September 24, 2012

Online Publishers Association
249 West 17th Street
New York, NY 10011

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-113 (Annex E),
Washington, D.C. 20580

Re: COPPA Rule Review: FTC File No. P104503

Dear Mr. Secretary:

The Online Publishers Association ("OPA") appreciates the opportunity to provide further comments on the Federal Trade Commission's proposed amendments to the Children's Online Privacy Protection Rule ("COPPA Rule" or the "Rule").[1] OPA is a trade association dedicated to representing trusted online content providers before the advertising community, the press, the government and the public. We are the only trade association focused exclusively on the digital content business and its unique role in the future of media. Our members include many of the Internet's most respected online publishing brands and they collectively reach an unduplicated audience of 221.2 million unique visitors per month, which represents 100% of the U.S. online population.[2]

Although several OPA members operate age-appropriate Websites that are specially designed for children, most operate sites directed to a general audience. As further explained in our comment letter dated December 21, 2011, OPA respects and shares the Commission's goal of enabling children to enjoy the Internet in a safe environment. At the same time, we believe that privacy regulations must be carefully tailored to avoid unintended consequences that could limit our members' ability to provide a rich, high-quality online experience to consumers of all ages.

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[1] Notice of Proposed Rulemaking, Federal Trade Commission, Children's Online Privacy Protection Rule, 77 Fed. Reg. 46443 (Aug 1, 2012), *available at* http://www.ftc.gov/os/2011/09/110915coppa.pdf ("Supplemental Notice").
[2] comScore Media Metrix, January 2012.

To help advance the Commission's goal of strengthening online privacy protections for children while preserving a vibrant market for online content, we offer the following comments in response to the Supplemental Notice. We also incorporate by reference our previous comments in this proceeding, as many of the points raised in our original letter remain relevant to the Commission's current proposals.

- **Any "Age Screening" Provision Should Be a Voluntary Enforcement Safe Harbor For Sites That Could Be Deemed "Directed to Children" Under The Existing Rule**

The Commission has proposed to modify the definition "Web site or online service directed to children" to address mixed-audience sites that, based on their "overall content," are "likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population."

The Supplemental Notice suggests that the Commission may have intended this change only to create a new compliance option for websites that intentionally target children but also cultivate an audience of teens and adults. The commentary suggests a desire to create a safe harbor that would allow this "mixed audience" subset of child-directed sites – *i.e.*, sites that target children but also cater to their parents or other adults – to differentiate among their visitors based on self-reported age information. Nonetheless, the operative language of the proposed amendment arguably goes farther in that it could be read to regulate as sites "directed to children" an amorphous new category of general audience sites that either attract a higher percentage of children than the typical general audience site or that have content or features that might be thought "likely" to attract an audience with a higher percentage of children than the percentage of children in the general population. The operators of such sites arguably would be required to provide a COPPA-compliant notice and obtain verifiable parental consent before collecting, using or disclosing personal information from *any* of their users, *unless* they affirmatively screen the ages of *all* their visitors prior to collecting any personal information and then comply with COPPA's verifiable parental consent requirements with respect to any users who identify themselves as under age 13.

Given the ambiguity surrounding the proposal to amend the definition of "Web site or online service directed to children," OPA believes that this facet of the Supplemental Notice could create serious problems on multiple levels – practical, statutory and constitutional – and should be clarified or reconsidered. OPA would be comfortable if the proposed amendment clearly created a voluntary "safe harbor" option for operators of sites that would be deemed to be "directed to children" under the current COPPA definition but that wish to collect information from both children and adults. If the Commission only intended to create a new compliance option for sites that would be classified as child-directed sites under the totality of the circumstances standard the Commission has used to date, the Commission should say so explicitly and should revise the proposed amended rule accordingly. Otherwise, the proposed amended rule could be read to impermissibly expand the reach of COPPA beyond the boundaries established by Congress and permitted by the Constitution. As explained below, the Commission should be careful not to redefine the critical term "Web site or online service directed to children" in a way that vitiates the "actual knowledge" standard prescribed by Congress to determine the COPPA compliance obligations of operators of general audience

websites. The Commission should also avoid creating a vague "disproportionate-child-audience" standard that would infringe on the First Amendment.

The need for further clarification is particularly acute given the ambiguity inherent in the totality of the cirumstances test used to determine when a website is "directed to children." The related commentary speaks of "child-friendly mixed audience" sites. However, this description is indefinite. It conceivably could apply to any general audience site that does not target children but has children in its audience, publishes content that appeals to users of all ages, and applies editorial standards that prohibit obscene language, graphic violence or sexually explicit material, and the like. The Commission should clarify that the proposal was intended to cover only those sites that would be deemed to be child-directed under the current totality of the circumstances test.

The circumstances that might trigger parental-notice-and-consent or age-testing obligations are also unclear. The proposed amendment does not indicate which population would be relevant to the disproportionate-child-audience test. The Supplemental Notice does not specify whether the amended COPPA Rule would require a comparison of a site's audience to the percentage of children in the general world population, in the U.S. population, or in only the online population. Nor does it indicate which of the various conflicting measurements of these populations would be considered authoritative or identify the relevant time period for such measurements.

The proposed rule could be read to suggest that there is a tipping point at which the percentage of children in an operator's audience would thrust the site into the child-directed category regardless of whether the site would otherwise be deemed to be directed to children under the totality of circumstances test and factors analysis traditionally employed by the Commission by the rule. It is unclear, however, where this line would be drawn. For example, the Commission does not indicate whether a general audience website would become a "child-directed site" if the percentage of children in its audience only marginally exceeded the distribution of children in the general population. It is similarly unclear whether an increase of 5%, 10%, or 20% would be considered "disproportionately large." Neither the language of the proposed expanded definition nor the Commission's related commentary provides any answers to such questions, even though they would be critical to a website operator's practical ability to understand and comply with its obligations under the proposed amended rule.

Even if the standard could be elucidated in a meaningful way, the Commission has already acknowledged that publishers currently lack data resources that would enable them to reliably determine the percentage of users under 13 in their audiences except by age gating. Indeed, the Commission specifically rejected the use of such audience age demographic metrics as a *de facto* legal standard in the 2011 NPRM in this proceeding.[3] Moreover, the necessary tools and data resources clearly could not be developed in the future without collecting *more* age information from users than publishers routinely collect today. The standard proposed by the

[3] 2011 NPRM at 59814 ("The commission's experience with online audience demographic data in both its studies of food marketing to children and marketing violent entertainment to children shows that such data is neither available for all Web sites and online services, nor is it sufficiently reliable, to adopt as a *per se* legal standard.")

most current amendment therefore is circular in that it would require sites to age gate in order to determine if they need to adopt an age-gating requirement. Equally important, in the name of protecting the privacy of children, it would require websites to increase their data collection about children.

- **Statutory Authority Does Not Exist to Expand The Scope of COPPA to Reach Websites that Neither Target Children Nor Knowingly Collect Information from Children**

Most fundamentally, the Commission lacks authority to apply the COPPA rule to general audience sites and services unless they have "actual knowledge" that a user is under 13. Whether a general audience site happens to be "child-friendly" is irrelevant for purposes of COPPA. The United States Supreme Court has established a two-step inquiry for reviewing an administrative agency's statutory interpretation.[4] The first step examines whether Congress has directly addressed the precise question at issue, and if it has, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If the statute is ambiguous, the court continues to the second step and considers whether the agency's interpretation is based on a permissible construction of the statute.

In this case, the statutory text clearly creates only two categories of websites and online services that are regulated under COPPA: (1) those that are "directed to children" and (2) those that have "actual knowledge[5]" that they are collecting personal information online from a child. These statutory categories circumscribe the FTC's rulemaking authority.[6] Congress defined a website or online service "directed to children" to mean a commercial website or online service that is "targeted to children." The plain meaning of "targeted" in this context requires a deliberate selection of an audience of children. The statutory text does not apply to any other category of website or service, including websites or services that are "child-friendly" or that "have reason to know" that children compose some portion of their general audience. Nor does the statute permit the Commission to extend COPPA to reach a vast new category of sites that are designed for a general audience of Internet users but may, for any number of reasons, have an audience composition that includes a higher percentage of children than the distribution of children in the general population.

Even if the plain language were not clear, the legislative history demonstrates that the Commission's authority to expand the scope of COPPA is limited. It is apparent from the legislative history of COPPA that Congress considered and rejected a broader standard. Specifically, the COPPA bill that Senators Bryan and McCain introduced on July 17, 1998, would have defined the term "website directed to children" to include commercial websites that "knowingly collect information from children."[7] This "knowledge" standard would have

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[4] *Chevron USA, Inc. v. National Resources Defense Council,* 467 U.S. 837, 843 (1984).
[5] Children's Online Privacy Protection Act, 15 U.S.C. § 6502(a)(1).
[6] *Id.* § 6502(b)(1)(A) ("Not later than 1 year after October 21, 1998, the Commission shall promulgate under section 553 of title 5 regulations that— (A) require the operator of any website or online service directed to children that collects personal information from children or the operator of a website or online service that has actual knowledge that it is collecting personal information from a child . . .").
[7] S.2326. 105th Congress, July 17, 1998 (emphasis added).

included a broad range of mental states, such as actual knowledge, constructive knowledge, deliberate ignorance, and reckless disregard.[8] Congress, however, subsequently "modified the knowledge standard in the final legislation to require 'actual knowledge'" instead.[9]

The statutory language is clear, but even if it were silent on this point, courts applying *Chevron* have consistently invalidated agency attempts to interpret statutory silence as an implicit grant of authority.[10] For example, the D.C. Circuit has rejected prior attempts by the FTC to regulate where Congress has left no gap for the agency to fill.[11] And in other contexts, the D.C. Circuit has made clear that an agency does not have authority to broaden the scope of a statute just because the text "does not expressly negate the existence of a claimed administrative power."[12]

Silence in the COPPA statute cannot be used to justify the Commission's authority to "redefine" the key statutorily-defined term "website or service directed to children." Unlike the definition of "personal information," which Congress implicitly granted the Commission authority to refine,[13] COPPA's definition of "website or service directed to children" does not reference the Commission. It therefore would be inconsistent with the statutory text for the Commission to impose an implied knowledge standard on general audience sites or otherwise expand its regulation of sites that do not target children based on Congressional silence regarding these issues. If Congress had intended COPPA to apply to the websites and online services that neither target children nor have actual knowledge that they are collecting personal information from a child, it would have made this intent clear in the statute.

In its September 2011 Notice of Proposed Rulemaking, the FTC implicitly acknowledged that a Congressional amendment would be required to broaden COPPA's actual knowledge standard: the Commission specifically noted that it "does not advocate that Congress amend the COPPA statute's actual knowledge requirements at this time."[14] The FTC correctly recognized that the "COPPA statute applies to two types of operators,"[15] and that applying the statute to other entities would require Congress to act.

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[8] *See Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Commission*, 108 F.3d 358, 363 (D.C. Cir. 1997); *see also United States v. DiSanto*, 86 F.3d 1238, 1257 (1st Cir. 1996) (noting that the knowledge standard includes actual knowledge and constructive knowledge).
[9] 76 Fed. Reg. 59804, 59806 fn. 26, September 27, 2011. As the FTC observed, "Actual knowledge is generally understood from case law to establish a far stricter standard than constructive knowledge or knowledge implied from the ambient facts." *Id.*
[10] *See, e.g*., *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005) (rejecting the FTC's attempt to regulate the legal profession through an expansive interpretation of "financial institutions" under the Gramm-Leach-Bliley Act (GLBA)).
[11] *Id.* at 468 (citing *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (internal citations omitted)).
[12] *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994).
[13] The statute's definition of personal information lists several specific identifiers, but includes a catch-all provision to account for "any other identifier that the Commission determines permits the physical or online contacting of a specific individual." The definition of "website or online service directed to children" does not similarly provide the FTC with rulemaking authority to expand on the statutory definition.
[14] 76 Fed. Reg. 59804, 59806 (emphasis added).
[15] *Id.* at 59806.

- **The Vague "Disproportionate-Child-Audience" Standard Could Infringe on the First Amendment**

The problems in ascertaining the scope and applicability of the proposed revised definition to general audience sites raise potentially serious constitutional issues, inviting a challenge on "void-for-vagueness" grounds. A law will be invalidated on its face for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385 (1926). The Supreme Court has stressed that where, as here, the regulation at issue impinges on expression protected by the First Amendment, the vagueness doctrine "demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566 (1974). In this case, the proposed amendment is clearly content-based, calling for an evaluation of the "overall content of the Web site or online service" to determine whether an online publisher must screen the age of its users or treat its entire audience as if they were children under COPPA.

The ambiguity of the audience-based test proposed by the Commission is compounded by an additional speculative prong that calls for a prediction about whether the combination of content and features on a particular site might be "likely" to attract an audience that includes a "disproportionately large percentage" of children. Thus, an operator's regulated status as a child-directed site would not necessarily depend on whether its audience composition matched or exceeded some objective population profile (however difficult that calculation might be to perform in practice). Instead, liability would depend on an even more elusive and subjective evaluation of whether the content and features of the operator's site might be "likely" to attract an audience with a certain composition. This subjective component of the standard makes compliance decisions all the more difficult and poses grave risks of inconsistent and selective enforcement. As the Supreme Court warned, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those that enforce them." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Industry has considerable experience with the totality of circumstances test and the FTC has provided reasonably clear guidance about how it applies this test, producing a degree of certainty for companies. However, the vagueness of the proposed amendments, particularly the phrases, "likely to attract," and "disproportionately large," could be interpreted to supplant the totality of the circumstances test altogether.

It is easy to imagine scenarios in which the percentage of children in the audience of a given site might fluctuate between "normal" and "disproportionately large" from day to day and even from hour to hour depending on the nature of the news stories that are making headlines at any given time. Accordingly, the proposed standard also threatens a significant chilling effect on the editorial and newsgathering decisions of publishers of general audience sites. Editorial staff would be left to worry about whether coverage of a particular issue that might be of interest to children might be likely to push the percentage of children in the audience above average levels.

By way of example, under the Commission's proposed amended COPPA Rule, a national site devoted to news coverage for a general audience might understandably wonder whether the Commission's proposed amended rule might require it to introduce an age gate for users trying to access editorial reviews or show times of movies for families and children. Given the

operational challenges that an age gate would pose and the friction it would add to the user experience, the operator might sensibly decide to simply eliminate or reduce its coverage of family-friendly movies and otherwise avoid topics of interest to children, thereby reducing the benefits of its service for everyone. In this context, the Commission's age screening proposal might reasonably be perceived as a government agency indirectly steering news coverage, a result incompatible with the First Amendment. As the Supreme Court stated in *Baggett v. Bullitt*, "vague statutes cause citizens to 'steer far wider of the unlawful zone' [than] if the boundaries of the forbidden areas were clearly marked," causing them to "restrict[] their conduct to that which is unquestionably safe. Free speech may not be so inhibited." 377 U.S. 360 (1964).

To the extent the proposed amendment would condition their access to an age gate or verifiable parental consent requirements, the proposed amendment may also threaten the First Amendment interests of adult and teen users who seek to post comments to blogs, participate in community forums, or otherwise "speak" using the interactive features of general audience websites that could be considered "child-friendly." The Supreme Court has held that similar content-based restrictions on protected speech and access to protected speech violate the First Amendment, even where such barriers are not insurmountable.

In *Ashcroft v. ACLU*, for example, the Supreme Court upheld a preliminary injunction against enforcement of a law that prohibited posting content deemed "harmful to minors" but provided a safe harbor for operators of sites that required adult users to use a credit card to access such material. 542 U.S. 656 (2004). Similarly, in *Brown v. Enter. Merchants Ass'n,* the Supreme Court struck down barriers to accessing speech when it invalidated a California law that prevented minors from purchasing violent video games. 131 S. Ct. 2729, 564 U.S. __ (2011). The law did not prohibit minors from accessing video games because an adult could purchase the game for the child but the restriction on direct purchases nonetheless sufficiently constrained speech so as to violate the First Amendment.

A rule that effectively required the age screening of all users of "child-friendly" general audience websites would erect a barrier comparable to those invalidated in *Ashcroft* and *Brown*. Although providing one's date of birth may be less intrusive than providing credit card information, the revised COPPA restrictions could be read to apply to a much larger number of sites and services. The restriction also is less narrowly tailored than the restriction invalidated in *Brown* because it could be read to require all users of certain general audience websites be age-screened, whereas the California law screened only minors.

Finally, OPA urges the Commission to clarify or re-scope the proposed amended definition of a "Web site or online service directed to children" to align it with the intent behind the original Disney proposal described in the Supplemental Notice – *i.e.*, to allow child-directed sites that intentionally target *both* adults and children to differentiate their information collection practices between these groups of users based on self-reported age information. OPA believes this can best be effectuated through a voluntary enforcement safe harbor for mixed audience sites that could otherwise be classified as sites "directed to children" under the existing COPPA standard. Structured as a safe harbor, an age-testing option that enables operators to avoid treating adult users as children is perfectly sensible and may spur the development of more

"family-friendly" digital content and services. By contrast, expanding COPPA to include a new class of sites based on the nebulous "disproportionate-child-audience" standard proposed by the Commission would likely have the opposite effect. Such a provision would chill the production of digital news and information content on subjects and themes that appeal to broad audiences but have a discernible nexus to children or their interests. Such a rule would also likely lead many publishers to collect more data about their users than they would otherwise collect, contrary to the Commission's data minimization goals. In light of these and all of the operational, jurisdictional and constitutional problems discussed above, OPA urges the Commission to reconsider this aspect of the Supplemental Notice.

- **The Definition of "Support for Internal Operations" Should Be Expanded**

OPA appreciates the Commission's decision to reconsider its previous proposed definition of the term "support for internal operations" and its related treatment of persistent identifiers. The most recent proposed amendments would permit operators of child-directed sites to collect IP addresses, cookie IDs and similar identifiers without obtaining verifiable parental consent for purposes such as analytics, authentication, network communications, contextual advertising and the personalization of content and features. All of these newly specified uses are indeed critical to the operation of virtually any website or online service and OPA applauds the Commission for recognizing that they should be included in the "internal operations" exception.

Notwithstanding the Commission's efforts to accommodate such uses, however, OPA remains concerned that the Commission's proposed definition, taken as a whole, is overly prescriptive, unduly narrow and insufficiently flexible to accommodate new technologies or functionalities that work across related sites and services. IP addresses and similar identifiers are integral to the operation of the Internet, and online technology and content platforms are evolving at dizzying pace. Given these considerations, OPA encourages the Commission to adopt a more flexible "support for internal operations" exception that sets forth an illustrative, rather than an exhaustive, list of permissible operational purposes.

A list of permitted operational uses that seems comprehensive in light of the technology of today will likely be rendered obsolete by the technology of tomorrow and any framework that requires operators to pigeonhole every step involved in the complex operations of a modern website or online service into one of only a handful of expressly articulated operational categories would be highly problematic. This concern is illustrated by the Commission's approach to the use of identifiers to support "contextual advertising." Although OPA strongly supports the Commission's conclusion that the use of persistent identifiers to deliver contextual ads should be covered by an "internal operations" exception, there are other, equally innocuous forms of online advertising that are important to the economics of online publishing and do not pose significant implications for children's privacy interests. For example, IP addresses and cookie IDs are routinely collected and used to report industry-standard metrics, to analyze performance-based marketing, and to perform core functions related to the sale and delivery of "run-of-site" and other forms of online advertising that do involve online behavioral profiling.

As we noted in our first comment letter, in addition to contextual advertising, publishers collect and use IP addresses to execute online campaigns in accordance with contractual

requirements (such as geographical delivery requirements and category or brand exclusivity commitments), to cap the frequency with which an individual ad is displayed (a feature that benefits both advertisers and website visitors), and to synchronize and sequence the display of advertising content, thereby enabling advertisers to "tell a story" through their campaigns using creative elements that must unfold in a logical order. Presumably such beneficial uses of IP addresses and similar persistent identifiers are included in the internal operations exception, but it is not clear.

Rather than attempt to enumerate in detail every potential operational use of a unique identifier that would not implicate the concerns underlying COPPA, OPA believes that the Commission would more effectively achieve its goals by articulating which types of privacy-sensitive uses should *not* be covered by the internal operational purposes exception and otherwise rely on the plain meaning of the words "internal operations." For example, the amended rule could simply note that the "support for internal operations" exception would not allow operators to target those under 13 with third-party behavioral advertising, as the Commission has previously defined that practice.

For similar reasons, OPA suggests that the Commission delete the word "necessary" from the current definition of "support for internal operations." In the context of an expanded COPPA rule that treats IP addresses and cookie IDs as personal information, the concept of "necessity" is confusing and unduly restrictive. Requiring a showing of "necessity" for each use of an IP address or cookie would be impractical to the extent this standard could be construed to prohibit any internal operational practice that could be performed in some other way that required comparatively less data collection regardless of the cost, efficacy or reliability of that alternative.

Consistent with the foregoing suggestions, OPA recommends that the Commission revise the "support for internal operations" definition to state that:

> *"Support for the internal operations of the Web site or online service" includes, for example, those activities undertaken by or for the Web site or online service, or any related Web site or online service, to: (a) maintain, improve or analyze the functioning of the Web site or online service; (b) perform network communications; (c) authenticate users of, or personalize the content on, the Web site or online service; (d) provide contextual or other advertisements that do not involve third-party behavioral profiling on the Web site or online service; (e) protect the security or integrity of the user, Web site, or online service; or (f) fulfill a request of a child as permitted by sections 312.5(c)(3) and (4).*

- **The Commission Should Reconsider The Proposed Amended Definition of "Operator"**

OPA is concerned that the Commission's revised "operator" definition would require first parties to ensure that third parties are COPPA-compliant and thus create new and potentially vast legal liabilities for first parties. We firmly believe that responsibility for COPPA compliance should continue to be borne only by the entity that collects, owns and/or controls the data about the user. There are many reasons for maintaining this long-standing legal principle which has provided clear guidance for industry for many years.[16] This principle also is consistent with the allocation of duties and liabilities in analogous consumer protection law contexts, such as product liability and false advertising. For example, numerous courts have held that newspapers and other media publishers have no duty to investigate the accuracy of claims made in advertisements they print.[17] These holdings stem from the recognition that imposing obligations on publishers to police their advertisers would both unduly restrict the flow of commercial speech and indirectly threaten the core, noncommercial speech that is supported by the sale of advertising.[18]

OPA also is concerned about the practical challenges and unreasonable burden imposed on publishers by the new "operator" definition, especially when paired with the proposals to expand the definition of personal information to include IP addresses and other persistent identifiers and the narrow "internal operations" exception. In combination, these changes threaten to create a cloud of vicarious liability over operators of child-directed sites that will likely chill incentives to offer high-quality, rich interactive content and features for children.

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[16] *See, e.g.* 64 Fed, Reg, 59892 (1999) ("[O]ne commenter sought assurance that an operator would not be liable if his site contained a link to another site that was violating the Rule. If the operator of the linking site is not an operator with respect to the second site (that is, if there is no ownership or control of the information collected at the second site according to the factors laid out in the NPRM), then the operators will not be liable for the violations occurring at the second site.").

[17] *See, e.g.*, *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La. 1987) ("[A] newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisements placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised."), *aff'd*, 834 F.2d 1171 (5th Cir. 1987) (per curiam); *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101, 103 (Cal. Ct. App. 1987) ("[W]e are loathe to create a new tort of negligently failing to investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue."); *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974) ("[N]o such legal duty to investigate [advertisements] rests upon respondent [, the publisher of *Popular Mechanics Magazine*,] unless it undertakes to guarantee, warrant or endorse the product. To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system."); *Goldstein v. Garlick*, 318 N.Y.S.2d 370, 374 (N.Y. Sup. Ct. 1971) ("Nor should the onerous burden be placed upon newspapers under ordinary circumstances to conduct investigations in order to determine the effect of a questioned advertisement.").

[18] *See, e.g.*, *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F. 2d 830, 837 (5th Cir. 1989) ("[T]he publication's editorial content would surely feel the economic crunch from the loss of revenue that would result if publishers were required to reject all ambiguous advertisements.").

As the Commission knows, the rendering of a webpage often involves multiple parties and a variety of software tools and technology. It would be logistically difficult and potentially prohibitive for a publisher to have to continually assess the ongoing COPPA-compliance of multiple third parties whose servers may be collecting information from users of its website. Software products tend to change often as new and innovative services emerge and software is updated. Publishers would be hesitant to integrate any third-party tool or software into a site for fear that standard industry software tools or third-party practices may run afoul of child-specific COPPA laws. With the proposed expansion of the Rule to include persistent identifiers as "personal information" and a narrow "internal operations" exception, software companies also may be hesitant to license or allow integration of their software products within child-directed websites due to concerns about the requirements, restrictions and potential liabilities under COPPA.

At a minimum, the FTC should clarify that the publisher is entitled to rely on the third party's representations about its information practices and will not be liable if the third party violates those representations. Online publishers should not be held responsible for the acts of third-party owners of tools, plug-ins or networks that profess to collect information from the publisher's users for one purpose but then use it for another purpose, share the information with third parties, or simply change their business model after the information is collected.

The stated rationale for the Commission's proposed expansion of the definition for "operator" is that the ad network or plug-in provider collects information "for the benefit" of or "in the interest" of the website publisher. This logic breaks down, however, when the third party shares information collected from the publisher's visitors with other entities, or uses it for purposes of retargeting consumers on competing websites or for other purposes that are inconsistent with the publisher's interests.

A related section of the Supplemental Notice proposes to include advertising networks, plug-in providers and social media networks in the definition of an "operator" when their services are integrated with child-directed sites. Significantly, in the commentary discussing this proposal, the Commission acknowledges that the "strict liability" standard applicable to "conventional child-directed sites" would be unworkable "because of the logistical difficulties" that the integrated services would face "in controlling or monitoring which sites incorporate their online services." It is no less difficult for online publishers to control or monitor how the third parties that collect information directly from website visitors actually use and share that information. Accordingly, the Commission should recognize that a strict liability standard for the first-party operator of a child-directed site would be equally unworkable and unfair in these circumstances.

- **OPA Supports the Proposed Treatment of Screen Names and User Names With Clarification**

OPA supports the Commission's conclusion that screen names and user names should not be included in the definition of "personal information" unless they function as "online contact information" as defined by COPPA. In other words, we understand that a screen or user name used in place of a child user's real name would trigger the requirements of COPPA only if it incorporates or consists of an email address, instant messaging address, video chat identifier or similar identifier that permits direct contact with a child online.

To avoid any ambiguity, however, we would encourage the Commission to clarify that anonymous screen names will not be considered "online personal information" merely because they are used to identify the users who have made posts to interactive forums, played games or chatted with others on child-directed sites that are otherwise operated in compliance with COPPA. Publishers of child-directed sites have long used carefully anonymized screen names in place of real names to minimize data collection and enable users to participate in filtered chat or moderated interactive forums without revealing individually-identifiable information. Publishers also commonly use a single screen name as a login credential that provides users with seamless access to personalized content and features across multiple platforms and devices. OPA anticipates that the Commission's proposed treatment of screen names and user names will preserve our members' ability to continue to provide these beneficial interactive services and features on sites and services designed for children. To the extent that the Commission expands "personal information" to include screen names, it would be helpful if the Commission revised the text of the proposed COPPA Rule to explicitly recognize that the use of screen names for these activities will not be deemed as permitting "direct contact" with the child online or requiring verifiable parental consent.

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OPA commends the Commission's commitment to protecting the privacy and safety of children online and looks forward to working with the Commission to answer any questions regarding the foregoing comments or the online publishing industry.

Sincerely,

Pam Horan
President
Online Publishers Association