

*Before the*  
FEDERAL TRADE COMMISSION  
Washington, DC 20580

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

**COMMENTS OF**

The Center for Digital Democracy,  
American Academy of Child and Adolescent Psychiatry,  
American Academy of Pediatrics,  
Benton Foundation,  
Berkeley Media Studies Group,  
Campaign for a Commercial-Free Childhood,  
Center for Science in the Public Interest,  
Children Now,  
Consumer Action,  
Consumer Federation of America,  
Consumer Watchdog,  
Consumers Union,  
National Consumers League,  
Privacy Rights Clearinghouse,  
Public Health Institute,  
U.S. PIRG, and  
World Privacy Forum

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## **SUMMARY**

The Center for Digital Democracy, American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, Benton Foundation, Berkeley Media Studies Group, Campaign for a Commercial-Free Childhood, Center for Science in the Public Interest, Children Now, Consumer Action, Consumer Federation of America, Consumer Watchdog, Consumers Union, National Consumers League, Privacy Rights Clearinghouse, Public Health Institute, U.S. PIRG, and World Privacy Forum are pleased that the FTC has begun a comprehensive review of its children's privacy regulations. In general, the Children's Online Privacy Protection Act (COPPA) and the FTC rules implementing it have helped to protect the privacy and safety of children online.

Recent developments in technology and marketing practices require that the COPPA rules be updated and clarified. When Congress passed COPPA in 1998, computers provided the only means of accessing websites and online services. Today, adults and children have many other ways to access the Internet and online services including mobile phones, gaming consoles, and interactive television. In addition, marketers have developed very sophisticated methods of collecting data and are using that data to target individuals with personalized marketing messages. These developments have increased the risks to children's privacy.

Fortunately, COPPA was drafted broadly and with an eye to the future, so that most of the necessary updates can be made under the FTC's existing statutory authority. COPPA generally prohibits the operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting information from a child, from collecting personal information without (1) providing notice of what information is being collected, how the operators uses such information, and what the operator's disclosure practices are, and (2)

obtaining verifiable parent consent for the collection, use or disclosure of the personal information. The FTC should clarify its understanding of or define several of these key terms in the statute.

First, the Commission should update the definition of personal information to reflect the evolving world in which persistent cookies, IP addresses, geolocation data, and even seemingly anonymous combinations of data such as age, zip code, and gender are collected and used to track individuals and to target personalized market messages to them, a practice known as “behavioral targeting.”

Second, the Commission should clarify that the language “website located on the Internet or an online service,” covers a broad range of digital threats to children’s privacy. Regardless of the device used to access a website on the Internet (e.g. mobile device, game console, interactive television set), that interaction is covered by COPPA because a “website located on the Internet or online service” is being accessed. COPPA also covers other online services that may not connect to a website on the Internet but nonetheless provide interactivity and collect or use personal information from children.

Third, the FTC should clarify the meaning of a website or online service “directed at children.” It should use the same definition for websites targeted to children that it employed in its Food Marketing Report, *i.e.*, any website or portion of a website that audience demographic data indicates that 20% or more of visitors are children ages 2-11; prominently features child-oriented animated or licensed characters or a celebrity endorser highly popular with children; uses language, such as “kid,” “child,” “tween,” or similar words; prominently depicts models or characters who appear to be younger than age 13; or promotes child-oriented themes, activities, incentives, products, or media. The FTC should also clarify that advertisements targeted to

children based on behavioral indicators meet COPPA's "directed to children" standard.

Moreover, the FTC should clarify that when a website or online service operator, including advertising networks or data exchanges, claims that it can deliver an advertisement to a child in a specific age group, it has actual knowledge that it is collecting or using information from a child.

The techniques for collecting and using data for targeted marketing are largely hidden, not well-understood by the public, and frequently change. Thus, the FTC should require major websites, ad networks, social networks, and other online service operators that collect data from an audience with 20% or more children under 13 to periodically inform the FTC about the types of data they are collecting; how they collect it; how they use it; and how they comply with COPPA. Unless hidden data collection practices are disclosed, the FTC cannot assess whether companies are complying with the existing rules or identify where the rules or law may need to be strengthened.

The FTC should also evaluate the effectiveness of the safe harbor program. First, it should determine what proportion of child-directed websites and online service operators participate in a safe harbor program. Second, it should assess the effectiveness of the safe harbor programs by requiring annual reports about their enforcement efforts. Third, to ensure that the safe harbor programs are keeping up to date on new threats to children's privacy, it should require them to apply for recertification every five years.

The Commission should instigate prompt investigations any time it receives credible evidence of possible COPPA violations. For example, certain statements made at the June 2, 2010 Roundtable suggest that some operators may be violating COPPA by abusing one of the limited exceptions to parental consent.

Finally, to provide at least some protection for children under 13 that visit sites intended for teens, and to protect teens, who are also vulnerable to marketing, albeit for different reasons than younger children, the FTC should ensure that teen-oriented sites comply with Fair Information Practices.

## TABLE OF CONTENTS

SUMMARY .....	ii
TABLE OF CONTENTS.....	vi
I. Recent Developments in Technology and Marketing Practices Threaten Children’s Privacy .....	6
A. The Number and Variety of Platforms Used to Access Website and Online Services and to Collect Data Has Vastly Expanded .....	7
1. Mobile Phones .....	7
2. Video Gaming.....	11
3. Interactive Television.....	15
4. Digital Signage.....	18
B. New Advertising Techniques Present Increased Risks to Children’s Privacy and of Unfair or Deceptive Practices.....	20
1. Behavioral Targeting .....	21
2. Advertising Networks, Advertising Exchanges and Data Exchanges .....	22
II. The FTC Should Takes Steps to Ensure the Continued Effectiveness of COPPA in Light of New Developments.....	24
A. Personal Information.....	25
1. Persistent Identifiers.....	26
2. Location .....	27
B. Online Service.....	28
C. Operator of a Website or Online Service.....	29
D. Website or Online Service Directed to Children and Actual Knowledge .....	31
III. The Commission Should Be More Proactive in Protecting Children's Privacy Online .....	35
A. Reports on Children's Privacy Online.....	35
B. The FTC Should Make Improvements to the Safe Harbor Program .....	37
C. The Commission Should Promptly Investigate Potential COPPA Violations.....	37
IV. The FTC Should Seek to Protect the Privacy of Adolescents .....	40
CONCLUSION.....	43

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**COMMENTS**

The Center for Digital Democracy, American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, Benton Foundation, Berkeley Media Studies Group, Campaign for a Commercial-Free Childhood, Center for Science in the Public Interest, Children Now, Consumer Action, Consumer Federation of America, Consumer Watchdog, Consumers Union, National Consumers League, Privacy Rights Clearinghouse, Public Health Institute, U.S. PIRG, and World Privacy Forum ("CDD et al."), by their attorneys, the Institute for Public Representation, respectfully submit these comments in response to the Federal Trade Commission’s ("FTC" or "Commission") request for comment.<sup>1</sup>

CDD et al. are a group of nonprofit public interest organizations interested in protecting children’s privacy. The Center for Digital Democracy (CDD) is a national nonpartisan organization dedicated to promoting responsible use of new digital communications technologies, especially on behalf of children and their families. CDD’s Executive Director was also a co-founder of the Center for Media Education, the leading organization that worked with the FTC to help establish the Children’s Online Privacy Protection Act ("COPPA" or "the Act").

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<sup>1</sup> *Request for Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule*, 75 Fed. Reg. 17089 (Apr. 5, 2010) (“the Notice”).

The American Academy of Child and Adolescent Psychiatry (AACAP) is a national professional medical association of over 7,500 doctors dedicated to treating and improving the quality of life for children affected by mental, behavioral, or developmental disorders. Since 1953 AACAP has worked to inform the public, advance medical education, collaborate as a member of the American Medical Association House of Delegates, and liaise with government to respond to national concerns over healthcare and socio-economic issues affecting children at the local and national level.

American Academy of Pediatrics (AAP) is an international organization of 60,000 pediatricians committed to the attainment of optimal physical, mental, and social well-being for all infants, children, adolescents, and young adults. AAP educates pediatric professionals and the public at large, with specialized councils in Clinical Information Technology and Communications and Media. AAP funds and executes research, publishes a variety of journals, and through state and federal advocacy, seeks to ensure that children's health needs are taken into consideration as child safety legislation and public policy are developed.

The Benton Foundation works to ensure that media and telecommunications serve the public interest and enhance our democracy. The Benton Foundation pursues this mission by seeking policy solutions that support the values of access, diversity and equity, and by demonstrating the value of media and telecommunications for improving the quality of life for all.

Berkeley Media Studies Group (BMSG), a Public Health Institute project, was founded in 1993 to help public health advocates make their voices heard in news media, and increase their participation in the democratic process. Public health groups come to BMSG when they want to work more effectively with journalists, and journalists come to BMSG when they are interested

in deepening their reporting on public health issues. BMSG's work is anchored in a public health approach and based on empirical studies of the media environment. BMSG conducts and commissions research on how news, entertainment, and advertising present health and social issues. BMSG is currently collaborating with the Center for Digital Democracy and others to analyze how digital marketing is used to market food, beverages, alcohol, and tobacco.

The Campaign for a Commercial-Free Childhood (CCFC) is a non-profit national coalition of health care professionals, educators, advocacy groups, and concerned parents. CCFC's mission is to reclaim childhood from corporate marketers. CCFC works for the rights of children to grow up—and the freedom for parents to raise them—without being undermined by commercial interests. CCFC advocates for the adoption of government policies that limit corporate marketers' access to children. CCFC mobilizes parents, educators, and health care providers to stop the commercial exploitation of children.

The Center for Science in the Public Interest's (CSPI) twin missions are to conduct innovative research and advocacy programs and to provide consumers with useful information about their health and well-being, which is published in the largest circulation health newsletter in North America. CSPI conducts research on food, alcohol, health, the environment, and other issues related to science and technology in order to provide current and objective information to the public and policymakers. CSPI represents citizens' interests before regulatory, judicial, and legislative bodies on food, alcohol, health, the environment, and other issues related to science and technology.

Children Now is a national organization for people who care about children and want to ensure that they are the top public policy priority. Children Now recently released a report on food marketing: *The Impact of Industry Self-Regulation on the Nutritional Quality of Foods*

Advertised on Television to Children. The report raises serious doubt about the future viability of industry self-regulation to help address the growing epidemic of childhood obesity.

Consumer Action, founded in 1971, is a national non-profit education and advocacy organization committed to inclusive consumer protection and multilingual consumer education. Consumer Action advocates for consumer rights both in the media and before lawmakers nationwide, and provides community and individual services to support financially and socio-politically literate consumers.

Consumer Federation of America (CFA) is an association of some 300 nonprofit consumer groups that seeks to advance the consumer interest through research, advocacy, and education.

Consumer Watchdog, formerly The Foundation for Taxpayer and Consumer Rights, is a consumer rights organization which advocates on behalf of taxpayers and consumers with a focus on insurance, health care, political reform, and privacy protection. Over the years, Consumer Watchdog has saved Americans billions of dollars and improved countless peoples' lives by speaking out on behalf of patients, ratepayers and policyholders.

Consumers Union (CU) is dedicated to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumer Union's staff consists of lobbyists, grassroots organizers, and outreach specialists who work with the organization's more than 600,000 online activists. It also employs several hundred mystery shoppers and technical experts to buy and test products which it evaluates. CU publishes Consumer Reports, one of the top-ten-circulation magazines in the country, and its combined publications have over 8 million subscriptions.

The National Consumers League (NCL) is America's oldest consumer organization, representing consumers and workers on marketplace and workplace issues since our founding in 1899. NCL provides government, businesses, and other organizations with the consumer's perspective on concerns including child labor, privacy, food safety, and medication information.

Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization, established in 1992 and based in San Diego, CA. It invites consumers' inquiries and troubleshoots their complaints. The PRC shares information on emerging issues with policymakers, the media, industry, and consumer advocates. It represents consumers' interests in local, state and federal public policy proceedings, including legislative testimony, regulatory agency workshops, and task forces. Its website provides over 50 guides with in-depth information on ways consumers can protect their privacy and exert their rights.

Public Health Institute is dedicated to promoting health, well-being, and quality of life for people throughout California, across the nation, and around the world. As one of the largest and most comprehensive public health organizations in the nation, Public Health Institute is at the forefront of research and innovations to improve the efficacy of public health nationally and internationally. For over forty years it has promoted a philosophy of public health that acknowledges the complex web of factors that contribute to health and related social problems, and has recognized the integral role that all institutions and sectors play in promoting healthy choices and creating healthy environments.

U.S. PIRG, the federation of state Public Interest Research Groups (PIRGs), stands up to powerful special interests on behalf of the American public, working to win concrete results for our health and our well-being. With a strong network of researchers, advocates, organizers and students in state capitols across the country, U.S. PIRG takes on the special interests on issues,

such as product safety, political corruption, prescription drugs and voting rights, where these interests stand in the way of reform and progress. U.S. PIRG's mission is to deliver persistent, result-oriented public interest activism that protects our health, encourages a fair, sustainable economy, and fosters responsive, democratic government.

The World Privacy Forum is a national and international research group founded in 2003, focusing on in-depth research, analysis, and consumer education in the area of privacy. It is the premier privacy-focused public interest research group conducting independent, longitudinal work. World Privacy Forum reports have broken ground in important areas of privacy threats, including medical identity theft. In addition to its research, World Privacy Forum members have given testimony before the FTC, the FDA, and other government bodies concerning privacy issues and inquiries.

In general, CDD et al. believe that the Act and the FTC's rules implementing it have been effective in protecting the privacy and safety of young children online. However, recent developments in technology and marketing practices require that the FTC's rules be updated and clarified.

### **I. Recent Developments in Technology and Marketing Practices Threaten Children's Privacy**

This section describes some of the new developments over the last decade that have put children's privacy at much greater risk. Today's children are growing up in a ubiquitous digital media environment where mobile devices, instant messaging, social networks, virtual reality, avatars, interactive games, and online video have become ingrained in their personal and social experiences. Members of this generation of young people are, in many ways, living their lives online. As *Advertising Age* reported, "more than 16 million children aged 2 to 11 are online, making for a growth rate of 18% in the period 2004 to 2009—the biggest increase among any

age group, according to Nielsen."<sup>2</sup> The same report explains that according to a Nielsen Online survey conducted in July 2009, "time spent online for children ages 2 to 11 increased from about 7 hours to more than 11 hours per week, or a jump of 63% over five years."<sup>3</sup>

**A. The Number and Variety of Platforms Used to Access Website and Online Services and to Collect Data Has Vastly Expanded**

When Congress passed COPPA in 1998, the only means of obtaining access to the Internet and online services was the computer. Today, children have many other ways to access the Internet and online services including mobile phones, gaming consoles, and interactive television. As a consequence, marketers also have many more ways to collect data from the users of these devices.

**1. Mobile Phones**

In its report on mobile marketing, the FTC Staff recognized that "the increasing use of smartphones to access the mobile web presents unique privacy challenges, especially regarding children."<sup>4</sup> The trends identified in that report have accelerated over the past year, and some new issues regarding mobile phones have surfaced.

Mobile phone use in America continues to grow, particularly among children. While more than four out of every five Americans already own a mobile phone,<sup>5</sup> mobile phone use is

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<sup>2</sup> Beth Snyder Bulik, *On-Demand Generation Will Pay to Play*, Advertising Age, Apr. 12 2010, [http://adage.com/digital/article?article\\_id=143220](http://adage.com/digital/article?article_id=143220).

<sup>3</sup> *Id.*

<sup>4</sup> FTC, *Beyond Voice: Mapping the Mobile Marketplace 3* (2009), available at <http://www.ftc.gov/reports/mobilemarketplace/mobilemktgfinal.pdf>.

<sup>5</sup> Interactive Advertising Bureau, *Mobile Buyer's Guide 4* (2009), available at [http://www.iab.net/iab\\_products\\_and\\_industry\\_services/508676/mobile\\_guidance/mobile\\_buyers\\_guide](http://www.iab.net/iab_products_and_industry_services/508676/mobile_guidance/mobile_buyers_guide).

still increasing among young teens and children.<sup>6</sup> Increasingly, young children are obtaining their own mobile phones, with the number of twelve-year-olds owning cell phones reaching 58% in 2009, up from 18% in 2004.<sup>7</sup>

A recent research survey of media usage by children ages 6-12, found that getting a cellphone has come to serve as a marker of development for children.<sup>8</sup> Parents often decide that their child is mature enough for a cellphone around age 8 or 9. Not only does this provide the child with the ability to watch video and play games, but it provides marketers unique access to children as young as 8 or 9.

Marketers are very interested in reaching children for several reasons. Children directly spent \$42 billion of their own money in 2009.<sup>9</sup> In addition, they directly or indirectly influenced family purchases amounting to more than \$700 billion.<sup>10</sup> Moreover, children are the "future consumers for all goods and services."<sup>11</sup>

Mobile marketing—combining text messaging, mobile video, and other new applications—is a particularly effective way to reach and engage children. As a recent Kaiser

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<sup>6</sup> Amanda Lenhart et al., Pew Internet & American Life Project, *Teens and Mobile Phones* 14 (2010), available at <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010.pdf>.

<sup>7</sup> *Id.* According to the latest industry data, roughly half of all children use a mobile phone by age 10, and by age 12, fully three fourths of all children have their own mobile phone. Pete Blackshaw, *A Pocket Guide to Social Media and Kids*, Nielsen Wire, Nov. 2, 2009, <http://blog.nielsen.com/nielsenwire/consumer/a-pocket-guide-to-social-media-andkids/>. As one media executive commented, the mobile phone is “the ultimate ad vehicle... the first one ever in the history of the planet that people go to bed with.” A. Klaassen, *Why Google Sees Cellphones as the ‘Ultimate Ad Vehicle,’* Advertising Age, Sept. 8, 2008, [http://adage.com/mobilemarketingguide08/article?article\\_id=130697](http://adage.com/mobilemarketingguide08/article?article_id=130697).

<sup>8</sup> Donna Sabino and Julianne Schiffer, Ipsos, *A Look at The Media Life of the American Family* (June 15, 2010), <http://www.ipsos-na.com/knowledge-ideas/media-content-technology/webinars/?q=inside-the-media-life-of-the-american-family> (Ipsos LMX Family Study Podcast).

<sup>9</sup> *Id.* This amount increased from \$6 billion in 1990.

<sup>10</sup> *Id.* This amount is up from \$50 billion in 1990.

<sup>11</sup> *Id.*

Family Foundation study noted, "Over the past five years,... cell phones... have become true multi-media devices: in fact, young people now spend more time listening to music, playing games, and watching TV on their cell phones (a total of :49 daily) than they spend talking on them (:33)." <sup>12</sup>

Advertisers view mobile as "the next great advertising medium" given mobile's ubiquitous status among consumers.<sup>13</sup> The advertising industry anticipates Internet advertising techniques migrating to mobile as the Internet continues to permeate mobile devices.<sup>14</sup> Jeff Chester and Kathryn Montgomery have documented a variety of mobile marketing campaigns for food and beverage products that are highly appealing to children.<sup>15</sup>

Mobile also presents new advertising opportunities, such as location-based advertising<sup>16</sup> and in-application advertisements.<sup>17</sup> Location-based advertising is one of the fastest growing segments of the mobile advertising market. Using GPS or cell phone tower data, it is possible to pinpoint a user's exact location—a process known as geolocation.<sup>18</sup> In fact, one researcher

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<sup>12</sup> Kaiser Family Foundation, *Daily Media Use Among Children and Teens Up Dramatically from Five Years Ago*, Jan. 20, 2010, <http://www.kff.org/entmedia/entmedia012010nr.cfm> (last visited June, 2010).

<sup>13</sup> IAB, *IAB Platform Status Report: A Mobile Advertising Overview 1* (July 2008), available at [http://www.iab.net/media/file/moble\\_platform\\_status\\_report.pdf](http://www.iab.net/media/file/moble_platform_status_report.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> Jeff Chester and Kathryn Montgomery, *Interactive Food and Beverage Marketing: Targeting Children & Youth in the Digital Age* 32-33 (May 2007), available at <http://www.digitalads.org/documents/digiMarketingFull.pdf>; Jeff Chester and Kathryn Montgomery, *Interactive Food & Beverage Marketing: An Update* 9 (July 2008), available at [http://www.digitalads.org/documents/NPLAN\\_digital\\_mktg\\_memo.pdf](http://www.digitalads.org/documents/NPLAN_digital_mktg_memo.pdf).

<sup>16</sup> IAB, *supra* note 5, at 8.

<sup>17</sup> IAB, *supra* note 5, at 7.

<sup>18</sup> Monique Cuvelier, *Where in the World Am I?*, *Smart Computing in Plain English*, May 2001, at 176-79. available at <http://www.smartcomputing.com/editorial/article.asp?article=articles/archive/r0502/42r02/42r02.asp&guid=>.

projects that spending on geolocation-based advertising will jump from \$34 million in 2009 to \$4 billion in 2015 – a 12,000% increase.<sup>19</sup>

As recently reported in the *New York Times*, "Loopt is one of several start-ups — including Foursquare, Shopkick and Gowalla — that are experimenting with ways to use cellphones to bridge the digital and physical worlds and turn the tasks of everyday life, like buying coffee and running errands, into a game."<sup>20</sup> In these games, people "compete to earn 'achievements' and become 'boss' of certain locations."<sup>21</sup> Burger King is one of many companies using this application. It offers a soda with a sandwich to people who check in three times.<sup>22</sup> In addition, Burger King can "use the data they collect from people's cellphones to learn more about who their customers are and how they behave."<sup>23</sup>

Geolocation's threat to privacy extends beyond advertising. Information collected through geolocation is especially sensitive given that it can allow for a child to be physically contacted wherever he or she is, at any time. The descriptively named web site pleaserobme.com demonstrated some of the concerns with such services by aggregating real time location information that users voluntarily shared on Twitter.<sup>24</sup> The risks of using such services can be

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<sup>19</sup> Dave Curry, *How to Survive Geolocation's Looming Apocalypse*, Advertising Age, March 29, 2010, [http://adage.com/digitalnext/article?article\\_id=143036](http://adage.com/digitalnext/article?article_id=143036).

<sup>20</sup> Claire Cain Miller, *Cellphone in New Role: Loyalty Card*, NY Times, May 31, 2010, <https://www.nytimes.com/2010/06/01/technology/01loopt.html>; Josh Smith, *FourSquare, Starbucks start location-based discounts*, WalletPop, May 18, 2010, <http://www.walletpop.com/blog/2010/05/18/foursquare-starbucks-start-location-based-discounts/>.

<sup>21</sup> *Id.*

<sup>22</sup> A user "checks-in" by being at the location and loading the app for the service. When they check in, the app transmits their location, associating this with a business or a landmark. See FAQ, FourSquare, <http://foursquare.com/help/> (last accessed June 29, 2010).

<sup>23</sup> Miller, *supra* note 20; See also Claire Cain Miller, *Starbucks Fans Can Become 'Baristas' on Foursquare*, NY Times, Mar. 11, 2010, <http://bits.blogs.nytimes.com/2010/03/11/starbucks-fans-can-become-a-barista-on-foursquare/>.

<sup>24</sup> *Location-Based Services on Mobile Phones: Follow Me*, The Economist, Mar. 6, 2010, at 92.

magnified for children, who will often fail to comprehend the significance of sharing such information. Even more concerning, a child's location information can be collected automatically,<sup>25</sup> so neither the parent nor the child knows about, much less consents to, such collection.

Applications downloaded to smart phones ("apps") can also be used to collect information from and send targeted advertisements to children. The iPhone App Store, for example, lists hundreds of applications directed to children, many of which can be obtained for free and include advertisements. For example, Animal Alphabets Lite by Better Logic provides "flash cards [that] are designed for kids that are 3 – 6 years old."<sup>26</sup> Animal Alphabets Lite has ads provided by, AdMob, which was recently acquired by Google, and serves ads inside apps on mobile phone platforms.<sup>27</sup> A reviewer of another AdMob supported app for children, ABC Free, commented, "I can't let my kids play with this because they'll click on the ads! And it keeps asking to use our location...why???"<sup>28</sup>

## 2. Video Gaming

Since the passage of COPPA, gaming networks have evolved as a means by which children connect with each other and share personal information. Online gaming has grown from a small pool of computer-based games into a multi-platform phenomenon, operating not only on mobile devices but also on gaming consoles. Steadily growing online game revenues are

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<sup>25</sup> See Ramaprasad Unni and Robert Harmon, *Perceived Effectiveness of Push vs. Pull Mobile Location-Based Advertising*, 7 J. of Interactive Advertising 28-29 (Spring 2007).

<sup>26</sup> iTunes, *Animal Alphabets Lite*, <http://itunes.apple.com/my/app/animal-alphabets-lite/id362733372?mt=8#> (last visited June 29, 2010).

<sup>27</sup> *Id.*; Adam Ostrow, *BREAKING: Google Acquires Mobile Ad Network AdMob for \$750 Million*, Mashable, Nov. 9, 2009, <http://mashable.com/2009/11/09/google-acquires-admob/>.

<sup>28</sup> MatsuVixen, *Not Kid Friendly*, Apple App Store, <http://itunes.apple.com/us/app/abcs-free/id304814569?mt=8> (last visited June 29, 2010)(reviewing ABCs Free app).

expected to reach \$24.8 billion by 2013,<sup>29</sup> and console based online gaming networks such as Microsoft's Xbox Live constitute 25% of all online gaming.<sup>30</sup> The proliferation of next-generation game consoles capable of online play has been dramatic; by 2012 approximately 190 million households will use a next-generation console, and 80% of these households will have this console connected to the Internet.<sup>31</sup>

Children are responsible for 25% of console games purchased.<sup>32</sup> Young children, especially those aged 6 to 7, are a burgeoning category of console gamers.<sup>33</sup> Comprehensive virtual worlds, the kind used by both computer and console based online gaming, provide an immersive effect for children, and 71% of the children who play such games feel their virtual worlds are "very important to them."<sup>34</sup> Such virtual worlds can incorporate social networking style interaction between players and exert significant influence on children.<sup>35</sup>

Two major gaming networks are Sony's Playstation Network and Microsoft's Xbox Live. Both offer similar functionality to their users: the ability to play games and chat with friends,

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<sup>29</sup> Gavin Ogden, *Study: Online Game Revenue To Fuel Market Growth*, Edge, Feb. 18, 2010, <http://www.edge-online.com/news/study-online-game-revenue-to-fuel-market-growth>.

<sup>30</sup> Ben Parfitt, *360 claims half of all online console gaming*, MCV, Mar. 10, 2009, <http://www.mcvuk.com/news/33490/360-claims-half-of-all-online-console-gaming>.

<sup>31</sup> Alex Moskalyuk, *190 mln households to have consoles by 2012*, IT Facts, ZDNet, Dec. 16, 2008, <http://www.zdnet.com/blog/itfacts/190-mln-households-to-have-consoles-by-2012-148-mln-of-those-will-have-internet-connected-consoles/15282>.

<sup>32</sup> Lucy Handley, *GAMING: Games console at hub of family entertainment*, Marketing Week, June 10, 2010 (citing study conducted by Turner Media Innovations).

<sup>33</sup> *Id.*

<sup>34</sup> Bill Hendrick, *Online game lets kids do good works in cyberspace*, Atlanta Journal-Constitution, Jan. 06, 2009, [http://www.ajc.com/business/content/metro/stories/2009/01/06/elf\\_island.html](http://www.ajc.com/business/content/metro/stories/2009/01/06/elf_island.html).

<sup>35</sup> *Id.*

download demos and full games, and access online media.<sup>36</sup> Although these services did not exist ten years ago, they now have over 50 million accounts combined.<sup>37</sup>

The types of user information collected by these online gaming consoles overlaps, and sometimes exceeds, the data captured during traditional web browsing. Gamers release personal information when registering their accounts. In addition, behavior is tracked as they play games. Microsoft can track an individual's behavior "across the Web, mobile and Xbox platforms when consumers sign into their Windows Live account."<sup>38</sup> Accounts are linked through Hotmail email, Xbox live, and Windows Live accounts, all contributing to behavioral profiles.<sup>39</sup> When a child on a mobile phone uses that same ID, perhaps on a Windows Mobile operated phone or on a Microsoft online service, Microsoft can link the behavior on the Web with behavior on their mobile phone and Xbox.<sup>40</sup> This facilitates targeting and allows advertisers to track game users to the degree that they can monitor gamers exposed to the ads to see if they then go online and use the advertised product.<sup>41</sup> By monitoring user IDs and tracking cookies across Microsoft

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<sup>36</sup> Xbox, *Join Xbox Live*, <http://www.xbox.com/en-US/live/joinlive.htm> (last visited May 3, 2010); Playstation Network, <http://us.playstation.com/psn/index.htm> (last visited May 3, 2010).

<sup>37</sup> Playstation Network, <http://us.playstation.com/psn/index.htm> (last visited May 3, 2010); Xbox, *An Open Letter from Xbox LIVE General Manager Marc Whitten*, <http://www.xbox.com/en-US/press/2010/0205-whittenletter.htm> (last visited May 3, 2010).

<sup>38</sup> Sullivan, Laurie, *Microsoft Links Behavioral Targeting Across Web, Mobile, Xbox*, Behavioral Insider, Sept. 23 2009, [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=114165](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=114165); see Laurie Sullivan, *Bing In-Game Advertising Campaign Pushes Players To Search Engine*, SearchBlog, Friday, May 21, 2010, [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=128691](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=128691).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Marius Oiaga, *Massive's In-Game Advertising On Par With Other Forms of Digital Marketing*, Softpedia, May 21, 2010, <http://news.softpedia.com/news/Massive-s-In-Game-Advertising-on-par-with-Other-Forms-of-Digital-Marketing-142655.shtml>.

affiliated sites, it was determined that in-game advertising increased the percentage of gamers using an advertised service by 108%, and two-thirds of those were new users.<sup>42</sup>

The amount of advertising in video games is also growing. This advertising is increasingly dynamic and can "be targeted to meet specific geographic needs and timing needs."<sup>43</sup> Conservative estimates predict the global in-game advertising market to be worth one billion dollars by 2014,<sup>44</sup> while more aggressive figures predict it will be worth two billion dollars by 2012.<sup>45</sup> The profitability and effectiveness of online in-game advertising, both console and computer, indicate it will continue to grow.<sup>46</sup>

Privacy threats can also arise from the increasing technical capabilities of video game consoles. Microsoft recently unveiled the Kinect voice and motion-control sensor system for the Xbox.<sup>47</sup> Kinect includes an RGB camera that enables facial recognition and more.<sup>48</sup> Kinect can identify the user playing a game, track full body movements, and view the entire room with 3-D

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<sup>42</sup> *See id.*

<sup>43</sup> Massive Incorporated, *Ad Types and Specs*, <http://www.massiveincorporated.com/adtypesandspecs.html> (last visited May 6, 2010) (Xbox advertising); *see also* Double Fusion, *In-Game Advertising. Putting Advertising in Play*, <http://www.doublefusion.com/> (last visited June 29, 2010) (Xbox advertising); Press Release, Double Fusion, *Double Fusion Brings Dynamic In-Game Ads to Dead to Rights: Retribution*, Sept. 28, 2009, available at <http://au.ps3.ign.com/articles/102/1028834p1.html>.

<sup>44</sup> JJ Richards, *In-Game Advertising "Facts are Stubborn Things..."*, Microsoft Advertising Blog, Oct. 4, 2009, <http://community.microsoftadvertising.com/Blogs/Advertising/archive/2009/10/05/in-game-advertising-facts-are-stubborn-things.aspx>.

<sup>45</sup> Alasdair Reid, *Media: All About ... In-game advertising*, Campaign, April 2, 2010.

<sup>46</sup> Robin Wauters, *Study: In-Game Video Advertising Trumps TV Advertising In Effectiveness*, TechCrunch, Mar. 24, 2009, <http://techcrunch.com/2009/03/24/study-in-game-video-advertising-trumps-tv-advertising-in-effectiveness/>; Massive Inc., *Case study – Significant Findings*, <http://www.massiveincorporated.com/casestudies.html> (last visited June 29, 2010).

<sup>47</sup> Press Release, Microsoft, *Kinect Fact Sheet*, June 2010, [www.microsoft.com/presspass/presskits/xbox/docs/KinectFS.docx](http://www.microsoft.com/presspass/presskits/xbox/docs/KinectFS.docx).

<sup>48</sup> *Id.*

imaging.<sup>49</sup> It is able to capture enough personal information to be used for biometric security applications.<sup>50</sup> This will allow Kinect and Xbox advertising to determine when children are playing, what their gender is, and to analyze their game preferences and behavior. The advertising applications of such specific user data have unprecedented potential for invasiveness that has been recognized by advertisers and watchdogs alike.<sup>51</sup>

### 3. Interactive Television

It is expected that interactive television will soon become another way to collect information and target ads to children. Some interactivity on television has existed for the past decade on many cable systems via set-top boxes and services that offer interactive program guides,<sup>52</sup> VOD (Video On Demand),<sup>53</sup> and digital video recorders<sup>54</sup> ("DVRs"). More recently, however, multichannel video programming distributors and set-top box and television manufacturers have introduced technology that creates an opportunity for television commercial interactivity: advertisements that offer interactive elements—such as voting and polling, request for information services, t-commerce, telescoping, and addressability components—during the

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<sup>49</sup> *Id.*

<sup>50</sup> Kevin McLaughlin, *Microsoft Partners See Kinect Going Beyond Games*, Channel Web, June 17, 2010, <http://www.crn.com/software/225700575>.

<sup>51</sup> Chris Lange, *Project Natal's Ad Potential*, Adweek, April 21, 2010, [http://www.adweek.com/aw/content\\_display/community/columns/other-columns/e3i9d00b780a7553c2191ffbfd21f9ace0c](http://www.adweek.com/aw/content_display/community/columns/other-columns/e3i9d00b780a7553c2191ffbfd21f9ace0c); Dbrendant, *Project Natal: Targeted Advertising, a Biometric Nightmare*, May 11, 2010, Eye Tracking Update, <http://eyetrackingupdate.com/2010/05/11/project-natal-targeted-advertising-biometric-nightmare/>.

<sup>52</sup> Interactive program guides allow users to browse the content available on each channel without having to change the channel.

<sup>53</sup> VOD allows users to order content when they want to view it, and the content may be offered free, paid, or tied to a particular subscription service.

<sup>54</sup> DVRs allow users to record content and access it at their convenience and enable users to pause, rewind, and fast-forward the content that they access.

traditional 30-second television spot. The technologies necessarily entail the collection of personal information of television viewers.

Interactive advertisements on television currently take one of three forms: superimposed interactive icons, interactive sub-channels, or telescopic.<sup>55</sup> An interactive icon superimposed over the traditional commercial is frequently accompanied by a textual message that encourages viewers to press a button on their remote controls to avail themselves of the advertised offer, such as a free brochure, callback, or sweepstakes.<sup>56</sup> With this form of interactivity, if the offer requires viewers to enter personal details such as their names or telephone numbers, the banners will remain superimposed until the interaction is complete, even if the adjacent advertising or programming is obscured by the interactive banner.<sup>57</sup> Interactive sub-channel advertisements allow much greater interactivity, and they "resemble miniature Web sites ('microsites')." <sup>58</sup> To view interactive advertisements located on sub-channels,<sup>59</sup> the viewer leaves the live video content, and navigates among different screens that resemble a PowerPoint presentation.<sup>60</sup> The third form of interactive advertisements is telescopic advertisements. These advertisements take viewers away from the live video content by inviting them to view extended or long-form audiovisual content that is downloaded on demand or stored in advance on the viewer's DVR.<sup>61</sup> Viewers opting to watch telescopic advertisements can frequently pause the live video content so

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<sup>55</sup> Steven Bellman, Anika Schweda, and Duane Varan, *A Comparison of Three Interactive Television Ad Formats*, J. of Interactive Advertising, 14 (Fall 2009).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> The subchannels are "obtained by dividing the main channel's allocated bandwidth, which limits the number of pages that can be used and the type of content displayed." *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

as not to miss any programming.<sup>62</sup> With these three forms of interactivity, advertisers have come up with many types of commercial interactivity to market their products and engage viewers.

Voting and polling allows viewers to participate in live votes using only their television remotes. Voting and polling was developed to keep viewers engaged with their televisions during regular programming.<sup>63</sup> Request for information is a feature that allows viewers to click an icon shown during programming to receive additional information about a product advertised. This information could be transmitted to the viewer in several forms, including an email message, the delivery of a physical catalogue, or even a free sample.<sup>64</sup> T-commerce is a service that allows viewers to use their remote controls to purchase items that are billed to their cable bill or credit card.<sup>65</sup> Cable companies tout t-commerce as hugely beneficial to advertisers: it provides both a quicker conversion time from awareness to interest to sale and a faster, more streamlined checkout process.<sup>66</sup> Telescoping is a service that allows viewers to "click through" programmed content to access additional content. It is commonly implemented by having a banner displayed during programmed content link to VOD content. Telescoping can deliver additional information to customers instantly and can increase the amount of time that viewers are exposed to commercial content. Cable companies envision this product being used to "click through on a movie [advertisement] and see a whole trailer, or click through on a video game ad and see a

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<sup>62</sup> *Id.*

<sup>63</sup> Stacey Higginbotham, *Canoe Venture Wants Your Data*, Newteevee.com, November 13, 2008, available at <http://newteevee.com/2008/11/13/canoe-ventures-wants-your-data/>.

<sup>64</sup> Many companies including Gillette, Benjamin Moore, Century 21, and Halls, have aired request for information advertisements. Mike Robuck, *Cablevision Bullish on Interactive TV Ads*, CES Magazine, Jan.12, 2010, available at <http://www.cedmagazine.com/News-Cablevision-interactive-TV-ads-011210.aspx>.

<sup>65</sup> Higginbotham, *supra* note 63.

<sup>66</sup> *Understanding Interactive TV*, Advanced TV Primer, distributed by the Cable Television Advertising Bureau, available at <http://www.thecab.tv/main/vod/index.shtml> (last visited Feb. 22, 2010).

demo."<sup>67</sup> Addressability is a feature that allows advertisers to target individual viewers specifically. One industry leader described this technology as a way to ensure that viewers receive "no more dog food ads if [they] don't own a dog."<sup>68</sup> Cable systems usually target viewers with addressable advertisements by overlaying census and other demographic data onto their cable system subscription information. This allows, for example, "General Motors [to] send an ad for a Cadillac Escalade to high-income houses, a Chevrolet to low-income houses, and another in Spanish to Hispanic consumers."<sup>69</sup> The same techniques could be used to send child-targeted ads to homes with children and different ads to homes without children.

#### **4. Digital Signage**

Personally identifiable data may also be collected from children even when they are not using a computer or mobile phone. For example, digital signage, seen in video billboards and interactive mall displays, has incorporated various forms of crowd recognition technology which allows advertisements to determine who is viewing the ad and to target ads based on a variety of characteristics.<sup>70</sup> Last year, for example, Castrol launched an advertising campaign in London that read license plates of approaching cars, matched their numbers in real time to the make and model of the car using data from the vehicle licensing agency, and then displayed a personalized message to the driver as the car approach the digital billboard.<sup>71</sup>

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<sup>67</sup> Higginbotham, *supra* note 63.

<sup>68</sup> *Id.*

<sup>69</sup> Stephanie Clifford, *Cable Companies Target Commercials to Audience*, N. Y. Times, March 3, 2009, <http://www.nytimes.com/2009/03/04/business/04cable.html>.

<sup>70</sup> Rob Lever, *Privacy fears mount as ad targeting grows*, AFP, May 26, 2010 <http://www.google.com/hostednews/afp/article/ALeqM5iNbYaXLVjyoqxq8PkYMktHD688lg>.

<sup>71</sup> *Id.*

The World Privacy Forum, one of the parties to these comments, has drawn attention to the privacy risks of digital signage in its recent report, *One Way Mirror Society*.<sup>72</sup> It notes that some "digital signs are equipped with sensor and/or cameras or webcams built directly into the screen, that can capture and record large amounts of information about who is looking at the sign, for how long, and at what time of day. Then sophisticated video analytics create a demographic profile of the gender, age, and ethnicity among other characteristics."<sup>73</sup> The purpose of creating demographic profiles "is twofold: one, to determine how many people are watching the ad on the digital signage, and what ages, genders, and ethnicities they are; and two, to target the advertising based on that information."<sup>74</sup> Thus, for example, a digital sign may advertise life insurance to seniors and the Jonas Brothers to young audiences.<sup>75</sup>

Without the knowledge of people passing by the digital signs, the "signs capture consumer images, analyze them, and report the data back to their operators and tell those operators a great deal. The screens are typically networked to a central location and can be controlled remotely in real time."<sup>76</sup> The data may be combined with other online information to track subjects between real-world shopping and online activity: "More sophisticated shopper analytics will be combined with other data sources, including loyalty programs and inventory management systems . . . ."<sup>77</sup>

This networked operation of digital signage makes it an online service under COPPA. However, CDD et al. are not aware that companies using digital signage have taken steps to limit

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<sup>72</sup> Pam Dixon, World Privacy Forum, *One Way Mirror Society* (2010), <http://www.worldprivacyforum.org/pdf/onewaymirrorsocietyfs.pdf>.

<sup>73</sup> *Id.* at 15.

<sup>74</sup> *Id.* at 17

<sup>75</sup> *TruMedia's PROM software targets digital signage ads*, Digital Signage Today (Aug. 19, 2008), <http://digitalsignagetoday.com/article.php?id=20430>.

<sup>76</sup> *One Way Mirror Society*, supra note 72 at 5.

<sup>77</sup> *One Way Mirror Society*, supra note 72 at 10 n. 30.

data collection from children or to obtain informed parental consent. Several of the parties to these comments have endorsed privacy principles for digital signage, including that "[a]ny digital signage operator collecting images of or data about a child who appears to be under 13 must immediately erase all images of the child as well as any identifiable data about the child."<sup>78</sup>

## **B. New Advertising Techniques Present Increased Risks to Children's Privacy and of Unfair or Deceptive Practices**

Not only do marketers have more platforms for collecting data and delivering marketing messages, but they have also developed very sophisticated methods of collecting data, often without the knowledge of the person from whom it has been collected. Marketers use that data to target individuals with personalized marketing messages. The forms of advertising, marketing and selling that are emerging as part of what the industry calls the new "media and marketing ecosystem," depart in significant ways from the more familiar commercial advertising we have seen in television, for example. In today's digital marketing system, advertising, editorial content, data collection, measurement, and content delivery are increasingly intertwined. As a major advertising industry report on the future of marketing in the digital era explained,

The influx of data into marketing has been one of the biggest changes to players across the landscape.... Advertising strategies, campaigns, and distribution are increasingly based on predictive algorithms, spreadsheets, and math.... Every Web page's individual views, every word typed in a search query box (also known as the 'database of consumer intentions'), every video download, and even every word in an e-mail may create one more data point that a marketer can leverage and use to more precisely target the audience.<sup>79</sup>

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<sup>78</sup> Pam Dixon, World Privacy Forum, et al., *Digital Signage Privacy Principles* (2010), <http://www.worldprivacyforum.org/pdf/DigitalSignage-principlesfs.pdf>.

<sup>79</sup> Edward Landry, Carolyn Ude, and Christopher Vollmer, Booz/Allen/Hamilton, *HD Marketing 2010: Sharpening the Conversation* (2008), [http://www.boozallen.com/media/file/HD\\_Marketing\\_2010.pdf](http://www.boozallen.com/media/file/HD_Marketing_2010.pdf).

The growth of behavioral advertising and ad networks, which allow advertisers to bid against each other in real time for the ability to direct a message to a single web surfer, are just a few of the developments that pose significant risks to children's privacy online.

### **1. Behavioral Targeting**

Behavioral targeting—a form of database or "customer relationship" marketing (CRM)—enables companies to develop unique, long-term relationships with individual customers. Marketers are able to track and monitor a broad spectrum of online consumer behaviors including the pages or sites visited, content viewed, search queries entered, ads clicked on, information shared on social network sites, and products placed in shopping carts. With ongoing data collection and tracking, marketers can create personalized marketing and sales appeals based on a customer's unique preferences, behaviors, and psychological profile.

Behavioral targeting is a very powerful technique:

Behavioral targets people, not pages. That is, behavioral uses the actions of a person to define its target, unlike contextual targeting, which serves ads based on a page's contents.... Behavioral information can also be merged with visitor demographic data—such as age, gender, and ZIP code.<sup>80</sup>

Advertising networks place cookies on a browser that the network operator can then use to identify the computer on future visits (so called "tracking cookies" or "third-party cookies").<sup>81</sup>

The cookies provide the operator with certain information about the user's Internet browsing

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<sup>80</sup> David Hallerman, *Behavioral Targeting: Marketing Trends*, eMarketer, 2-11, June 2008.

<sup>81</sup> FTC, *Self Regulatory Principles for Online Behavioral Advertising*, 2-3 & n.3 (2009), <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

activities.<sup>82</sup> Advertising networks that operate on multiple sites are able to use third-party cookies to track a computer user across those sites.<sup>83</sup>

Other services take this online contact even further, touting their ability to "forge a relationship"<sup>84</sup> with site visitors by monitoring their visits to e-commerce sites and then displaying advertisements to those same customers on other sites, claiming they can "find your customers just about anywhere they might go online."<sup>85</sup> Thus, advertisers are able to use the information that they glean from placing cookies in a browser to send a specific message to a specific individual.

Behavioral targeting is becoming a core business practice for online advertisers. U.S. spending for behavioral online advertising is predicted to grow dramatically to \$4.4 billion by 2012 (up from "only \$775 million in 2008").<sup>86</sup>

## **2. Advertising Networks, Advertising Exchanges and Data Exchanges**

An online advertising network or ad network is a company that connects advertisers to web sites that want to host advertisements. Google's DoubleClick is an example of an ad network. Ad exchanges are technology platforms for buying and selling online ad impressions. The major ad exchanges are Microsoft's AdECN, Yahoo's Right Media, ContextWeb's ADSDAQ Exchange, the leading independent exchange, and DoubleClick Ad Exchange.

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<sup>82</sup> *Id.* at 2, n.3.

<sup>83</sup> *Id.*

<sup>84</sup> See FetchBack – The Retargeting Company, <http://www.fetchback.com/retargeting.html> (last visited June 30, 2010).

<sup>85</sup> *How Does Retargeting Work?*, Adroll, <http://www.adroll.com/about/retargeting> (last visited June 29, 2010).

<sup>86</sup> Hallerman, *Behavioral Targeting: Marketing Trends*, at 1.

Advertising networks are supplementing their behavioral targeting activities with real time information about consumers. For example, Exelate offers a targeting exchange that claims it can deliver to advertisers specific consumers based on their age, ethnicity, gender, and even items they are interested in purchasing.<sup>87</sup> Under a recent deal with Nielsen, Exelate will combine information collected offline with its online tracking data.<sup>88</sup> These data exchange services increase the amount of information that advertisers maintain and use to target individual consumers online.

Several companies offer the ability to target children. For example, Betawave sells an advertising category of children between six and eleven years old whom it claims cannot be reached on other leading sites such as Nickelodeon Kids and Family and Disney Online.<sup>89</sup> Betawave also works with companies such as BlueKai and Exelate to build profiles based on information that it collects about its users.<sup>90</sup> Many "teen" and "pre-teen" sites (such as Tribal Fusion and Stardoll) offer advertising targeted to children.<sup>91</sup> Whyville emphasizes its ability to reach children between eight and fifteen years old and offers "market research" based on their audience.<sup>92</sup>

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<sup>87</sup> See Laurie Sullivan, *Media Buyers Get Targeting Data in Real Time*, Behavioral Insider, Jan. 10, 2010, available at <http://www.exelate.com/new/info-newscoverage-61.html>.

<sup>88</sup> Laurie Sullivan, *What Nielsen's Deal With EXelate Really Means*, Behavioral Insider, Mar. 17, 2010, available at [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=124371](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=124371).

<sup>89</sup> Betawave Kids 6-11, <http://betawave.com/audiences/kids.html> (last visited June 29, 2010).

<sup>90</sup> Betawave Privacy Policy, <http://www.betawave.com/privacy.html> (last visited June 29, 2010).

<sup>91</sup> See Tribal Fusion: Teen Channel, <http://www.tribalfusion.com/channels/teen/> (last visited June 29, 2010); Stardoll, <http://www.stardoll.com/en/help/article.php?sectionId=15&articleId=1> (last visited June 29, 2010) (emphasizing that the majority of visitors to the site are between seven and seventeen years old).

<sup>92</sup> Whyville for Sponsors, [http://b.whyville.net/smmk/top/gatesInfo?topic=whyville\\_for\\_sponsors](http://b.whyville.net/smmk/top/gatesInfo?topic=whyville_for_sponsors) (last visited June 28, 2010).

## **II. The FTC Should Take Steps to Ensure the Continued Effectiveness of COPPA in Light of New Developments**

In light of these new developments, CDD et al. urge the FTC to clarify or define certain terms used in COPPA and the FTC's rules, strengthen its safe harbor program, and take a more proactive role in uncovering and informing the public about how marketers are collecting and using information from and about individuals.

The purpose of COPPA is:

(1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent.<sup>93</sup>

To achieve these purposes, COPPA required the FTC to adopt rules that generally prohibit the operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting information from a child, from collecting personal information without providing notice of what information is being collected, how the operator uses such information, and the operator's disclosure practices, and obtaining verifiable parental consent for the collection, use, or disclosure of the personal information.<sup>94</sup> COPPA also directed the FTC to minimize the collection of information from children by adopting a rule that prohibits conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosure of more personal information than is reasonably necessary for such

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<sup>93</sup> 144 Cong. Rec. S11651-02, S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

<sup>94</sup> 15 U.S.C. § 6501 et seq.

participation.<sup>95</sup> Recognizing that the Internet was still developing, COPPA adopted broad, forward-looking definitions of key terms<sup>96</sup> and required the FTC to review its regulations within 5 years.<sup>97</sup>

The Commission should update and clarify several key terms in the rule. "Personal information" should be updated to reflect how information such as third-party cookies and IP addresses are being used. The Commission should clarify that the term "online services" includes any of a vast array of networked technologies able to collect and use personal information. The Commission should also clarify that, for a given user experience, there can be several "operators" that potentially fall under COPPA. Lastly, the FTC should update its concepts of "directed to children" and "actual knowledge" to reflect how operators are collecting and using information, especially in the context of behavioral advertising.

#### **A. Personal Information**

CDD et al. believe it is essential for the FTC to revisit its definition of personal information in the COPPA Rules in order to continue protecting children. The FTC recognized in its recent staff report on behavioral advertising that data that were traditionally considered non-personally identifiable, like cookies and IP addresses, now pose many of the same threats as personal information.<sup>98</sup> The COPPA Rule should, at a minimum, reflect this understanding.

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<sup>95</sup> 15 U.S.C. § 6502(b)(1)(C).

<sup>96</sup> For example, Internet is defined 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." 15 U.S.C. § 6501(6) (emphasis added).

<sup>97</sup> 15 U.S.C. § 6506.

<sup>98</sup> FTC, *supra* note 81 at 21-25.

## 1. Persistent Identifiers

The Commission should amend its current definition of personal information to make it clear that information that permits targeting an individual without necessarily knowing the individual's identity is considered to be "personal information." The current FTC definition of "personal information" only includes persistent identifiers when such identifiers are combined with individually identifiable information.<sup>99</sup> Although the rule closely tracks the language in COPPA, COPPA also gives the FTC authority to include "any other identifier that the Commission determines permits the physical or online contacting of a specific individual."<sup>100</sup>

Many of the techniques discussed above permit the physical or online contacting of specific individuals. For example, persistent cookies, IP addresses, geolocation data (GPS and cell phone tower data), and even seemingly anonymous combinations of data like age, zip code, and gender can be used to track and communicate with specific individuals. When an advertiser uses information it has collected about an individual to display an advertisement chosen to appeal to that person at that time, the advertiser is contacting the specific individual online. Cookies and IP addresses allow advertisers and other online operators to identify a "particular or defined" individual even if they do not have that person's name.<sup>101</sup>

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<sup>99</sup> 16 C.F.R. § 312.2 (2009).

<sup>100</sup> 15 U.S.C. § 6501(8)(F).

<sup>101</sup> See, Wendy Davis, *Start-Up Links 65 Million IP Addresses To Users, Readies Targeting Platform*, Mediapost, Feb 25, 2010, [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=123280](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=123280). ("[T]he company ClearSight Interactive is getting ready to launch a form of targeting based on users' IP addresses. ClearSight, which describes IP addresses as the bridge between users' offline and online data, has spent the last 18 months acquiring more than 100 million IP addresses -- along with email addresses and postal addresses -- from publishers. As of today, ClearSight Interactive believes it has collected enough data from publishers to reliably link 65 million "sticky" IP addresses -- typically for people who connect to the Web using cable modems -- to specific individuals, ClearSight president Tim Daly told MediaPost today.")

The Commission has acknowledged that advertisers build complex consumer profiles to guide advertising efforts.<sup>102</sup> Further, the concept of retargeting is based on an operator's ability to track a specific consumer and entice that consumer to purchase a product in which he or she has previously expressed an interest.<sup>103</sup> The ability to contact specific consumers based on cookies or IP addresses makes these practices possible and quite lucrative.

Persistent identifiers such as tracking cookies and IP addresses further threaten children's privacy by allowing otherwise anonymous information to be linked in a way that can identify a specific individual. Information such as zip code, gender, and birth date are all seemingly innocuous, yet when combined these three items can uniquely identify 87% of Americans.<sup>104</sup> In recent years, reporters were able to identify an AOL member solely by reviewing her "anonymous" online activities,<sup>105</sup> and researchers were able to identify Netflix users based on supposedly "anonymous" comments.<sup>106</sup> Professor Paul Ohm correctly refers to these cases as a "failure of anonymization" and calls on regulators to pay more attention to this privacy issue.<sup>107</sup>

## 2. Location

The FTC should also clarify or amend the definition of personal information to make explicit that GPS and other location-based information that permit both physical and online

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<sup>102</sup> See FTC, *supra* note 81.

<sup>103</sup> See FetchBack, *supra* note 84.

<sup>104</sup> See Latanya Sweeney, Abstract, *Uniqueness of Simple Demographics in the U.S. Population* (Carnegie Mellon Univ. Lab. for Int'l Data Privacy 2000), available at <http://www.citeulike.org/user/burd/article/5822736>.

<sup>105</sup> Michael Barbaro and Tom Zeller, Jr., *A Face is Exposed for AOL Searcher No.4417749*, N.Y. Times, Aug. 9, 2006, at A1.

<sup>106</sup> Arvind Narayanan and Vitaly Shmatikov, *Robust De-Anonymization of Large Sparse Datasets*, 2008 IEEE Symposium On Security and Privacy 111, available at [http://userweb.cs.utexas.edu/~shmat/shmat\\_oak08netflix.pdf](http://userweb.cs.utexas.edu/~shmat/shmat_oak08netflix.pdf)

<sup>107</sup> *Anonymization FAIL! Privacy Law FAIL!*, Freedom to Tinker (Aug. 13, 2009), <http://www.freedom-to-tinker.com/blog/paul/anonymization-fail-privacy-law-fail..>

contacting of children is "personal information." Data obtained from either GPS or cell phone towers can identify a child's exact location.<sup>108</sup> This makes it possible for someone with access to the information to physically contact and track the child. It also facilitates online contact using location-based advertising, where the child's location triggers a text message, in-application advertisement, or pop-up advertisement.

The Rule likely already covers GPS and cell phone tower data as "a home or other physical address."<sup>109</sup> The Commission should clarify that the definition is not limited to a home address by specifically including GPS co-ordinates and other location-based information, such as mobile app "check-ins," in the definition of personal information.<sup>110</sup>

## **B. Online Service**

The FTC should make it clear that the term "online service" is broad enough to protect children from the unauthorized collection and use of their data regardless of the device used, e.g., mobile device, game console, software, digital billboard, or interactive television set. In adopting the initial rules, the FTC did not find it necessary to adopt a definition of "online service." CDD et al. agree that it is not necessary for the FTC to define the term "online service" because its meaning is generally understood. The addition of the phrase, "or an online service," does, however, make it clear that COPPA was not limited to websites that collect information.<sup>111</sup>

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<sup>108</sup> See Monique Cuvelier, *supra* note 18.

<sup>109</sup> 16 C.F.R. § 312.2.

<sup>110</sup> See geolocation discussion, *supra* 7.

<sup>111</sup> The phrase, "or an online service," appears to have been added at the Committee mark up held October 1, 1998. It first appears in print on October 2, when COPPA was incorporated into S. 442, the Internet Tax Bill. 144 Cong. Rec. S11324. Definitions from contemporary dictionaries define the term broadly. For example, *Webster's New World Pocket Internet Directory and Dictionary* (Simon & Schuster, Inc., 1997) defines "online" as "connected to a network or available from a network" and "Online Information Service" as "a for-profit firm that makes current news, stock quotes, or other information available to its subscribers over standard telephone line." Similarly, *Newton's Telecom Dictionary (1999 ed.)* defines "online" as

Clarifying that "online services" is an inclusive term responds to Question 11 – asking about the implications for COPPA enforcement raised by technologies such as mobile communications, interactive television, interactive gaming, or other interactive media. To the extent that mobile communications, interactive television, and interactive gaming provide access to websites on the Internet, they would clearly be covered by COPPA. However, even if one provides an interactive service that does not involve websites, one could still be covered under COPPA as an "online service." Examples of these online services include software installed on a computer that reports a user's interactions or a digital billboard that takes pictures and transmits data about people who view the billboard.

### **C. Operator of a Website or Online Service**

Although the Notice does not specifically ask about the meaning of the phrase "operator of a website or online service," CDD et al. believe that some clarification would be useful. Importantly, a given user interaction with a website or online service may involve more than one entity. Each needs to determine whether it is an "operator" under COPPA and, if so, what it needs to do to comply with COPPA. Sen. Bryan's statement in Congressional Record explains that the term "operator":

is defined as the person or entity who both operates an Internet website or online service and collects information on that site either directly or through a subcontractor. *This definition is intended to hold responsible the entity that collects the information, as well as the entity on whose behalf the information is collected.* This definition, however, would not apply to an online

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“available through the computer. Online may refer to information on the hard disk, such as online documentation or online help, or a connection, through a modem, to another computer.” It defines “online service” as a “commercial service that gives computer users (i.e. its customers) access to a variety of online offerings such as shopping, games, and chat rooms, as well as access to the Internet. America Online and Microsoft Network are examples of online services.”

service to the extent that it does not collect or use the information."<sup>112</sup>

In adopting the COPPA Rules, the FTC noted that the "definition of 'operator' is of central importance because it determines who is covered by the Act and the Rule."<sup>113</sup> In the Statement of Basis and Purpose accompanying the Final Rule, the FTC further explained that, "if such companies collect personal information directly from children who click on ads placed on websites or online services directed to children," or "if such companies collect personal information from visitors who click on their ads at general audience sites, and that information reveals that the visitor is a child, then they will be subject to the Act."<sup>114</sup>

Today, information may often be collected and used not only by websites and advertisers, but, as discussed above, by ad networks and data exchanges. The FTC should clarify that these entities are subject to COPPA. This clarification would be consistent with the Commission's enforcement action against BigMailbox.com, Inc. There, the Commission argued that BigMailbox.com was required to comply with COPPA when it offered mailbox services embedded in children's websites.<sup>115</sup> Because BigMailbox.com collected personal information about children through this embedded component, the FTC considered it an operator under the Act. This case illustrates how a single website can contain multiple operators and that a COPPA analysis is appropriate for each of them. Advertising networks operate in much the same way that BigMailbox.com did: they embed their content on other sites and potentially use that presence to collect personal information.

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<sup>112</sup> 144 Cong. Rec. S 11651, 11657 (daily ed. Oct. 7, 1998) (emphasis added).

<sup>113</sup> Children's Online Privacy Protection Rule, 64 Fed. Reg. 59888, 59891 (Nov. 3, 1999).

<sup>114</sup> *Id.* at 59892.

<sup>115</sup> Complaint at 5, *United States v. BigMailbox.com, Inc.*, Civ. Action No. 01-605-A (E.D. Va. Apr. 9, 2001).

The potential for multiple operators exists not only on websites, but in other online services. For example, the creator of a mobile app may be an "operator" depending on whether the app collects personal data. But the question of being an operator will also arise about any embedded advertising service within that app, as well as the online store where the app was purchased. Providers of applications on social networking services may be "operators" even if the individual's interaction with that application takes place on the social networking service's website. Makers of console video games may be operators if they meet the definition, but the determination should also be made separately for the provider of the gaming network as a whole, as well as for those providing any embedded advertising services within the game.

**D. Website or Online Service Directed to Children and Actual Knowledge**

The FTC should update the definitions of "directed to children" and "actual knowledge." These definitions should take into account the FTC's approach to child-directed marketing used elsewhere. The Commission should also recognize how online services are collecting and using information, such as in online behavioral advertising.

Under the current rules, "directed at children" means "targeted to children."<sup>116</sup> In determining whether a website is targeted to children, the FTC considers:

its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed at children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characteristics and/or child-oriented activities and incentives."<sup>117</sup>

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<sup>116</sup> 16 C.F.R. §312.2.

<sup>117</sup> *Id.*

This definition is similar but not identical to that used in the FTC's report to Congress on Marketing Food to Children and Adolescents (April 2008).<sup>118</sup> To gather the data for this report, the FTC directed major food and beverage advertisers to file reports on their advertising and promotional activities targeted toward children in many different forms of media, including websites, the Internet, and digital outlets. In the information requests sent to advertisers, the FTC defined Internet advertising to children as:

advertising on or through Internet sites or pages other than company-sponsored Internet sites that bear or otherwise display the name or logo or any portion of the package of any of the company's food brands or otherwise refers or relates to such food brands, including, but not limited to, sponsored hyperlinks, banner or pop-up advertisements, in-stream and in-page audio and video advertisements, sponsored text advertising, sponsored search keywords, and advertising in chat rooms, weblogs, social networking sites, online video games, bulletin boards, and listservs. Report expenditures on, and activities associated with, other Internet advertising if *any* of the following apply:

1. A marketing plan specifically indicates that the Internet advertising was intended to reach children under age 12;
2. The company knowingly sought the participation of children in the Internet advertising campaign;
3. The advertising appeared on any Internet website for which audience demographic data indicate that children ages 2-11 constituted at least 20% of the audience for any month during 2006; or
4. The advertising:
  - A. prominently featured child-oriented animated or licensed characters;
  - B. prominently featured a celebrity endorser highly popular with children, according to any of the following sources: a marketing

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<sup>118</sup> FTC, Marketing Food To Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation: A Federal Trade Commission Report To Congress (2008), <http://www.ftc.gov/opa/2008/07/foodmkting.shtm>.

plan; opinion research data within the company's possession, custody, or control; or a publicly available opinion poll of children;

C. used language, such as "kid," "child," "tween," or similar words, or prominently depicted models or characters who were or appeared to be younger than age 12, in order to indicate that the advertising was intended for children; or

D. promoted child-oriented themes, activities, incentives, products, or media.<sup>119</sup>

The FTC used similar factors in defining company-sponsored internet sites.<sup>120</sup> In both cases, the FTC set the standard as audience demographic data that indicated children ages 2-11 constituted 20% or more of the visitors to the site. The FTC explained that the "20% audience share was chosen for children ages 2-11 because this level of audience share is approximately double the proportion of that group in the population of active Internet users during 2006. Data from March through December 2006 show that children ages 2-11 constituted between 8.87 and 9.47% of the active Internet audience."<sup>121</sup>

CDD et al. urge the FTC to supplement the "directed at children" definition in the COPPA Rules with some of the concepts from the Food Marketing definitions. Specifically, CDD et al. urge the FTC to adopt the 20% audience demographic data because it will provide greater clarity to advertisers and the public alike about which websites and online services are targeted to children.

The Commission should also clarify the meaning of the "actual knowledge" standard to ensure that uses of children's data are covered by the Rule. The Commission already takes the position that when an operator has collected a child's age and/or birth date, it has actual

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<sup>119</sup> FTC, *Marketing Food To Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation: A Federal Trade Commission Report To Congress*, App. B at B-15 (2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktingreportappendices.pdf>.

<sup>120</sup> *Id.* at B-14.

<sup>121</sup> *Id.* at n. 14, citing Nielsen/Net Ratings NetView (Home and Work Panel).

knowledge that the child is under thirteen.<sup>122</sup> Where a website obtains information from another source that an individual from whom it is collecting information is under thirteen, that operator likewise has actual knowledge that the child is under thirteen. It should not matter whether the operator collected this information directly from the child, obtained the information from another service, such as OpenID or Facebook Connect, or even purchased the information on an exchange or from a data broker.

Similarly, if an operator, using behavioral or other profiling information, makes a determination that a user is of an age under thirteen, that operator would have the actual knowledge that it is collecting or using information from a child. If an operator creates a behavioral category that uses an age under thirteen, then that operator has actual knowledge that the individuals in that behavioral category are under thirteen. If an operator purports to sell advertisers access to a behavioral category of children under thirteen, then that operator has actual knowledge that those individuals are under thirteen. Simply, if an operator decides on, or uses, or purports to know the fact that someone is a child, then that operator has actual knowledge that it is dealing with a child. Otherwise, a website, advertising network, or data exchange could simultaneously claim to potential advertisers that it can target demographic groups including children while claiming to parents and regulators that it does not have "actual knowledge" that it is collecting information from children. If a website, advertising network or data exchange is confident enough to claim that it can deliver an advertisement to a child in a

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<sup>122</sup> *See, e.g.*, Complaint at 5, *United States v. Iconix Brand Group*, 09 Civ. \_\_\_\_ (S.D.N.Y. Sept. 20, 2009), *available at* <http://www.ftc.gov/os/caselist/0923032/091020Iconixcmpt.pdf>. *But see* Complaint at 6-7, *United States v. Lisa Frank, Inc.*, Civil Action No. \_\_\_\_ (E.D. Va. Oct. 2, 2001), *available at* <http://www.ftc.gov/os/2001/10/lfcmp.pdf> (alleging that a website had actual knowledge that it was collecting information from children when the pull down menu only included dates that would identify the user as thirteen or older).

specific age group, that confidence should constitute actual knowledge that the operator has collected information from a child.

The FTC should also clarify that advertisements targeted to children based on behavioral indicators meet COPPA's "directed to children" standard. An operator serving ads based on behavioral categories can be "directed to children" under several different criteria. The creative content of the ad itself could be considered directed at children. Further, the behavioral or interest category could be directed at children. Much like a "Barbie" themed website could be directed at children, so could a behavioral category that tries to target users who are interested in "Barbie." Lastly, the behavioral category itself could be age-based and could include children – such as a category that attempted to target ads to children under thirteen. This last example would literally fit exactly under the FTC's current definition that directed to children means targeted to children. Nevertheless the Commission should clarify that collecting or using behavioral information that targets children falls under COPPA.

### **III. The Commission Should Be More Proactive in Protecting Children's Privacy Online**

The Commission should be more proactive in understanding and responding to the challenges to children's privacy online. First, the Commission should monitor and report on developments concerning children's privacy online. Second, the Commission should require regular reports and re-evaluation of its Safe Harbor providers. Lastly, the Commission should promptly investigate whenever it receives credible evidence of possible COPPA violations.

#### **A. Reports on Children's Privacy Online**

The Commission should regularly investigate the data collection and privacy practices of operators that collect and use children's data. The Notice asks several questions about how different parts of the COPPA rule are being implemented. For example, on the topic of parental

consent, it asks for data on the use of consent mechanisms.<sup>123</sup> These and many other questions could be answered by conducting periodic reports similar to those the Commission undertakes regarding the marketing of violent entertainment and food to children.<sup>124</sup> Especially since the Commission, declined to study privacy practices in its current study of food marketing,<sup>125</sup> it should separately examine children's privacy issues on a regular basis.

In addition to gathering data about COPPA implementation, the FTC should gather data and report on the techniques used to collect and utilize data. These practices are not generally well known or understood by the public. This lack of knowledge in turn makes it difficult for parents to make meaningful decisions about whether to consent to having their child's data collected. The entire process of behavioral marketing is largely invisible to the public and is changing rapidly. Thus, the FTC should require major websites, ad networks, social networks, and other online service operators that collect data from an audience with 20% or more children under 13 to periodically inform the FTC about the types of data they have collected; how they collect it; how they use it; and how they comply with COPPA. Unless hidden data collection practices are disclosed, the FTC cannot assess whether companies are complying with the existing rules or identify where the rules or law may need to be strengthened.

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<sup>123</sup> Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection rule, 75 Fed Reg. 17089, 17090 (April 5, 2010).

<sup>124</sup> FTC, *Marketing Food To Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation: A Federal Trade Commission Report To Congress* (July 2008); FTC, *Marketing Violent Entertainment to Children: A Sixth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Dec 2009)

<sup>125</sup> Agency Information Collection Activities, 75 Fed. Reg. 29340, 29345 (May 25, 2010).

## **B. The FTC Should Make Improvements to the Safe Harbor Program**

The FTC should evaluate the effectiveness of the Safe Harbor program. To do so it needs to determine what proportion of child directed websites participate in Safe Harbor programs. The COPPA Safe Harbor program should be improved by providing additional monitoring and a periodic reassessment.

Safe Harbor providers are already required to keep records of consumer complaints, disciplinary actions and the results of assessments of operator compliance.<sup>126</sup> The Commission should require that Safe Harbor providers regularly submit these records to the Commission and to the public for analysis of the effectiveness of the Safe Harbor enforcement efforts.

The Commission should also have Safe Harbor providers re-apply for their certification every five years. In this way, the Commission can ensure that developments in technology are being addressed by the Safe Harbor providers. Further, periodic re-evaluation of Safe Harbors will confirm to the Commission that Safe Harbor providers are incorporating any changes to the Commission's rules and explanations of those rules.

## **C. The Commission Should Promptly Investigate Potential COPPA Violations**

When the Commission learns of potential COPPA violations, it should promptly investigate. For example, at the June 2, 2010 Roundtable, several participants made statements suggesting possible abuses of a COPPA exception to verified parental consent.<sup>127</sup> The "multiple contact" exception permits the "collection of online contact information from a child to be used

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<sup>126</sup> 16 C.F.R. § 312.10(d).

<sup>127</sup> *Protecting Kids' Privacy Online: Reviewing the COPPA Rule*, FTC Roundtable, Panel 5: COPPA's Exceptions to Parental Consent, June 2, 2010, transcript at 39-43, [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/transcripts/060210\\_sess4.pdf](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/transcripts/060210_sess4.pdf).

to respond directly more than once to a specific request from the child."<sup>128</sup> The exception exists for the purpose of allowing children to submit their contact information to subscribe to newsletters and online magazines.<sup>129</sup> However, the indications are that the exception is being used to run general marketing lists, and providers may even be collecting other personal information along with the email. A workshop participant described how the exception was used:

[W]here we're seeing it used most often is newsletters, eNews, alerts, new products, information about a new feature on the site, something really cool that's come up. And so we see that repeated newsletter or notices to the kids at the site.<sup>130</sup>

...

An online catalog, sales, that kind of thing, new offerings in virtual worlds. "Now you can buy a new tractor. Now you can buy a new fish. Now you can go to outer space."<sup>131</sup>

...

What will happen is -- Yeah, well, it's not -- I don't know that it's targeting specific kids. It's targeting all kids. So if you are on XYZ virtual world and they have a new character that you can now earn, they'll say, "There's a new character out there, and you're gonna have to earn 2,000 points or you'll have to do that" or "There's a new section of the world that has these new things that you can engage with." What we're seeing is the multiple-use exception. It's the constant communication about the world, about opportunities, about newsletters, about alerts, about a whole bunch of different things.<sup>132</sup>

These uses seem to go beyond the direct response to a specific request from a child for information. Rather, they are marketing communications. They further bring up the potential that marketing emails are being tracked and that children's reading of the email or interest in parts of

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<sup>128</sup> 16 C.F.R. § 312.5(c)(3).

<sup>129</sup> 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

<sup>130</sup> Transcript, *supra* note 127 at 40 (statement of Parry Aftab).

<sup>131</sup> *Id.* at 40 (statement of Parry Aftab).

<sup>132</sup> *Id.* at 41 (statement of Parry Aftab).

the email is being collected in violation of the rule. It is a standard email marketing practice to track recipients of emails to determine whether they opened any embedded links, and to further collect information about their subsequent behavior on the web.<sup>133</sup> Email marketing companies track recipients' reading and clicking behavior.<sup>134</sup> As early as 2006, this practice was regarded to be "widely used."<sup>135</sup> Collecting information about whether or not a child has clicked a link and about their activity on the destination website exceeds "online contact information." Gathering such information is prohibited by the rule.

Another workshop participant described how some companies may claim to be collecting children's email addresses for one purpose but instead using them for other purposes:

I'm gonna use the example that we've talked about, which is a company that, you know, sends out a birthday-notice e-mail. The next thing you know, they've collected your e-mail address simply to notify you on your birthday. Next thing you know - - Which should only be one time a year. But now, next thing you know, you're receiving 10 emails in a matter of two months.<sup>136</sup>

Not only does the example present an abuse of the "specific" response to a "direct request," but the personal information collected – the date of birth – would not be covered by the exception:

When you add a date of birth, you've added a piece of information that you're aggregating against that. It should step you up to "email plus.".... But instead, they're using notice and opt-out in place of

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<sup>133</sup> Press Release, Genius.com, *Genius.com Awarded First Patent for Instant-On Website Tracking Technology*, EarthTimes, June 15, 2010, <http://www.earthtimes.org/articles/press/tracking-technology,1344655.html>; Toolkit Tuesday, *Email Marketing*, Marketing Vox, June 22, 2010, <http://www.marketingvox.com/toolkit-tuesday-047202/> (discussing Sitecore Email Campaign Manager).

<sup>134</sup> See, eg., Constant Contact, *Email Marketing Tracking and Reporting*, <http://www.constantcontact.com/email-marketing/email-tracking-reporting/index.jsp> (last visited June 29, 2010).

<sup>135</sup> Robert McMillian, *Web Bugs Trained to Track Your E-Mail*, PCWorld, Oct. 9, 2006, [http://www.pcworld.com/businesscenter/article/127444/web\\_bugs\\_trained\\_to\\_track\\_your\\_email.html](http://www.pcworld.com/businesscenter/article/127444/web_bugs_trained_to_track_your_email.html).

<sup>136</sup> Transcript, *supra* note 127 at 42 (statement of Dona Fraser).

"email plus" and adding this other data. And the other big one is user name and password against an e-mail address. The e-mail's for newsletters, but the user name and password is gathering points and likes and dislikes. So it's not that every kid gets the exact same newsletter. They get something tailored, based on when they were last in that game or how many points they might have or what they can do.<sup>137</sup>

The Commission should investigate these practices and take appropriate enforcement action to prevent misuse of the multiple contact exception and the collection of more personal information than is permitted under COPPA.

#### **IV. The FTC Should Seek to Protect the Privacy of Adolescents**

Although adolescents are more sophisticated consumers than young children are, they face their own age-related vulnerabilities regarding privacy. The Commission should seek ways to provide protections to teens. Revealing information is necessary for even the most basic social and developmental interactions online. The most insidious data collection that occurs is "passive" – interactions that teens have with their friends, family, schools, and others online are recorded and used to target them. Policy should focus on protecting data and regulating collection and use, rather than discouraging teens from participating online.

COPPA established an important framework for safeguarding our youngest consumers in the digital marketplace, but adolescents have no such protections. Because of their avid use of new media, adolescents are primary targets for digital marketing.<sup>138</sup> Today's teens are being socialized into this new commercial digital culture, which resonates strongly with many of their fundamental developmental tasks, such as identity exploration, social interaction, and

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<sup>137</sup> *Id.* at 43 (statement of Female Speaker).

<sup>138</sup> Kathryn C. Montgomery and Jeff Chester, *Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age*, Special supplement to *J. of Adolescent Health* 1-12 (Sept. 2009).

autonomy.<sup>139</sup> Many teens go online to seek help for their personal problems, to explore their own sexual identities, to find support groups for handling emotional crises in their lives, and sometimes to talk about things they do not feel comfortable or safe discussing with their own parents. Yet, this increased reliance on the Internet subjects them to wholesale data collection and profiling. The unprecedented ability of digital technologies to track and profile individuals across the media landscape and to engage in "micro" or "nano" targeting puts these young people at special risk of compromising their privacy. Teens may be internalizing and normalizing these invasive practices that have been so integrally woven into their everyday actions and experiences.

Recent research within the fields of neuroscience, psychology, and marketing has identified key biological and psychosocial attributes of the adolescent experience that may make members of this age group particularly susceptible to interactive marketing and data collection techniques.<sup>140</sup> A number of scholars have challenged the notion that cognitive defenses enable adolescents to resist advertising (particularly in new media) more effectively than younger children.<sup>141</sup> Rather than communicating rational or factual appeals, many digital marketing

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<sup>139</sup> S. Harter, *Processes Underlying the Construction, Maintenance and Enhancement of the Self Concept in Children*, 3 *Psychological Perspective on the Self* 45-78 (1990); U. Uhlenborff, *The Concept of Developmental Tasks*, 2 *Social Work & Society* 54-63 (2004); J. Hill, *Early Adolescence: A Framework*, 3 *J. of Early Adolescence* 1-21 (1983); K. Subrahmanyam and P. Greenfield, *Online Communication and Adolescent Relationships*, 18 *The Future of Children* 119-146 (2008).

<sup>140</sup> C. Pechmann, L. Levine, S. Loughlin, et al., *Impulsive and Self-conscious: Adolescents' Vulnerability to Advertising and Promotion*, 24 *J. of Public Policy & Marketing* 202-221 (2005); Frances M. Leslie, Linda J. Levine, Sandra E. Loughlin, & Cornelia Pechmann, *Adolescents' Psychological & Neurobiological Development: Implications for Digital Marketing*, (June 2009), [http://digitalads.org/documents/Leslie\\_et\\_al\\_NPLAN\\_BMSG\\_memo.pdf](http://digitalads.org/documents/Leslie_et_al_NPLAN_BMSG_memo.pdf) (viewed 27 Apr. 2010).

<sup>141</sup> S. Livingstone & E. J. Helsper, *Does Advertising Literacy Mediate the Effects of Advertising on Children? A Critical Examination of Two Linked Research Literatures in Relation to Obesity and Food Choice*, 56 *J. of Communication*, 560-584 (2006).

techniques are forms of "implicit persuasion" that promote "subtle affective associations," often circumventing a consumer's explicit persuasion knowledge.

Adolescents face enormous pressures to socially interact online—providing personal information in the process—and are less able to understand the potential long-term consequences of having their information available to advertisers, other individuals, and third-parties. In one survey, the Pew Internet & American Life Project found that "[o]ne of the major reasons why adolescents are such enthusiastic users of social network sites is that the sites give them opportunities to present themselves to a group of peers and then get feedback and affirmation."<sup>142</sup> Another researcher surveyed adolescents to measure their susceptibility to and strategies for dealing with perceived risk from online advertising.<sup>143</sup> The author concluded that "given teenagers' tendencies toward risk taking and experimentation, it is not surprising that teenagers focus more on benefits that marketers may offer, instead of potential risks posed by the loss of privacy."<sup>144</sup>

Adolescents should receive protections in line with the Fair Information Practices principles created by the OECD.<sup>145</sup> Operators collecting data from teens need to have notices that teens understand. Operators should only collect and use teen data with a reasonably time-limited opt in. Teens are growing and maturing, and advertisers prey on their emotional development. Thus teens need access to the data collected about them and the ability to update, delete, and

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<sup>142</sup> Amanda Lenhart and Mary Madden, Pew Internet and American Life Project, *Teens Privacy and Online Social Networks* 13 (2007), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society\\_and\\_the\\_Internet/PI\\_P\\_Teens\\_Privacy\\_SNS\\_Report\\_Final.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/PI_P_Teens_Privacy_SNS_Report_Final.pdf).

<sup>143</sup> Seounmi Youn, *Teenagers' Perceptions of Online Privacy and Coping Behaviors: A Risk-Benefit Appraisal Approach*, 49 *J. Broadcasting & Electronic Media* 86 (2005).

<sup>144</sup> *Id.* at 104.

<sup>145</sup> OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980), [http://www.oecd.org/document/18/0,3343,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html).

control this data. In addition, providing Fair Information Practices to teens will provide some protections to children who visit teen sites.

### **CONCLUSION**

CDD et al. are pleased that the FTC has begun a comprehensive review of its children's privacy regulations. In general, the Children's Online Privacy Protection Act and the FTC rules implementing it have helped protect the privacy and safety of children online. We urge the FTC to act on the suggested updates so that children can continue to be protected from advances in online data collection and other invasive practices.

Respectfully Submitted,

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