

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580



Division of Advertising Practices

**Sent via electronic and U.S. mail**

July 31, 2012

Susan L. Lyon  
Cooley LLP  
719 Second Avenue  
Suite 900  
Seattle, WA 98104-1732

Re: OpenFeint, Inc., FTC File No. 112-3113

Dear Ms. Lyon:

As you know, the staff of the Federal Trade Commission's Division of Advertising Practices has investigated whether your client, OpenFeint, Inc., violated the FTC's Children's Online Privacy Protection Rule ("COPPA Rule"), 16 C.F.R. Part 312, through the operation of the OpenFeint online service. The COPPA Rule requires operators of websites or online services directed to children under the age of 13, and operators who have actual knowledge that they are collecting personal information online from such children, to provide notice of their information practices to parents and to obtain verifiable parental consent prior to collecting, using, or disclosing children's personal information.

OpenFeint is an online social gaming network run on OpenFeint's server that is available as a downloadable software kit to mobile applications ("apps"). OpenFeint's software has been downloaded and incorporated into several thousand apps available through the Apple and Android platforms. OpenFeint also maintains the openfeint.com website, which advertises and promotes OpenFeint-enabled apps. App developers can list their apps on the website and choose an appropriate category, including "Kids," to describe their apps. The FTC staff's investigation determined that the OpenFeint platform was available on numerous child-directed apps. Once incorporated into an app, the OpenFeint platform collects personal information, as defined by the COPPA Rule, from app users who engage with its social networking features, such as friend searches, app-related fan clubs, instant messaging, forums, and live chat.

OpenFeint may be an operator of an online service directed to children in connection with its information collection practices on child-directed apps. The COPPA statute and Rule define an operator, in pertinent part, as any person who operates a website or online service and who collects or maintains personal information from its visitors. The COPPA statute and Rule

define website or online service directed to children as a commercial website or online service, or a portion thereof, that is targeted to children.<sup>1</sup> The Commission's original April 1999 Notice of Proposed Rulemaking (NPRM) and the November 1999 Statement of Basis and Purpose (SBP) accompanying the final Rule indicate that the Rule is intended to cover entities in the position of OpenFeint. In the NPRM, in discussing the definition of "operator," the Commission stated that it includes "both a person who collects or maintains personal information directly from a visitor through a website or online service and a person who collects or maintains such information through another's website or online service."<sup>2</sup> In the SBP, in discussing the potential liability of network advertising companies, the Commission noted that "[i]f such companies collect personal information directly from children who click on ads placed on websites or online services directed to children, then they will be considered operators who must comply with the Act, unless one of the exceptions applies."<sup>3</sup> The Commission's statements show that it envisioned an entity such as OpenFeint to be a covered operator under the COPPA Rule.

OpenFeint maintains that its online service is not directed to children, as defined by COPPA. It also maintains that it has no role or control over the design or the content of the apps on which its service runs. In addition, OpenFeint maintains that it has limited ability to control which apps choose to incorporate its open source software, and thus to enable the information sharing functions of its service. Based on these assertions, OpenFeint argues that nothing in the statute permits the Commission to impute to OpenFeint the child-directed nature of the apps on which its software appears.

The staff disagrees with OpenFeint's position. COPPA gives the Commission broad discretion to define through rulemaking the phrase "website or online service directed to children." Congress provided only one specific limitation to that discretion: that a general audience website shall not be deemed directed to children solely because it contains a link to a child-directed site or service.<sup>4</sup> OpenFeint, which collects and maintains personal information directly from users of child-directed online services, through an interface appearing on those services, does not fall within that exception.

The staff recognizes, however, that the Rule's current definition of *website or online service directed to children* may be ambiguous as to an operator in OpenFeint's position. The

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<sup>1</sup> See 16 C.F.R. Part 312.2.

<sup>2</sup> 1999 Notice of Proposed Rulemaking and Request for Public Comment, 64 Fed. Reg. 22,750, 22,752 (Apr. 27, 1999), *available at* <http://www.ftc.gov/os/fedreg/1999/april/990427childrensonlineprivacy.pdf>

<sup>3</sup> Statement of Basis and Purpose to the COPPA Rule, 64 Fed. Reg. 59,888, 59,892 (Nov. 3, 1999), *available at* <http://www.ftc.gov/os/1999/10/64Fr59888.pdf>.

<sup>4</sup> 15 U.S.C. § 6501(10)(B).

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staff also recognizes the many policy implications regarding the potential responsibility of software “plug-ins” under COPPA, some of which have been raised by comments in the current Rule review proceedings. Accordingly, the staff has determined not to recommend enforcement action at this time.

This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take further action as the public interest may require.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mary K. Engle". The signature is written in a cursive, flowing style.

Mary Koelbel Engle  
Associate Director

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