

September 24, 2012

VIA ONLINE SUBMISSION

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: In the Matter of COPPA Rule Review, 16 CFR Part 312, Project No. P104503

The Walt Disney Company (“Disney”) is pleased to submit these comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) supplementary request for comments¹ (the “2012 COPPA NPRM”) on its proposed revisions to the Children’s Online Privacy Protection Act (“COPPA”) Rule.² Disney applauds the vision and leadership demonstrated by the FTC in proposing revisions to the COPPA Rule that will enable children to benefit from increasingly interactive online content in a safe environment, promote parental engagement in a manner that reflects the reality of how children use the Internet, remove disincentives for service providers to invest in measures that will engage parents and protect children, and encourage continued innovation in the online space.

Disney strongly supports many of the proposed revisions to the COPPA Rule presented thus far by the Commission, including those within the 2012 COPPA NPRM. In particular, Disney appreciates the FTC’s recognition of the need for a new path to COPPA compliance for websites and online services that are directed to children but designed to appeal to a mixed audience that includes both children and adults. The Commission’s proposed approach will encourage online operators to design and operate family directed websites and online services that fall within the definition of websites “directed to children” without the requirement to presumptively treat all users as children, so long as they do so in a manner that achieves COPPA’s goals by embracing the Rule’s data minimization, transparency, and parental consent-based privacy protections.

We share the goals of both the Commission and COPPA and see the Commission’s proposal as going far in achieving these goals. In these comments, however, we address four aspects of the Commission’s proposal which, as currently formulated, would lead to unintended consequences that would defeat, rather than fulfill, COPPA’s primary objectives. In each instance, we offer alternative approaches that can meet the objectives of the Commission without those consequences. Specifically, Disney recommends an alternative approach to holding

¹ Children’s Online Privacy Protection Rule, 77 Fed. Reg. 46643 (Aug. 6, 2012).

² Children’s Online Privacy Protection Rule, 16 C.F.R. Part 312.

operators of websites directed to children equally responsible for the personal data collection practices of independent entities and third party software “plug-ins” that are present on an operator’s site. Disney also requests that the FTC clarify that these plug-ins can collect information that is used only for their internal purposes. In addition, Disney’s comments propose that the Commission allow persistent identifiers that support targeted advertising to be used in limited environments that will not undermine children’s privacy protections. Lastly, Disney proposes an additional modification to the proposed definition of “personal information” that would exclude geolocation information that provides “support for the internal operations” of websites or online services, as this term is defined in the 2012 COPPA NPRM.

I. Disney Commends the FTC’s Proposal to Create A New Clearer Path to COPPA Compliance

In recognition of the rapidly evolving manner in which children and families access and use the Internet, the 2012 COPPA NPRM contains a proposal to include an appropriately drawn, family friendly distinction within the COPPA Rule’s definition of “website or online service directed to children.” Disney applauds this step.

In particular, the Commission’s proposed addition of a new subsection (c) within the definition of “Web site or online service directed to children” gives appropriately-weighted consideration to the value of family friendly websites that are designed to appeal to families, yet, because of the necessary ambiguity built into the FTC’s totality of the circumstances test, might be considered “directed to children.”³ This new approach recognizes that family friendly websites and online services that may fall within the definition of websites directed to children must be able to effectively serve all users—including adult family members. The Commission correctly concluded that, for such family friendly online destinations, it is neither appropriate nor necessary for operators to treat all website users as children, and that to do so would unnecessarily work at cross purposes with the Commission’s core objective of “maintaining children’s access to the Internet, preserving the interactivity of the medium, and minimizing the potential burdens of compliance on companies, parents, and children.”⁴

The proposed definition of “Web site or online service directed to children” that includes the new subsection (c) will provide several important benefits. Most significantly, by creating a new clearer path to COPPA compliance that neither dilutes existing COPPA notice and consent requirements, nor expands the definition to include general audience websites where children may be users, operators choosing to operate under subsection (c) will be encouraged to invest in solutions that offer greater transparency and enhanced parental controls. This additional path to COPPA compliance also will address the current reluctance by some operators to invest in sites that are directed to children and other users, as well as promote data minimization by providing operators incentives to restrict the collection of children’s personal information unless obtained with verifiable parental consent. Further, the proposed definition is consistent with consumer expectations, particularly given the increasingly multigenerational online viewing patterns and parental interest in maintaining some form of control over children’s online experiences, while

³ 77 Fed. Reg. at 46645-46646.

⁴ Children’s Online Privacy Protection Rule; Final Rule, 64 Fed. Reg. 59804, 59889 (Nov. 3, 1999) (to be codified at 16 C.F.R. pt. 312).

not requiring that all adult users on a family friendly site be treated as a child for COPPA purposes. Thus, the end result from a public policy perspective is that the proposal fosters COPPA's goals by establishing an environment where children will not be subject to data collection without parental permission, and operators of websites and online services will have a clear path to invest in websites designed to be inclusive of a wider audience.

Lastly, the Commission rightfully noted in the 2012 COPPA NPRM that the new family friendly distinction is consistent with the Commission's existing jurisdiction over these sites when they are directed to children based on the totality of the circumstances test and the factors in the definition. The Commission noted that, through its traditional use of prosecutorial discretion in enforcing the COPPA Rule, it recognized the burden of treating all users as children and instead chose enforcement cases centered on "actual knowledge." However, by clarifying a compliance path for the family friendly category within the definition of "Web site or online service directed to children," the Rule will provide all parties that operate in the online ecosystem with greater certainty as to their age verification and parental notice and consent obligations.

II. Some Aspects of the Commission's Proposals on Software Plug-Ins and Targeted Advertising Will Have Unintended Consequences and Are Unnecessary

As discussed above, the Commission's proposed approach will enable websites and services designed for families to continue to grow and innovate while continuing to protect children in furtherance of the goals of COPPA. There are, however, provisions within the proposed treatment of software plug-ins ("plug-ins"), and the proposed definition of persistent identifier, which Disney recommends that the Commission recalibrate to eliminate undesirable and unnecessary consequences that work against those goals. Specifically, the proposal to hold operators responsible for the data use and collection practices of plug-ins and ad networks creates a barrier to operators working to achieve the joint goals of protecting children and providing engaging, interactive online experiences. In addition, the Commission's proposal regarding persistent identifiers used for targeted advertising is particularly difficult to implement for sites operating under the proposed exception in subsection (c). An approach that builds on existing control features will better protect children and encourage growth in family friendly sites.

A. Responsibility for Unauthorized Data Collection Should Remain with the Entity Collecting the Data

The 2012 COPPA NPRM proposes to significantly expand the allocation of responsibilities under COPPA when independent entities or third parties, such as plug-ins or advertising networks, collect information from users through child-directed sites and services. Whereas today responsibility for the collection of personal information resides with the information-collection entity, the FTC now proposes that the operator of a child-directed site and the information-collecting site or service made available through such child-directed site should be considered "co-operators" that are equally responsible for the personal information that is collected, even when the child-directed site or service does not own, control, or have access to

the information collected.⁵ The Commission suggests that this revised approach to assigning liability will help to ensure that website operators and third parties cooperate to meet their statutory duty to notify parents and obtain parental consent.⁶

Disney fully supports the notion that all entities in the online ecosystem have an obligation to work together to achieve responsible data collection practices on websites directed to children. To achieve that policy goal, however, Disney believes that the Commission's proposal should be modified so that ultimate liability of any data collection remains with the entity collecting the information, particularly when the operator has made reasonable efforts to ensure that any data collection occurs in accordance with COPPA. For the reasons that follow, Disney believes that the adoption of the proposed approach would lead to unintended, undesirable consequences and is not necessary to achieve the underlying policy objectives.

The flaw in the Commission's proposal is that, as a practical matter, it would impose a form of strict liability on operators who do not have the ability to control or monitor the plug-in operators' data collection practices. Imposing strict liability on operators for the conduct of the plug-in providers that operators cannot control will inevitably drive operators and plug-in providers to avoid engaging with each other and deprive users of valuable functionality. That outcome – which is predictably certain to occur – would be contrary to the interests of consumers and the goal of promoting investment in quality websites and services directed to children. Specifically, concerns relating to strict liability and the inability to oversee and monitor third parties would result in a reduced amount of personalized online content, feature-rich functionality, and choices developed for children and families because operators will be reluctant to incorporate plug-ins, even from third parties that provide written assurances of their privacy practices, due to the real liability and reputational risks.

As Disney described in its prior comments on the proposed revisions to COPPA, current online content and services are delivered through a variety of systems, platforms, and devices that are the result of a collaboration among numerous entities, including content providers, Internet-based platforms, telecommunications carriers, device manufacturers, mobile and desktop application developers, and service providers.⁷ Because of the complexity and constantly changing nature of this ecosystem, it is not practical for online destinations directed to children to implement a comprehensive system of oversight and monitoring over all such third-party entities from which the site operator could conceivably receive a "benefit" (as broadly construed by the new proposal), and to confirm whether each such entity is adequately addressing the co-operator obligations proposed by the Commission.

Moreover, many (if not most) online operators simply do not have sufficient leverage or negotiating power in the marketplace to obtain contractual terms with providers of plug-ins to allow for meaningful oversight and monitoring. Many online operators also lack the resources that would be required to oversee and monitor all the various entities involved, even if they were

⁵ 77 Fed. Reg. at 46643.

⁶ *Id.* at 46645.

⁷ The Walt Disney Co. (comment 170) at 5.

able to obtain appropriate contract terms. In effect, the Commission's proposed approach assumes a level of control and influence over the conduct of counterparties that simply does not exist.

There is, however, an alternative approach that will promote the Commission's objectives while avoiding these undesirable disincentives. And that is to permit an operator of a site directed to children to rely on the representations made by third parties regarding their personal information collection practices, as long as the operator has undertaken reasonable efforts to limit any unauthorized data collection. Liability founded on a prior due diligence and knowledge standard would be suitably rigorous and would be in accord with the Commission's past statements that a higher standard of proof is appropriate in instances where an entity may be subject to civil penalties based on the conduct of a third party, as is the case here with COPPA.⁸

Similar examples are present in other FTC Rules. For example, the Commission could adopt an approach that is comparable to the third-party accountability standard within the FTC's regulations designed to protect the privacy of consumer financial information.⁹ These regulations limit liability for financial institutions that enter into a contractual agreement with a third party that performs services or functions on the institution's behalf when the agreement prohibits the third party from disclosing or using the information other than to carry out the purposes for which the financial institution initially disclosed such information. Thus, if the third party later discloses the information for a purpose that is outside the scope of the agreement with the financial institution, the institution is still considered to have met its regulatory obligations.¹⁰

The COPPA Rule presents the Commission with a similar opportunity to delegate responsibility in a manner that will require third parties to meet their privacy obligations without creating a disincentive for operators to deploy new third-party services. Specifically, operators of online destinations that are directed to children would be permitted under the COPPA Rule to rely on the representations within contractual agreements or posted privacy policies of third parties, and would not be subject to liability in the event that a third party that provides services through an operator's site engaged in the collection or use of personal information from children in a manner that conflicts with the third party's own stated policies and practices.

B. Plug-Ins Should be Permitted to Collect Information That Is Limited to Internal Use

The Commission rightfully recognized that, in order for the online environment to function effectively, operators must be allowed to collect data to support the internal operations of a website or online service, and that this type of data collection will not negatively impact a user's privacy protections. There is, however, some ambiguity as to whether this important

⁸ See, e.g., Telemarketing Sales Rule: Final Rule, 68 Fed. Reg. 4580, 4611 (Jan. 29, 2003)(addressing why a "knew or should have known" standard was not appropriate given that civil penalties rest on another person's violation of the Rule).

⁹ 16 C.F.R. pt. 313.

¹⁰ *Id.* at § 313.13(a)(1)-(2).

exception extends to social plug-ins in their role as co-operators. We believe a similar allowance is both appropriate and necessary to advance the Commission's objectives. Clarifying the application of this exception to plug-in co-operators will preserve the benefits of interactivity and parental engagement that flow from the plug-ins' primary function. As with any web-based functionality, plug-ins automatically collect information that meets the strict definition of persistent identifier (*e.g.*, an IP address) at the moment the user visits the site, making prior parental consent unworkable. A plug-in's data collection practices should be subject to the same rules that apply to operators, which would permit plug-ins to collect information that is limited to internal use. Any other approach would have the highly undesirable effect of effectively precluding the use of plug-ins as a means of parental engagement on sites directed to children. With respect, Disney believes that promoting the availability of such tools should be a core Commission objective, and the Commission should refrain from the adoption of rules that would deter their deployment.

For example, Disney's Club Penguin service, which is directed to children, features a tool page designed for parents to keep current on the Club Penguin activities used by their children. This tool page includes Twitter and Facebook plug-ins that enable parents to more easily track and connect to new site updates and important safety and control features. Club Penguin routinely tweets reminders to parents on how their children can safely engage in Club Penguin, and the Internet generally, by providing specific tips and resources for talking to children about safe Internet use.¹¹ Similarly, parents can use the Facebook plug-in to connect to information and Club Penguin control features accessible through a parent-focused Facebook app.¹² If operators are forced to remove these features, it will become increasingly difficult for operators of services directed to children to effectively engage parents in their children's use of a particular online service.

Given the practical challenges that operators face in reaching and engaging parents, every effort should be made to promote these tools, and not to restrict them. In addition, a prohibition on all data collection by plug-ins would erode the positive incentives created by the proposed subsection (c) because it will limit innovation and significantly restrict an operator's ability to deliver an interactive and dynamic environment that will engage children.

C. The Limited Use of Targeted Advertising Prior to Age Verification Will Help to Preserve the Free Online Content Business Model

The Commission proposes to prevent the use of any targeted advertising prior to age verification. Disney believes that such an unequivocal approach is not necessary in the context of family friendly sites and would work at serious cross purposes with the goal of incentivizing the creation of such sites that the Commission has rightfully embraced. Disney believes that a more effective way to address the Commission's concerns about targeted advertising is to permit the use of persistent identifiers for targeted advertising purposes on family friendly sites prior to age verification, but only in the limited circumstances where an operator provides (1) clear and conspicuous disclosures on data collection and use practices specific to behavioral advertising;

¹¹ See <http://twitter.com/cpparents>.

¹² See <http://www.facebook.com/disneyparentapp>.

and (2) a prominent mechanism through which users can choose whether their data is collected and used for targeted advertising purposes (*e.g.*, such as through participation in the Digital Advertising Alliance (“DAA”) program, including by offering users a prominent opportunity to exercise the DAA opt-out).¹³ Such an approach embraces parental control, acknowledges the reality of the Internet ecosystem and its underlying economics, and recognizes that these websites and online services are intended for a mixed-age audience. Disney believes that a prominent opportunity to exercise a control mechanism recognized throughout the Internet advertising ecosystem will be the most effective way for parents to exercise control over behavioral targeted advertising.

Underlying Disney’s concern on this point is the way in which the Commission’s proposal rubs against the reality of how the flow of online advertising revenue—essential to fund the development of family friendly sites—works in the Internet environment. The starting point of the analysis is that in many instances within the current ecosystem, an advertising network purchases advertising space from an operator for a future period of time. The network then provides the ads in real time without any knowledge of whether the context of the ad is such that the site or service, or portion of the site or service where the ad appears, is directed to children. In addition, it is the advertising network that determines whether the ad to be delivered uses behavioral tracking technology.¹⁴ Currently, the website or online service typically has no knowledge of (and no reason to know) which type of ad is delivered. As a result, it is simply impossible for an individual operator to ensure that third-party targeted advertising does not occur on its site or for an advertising network to know, or websites to indicate, that a site or online service is “directed to children” and, therefore, that targeted advertising persistent identifiers should not be permitted.

Because the advertising networks cannot distinguish between sites that are child-directed and those that are not and, thus, where behaviorally targeted ads are or are not allowed, a prohibition may cause operators and ad networks to forego advertising opportunities on family friendly sites out of an abundance of caution that they would trigger a COPPA violation. This, in turn, could decrease the value of these sites and impact operators’ ability to maintain the sites or deploy new features. Websites—particularly those in which children make up a significant portion of the audience—are not in a position to dictate pricing terms. While advertising can be a meaningful part of the revenue for a family friendly site, family friendly sites are not typically a meaningful part of the broader audience that advertisers are trying to reach. In many instances, the value of a family friendly website, from the advertiser’s perspective, is the ability to reach the adults on that site. Yet, by eliminating the use of persistent identifiers for behavioral targeting purposes on family friendly sites unless and until age verification has occurred, the FTC’s proposal, as a practical matter, removes the advertisers’ ability to locate the adults they are attempting to reach.

¹³ In addition, and as the FTC is well aware, the DAA and others are actively discussing the implementation of a browser-based Do Not Track mechanism that also may be incorporated into the DAA regime.

¹⁴ It is important to note that advertising that uses behavioral tracking technology is targeting an adult. The Network Advertising Initiative’s (“NAI”) self-regulatory guidelines have for many years prohibited the creation of targeted advertising campaigns intended to target children.

Advertisers that are interested in reaching the adult visitors to the site will no longer be able to do so (without the ability to use persistent identifiers) and will instead seek out the adult consumers elsewhere on general audience sites leaving a void that can only be filled with child-directed advertising. As a result, advertisers may simply choose to stop working with family friendly sites — an undesirable outcome that would starve family friendly sites of revenue needed to fund the development of such sites.

Due to these real concerns, Disney believes that a more balanced approach would allow the use of persistent identifiers for targeted advertising purposes on family friendly sites prior to age verification, but only in instances where an operator has adopted robust controls (*e.g.*, the DAA program) that require clear and conspicuous disclosures on data use and collection practices and a prominent behavioral tracking opt-out mechanism. Such an approach would foster COPPA’s privacy objectives because it would provide parents with greater control over advertising practices that affect their children. And, because the disclosures and opt-out mechanism would be displayed and available not just to children but to all users on the site prior to age verification, this approach would promote better understanding and compliance by industry as to the acceptable use of behavioral advertising information. Moreover, through this approach, family friendly sites could continue to expand their services, while avoiding the unintended result of exposing children to an increased level of advertising intended to influence them.

III. The Limited Collection of Geolocation Data to Personalize the User Experience Is Consistent with the Commission’s Proposed Definition of “Support for Internal Operations” of the Website or Online Service

In the 2012 COPPA NPRM, the Commission clarified that the scope of “support of internal operations” of the website or online service includes information that is necessary to authenticate users of, or personalize the content on, the website or online service.¹⁵ Based on this clarification, Disney recommends that the Commission further modify the proposed definition of “personal information” to permit the collection of geolocation information in the limited circumstances necessary to provide authentication, or to personalize the content, for a specific user, provided that such geolocation information is not retained by the operator.

As Disney described in its initial comments to the Commission on the proposed COPPA Rule changes, individuals, including children, are increasingly using mobile devices to access online services.¹⁶ In addition, the geolocation data generated by these devices has become a key feature that businesses leverage to offer a personalized content experience for a growing number of mobile device users. As one example, geolocation data generated by a mobile device can be used to deliver a location-specific game or interactive functionality based on a nearby attraction, physical landmark, or notable location. Geolocation data also can be used to authenticate a user’s right to access certain content consistent with an operator’s licensing agreements. Importantly, these personalized services and authentication features can be provided in a manner that does not require the operator to retain the geolocation information beyond the provisioning

¹⁵ 77 Fed. Reg. at 46648.

¹⁶ The Walt Disney Co. (comment 170) at 4.

of the service. As a result, such limited collection of geolocation information would not pose the same risks to children as geolocation information that is collected and stored, used to contact a child, or used to build a profile that identifies where a device or child has been located over time.

In acknowledgement of businesses' increasing use of geolocation data for authentication and personalization purposes, Disney recommends that the Commission create an express exception within the definition of "personal information" that would allow the collection of geolocation information when used only to support the operation of the website or online service. Such an exception could closely resemble the proposed carve-out within the "personal information" definition created for persistent identifiers that are used for functions that support the operation of the website or online service.¹⁷ In addition, to ensure that the geolocational data is subject only to its intended limited use, this new exception could state that the use of geolocation information is restricted to instances where the information (1) is used for purposes of authentication or fulfillment and no other purpose; (2) is not shared with third parties; and (3) is not stored by the operator of the website or online service.

By creating this type of narrow carve out for geolocation information within the "personal information" definition, the Rule would both protect users' privacy and enable operators to continue to innovate and deliver online mobile content to more efficiently, effectively, and safely deliver authentication services and personalized content to users.

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Disney appreciates the Commission's continuing efforts to ensure that children can access informative, fun, and increasingly interactive online content in a protected environment, and the important progress the Commission has made through the current rulemaking proceedings to further these laudable goals. Disney recommends that the FTC revisit its proposed approach to assigning liability so that the responsibility for unauthorized collection of personal information remains with the entity that collected the data. Disney also requests that the Commission clarify that plug-ins are permitted to collect information that is limited to internal use. Further, Disney proposes that the Commission permit limited targeted advertising in a manner that will not undermine children's privacy protections. Lastly, Disney recommends that the Commission consider additional modifications to the definition to "personal information" to allow operators to collect and use geolocation information that is used to support the internal operations of the website or online service.

Disney looks forward to engaging further with the Commission on these important issues.

¹⁷ 77 Fed. Reg. at 46652.

Respectfully Submitted,

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