Interactive Advertising Bureau

September 24, 2012

Via electronic filing: https://ftcpublic.commentworks.com/ftc/2012copparulereview

Hon. Donald S. Clark
Federal Trade Commission
Office of the Secretary, Room H-135 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: COPPA Rule Review, 16 CFR Part 312, Project No. P104503

Dear Secretary Clark:

The Interactive Advertising Bureau ("IAB") appreciates the opportunity to provide comments on the Federal Trade Commission's ("Commission") supplemental proposed changes to the Children's Online Privacy Protection Rule ("Rule").[1] The IAB and its member companies are firmly committed to protecting children online. We continue to believe that the existing COPPA Rule strikes a workable balance that protects children while promoting their access to online resources, and does not require amendment at this time.[2] While we appreciate the Commission's attempt to try to address some of the concerns received through public comment in response to its first proposed amendments to the Rule, we are concerned that the proposed modifications to the Commission's initial proposal will only create new and different negative effects for consumers and industry alike. These concerns are detailed below.

I. INTRODUCTION

Founded in 1996 and headquartered in New York City, the IAB (www.iab.net) represents over 500 leading companies that actively engage in and support the sale of interactive advertising, including prominent search engines and online publishers. Collectively, our members are responsible for selling over 86% of online advertising in the United States. The IAB educates policymakers, consumers, marketers, agencies, media companies and the wider business community about the value of interactive advertising. Working with its member companies, the IAB evaluates and recommends standards and practices and fields critical research on interactive advertising. The IAB has led, with other prominent trade associations, the development and implementation of cross-industry self-regulatory privacy principles for online data collection.

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[1] Supplemental Notice of Proposed Rulemaking for the Children's Online Privacy Protection Rule, 77 Fed. Reg. 46643 (Aug. 6, 2012) ("SNPRM").

[2] IAB also incorporates its previous comments by reference. *See* Comments of the Interactive Advertising Bureau, filed in response to the Proposed Rule and Request for Comment on the Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011) (filed on Dec. 23, 2011).

II. SELF-REGULATION ADEQUATELY ADDRESSES ONLINE BEHAVIORAL ADVERTISING CONCERNS

The IAB shares the Commission's goals of protecting the privacy of children while supporting companies' ability to offer engaging online resources for children. This commitment is evidenced through the comprehensive Self-Regulatory Principles governing online data collection, which have been spearheaded by IAB in conjunction with other leading trade associations. The Self-Regulatory Principles for Online Behavioral Advertising ("OBA Principles") were issued in 2009 and recently supplemented with the Self-Regulatory Principles for Multi-Site Data. These Self-Regulatory Principles are administered by the Digital Advertising Alliance ("DAA"), have been widely implemented across the online advertising industry, and are enforceable through longstanding and effective industry self-regulatory compliance programs.

The Sensitive Data provision of the OBA Principles limits the collection and use of personal information that can be associated with a particular computer or device for the purpose of engaging in online behavioral advertising when the entity collecting the data has actual knowledge the user is a child under 13.[3] This standard is consistent with the current COPPA Rule and the intent of Congress at the time of COPPA's passage.

The Commission is attempting to bring online behavioral advertising activities within COPPA, a subject that currently falls outside of COPPA given the anonymous and passive nature of the data practices involved.[4] Such a move would restrict children's access to online resources by undermining the prevailing business model in which advertising revenues support the availability of free and low-cost resources. Self-regulation remains the best and most efficient means to address concerns about the collection of children's online browsing data, without running the risk of dramatically reducing online resources available to children. Moreover, the proposed changes to the existing COPPA rule would undermine the active efforts of industry to promote and implement effective self-regulation.

The IAB therefore continues to believe that self-regulation is the best way to address the Commission's concerns regarding online behavioral advertising.

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[3] American Association of Advertising Agencies, Association of national Advertisers, Council of Better Business Bureaus, Direct Marketing Association, and Interactive Advertising Bureau, *Self-Regulatory Principles for Online Behavioral Advertising* at Principle VI.A (July 2009) ("Entities should not collect 'personal information', as defined in the Children's Online Privacy Protection Act ('COPPA'), from children they have actual knowledge are under the age of 13 or from sites directed to children under the age of 13 for Online Behavioral Advertising, or engage in Online Behavioral Advertising directed to children they have actual knowledge are under the age of 13 except as compliant with the COPPA.").

[4] *See, e.g.*, 76 Fed. Reg. at 59812.

III. THE COMMISSION'S DEFINITION OF PERSISTENT IDENTIFIERS AS "PERSONAL INFORMATION"

COPPA does not provide the statutory authority to expand the definition of "personal information" to include clickstream data. Under the Commission's proposal, sites and services could find themselves in the position of collecting enough data to trigger COPPA but not enough to comply with COPPA. As explained at length in IAB's prior comments, and those of other commenters, COPPA does not support the Commission's effort to define persistent identifiers, without further data, as "personal information." Persistent identifiers that can "recognize a user over time" such as IP addresses, customer numbers in cookies, and device identifiers do not fit within the Commission's existing authority to define an "identifier" as "personal information" only if the identifier "permits the physical or online contacting of a specific individual[.]"[5] This modified definition continues to be inconsistent with the plain language of the statute, and may have a number of unintended consequences, by affecting other privacy statutes that define "personal information" to include information that can be used to contact an individual.

As the Commission is aware, persistent identifiers permit the delivery of content and advertising to a device, not to an identified individual. A device may be used by many individuals, and these identifiers alone do not provide a basis upon which to identify the user of the device at a particular time, without linking the particular identifier to additional personally identifying information. Including persistent identifiers within the definition of "personal information" would continue to pose technical challenges between first and third parties, especially where the first party operator does not currently collect information from visitors. This proposed expansion of responsibility will be quite impactful, especially as the Commission contemplates expanding COPPA to mixed audience sites.

The Commission's approach would have the result of discouraging data minimization, a key element of "privacy by design." The SNPRM modifies the Commission's definition of "persistent identifiers," but does not abandon the problematic attempt to define such data as "personal information." The current COPPA Rule creates strong incentives for sites and services to avoid the collection of "personal information" as currently defined – such as names, email addresses, and telephone numbers. The Commission's proposal eliminates these incentives by erasing the distinction between such truly personal information and the non-identifying data that would be captured by the SNPRM. In fact, the Commission would require many sites and services that are currently designed to promote privacy best practices of minimizing in a privacy-sensitive way to collect more personal data in order to provide notice, seek consent, and otherwise comply with COPPA. In turn, this increased collection of such data would be detrimental from the consumer perspective because it diminishes the inherent protections afforded by anonymity.

[5] 15 U.S.C. § 6501(8).

The proposed changes to the definition of "support for internal operations" would still burden routine website operations. The Commission has put forward a welcome proposal to broaden the definition of "support for internal operations".[6] This list includes a number of routine, first-party activities, such as maintaining or analyzing the functioning of the Web site or online service, authenticating users of or personalizing the content on, the Web site or online service, serving contextual advertising and protecting the security or integrity of the user.[7] The "support for internal operations" exception provides a crucial limitation on the "persistent identifiers" definition.

This expanded definition represents an improvement over the Commission's prior proposal, but nevertheless would affect routine, first-party activities conducted on a regular basis by most websites. For example, this narrow definition could restrict the common practices of collection of data use for intellectual property protection, protection against spam, as well as website analytics and advertising and marketing functions beyond serving contextual advertising. To avoid this result, IAB encourages the Commission to clarify its definition of "support for internal operations" to cover website affiliates and include the common business practice of data usage across related sites or services. This will have the beneficial effect of promoting integration between sites and eliminating potential friction points, such as an increased number of pop-up boxes, between sites and consumers. IAB also suggests that the list of "internal operations" provided in the regulation should be illustrative, rather than exhaustive, to avoid restricting future beneficial operations that are not anticipated at the current time.

IV. THE CUMULATIVE EFFECT OF THE COMMISSION'S PROPOSED AMENDMENTS WILL UNDERMINE INTERACTIVE AND ADVERTISING-SUPPORTED ONLINE RESOURCES FOR CHILDREN

Although IAB appreciates the Commission's amendments to its proposed rule in response to concerns raised by IAB and others, significant substantive and technical concerns remain with the proposed revision. These concerns arise from the Commission's effort to address the technical problems created by its attempt to expand COPPA to reach data that is not truly "personal information."

The statute does not provide the authority to impose vicarious liability on first parties based on third-party practices. As proposed, this liability scheme would have the effect of increasing users' friction with individual sites as well as advancing other negative consequences that the Commission likely does not intend. The Commission has proposed to attach liability to the first-party operator of a site or service where a third party, such as a plug-in, collects information through the first-party site. It plans on accomplishing this by adding a proviso to the definition of "operator" to expand the activities that are considered third-party data collection of "personal information" conducted "on behalf of" the operator.[8] (The Commission previously proposed that persistent identifiers would be "personal information" regardless of whether they are

[6] 77 Fed. Reg. at 46648.
[7] *Id.*
[8] 77 Fed. Reg. at 46644.

associated with individually identifiable information.) As part of its reasoning, the Commission asserts that it "did not foresee" how "easy and commonplace" it would become for sites to integrate third party data collection into their sites.[9]

This amendment exposes first parties to liability based on the practices of third parties—an expansion of liability not contemplated by the statute. This expansion could have unintended effects on how other privacy laws are interpreted.

As authority for this unprecedented change, the Commission has cited *Madden v. Cowen & Co.*, 576 F.3d 957, 974 (9th Cir. 2009), a securities case unrelated to privacy or the other areas of consumer protection enforced by the Commission. In that case, the court undertook a highly fact-specific inquiry into the relationship between two parties, and the conclusions of this case are too narrow to be drawn upon here, in the context of the broad expansion of the statutory requirements of COPPA, as the Commission is attempting to do.

Contrary to the claim in its commentary accompanying the supplemental proposed changes to the Rule that the Commission "did not foresee" the role of advertising networks, the potential role of third parties in relation to first party website operators has been understood for a long time. COPPA was passed in 1998, with the final Rule published in November 1999. During this same time period, the Commission had been engaged in a multi-year examination of online privacy practices regarding children,[10] and this research informed the Commission's negotiations with online ad networks of online profiling principles, an effort that culminated in the Network Advertising Initiative Code.[11] Against this backdrop, Congress chose not to address third parties in COPPA. This process also resulted in the Commission becoming well-versed in the technology behind data collection through cookies and other automated technologies. The Commission's claim that it "did not foresee" the role of third parties overlooks the historical record.

The proposed amendment would also pose technical challenges to the effective functioning of the online ecosystem, particularly in situations where the first party does not collect contact information from visitors. In order to comply with COPPA, a website or online service that incorporates third parties would either need to prevent the third party from collecting data for purposes that would trigger COPPA, or would need to comply with COPPA with respect to such third party activities. As the proposed amendment to the Rule would capture a number of mixed audience sites and services, these technical challenges will be imposed on countless websites that have no experience with COPPA compliance. Third-parties that are "directed to children" would also be required to provide notice and seek consent. To the extent that these third parties collect data from first party sites directed to children, multiple operators would be providing notice and seeking consent with respect to the same website. This change would likely confuse parents and alarm them unnecessarily.

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[9] *Id.*
[10] *See* http://www.ftc.gov/reports/privacy3/63fr10916.pdf.
[11] *See* http://www.ftc.gov/os/2000/07/onlineprofiling.htm.

The statute does not provide legal authority for the new "reason to know" standard. The Commission has proposed a new "reason to know" standard that would apply to third party operators who collect data through another operator. Such operators would be deemed to be "directed to children" if they "know or have reason to know" that the first party site or service is directed to children.[12] The COPPA statute, however, does not provide the authority to create a knowledge requirement, because the statute does not have a scienter requirement for all online services or websites. Instead, the statute imposes a strict liability regime for the data collection activities conducted by or on behalf of first party operators of sites "directed to children."

The "directed to children" standard in the existing Rule fully complies with the strict liability standard imposed on certain website operators for their own activities on the site or service by Congress. "Directed to children" serves as a proxy for actual knowledge in situations where there is no age gate/actual knowledge to apply to sites that were intentionally directed at children. This standard is consistent with Congress' intent to impose strict liability upon operators for data collected by or on their behalf. Both "actual knowledge" and "directed to children," under the existing Rule, turn upon facts known to the operator, and on whether an operator has factual knowledge that its own site or services is targeted at children generally or at specific users known to be children. The proposed rule now attempts to impose a standard far looser than the one imposed by Congress based on whether it can be inferred or assumed that some clickstream data originated with a child, based upon whether the circumstances could lead to a determination that the third party had "reason to know" this to be the case.

At the time that COPPA was passed, Congress understood and accepted that the unknowing collection of information from children would continue on general audience websites. By applying COPPA to general audience sites and services only where there is actual knowledge that specific users are children, COPPA's statutory scheme clearly leaves room for the collection of even sensitive personal information from children where there is no knowledge that a user is a child at least in some online sites or services.

Third party advertising networks are analogous to general audience websites that may unknowingly collect non-personal information from children. Like general audience websites, ad networks collect non-personal information from a number of different users and are not targeted towards children. The Commission's proposal in the SNPRM would create the incongruous result that persistent identifiers of anonymous clickstream data collected by a third party, without knowledge that a specific user is a child, would be subject to COPPA in many cases, whereas a general audience website's collection of individually identifiable information like names, addresses and phone numbers falls outside the Rule. Just as Congress understood and accepted that some level of unknowing collection of information from children would continue on general audience websites, third party advertising networks who do not intentionally direct their activities towards children similarly should not be captured by COPPA.

[12] 77 Fed. Reg. 46645.

The goal of the Commission's statutory interpretations appears to be an effort to capture within COPPA the collection of clickstream data used for OBA, even if such data does not include data currently defined as "personal information" by the Rule. The Commission's proposal would bring under COPPA technologies that existed when COPPA was enacted but that Congress declined to bring within the law.

In addition to being unsupported by the COPPA statute, the Commission's explanation of its new "reason to know" standard also creates technical difficulties because it does not provide clear guidance to operators. The primary case put forth by the Commission in support, *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991), applies the "reason to know" standard very narrowly. While the Commission does acknowledge that "reason to know" does not impose a duty to monitor or investigate, it also notes that "such sites and services will not be free to ignore credible information brought to their attention…."[13] This is inconsistent with how the standard is applied in *Novicki* and other cases, which requires contemporaneous information, *i.e.*, facts, presented to the person such that a reasonable person would infer that misconduct was occurring. It is difficult to conceptualize what "facts" could be supplied to a third party operator to lead it to infer that another site or service is "directed to children." Whether a site or service is "directed to children" is never an incontrovertible fact but rather, by the Commission's design under the COPPA Rule, a conclusion based on a multi-factor analysis. The "reason to know" standard is too subjective to provide a justifiable basis for liability.[14]

V. IAB'S PROPOSES AN ALTERNATIVE APPROACH TO ADDRESS CLICKSTREAM DATA

IAB understands that the Commission is concerned about third party online behavioral advertising that may unintentionally collect data from children. While the IAB believes that self-regulation has adequately managed these concerns, it proposes the following modification to the Rule.

IAB proposes that a third party collecting persistent identifiers can have "actual knowledge" that it is collecting "personal information" from a child, only if: (1) the third party (with actual knowledge that it is collecting from persistent identifiers and data from a child under 13) combines such persistent identifiers with data that is currently defined as "personal information"; or (2) the third party offers age-based segments that target children under 13. The third party's ability to offer age-based segments demonstrates its awareness that users receiving ads on the basis of those segments are children and thus, constitutes "actual knowledge" that the audience consists of children under 13.

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[13] *Id.*

[14] The SNPRM also proposes that a website that is likely to attract an audience that includes a disproportionately large percentage of children as compared to the percentage of such children in the general population, must treat all users as children. This further erodes the actual knowledge standard imposed by the statute. How one might determine whether it has reached a disproportionately large percentage of children under this vague standard surely would prove difficult. This could also have a chilling effect on companies which might otherwise create mixed audience sites.

Under this proposed framework, third party collection of anonymous clickstream data would not be covered by COPPA, unless falling under one of the cases described above. This would be consistent with the treatment of general audience websites under the existing Rule, as envisioned by Congress, and would avoid the illogical result that general audience websites collecting true personal information from children under 13 avoid the Rule, while third parties collecting anonymous clickstream data without knowledge fall under the Rule. IAB believes this addresses the Commission's concern regarding online behavioral advertising, within the limits of the Commission's authority and the intent of Congress.

VI. TRANSITION CONSIDERATIONS

The IAB wishes to reiterate its previous request to the Commission that any changes to the Rule should be implemented over a reasonable period of time (such as one year) and should not be applied retroactively to data collected under the existing Rule. The online ecosystem has been in compliance with the existing Rule for over a decade and will require a reasonable transition period to make any technical adjustments required.

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The IAB appreciates the opportunity to provide these comments to the Commission. The IAB and its member companies are committed to keeping children safe online, and we look forward to continuing to work with the Commission on this important issue. Please contact me at (with any questions.

Sincerely,

Michael Zaneis
Senior Vice President, Public Policy & General Counsel
Interactive Advertising Bureau