

**Before the
FEDERAL TRADE COMMISSION
Washington, DC**

In the Matter of)	
Request for Public)	
Comment on the Federal)	COPPA Rule Review
Trade Commission's)	P104503
Implementation of the)	
Children's Online Privacy)	
Protection Act Rule)	

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

I. Introduction and Summary

CTIA – The Wireless Association® (~~CTIA~~)¹ hereby submits these comments in response to the Federal Trade Commission's (~~FTC~~ or ~~Commission~~) request for public comment on the FTC's continuing implementation of the Children's Online Privacy Protection Rule (~~COPPA Rule~~).² First, while wireless services now offer access to the public Internet and to websites whose content is properly addressed by the COPPA Rule, short message service (~~SMS~~) text messaging falls outside of COPPA. Even though SMS text messaging when provided for commercial services, can, like communications generally, raise certain privacy concerns, a combination of Federal Communications Commission (~~FCC~~) oversight and active self-regulation by the wireless industry fully and effectively address these concerns.

¹ CTIA-The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (~~CMRS~~) providers and manufacturers, including cellular Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, 75 Fed. Reg. 17,089 (Apr. 5, 2010).

Second, COPPA should continue to cover only the defined functions of operating websites and online services that collect information from children and should remain platform-neutral. COPPA rightly does not focus on the platform for Internet access functions—whether a computer, a wireless device, an app store, or a game console—and instead focuses on information collection by the website or online services accessed through these platforms. COPPA’s obligation falls (and should remain) on the function of providing of Internet content and online services that knowingly collect information from children over the Internet and not on the function of providing the platforms used to access the Internet. COPPA should not be expanded to cover the provision of Internet access functions because it is the provision of websites and online content that Congress intended the rules to address.

Finally, COPPA’s ~~“actual knowledge”~~ standard should be maintained. As a bright line rule, it has provided clarity, and a change could cause uncertainty and ultimately chill innovation in the content and application space. Moreover, a change in the standard to require covered providers to analyze information to determine a particular user’s actual age would contradict the privacy goal of minimizing data collection.

II. COPPA Does Not Apply to SMS Text Messaging as a Matter of Law

COPPA applies to the collection and disclosure of personal information by commercial websites and online service providers and is thus expressly limited to online Internet-based services.³ The FTC has requested comment on whether the definition of ~~“collects or collection”~~ should ~~be~~ modified in any way to take into account online technologies and/or Internet activities and features that have emerged since the Rule was

³ See 15 U.S.C. § 6502(a)(1). COPPA defines the Internet as ~~“collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.”~~ See *id.* § 6501(6).

enacted or that may emerge in the future.”⁴ Some participants at the FTC’s COPPA Rule review roundtable suggested that SMS text messaging also should be deemed subject to COPPA. There are significant technology distinctions, however, between the online activities subject to COPPA and the use of SMS text messaging. These technical distinctions, in turn, preclude the FTC from taking such action as a matter of law and in any event render such action unnecessary.

The activities in question — on one hand, accessing websites on the public Internet via the Domain Name System (“DNS”) that uses a domain name that is translated to an Internet address, and on the other, the use of a telephone number or short code (a 5 or 6 digit number) for sending SMS text messages via a wireless carrier’s own network — are distinct technologies and fall under different regulatory regimes. As noted, COPPA is expressly limited to online Internet-based services.⁵ Many SMS text messages, however, utilize the recipient’s telephone number assigned to mobile voice service lines using the Short Message Peer-to-Peer (“SMPP”) and Simple Mail Transfer Protocol (“SMTP”) IP-based protocols, and none use the DNS addresses that are used by the Internet. SMS text messages traverse wireless service providers’ networks and short message service centers (“SMSCs”), not the public Internet.⁶ Such services are thus not Internet-based, as the FCC has previously

⁴ 75 Fed. Reg. at 17090 (¶ 8).

⁵ See 15 U.S.C. § 6502(a)(1).

⁶ SMS involves the storage and forwarding of messages, data conversion and data retrieval functions. SMS messages are not exchanged directly between the originator and recipient over an open circuit. Nor are they routed over the PSTN – or subject to the interconnection requirements of Title II of the Communications Act of 1934, as amended. Instead, SMS messages are always routed through a SMSC. Similarly, SMS does not rely on the Internet for delivery, a fact acknowledged by even the critics of SMS. See Public Knowledge, *et al.*, Petition for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, WT Docket No. 08-7 (Dec. 11, 2007) at 10-11.

recognized in its 2004 Order implementing its responsibilities under the CAN-SPAM Act.⁷ SMS text message communications are therefore not subject to COPPA in the first instance.

Modifying the COPPA Rule to cover SMS text messages would also risk unnecessary burdens and conflicts with other federal regulations.⁸ The FCC already regulates and imposes consent requirements on commercial SMS text messaging under the Telephone Consumer Protection Act (~~“TCPA”~~).⁹ The FCC has found that ~~“calls”~~ under the TCPA include SMS text messages to wireless phone numbers. Specifically, the FCC found that the TCPA’s prohibition on telephone solicitations and automatic telephone dialing systems ~~“encompasses both voice calls and text calls to wireless numbers including ... short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.”~~¹⁰ The TCPA and the FCC’s implementing rules already impose prior consent, consumer opt-out, and other safeguards for such communications.¹¹ Thus, under current law

⁷ See *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 15927, ¶ 17 (2004) (~~“phone-to-phone SMS is not captured by section 14 [of the CAN-SPAM Act] because such messages do not have references to Internet domains”~~).

⁸ See 75 Fed. Reg. at 17090 (¶ 5).

⁹ See 47 U.S.C. § 227; 47 C.F.R. § 64.1200. The TCPA’s restrictions on calls from automated telephone dialing systems (~~“autodialers”~~) apply to both commercial and noncommercial calls. See 47 U.S.C. § 227(b)(1)(A).

¹⁰ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115, ¶ 165 (2003); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (agreeing with FCC’s conclusion). With the exception of autodialer calls, see *supra* note 9, under the FCC’s interpretation the TCPA applies only to commercial ~~“telephone solicitation”~~ calls. Thus, user-originated messages that use either short codes or ten digit phone numbers are not covered by the TCPA unless they are ~~“commercial,” i.e., sent by a business for a business purpose.~~ See 47 C.F.R. § 64.1200(f)(12) (defining ~~“telephone solicitation”~~ as including a ~~“call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services,”~~ although calls with the recipient’s ~~“prior express invitation or permission”~~ are excluded).

¹¹ While CTIA does not opine whether the FCC’s determination that SMS text messages are TCPA ~~“calls”~~ is correct and notes that the regulatory classification of SMS under the Communications Act is the subject of a pending proceeding, see Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Non-Discrimination Rules*, WT Docket No. 08-7, DA 08-78 (WTB rel. Jan. 14, 2008), Comments of CTIA - The Wireless Association, WT Dkt. No. 08-7 (filed Mar. 14, 2008) (explaining in detail the specific technical characteristics supporting the conclusion that SMS fits squarely within the definition and precedent that determine an information service), the FCC’s determination has been adopted by a number of Federal courts in the context of TCPA private enforcement actions.

any extension of COPPA to SMS would create a duplicative and discordant regulatory regime.

III. Industry Self-Regulatory Initiatives for the Use of SMS Text Messages in Marketing to Children Are More Effective than Government Regulation Under COPPA

Imposition of COPPA restrictions on SMS text messaging services not only is contrary to the statute – it is unnecessary. The self-regulatory efforts of the wireless industry and other participants in the SMS text messaging marketplace already protect the privacy rights addressed in COPPA. The industry voluntarily has agreed to abide by COPPA obligations as applied to SMS services that are otherwise not subject to the statute. Moreover, the industry’s efforts go well beyond COPPA requirements to shield children from inappropriate content and provide parents with the tools to control their children’s use of wireless devices.¹²

A key self-regulatory program is that of the Mobile Marketing Association (–MMA”), a non-profit association with over 750 member companies, including all of the principal wireless carriers operating in the U.S. The *U.S. Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs* (“*Guidelines*”) have been adopted by all of the Nation’s Tier I wireless carriers as well as others, which have agreed to merge their individual consumer protection rules for mobile content into the *Guidelines*.¹³

As a general matter, the *Guidelines* address the appropriate marketing of products and services to their intended audiences and include specific requirements with regard to

¹² Among other protective measures, –the top five U.S. wireless carriers currently offer, at no cost, a relatively common set of parental controls including: 1) the ability to turn off Internet access; 2) the ability to filter web content; and 3) the ability to block unwanted text messages and phone calls.” *Beyond Voice: Mapping the Mobile Marketplace* (Federal Trade Commission Staff Report, Apr. 2009), p. 32, available at <http://www.ftc.gov/reports/mobilemarketplace/mobilemktgfinal.pdf>.

¹³ *U.S. Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs*, V5.1 (Mobile Marketing Association, May, 2010) (“*Guidelines*”), available at <http://www.mmaglobal.com/bestpractices.pdf>, p. 6. The present version of the *Guidelines* took effect on June 1, 2010.

marketing to children.¹⁴ Notably, the *Guidelines* also require industry participants to “comply with all applicable laws and industry standards that apply to advertising and marketing to children,” including “compliance with the FCC’s Children’s Television Act as it applies to the promotion of commercial websites, the FTC’s *Children’s Online Privacy Protection Act (COPPA)*, FTC advertising regulations, Children’s Advertising Review Unit (CARU) guidelines and various trade organization regulations such as those set forth by the MPAA and ESRB.”¹⁵ Among other enforcement mechanisms, wireless carriers screen all requests for the short message codes used in many mobile marketing campaigns for compliance with the *Guidelines*, and reject proposed campaigns that do not comply.¹⁶

By adopting and enforcing COPPA obligations for SMS services, the wireless industry voluntarily has extended those protections to these non-Internet based services. Given the industry’s record of responsible self-regulation, the Commission has no need to stretch its COPPA regulations to cover services that are outside the scope of the authority granted it by Congress.

The wireless industry’s adoption and enforcement of consumer protection best practices, including measures that promote children’s privacy, are driven by rapidly-evolving consumer expectations in a dynamic marketplace. Such private initiatives are inherently more effective and responsive than the regulatory process. Accordingly, the Commission should continue to rely upon self-regulation as the primary means of serving the interests of wireless service consumers.

¹⁴ *Guidelines*, sec. 1.4-3, p. 15.

¹⁵ *Id.* sec. 1.4-2, p. 15 (emphasis added).

¹⁶ See *Mobile Marketing Association Common Short Code Primer*, Revision No. 1.0 (June, 2006), p. 10, available at <http://www.mmaglobal.com/shortcodeprimer.pdf> (noting that a submission for a common short code “is first checked for compliance with the MMA Consumer Best Practices Guidelines, and those that don’t meet the guidelines typically are rejected immediately”).

IV. In Considering Recommendations to Revise COPPA, the FTC Must Preserve the Distinction Between the Operation of Websites or Online Services and Providing Internet Access

A. COPPA Applies to the Operation of Websites or Online Services that Knowingly Collect Information from Children – Not to Internet Access Functions

In addition to not applying the COPPA rules to SMS, the FTC should maintain the separation between the provision of Internet access functions and website operation functions. COPPA imposes obligations on operators of websites or online services directed to children or that have actual knowledge that they are collecting or maintaining personal information from a child under age 13.¹⁷ The statute defines an operator as ~~any~~ *any person who operates a website located on the Internet or an online service and who collects personal information from or about the users of or visitors to such website or online service . . .*”¹⁸ Thus, the obligation to comply with COPPA falls squarely on website operators and providers of online services that knowingly collect personal information from children online.

COPPA does not, however, apply to a service provider’s mere provision of Internet access functionality. In the Statement of Basis and Purpose accompanying issuance of its COPPA Rule, the FTC stated that merely providing access to the Internet without providing content or online services — *i.e.*, serving as a ~~conduit~~ *conduit through which the information flows*” — would not render a service provider a website or online service operator subject to COPPA.¹⁹ The FTC expressly stated, ~~Thus~~, [Internet Service Providers (~~ISPs~~”)] and cable operators that merely offer Internet access would not be considered operators under the

¹⁷ 16 C.F.R. § 312.3.

¹⁸ 15 U.S.C. § 6501(2)(A) (emphasis added).

¹⁹ Children’s Online Privacy Protection Rule; Final Rule (Statement of Basis and Purpose), 64 Fed. Reg. 59,888, 59,891 (Nov. 3, 1999).

Rule.”²⁰ Accordingly, simply providing a way to access the Internet does not create COPPA obligations.

Furthermore, as with SMS, it is not necessary to expand COPPA to reach the provision of Internet access using a wireless device. COPPA seeks to enhance parental involvement in children’s online activities in order to protect children’s privacy.²¹ Unlike a website that a child may visit without his or her parent’s knowledge, however, parents already control their child’s relationship to the wireless Internet access provider and have a variety of tools to manage their children’s use of wireless Internet access.²²

B. This Clear Delineation between Providing Online Content or Service Functions and Simply Providing Internet Access Functions Applies As Equally to Wireless Service Providers As It Does to Cable Operators, Fiber Network Operators, and Other ISPs.

Any revision of COPPA should acknowledge that the provision of wireless Internet access functions is distinct from the provision of Internet content or online service functions to which the rules apply. Although wireless Internet access may not have been widespread when the COPPA Rule was promulgated in 1999, wireless carriers now provide the same Internet access function as do other ISPs, such as cable operators and DSL providers. Such a technology-neutral approach is consistent with the liability limitations for ISPs found in the Communications Decency Act,²³ and the Digital Millennium Copyright Act.²⁴

²⁰ *Id.* at n. 52.

²¹ *See* An Examination of Children’s Privacy: New Technology and the Children’s Online Privacy Protection Act: Hearing Before the S. Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation , 111th Cong. 3 (Apr. 29, 2010) (statement of the Federal Trade Commission).

²² *See supra* note 12.

²³ The Communications Decency Act of 1996 states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

²⁴ The Digital Millennium Copyright Act limits the copyright infringement liability of a service provider that transmits, routes, or provides connections for copyrighted material traveling through its system or network. 17 U.S.C. § 512.

In addition, although wireless devices give users access to online applications and online service functions, these applications and service functions are wholly independent from the service providers and their Internet access functions. Many wireless service providers and wireless device makers offer users a wide variety of applications (~~–apps~~) through online stores. If these applications and services provide Internet content and knowingly collect information from children, they are analogous to COPPA’s definition of an ~~–operator~~ of a website or online service” and are thus subject to COPPA. Merely offering third party apps to consumers through online stores that house the apps does not, however, trigger COPPA obligations for the app store, device manufacturer, or service provider. The app store is analogous to Amazon.com offering for sale a computer game that includes an online component that collects information from children – in which case clearly the online game service, and not Amazon.com, would have COPPA obligations related to that application.

A further example of why COPPA liability should not attach to wireless service providers who provide Internet access functions is that increasingly a wireless carrier may not even play a role in its subscribers’ Internet access through a wireless device and may have no visibility into the subscriber’s online use at all. For example, new wireless devices often feature built-in Wi-Fi capability, which allow users to access the Internet through Wi-Fi networks that are not operated by users’ wireless carriers. In that regard as well, in order to facilitate innovation and promote broad consumer choices, as a general rule third party apps need to meet minimal standardized technical criteria to ensure device and service compatibility, but wireless Internet providers and device manufacturers do not have visibility into an application’s ~~–ollection~~” functionalities.

As the above discussion illustrates, COPPA rightly does not focus on the platform for Internet access functions—whether a computer, a wireless device, an app store, or a game console—and instead focuses on information collection by the website or online services accessed through these platforms. COPPA’s obligation falls (and should remain) on the providers of Internet content and online services that knowingly collect information from children over the Internet and not on the function of providing the platforms used to access the Internet.

Finally, as policy makers consider the obligations of wireless service providers under COPPA, we urge them to recognize that service providers must have the ability to reasonably manage their networks to prevent harmful content and applications.

V. The FTC Should Maintain COPPA’s Actual Knowledge Standard

COPPA currently imposes certain requirements on operators of websites or online services directed to children less than 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age.²⁵ CTIA supports retention of the current standard. As many participants at the FTC’s COPPA Rule review roundtable stated, COPPA has worked well because the actual knowledge standard gives operators clear guidance.²⁶

In promulgating the COPPA Rule, the FTC stated that it ~~has~~ taken very seriously the concerns expressed about maintaining children’s access to the Internet, preserving the interactivity of the medium, and minimizing the potential burdens of compliance on

²⁵ 16 C.F.R. § 312.3; 15 U.S.C. § 6502(a).

²⁶ See transcript of FTC Workshop, Protecting Kids’ Privacy Online - Reviewing The COPPA Rule (June 2, 2010), *available at* http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/transcripts/060210_sess2.pdf.

companies, parents, and children.”²⁷ The actual knowledge standard is an important factor in keeping the Internet interactive, innovative and available to children. A change to a less clear cut or more burdensome standard could reduce children’s Internet access, limit interactivity, and needlessly create uncertainty among content and application providers, which may ultimately chill innovation in the dynamic application sector of the wireless ecosystem.

In addition, changing the standard to require industry to engage in additional analysis of user information to determine a particular user’s actual age would contradict the privacy goal of minimizing data collection. As some roundtable participants noted, it is ultimately *less* protective of users’ privacy to require site operators to engage in additional data collection and analysis to determine the age of all users in an attempt to weed out users under age 13.²⁸

VI. Conclusion

The ways that children access and use the Internet have expanded greatly since the adoption of COPPA in 1999, with the emergence of wireless Internet access being just one example. Wireless devices now include many capabilities that provide access to a variety of content, such as news and entertainment, as well as offering safety benefits. To the extent that wireless services, such as SMS text messaging, can raise certain privacy concerns for users, including children, these concerns are adequately addressed through FCC oversight and the self-regulatory efforts of the wireless industry. Indeed, industry efforts not only protect the privacy rights addressed in COPPA but go well beyond COPPA requirements to

²⁷ Children’s Online Privacy Protection Rule; Final Rule (Statement of Basis and Purpose), 64 Fed. Reg. 59,888, 59,889 (Nov. 3, 1999).

²⁸ *See supra* note 26.

shield children from inappropriate content and provide parents with the tools to control their children's use of wireless devices.

COPPA should continue to cover only the function of operating websites and online services that collect information from children and it should remain platform-neutral. It should not be expanded to cover the provision of Internet access functions alone. Finally, COPPA's actual knowledge standard should be maintained. It has worked well as a bright line rule and a change to a less clear or more onerous standard could cause confusion or even contradict the privacy goal of minimizing data collection.

Respectfully submitted,

By: ____ _

Brian M. Josef
Director, Regulatory Affairs

Michael F. Altschul
Senior Vice President and General
Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

CTIA-The Wireless Association®
1400 Sixteenth Street, NW, Suite 600
Washington, DC 20036
(202) 785-0081

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