WASHINGTON
LEGISLATIVE OFFICE

September 24, 2012

Federal Trade Commission
Office of the Secretary, Room H-113 (Annex E)
600 Pennsylvania Avenue NW
Washington, DC 20580

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

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Dear Secretary Clark:

On behalf of the ACLU, a non-partisan organization with over half a million members, countless additional supporters and activists and 53 affiliates nationwide, we write to offer comments with respect to the Federal Trade Commission's ("FTC" or "the Commission") current rulemaking to modify the Child Online Privacy Protection Rule (the "COPPA Rule" or "the Rule").[1] In brief, while the ACLU supports enhancing privacy for all internet users—young and old—we fear that proposed modifications to the definition of "Web site or online service directed to children" could violate the First Amendment.[2]

The ACLU is one of the premiere organizations in the United States advocating for both internet privacy and robust online First Amendment protection. We have appeared before the Supreme Court in all of the landmark internet freedom decisions of the past three decades, including *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) ("*Reno*"), and the line of cases that led to a permanent injunction against enforcement of the Child Online Protection Act ("COPA").[3] We also joined other

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1 *See* Children's Online Privacy Protection Rule Supplemental Notice, 77 Fed. Reg. 46643 (proposed Aug. 6, 2012) (to be codified at 16 C.F.R. pt. 312) ("Supplemental Notice").

2 In these comments, we use the term "child-directed" site or service synonymously with "Web site or online service directed to children."

3 *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002) ("*ACLU I*"), *remanded to* 322 F.3d 240 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004) ("*ACLU II*"), *remanded to Am. Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd*, *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

advocacy organizations in support of the Commission's current COPPA rulemaking.[4]

The ACLU strongly supports aggressive privacy protections online, including baseline consumer privacy protections that ensure that all users, not just children, are fully informed and able to control their personal information as they use the internet. These protections include, for instance, "Do Not Track" rules that protect internet content providers' First Amendment rights while ensuring that consumers are able to make informed decisions about when providers can track their use and what information they can gather for behavioral advertising and other purposes. COPPA has long been a valuable first step on the road to these universal baseline principles, and we applaud the spirit and letter of the law.

COPPA, however, must protect, on the one hand, the First Amendment rights of both adults and children and, on the other, the legitimate privacy rights of children who may be unable, because of their particularly young age, to provide informed consent for the collection and use of their personal information for commercial purposes.

Accordingly, the ACLU has generally supported an understanding of COPPA that imposes COPPA's unique notice-and-consent burdens[5] on commercial websites and online services[6] that are overwhelmingly targeted at children under the age of 13, or where the entity that collects and controls the personal information has actual knowledge that children under the age of 13 are using the entity's site or service. COPPA should not sweep more broadly, and we offer comments on two proposed modifications in the Supplemental Notice that raise concerns.

1. **The Proposed Revision to 16 C.F.R. § 312.2 Extending its Terms to Sites and Services that Have "Reason to Know" They May Appeal to Children Under Age 13 May Violate the Plain Language of COPPA and Raise First Amendment Concerns**

The Commission proposes to add a new paragraph (d) to the definition of "Web site or online service directed to children" that would extend the definition to a site or service that "knows or *has reason to know* that it is collecting personal information through any" child-directed site or service. We share the concerns of other commenters that this modification would essentially

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[4] *See* Letter from Am. Civil Liberties Union et al. to Fed. Trade Comm'n (Dec. 22, 2011), http://www.aclu.org/files/assets/ftc_coppa_rules_letter.pdf.

[5] The ACLU, of course, supports notice-and-consent privacy protections in numerous contexts and continues to do so. COPPA's requirements are relatively unique and impose certain burdens that go beyond most notice-and-consent regimes. They require a child-directed website to directly notify a user's parent, obtain verifiable consent (with only limited exceptions) and then continue to give the parent the ability to control the treatment of the visitor's personal information at any time going forward. This regime is distinct, for instance, from most opt-in "Do Not Track" approaches, which require notice-and-consent only by the user (i.e., not a third party).

[6] "Services" would presumably include, and we use the term assuming they do include, downloadable software kits (including software plug-ins like Flash or Shockwave as well as social media integration like the Facebook "Like" button) and third-party advertising intermediaries including advertising networks and advertising exchanges. *See Supplemental Notice* at 46643.

(and impermissibly) amend the "actual knowledge" standard in 15 U.S.C. § 6502(a)(1) (2006) to create a vague "constructive knowledge" standard for all sites and online services, which would of course include sites and services that are overwhelmingly targeted at teens or adults.[7]

While we appreciate the Commission's clarification in the Supplemental Notice that the "reason to know" standard does not impose a duty to uncover unknown facts, we are concerned that the plain language of the COPPA "Acts prohibited" provision was meant by Congress to be limited to those circumstances where websites that collect personal information from their users are actually aware that they are attracting users under the age of 13, or are informed through some third party (including the FTC) that such users are on the site. To the extent the "reason to know" standard would go beyond this clear line, it is of concern.

Additionally, under the proposed modification, the Commission explains in the Supplemental Notice that "sites and services will not be free to ignore credible information brought to their attention" that children under the age of 13 are using their site or service, even if they do not have an affirmative duty to identify such users. However, under an "actual knowledge" standard, presumably sites or services are also not permitted to ignore information that underage users are on their site or using their service. This, of course, raises the question of whether the "reason to know" standard is necessary at all.

Finally, by injecting the ambiguity and uncertainty of a constructive notice standard into the regulatory regime, third party service providers who are unable to effectively police the ages of the users who access the sites they service will simply deny their services to sites that may attract such users. Conversely, sites that are largely targeted at teens or adults will consciously tailor their content to ensure they can use third party service providers, which raises issues similar to those discussed directly below (and especially the danger that government is tacitly controlling the content of online speech through overbroad regulation).

2. The Expansion of the Child-Directed Definition to Sites and Services that Only Attract a Relatively Small Cohort of Users Under Age 13 Raises Significant First Amendment Concerns

Again, as noted above, the ACLU supports the intent and letter of the COPPA statute. Likewise, we strongly support the Commission's laudable efforts to effectively implement and aggressively enforce COPPA. That said, COPPA was meant to apply very narrowly. Its notice-and-consent requirements were meant to apply to commercial sites and services that "target" children under the age of 13. COPPA's requirements would be inappropriate if applied to a site or service that predominantly "targets" any other demographic.

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[7] COPPA's "Acts prohibited" section, 15 U.S.C. § 6502(a)(1) (2006), bars the collection of personal information by both child-directed sites and services, and, in the second clause of the subparagraph, "any operator that has *actual knowledge* that it is collecting personal information from a child," which is independent from the definition of a child-directed site in 15 U.S.C. § 6501(10) (2006) but would be effectively supplanted and broadened by paragraph (d) in the proposed modified Rule.

The plain language of the proposed modification to "Web site or online service directed to children" would greatly extend the universe of sites and services subject to COPPA notice-and-consent requirements. While paragraphs (a) and (b) of the proposed definition are largely noncontroversial,[8] paragraph (c), which would extend the definition to a site or service that 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,"[9] raises significant concerns.

Based on 2010 census figures, there are approximately 57.06 million individuals in the resident population of the United States under the age of 13 (out of a total of 308.75 million).[10] This means that, even though on average internet usage is generally lower (and subject to far more active parental supervision) among the 0-13 demographic,[11] any site or service that is "likely" to attract more than 18.5% of users under the age of 13 could automatically be considered a child-directed site, subject to the notice-and-consent regime under COPPA.

Accordingly, two things are likely to happen under the proposed modification.

First, all sites and services (and especially sites and services that target young adults) are likely to, paradoxically, make their content more mature so as to reduce the likelihood that young children will visit the website. Not only does this raise First Amendment concerns in that it involves de facto government influence on the content of internet speech, it is likely not what the drafters of COPPA or the FTC intend.

Second, those sites that are "close calls" in terms of their likelihood to attract a large number of users under the age of 13 could overcompensate to reduce their exposure to COPPA liability, in one of two ways. First, many will simply opt to continue treating every visitor as a child under the age of 13 (even when four out of five visitors are likely to be teens over the age of 13 or even adults), requiring notice-and-consent and the other requirements of the law before collection or use of visitors' personal information.

But, there is a larger problem than just having sites or services with a small number of users under the age of 13 adopting COPPA notice-and-consent requirements. Sites and services that

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[8] The "totality of the circumstances" test for determining whether a site that does not actively target the 13-and-under demographic is still subject to the definition raises practical concerns about inconsistent enforcement by the Commission, but this is of less severity than extending the definition to sites or services with a relatively small percentage of users under age 13. *See Supplement Notice* at 46645.

[9] Unless the site or service actively age-screens before collecting any personal information, which raises even more serious constitutional concerns than just increasing the universe of affected sites or services, as discussed directly below.

[10] U.S. Census Bureau, The 2012 Statistical Abstract, Table 7, http://www.census.gov/compendia/statab/2012/tables/12s0007.pdf.

[11] *See* Aviva Lucas Gutnick et al., The Joan Ganz Clooney Center at Sesame Workshop, *Always Connected: The New Digital Media Habits of Young Children* (2011) (documenting how daily internet use increases with age among very young children).

fear the application of paragraph (c) may also use the age-screening safe harbor. That is, they will enjoy immunity from COPPA liability if they age-screen before collecting and using any personal information. This directly implicates one of the concerns that led the Supreme Court to uphold the injunction against enforcement of COPA in *ACLU II*. There, in distinguishing COPA's age verification provision from the "blinder racks" that serve to hide adult printed material from children, the Court explained:

> *The use of 'blinder racks' . . . does not create the same deterrent effect on adults as would COPA's credit card or adult verification screens. Blinder racks do not require adults to compromise their anonymity in their viewing of material harmful to minors, nor do they create any financial burden on the user. Moreover, they do not burden the speech contained in the targeted publications any more than is absolutely necessary to shield minors from its content.*[12]

Although the Commission suggests that the age-screening will be subject to circumvention by children who lie about their age (implying perhaps that the age-screen will not actually require age *verification*), the proposed definition does not address what level of verification would be required to trigger the safe harbor. Accordingly, many mixed-use sites may impose quite rigorous age-screening—including identity verification—before allowing young adults and adults to access their content. To the extent that age-screening would compromise an adult's anonymity in accessing what, in this case, is actually material that poses no risk of "harm" to minors (because it is meant for young children), it raises serious concerns.

Additionally, as we argued above, COPPA's notice-and-consent burdens are justified (and welcome) because they are narrowly focused on commercial sites and services that are overwhelmingly targeted at children under the age of 13, and are consequently interested in marketing commercial products or services to young children.[13] By extending COPPA's sweep to mixed-use sites, the proposed definition would burden far more speech than is necessary to effectuate its purposes, which is problematic under the above-quoted holding of *ACLU II*.

Finally, it should be noted that tipping the delicate COPPA balance in the direction the Commission proposes could result in a net decrease in the amount of internet content created for children. By heightening the risk of liability, internet developers of sites that appeal to a younger demographic may self-police for content that could attract children under the age of 13 (YouTube, for instance, could take down the Sesame Street channel). A similar danger applied in the *Reno* and COPA cases noted above, where overbroad online content regulation—in the name of protecting children—resulted in either the sanitization of online speech, or dissuaded

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[12] 322 F.3d at 259.

[13] YouTube, again, provides a good example of the potential risk of the proposed modification. YouTube has a significant amount of material that would appeal to very young children (and certainly to children approaching the age of 13). Currently, its terms of service simply request that children under the age of 13 not use the site. Under the proposed modification to the definition of a child-directed site, YouTube could conceivably feel it necessary to impose age-screening and identify verification for all users out of an abundance of caution. *See* YouTube Terms of Service ¶ 12, http://www.youtube.com/static?gl=US&template=terms.

speakers from speaking at all. Simply put, the government should not be in the business, directly or indirectly, of either influencing the content of online speech, or in creating an incentive for online content providers to self-censor.

3. Conclusion

In sum, we continue to applaud the Commission's efforts to protect Americans' privacy online. We also reiterate our support for COPPA, and for the COPPA Rule. The current expansive definition of personal information in the law and Rule, the requirement that sites and services keep personal information for only as long as possible and limit the information gathered to that which is necessary for the services offered, and the various information protection measures imposed by the Commission have all received our full backing.

Nevertheless, COPPA makes it more difficult for a covered site or service to operate, and its notice-and-consent requirements should be limited to those instances where they are truly necessary. We fear that the proposed modifications to the definition of "Web site or online service directed to children" potentially strike the wrong balance, and may indeed result in consequences that are unintended by the Commission (including a reduction in the amount of child-friendly material on the internet). Accordingly, we urge the Commission to revisit this definition and to, at the very least, delete proposed paragraphs (c) and (d).

Please do not hesitate to contact Legislative Counsel Gabe Rottman at or if you have any questions or comments.

Sincerely,

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