific individual,"²⁰ or information concerning the child or the parents of the child that is combined with one of those data elements. This statutory language does not include or expect the inclusion of user names as personal information.

Example:

Kidz.ex, allows users to register a username on the Kidz.ex platform that is used across all Kidz.ex related sites like Puzzles.ex, Creative.ex, and Math.ex.

However, if user names alone are considered personal information, Kidz.ex may not be able to share the usernames with its related sites.

¹⁸ COPPA NPRM 2012 at 37.

¹⁹ A facially COPPA compliant website that seeks parental consent prior to authorizing a user under 13.

²⁰ 15 USC § 6502(8)(c).

Instead, Kidz.ex would need to obtain parental consent before sharing, but so would Puzzles.ex, Creative.ex, and Math.ex. So instead of parents giving consent once, they must now register their consent four times.

Recommended Action

The FTC should not include screen names, user names, or identifiers that link a child's activities across different

websites in the definition of personal information unless those anonymous identifiers are coupled with identifying information that allows contact with a specific child under 13.

A possible solution is to change the parental consent mechanism so that parental approval on one site for the use of a user name would authorize the same user name across all sites listed in the consent form (subject to revocation by the parent).

Finally, parents around the country have already given their consent under COPPA to many current operators. The proposed changes should not require these parents to again give their consent. So we ask that if an operator already received parental consent prior to enactment of any changes to COPPA, that operator should not need to burden parents with another request for consent.

Suggested Change to NPRM:

"(a) General requirements.

(1) An operator is required to obtain verifiable parental consent before any collection, use, and/or disclosure of personal information from children, including consent to any material change in the collection, use, and/or disclosure practices to which the parent has previously consented.

(2) An operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to disclosure of his or her personal information to third parties."

(3) A single operator or services using a common platform (including a Web site, network, or collection of services) may obtain parental consent on behalf of listed operators or services using a common platform.

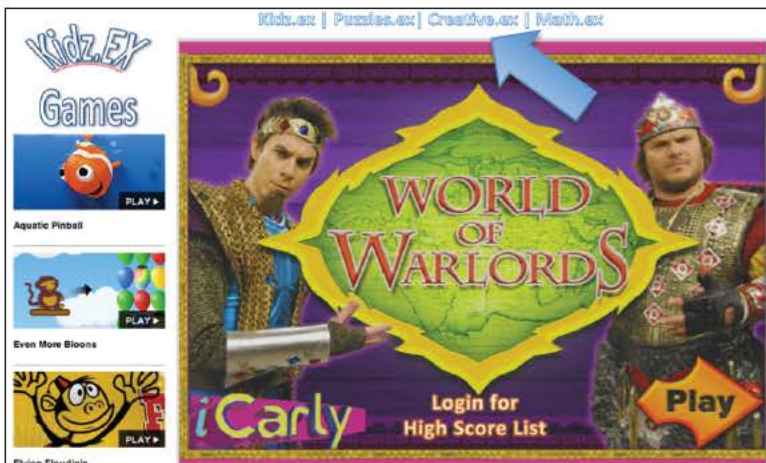
(4) Parental consent properly obtained prior to [INSERT DATE OF ENACTMENT] will be considered adequate for verifiable parental consent.

7. "Prompting or encouraging" could force teen oriented websites to remove social networking functionality

NPRM Language:

"Requesting, prompting, or encouraging a child to submit personal information online"²¹

²¹ COPPA NPRM 2011 at p.22.



The FTC should not include “prompting, or encouraging” as forms of collection. Such a classification has the unintended consequences of pulling otherwise non-COPPA sites under COPPA regulation.

Social networking has changed the structure of nearly every website. Buttons such as “Like,” “Tweet This,” and “+1” now appear on websites as diverse as WallStreetJournal.com, StateFarm.com, and Epicurious.com. These buttons also show on sites directed to children, like clubLeBron.com and GirlSense.com.

These buttons allow users to easily connect with their friends’ interests and learn about content their friends like. However, the NPRM would regard the mere display of these buttons as “prompting or encouraging of a child to submit personal information online”²² as defined in the “Collection” section of the NPRM, since their presence “encourages” the sharing of personal information without prior parental consent.

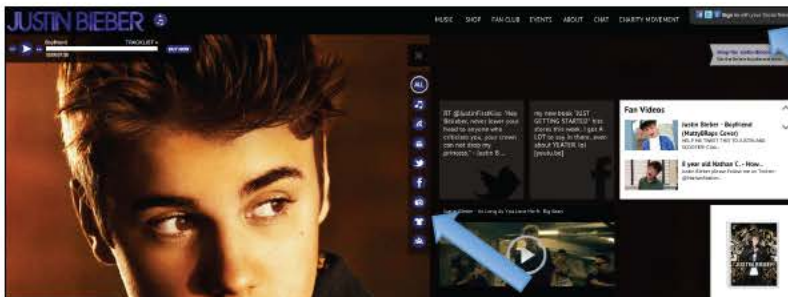
Such an expansion is outside the FTC’s statutory authority. “Collects or collection” was created by Congress to address the *actual* collection of information from a child – not the *possible* collection of information. But the use of “prompting or encouraging” in the NPRM creates liability for the latter. This was not the intent of Congress and this change to “collects or collection” is an unauthorized expansion of COPPA.

Example:

JustinBiebermusic.com, like most modern sites, allows users to “like” and “tweet” about content, and in this case, Justin Bieber. Moreover, this integrated social networking functionality allows fans to more easily follow Justin.

And since JustinBieberMusic.com is “likely to attract” girls under 13, it would be subject to COPPA (see discussion on pages 2-3).

But by merely displaying these social networking options when the page is loaded, JustinBieberMusic.com is encouraging the collection of personal information under the NPRM. So even if the site wanted to obtain parental consent prior to collection, there is no opportunity to get this consent before a child is encouraged to share by simply viewing the page.



This means that if a site subject to COPPA has any social networking functionality, they would facially violate COPPA even before they even had a chance to obtain parental consent.

Recommended Action

The likely goal of the NPRM is not to eradicate such social networking features from sites directed to children. However, that is the effect of treating “prompting or encouraging” as collection. NetChoice recommends that the FTC not change COPPA to include “prompting or encouraging” as collection.

Suggested Change to NPRM:

Collects or collection means the gathering of any personal information from a child by any means, including but not limited to:

²² *Id.* at p.19-20.

~~(a) Requiring Requesting, prompting, or encouraging a child to submit personal information online;~~

Conclusion

For the reasons expressed above, NetChoice proposes the following edits to the NPRM's proposed COPPA changes:

§ 312.2 Definitions.

Collects or collection means the gathering of any personal information from a child by any means, including but not limited to:

~~(a) Requiring Requesting, prompting, or encouraging a child to submit personal information online; ...~~

~~(c) Passive tracking~~

Personal information means individually identifiable information about an individual collected online, including: ...

~~(d) A screen or user name where it functions in the same manner as online contact information, as defined in this Section;...~~

(g) A persistent identifier that can be used to recognize a user over time, or across different websites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the website or online service and where such identifier alone permits the knowing contacting of a child. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;

(h) A photograph, video, or audio file where such file contains a child's image or voice that contains other identifiers which permit the online contacting of that child;

Support for the internal operations of the website or online service means those activities ~~necessary~~ to: (a) maintain or analyze the functioning of the website or online service; (b) perform network communications; (c) authenticate users of, or personalize the content on, the website or online service; (d) serve contextual advertising on the website or online service; (e) protect the security or integrity of the user, website, or online service; or (f) fulfill a request of a child as permitted by §§ 312.5(c)(3) and (4); so long as the information collected for the activities listed in (a)-(f) is not used or disclosed to contact a specific individual ~~or for any other purpose~~.

Website or online service directed to children means a commercial website or online service, or portion thereof, that is targeted to children. Provided, however, that a commercial website or online service, or a portion thereof, shall not be deemed directed to children solely because it refers or links to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link:

~~(a) knowingly targets children under age 13 as its primary audience; or,~~

~~(b) based on the overall content of the website or online service, is likely to attract children under age 13 as its primary audience; or,~~

~~(c) based on the overall content of the website or online service, is likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population; provided however that such website or online service shall not be deemed to be directed to children if it: (i) does not collect personal information from any visitor prior to collecting age information; and (ii) prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first obtaining verifiable parental consent; or,~~

~~(d) knows or has reason to know that it is collecting personal information through any website or online service covered under paragraphs (a) (c).~~

In determining whether a commercial website or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.

A commercial website or online service, or a portion thereof, shall not be deemed directed to children solely because it refers or links to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link.

§ 312.5 Parental consent.

(a) *General requirements.* ...

(3) A single operator or services using a common platform (including a Web site, network, or collection of services) may obtain parental consent on behalf of listed operators or services using a common platform.

(4) Parental consent properly obtained prior to [INSERT DATE OF ENACTMENT] will be considered adequate for verifiable parental consent.

Please note that the above edits do not represent an exhaustive list of our recommended edits, and we welcome the opportunity to further work with the FTC on the language of the NPRM.

We thank you for your consideration and we ask that you recognize the impact even the smallest changes to COPPA will have on websites that beneficially serve our nation's children.

Sincerely,

Steve DelBianco
Executive Director, NetChoice

Carl M. Szabo
Policy Counsel, NetChoice

NetChoice is an association of online services and e-commerce companies, with the shared goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at www.netchoice.org