

**Before the  
Federal Trade Commission  
Washington, D.C.**

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COPPA Rule Review	)	
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16 CFR Part 312	)	Matter No. P104503
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**COMMENTS OF TECHAMERICA**

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TechAmerica hereby submits these comments to the Federal Trade Commission (“Commission”) in regard to the Commission’s Notice of Proposed Rulemaking (“NPRM”) concerning the Children’s Online Privacy Protection Act (“COPPA”).<sup>1</sup> TechAmerica’s members have a vested interest in protecting children when they are online and also ensuring that the Internet remains a vibrant medium of communication and e-commerce. TechAmerica is pleased to be able to file comments on their behalf in this proceeding.

TechAmerica is the leading voice for the U.S. technology industry, which is the driving force behind productivity growth and jobs creation in the United States and the foundation for the global innovation economy. Representing approximately 1,000 member companies of all sizes from the public and commercial sectors of the economy, TechAmerica is the industry’s largest advocacy organization.

TechAmerica welcomes this opportunity to provide the Commission with a viewpoint shared by such a diverse membership.

### **COPPA Today**

TechAmerica believes that the Commission’s implementation of COPPA since 2000 (“COPPA Rule”) has provided the Internet industry with relatively certain guidelines and parameters within which to work.

The Internet industry has successfully protected the privacy of children online since COPPA’s inception. Industry members have a vested interest in ensuring that their online operations are safe for all users, especially children and their parents, and will continue to diligently do so. The Commission’s use of a safe harbor for qualified

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<sup>1</sup> Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59804 (proposed Sept. 27, 2011) (“COPPA NPRM”).

industry self-regulation proposals is especially helpful this regard. Indeed, a number of TechAmerica member companies have designed innovative parental control tools to address parental concern about children’s digital media and communications use and protect families from unwanted online contact and content.

Congress, too, in drafting COPPA, provided the Commission with sufficient flexibility to conform the law to evolutionary technological changes over time. While compliance costs incurred may be high for certain industry participants, there is a general recognition among TechAmerica’s members that the law works relatively well as written, as it is technology-neutral and allows for innovation.

TechAmerica, therefore, does not believe a comprehensive overhaul of the COPPA Rule is needed.

### **COPPA Rule Scope**

TechAmerica appreciates the Commission’s recognition that the statutory definition of a “child” under COPPA should remain the same.<sup>2</sup> TechAmerica agrees that the COPPA framework does not work well when applied to teenagers for both practical and constitutional reasons, as the Commission notes.<sup>3</sup> Further, TechAmerica supports the Commission’s determination to maintain the “actual knowledge” standard written in the COPPA statute,<sup>4</sup> whereby it is unlawful for an operator of a website not directed at children to collect a child’s personal information only if it has actual knowledge that it is doing so. As TechAmerica noted in its COPPA rule review comments in July 2010, a

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<sup>2</sup> COPPA NPRM at 59805.

<sup>3</sup> Id.

<sup>4</sup> Id. at 59806.

change to a constructive knowledge standard would be unnecessarily burdensome on Internet companies. The “actual knowledge” standard has been applied well since COPPA’s inception and provides Internet companies the necessary clear standard to develop appropriate innovative business models.

### **Definitions**

In its COPPA NRPM the Commission proposes to revise the definition of “support for internal operations of a website or online service.”<sup>5</sup> To be sure, this exemption included within COPPA is vitally important to TechAmerica’s members, which rely upon the use of certain “personal information” to effectively manage their websites or online services. However, TechAmerica requests that the Commission consider redrafting the proposed definition to explicitly include fraud detection and prevention. While the term includes “protect[ing] the security or integrity of the website or online service,” it is unclear if that phrase includes fraud detection or prevention.

The Commission also proposes to expand the definition of “personal information” to include an IP address, a screen name regardless of whether it contains a user’s email address, and videos, photos and audio files.<sup>6</sup>

With regard to IP addresses, TechAmerica notes that IP addresses, in and of themselves, are not generally considered personally identifiable information. While TechAmerica appreciates the Commission’s recognition that IP addresses are often used for security and website functionality purposes and therefore treats them as personal information if not used for “support for the internal operations of the website or

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<sup>5</sup> COPPA NPRM at 59809-10.

<sup>6</sup> Id. at 59810-13.

online service,” TechAmerica remains concerned with the Commission’s proposal to treat an IP address as personal information. It is only when an IP address is combined with personal information of a user that COPPA should be triggered and the COPPA Rule’s current definition of “personal information” accommodates that distinction under subsection (f) of the current definition. No further changes are needed.

Increasingly, the IP addresses passed with communications through the Internet are no longer unique to a specific end-user device. Indeed, some Internet access providers are adopting a technique called Network Address Translation (“NAT”) on a large scale to assign and manage IP addresses. When NAT is used, the IP address passed with a communication to its destination is different from the IP address the ISP assigns to the customer on the “private” side of its network. Thus, the increasing use of NAT renders moot the Commission’s argument that because consumers access the Internet more on handheld devices, as opposed to family computers, an IP address should be considered personal information.<sup>7</sup>

Further, the public-facing IP address may be shared by many users. The Commission attempts to dismiss this argument by noting that an IP address need not specify a particular individual just as a home address, which is currently defined as “personal information,” does not necessarily specify a particular individual.<sup>8</sup> While this may be true, users (including children under the age of 13) can access the Internet from a variety of public access points, including libraries, schools, community centers, airports, hotels, and certain retail stores, for example. To equate the geographical

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<sup>7</sup> Id.

<sup>8</sup> Id. at 59811.

ubiquity of an IP address (which could implicate hundreds of people sharing an address) with the relative specificity of a home address (which likely only contains a small subset of people), as the Commission does, is misguided. Therefore, as technology has changed, it is not necessarily “reasonably likely” to be able to contact a specific individual via solely an IP address, as the Commission believes.<sup>9</sup> The Commission should reconsider its proposal to treat an IP address in and of itself as “personal information,” notwithstanding its attempt to allow its use for internal support operations.

The Commission proposes to further expand the definition of “personal information” to include photographs, videos, and audio files that “may enable the identification and contacting of a child.”<sup>10</sup> TechAmerica disagrees with the Commission and believes that a photograph, video, or audio file should only be considered personal information under COPPA if such file can “reasonably” identify or locate such child, such as when a video or audio file is linked with identifying information (e.g., an email address). Moreover, the Commission’s argument that video and photo files should be considered personal information because of the mere existence of “facial recognition technology” is specious. Such technology is relatively nascent, as the Commission learned during its December 8 workshop on the matter, and further study is required before the Commission fashions regulations implicating the technology (notwithstanding the fact that is unclear if such technologies, including geotagging, “reasonably” identify a

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<sup>9</sup> Id.

<sup>10</sup> Id. at 59813.

person).<sup>11</sup> Thus, a blanket application of COPPA to any photo, video, or audio file that contains a child's image or voice is unnecessarily prescriptive and burdensome, especially considering how difficult it can be to distinguish between, for example, a 12 year-old child (covered by COPPA) and a 14 year-old child (not covered by COPPA) in a photo, video, or audio file.

In this vein, TechAmerica also disagrees with the Commission's proposal to treat any screen or user name as "personal information" under COPPA. For similar reasons expressed above, such screen or user name should only be considered personal information if it can reasonably identify or locate a child child, such as if it contains an email address, or if it is linked with some form of "personal information."

In addition, the proposed expansion of the definition of "personal information" to information that is not necessarily linked to a person has other consequences for those members of TechAmerica who work to comply with the law. For instance, the change in the definition of "collect or collection" to remove "or use of any identifying code linked to an individual, such as a cookie" from "the passive tracking of a child online"<sup>12</sup> would remove the linking of the information to an individual. This change does more than just cover all types of technology; as explained above, this change also expands the rule to information that is not linked to a person. The rule already addresses passive tracking when it is linked to an individual. This change could make many of the functions that are necessary to the smooth operation of the Internet, and done in an anonymous

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<sup>11</sup> TechAmerica appreciates the Commission's announcement on December 23 that it is seeking public comment until January 31, 2012 on facial recognition technologies, including their impact on children. However, it seems especially incongruous for the Commission to be regulating through COPPA, if even indirectly, facial recognition technology in light of the Commission's nascent study of such technologies.

<sup>12</sup> COPPA NPRM at 59808-09.

manner, unnecessarily subject to the requirements of COPPA. For these reasons, TechAmerica respectfully asks that the Commission not change the definitions around passive tracking and personal information to cover information that is not linked to an individual.

### **Conclusion**

TechAmerica believes COPPA and the COPPA Rule work relatively well in today's Internet environment. While it is true that the Internet marketplace is changing rapidly, the COPPA Rule need not change drastically to accommodate such changes. Rather, the COPPA statute itself contemplated technological evolution and the Commission should exercise extreme caution, pursuant to the reasons expressed above, when updating the COPPA Rule so as to not unnecessarily disrupt the balance struck in the law between protecting children's privacy online and ensuring Internet operators can continue to innovate.