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COPPA Rule Review	)	
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COMMENTS OF TECHAMERICA

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TechAmerica hereby submits these comments to the Federal Trade Commission ("Commission") in regard to the Commission's Supplemental Notice of Proposed Rulemaking ("Supplemental NPRM") concerning the Children's Online Privacy Protection Act ("COPPA").[1] TechAmerica's members have a vested interest in protecting children when they are online and also ensuring that the Internet remains a vibrant medium of communication and e-commerce. TechAmerica is pleased to be able to file comments on their behalf in this proceeding.

TechAmerica is the leading voice for the U.S. technology industry, which is the driving force behind productivity growth and jobs creation in the United States and the foundation for the global innovation economy. Representing approximately 1,000 member companies of all sizes from the public and commercial sectors of the economy, TechAmerica is the industry's largest advocacy organization.

TechAmerica welcomes this opportunity to provide the Commission with a viewpoint shared by such a diverse membership.

Certain Further Proposed Changes Exceed the FTC's Statutory Authority

As noted in our initial comments in December 2011, TechAmerica believes that the Commission's implementation of COPPA since 2000 ("COPPA Rule") has provided the Internet industry with relatively certain guidelines and parameters within which to work.

However, the Commission's further proposed changes, particularly to its definition of "operator" and "personal information," are unnecessarily expansive and likely exceed Congress's intent when enacting COPPA.

[1] Children's Online Privacy Protection Rule, 77 Fed. Reg. 46643 (proposed Aug. 6, 2012) ("COPPA SNPRM").

Definition of Operator

With regard to the definition of "operator," the Commission states that it is expanding the definition in order to "clarify the responsibilities of child-directed properties that integrate independent social networking or other types of 'plug-ins' into their sites and services."[2] In so doing, the Commission proposes to expand the definition of "operator" by adding a proviso that information is collected "on behalf of" an operator by a third party if the information is collected "in the interest of, as a representative of, or for the benefit of," the operator.[3]

However, rather than clarifying the rules of the road for child-directed properties, the Commission is proposing to expose them to additional liability regardless of whether or not they know of the third party's collection of personal information from children. Such an action is unreasonable and contrary to the underlying statute. Notwithstanding the Commission's contention that the statute is unclear as to what circumstances third-party data collection activities are deemed to be conducted "on an operator's behalf,"[4] COPPA states clearly that the Commission may only impose specific requirements on "the operator of any website or online service directed to children that collects personal information from children or the operator of a website or online service that has *actual knowledge* that it is collecting personal information from a child" (emphasis added).[5]

Indeed, the Commission has distinguished the actual knowledge standard by stating, "the case law makes clear that actual knowledge does not equate to 'knowledge

[2] COPPA SNPRM at 46644.

[3] Id.

[4] Id.

[5] 15 U.S.C. § 6502(a)(1)(A).

fairly implied by the circumstances'; nor is actual knowledge 'constructive knowledge,' as that term is interpreted and applied legally.[6] But the Commission's proposed change to the term "operator" would diminish the actual knowledge standard inherent in the statute and instead impart, at best, an implied knowledge standard on an operator with regard to a third party merely because it may "benefit" from the integrated use of a third-party's service. To be sure, the plug-in provider and the website operator are not working in concert. Neither operates "on behalf of" the other. Such an approach clearly violates the plain reading and intent of COPPA.

Further, it seems that the Commission's proposed change in this regard would impose liability on third party "plug-in" and service providers who heretofore were not covered by COPPA even if the third party operators of ad networks or plug-ins do not directly target children. It is incorrect for the Commission to conclude that a plug-in provider is necessarily an "operator" at all: a plug-in operator is not collecting data from or about visitors to its website or online service, even though it might be the case that the plug-in provider is separately an "operator" with respect to data collected on its own website. Moreover, an entity is not an operator subject to COPPA if it does not have actual knowledge that it is collecting data from a child or if the entity's own website (in the context of a plug-in provider, this is different from the website on which the plug-in appears) is child-directed. In the case of non-child directed plug-ins, this seems to put them entirely outside of the statutory scope.

[6] Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804, 59806 (proposed Sept. 27, 2011) ("COPPA NPRM").

TechAmerica appreciates the Commission's concern with the interaction of third party technologies and traditional "operator" sites and the potential for a child's personal information to be collected without permission. However, TechAmerica prefers that the Commission take into consideration whether or not a first party website or online service imposes a contractual obligation upon the third party to make clear that the third party must notify the underlying "operator" if/when it collects a child's personal information. Certainly, if a third party collects a child's personal information in violation of the operator's imposed contractual obligations, it cannot be argued that the third party is acting "on behalf of" the underlying operator. Additionally, such an allowance is also consistent with the Commission's belief that an operator "is in the best position to…control which plug-ins, software downloads, or advertising networks it integrates into its site."[7] Therefore, imposition of liability upon the underlying operator would then be only valid (i.e. consistent statutorily) if that party either willfully allowed the collection of a child's personal information by a third party despite receiving notice or if the third party is directed to collect such information by the underlying operator. Otherwise, the Commission should continue to heed its own earlier advice to not impose liability on operators that are mere conduits for data flows to a third party.[8]

Definition of Web Site or Online Service Directed to Children

The Commission proposes to "make clear that a Web site or online service that knows or has reason to know that it collects personal information from children through

[7] COPPA SNPRM at 46644.

[8] Id.

a child-directed Web site…is itself 'directed to children.'"[9] While TechAmerica appreciates the Commission's desire to not impose strict liability upon advertising networks or social plug-ins that are not designed to be directed towards children but are utilized by an operator of a site or service that is directed towards children,[10] its introduction of a "reason to know" standard is improper.

As noted above, Congress made it clear that only an "actual knowledge" standard is proper when applicable. Indeed, the Commission itself has noted the legislative history of COPPA and the important distinctions between actual knowledge and implied or constructive knowledge.[11] Therefore, for the same reason espoused previously, a third party plug-in service or advertising network that does not intentionally target their services to children should not have independent COPPA liability when an operator utilizes such services unless the third party has actual knowledge of such activity. Liability would be justified, however, when the third party breaches contractual obligations between the third party and the underlying operator to not do so.

Definition of Personal Information

TechAmerica applauds the Commission for taking certain steps in its Supplemental NPRM to ensure that items included in the definition of "personal information" sufficiently permit direct contact with a person online. Thus, TechAmerica

[9] Id.

[10] Id. at 46645.

[11] COPPA NPRM at 59806, fn 26 (acknowledging that Congress changed the COPPA from a "knowingly" standard to an "actual knowledge" standard).

supports the Commission's suggested change that a "screen or user name" only be deemed personal information if it "rises to the level of 'online contact information'."[12]

However, the Commission's insistence to treat a "persistent identifier" as personal information is problematic.

As TechAmerica stated in its comments to the Commission in response to its initial NPRM, IP addresses and device identifiers, in and of themselves, should not be considered personally identifiable information. While TechAmerica appreciates the Commission's recognition that IP addresses and device identifiers are often used for security and website functionality purposes and therefore only treats them as personal information if not used for "support for the internal operations of the website or online service," TechAmerica remains concerned with the Commission's proposal to treat an IP address or device identifier as personal information. It is only when an IP address or device identifier can directly identify a person, such as when it is combined with traditional personal information of a user, and is used to do so, that it should it fall within the definition of "personal information." Increasingly, the IP addresses passed with communications through the Internet are no longer unique to a specific end-user device. Indeed, some Internet access providers are adopting a technique called Network Address Translation ("NAT") on a large scale to assign and manage IP addresses. When NAT is used, the IP address passed with a communication to its destination is different from the IP address the ISP assigns to the customer on the "private" side of its network. Thus, the increasing use of NAT renders moot the Commission's argument

[12] COPPA SNPRM at 46646.

that because consumers access the Internet more on handheld devices, as opposed to family computers, an IP address should be considered personal information.[13]

Further, the public-facing IP address may be shared by many users. The Commission has attempted to dismiss this argument by noting that an IP address need not specify a particular individual just as a home address does not necessarily specify a particular individual.[14] While this may be true, users (including children under the age of 13) can access the Internet from a variety of public access points, including libraries, schools, community centers, airports, hotels, and certain retail stores, for example. To equate the geographical ubiquity of an IP address (which could implicate hundreds of people sharing an address) with the relative specificity of a home address (which likely only contains a small subset of people), as the Commission does, is misguided. Therefore, as technology has changed, it is not necessarily "reasonably likely" to be able to contact a specific individual via solely an IP address, as the Commission believes.[15] Consistent with the approach taken in the Supplemental NPRM regarding a "screen or user name," the Commission should only treat an IP address or device identifier as "personal information" when such persistent identifier rises to the level of online contact information, notwithstanding the Commission's attempt to allow its use for internal support operations.

[13] COPPA NPRM at 59811.

[14] Id. at 59811.

[15] Id.

“Cooperative Consent” Model Beneficial

TechAmerica appreciates the Commission’s desire, as evidenced throughout its Supplemental NPRM, to provide parents easier and better methods to ensure their consent is given and withdrawn, as needed. To this end, TechAmerica supports amending the COPPA Rule, as suggested by commenters in response to the Commission’s NPRM,[16] to allow for those entities that participate in a common platform to collectively provide parents a “one stop shop” opportunity to provide the necessary consent and learn generally about what information is being collected by platform participants.

Such a common mechanism would provide the requisite notice, offer an opportunity to provide consent, and facilitate additional COPPA obligations. As online integration of sites and services evolves, it is important for parents to be able to exercise their permissions as flexibly as possible.

TechAmerica suggests this “cooperative consent” model provide parents additional information regarding the types of entities within the platform and a general description of the manner in which participating operators will collect, use, and disclose the personal information from such children through the platform.

To be sure, further discussion is needed on this concept, but TechAmerica agrees that the Commission and industry should continue to explore together innovative alternatives for industry to comply with COPPA and for parents (and children) to reap the full benefits of today’s and tomorrow’s online services. Certainly, such an approach

[16] See, e.g., Comments of Software & Information Industry Association at 10-12 (filed Dec. 23, 2011); Comments of Future of Privacy Forum at 5-6 (filed Dec. 22, 2011).

is preferable to imposing COPPA obligations on third parties not otherwise subject to COPPA.

Conclusion

TechAmerica believes COPPA and the COPPA Rule work relatively well in today's Internet environment. While it is true that the Internet marketplace is changing rapidly, the COPPA Rule need not change drastically to accommodate such changes. Rather, the Commission should exercise extreme caution, pursuant to the reasons expressed above and within the confines of its statutory authority, when updating the COPPA Rule so as to not unnecessarily disrupt the balance struck in the law between protecting children's privacy online and ensuring Internet operators can continue to innovate.