Before the
Federal Trade Commission
Washington, D.C. 20580

In the Matter of	)	
	)	
COPPA Rule Review	)	Project No. P104503
16 C.F.R. Part 312	)	
	)	

COMMENTS OF THE INTERNET COMMERCE COALITION IN RESPONSE TO THE SUPPLEMENTAL NPRM

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September 24, 2012

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I. Introduction and Summary

The Internet Commerce Coalition ("ICC") appreciates the opportunity to respond the Commission's supplemental proposal in its rulemaking. The ICC's members include leading Internet and e-commerce companies and trade associations: Amazon.com, AOL, AT&T, CareerBuilder, Comcast, eBay, Google, Monster.com, Verizon, TechAmerica and US Telecom. We work for balanced rules governing Internet conduct that protect important interests such as privacy without impeding innovation or the utility of the Internet as a platform for human communication.

ICC members care deeply about protecting children's privacy online, and the ICC General Counsel helped to draft the COPPA statute, working closely with Senate and FTC staff.

At the same time, the ICC believes strongly in the careful balance that COPPA struck between protecting children's privacy through a rigorous verifiable consent requirement, and avoiding burdening speech on sites and online services that are not targeted to children under age 13 and do not have actual knowledge that they are collecting information from a child.

We urge the Commission to reconsider three proposals in its proposed supplemental rulemaking: (1) its proposal to hold first party operators strictly and vicariously liable for information collection by third parties through the first party site or service; (2) its proposal to make third parties liable if they have "reason to know" that they are collecting information from a site or service targeted to children; and (3) its proposal to treat sites or services that have content likely to attract a higher percentage of children than in the general population as targeted to children and required to do age-screening.

We also urge the Commission, if it is set on expanding the Rule's definition of personal information, either to: (1) narrow the range of situations in which IP addresses or device

identifiers are considered to be personal information, or (2) amend its proposed definition of "internal operations" to make the list open-ended and able to expand as the Internet evolves.

COPPA verifiable consent is already a significant barrier to the availability of interactive content on the Internet for children, and the proposed Rule would eliminate the important "email plus" exception to opt-in parental consent for limited collection of personal information. In revising the COPPA Rule, we urge the Commission to be careful to respect the balance reflected in the statute and to reserve changes to the Rule to those that are narrowly tailored to protect children's privacy and consistent with the statutory bounds that Congress established in COPPA.

Taken together, these other elements of the proposed Rule would vastly expand the COPPA Rule to reach a large number of entities that Congress had no intention of regulating through the statute -- sites and services that are not targeted children, do not have actual knowledge that they are collecting information from a child, or that collect no information that would enable them to locate or contact a specific child. Each of these four features of the proposed Rule would: (1) exceed the Commission's COPPA rulemaking authority, (2) have serious negative practical consequences for the availability of content and services for children, and (3) set onerous and very negative precedents for Internet regulation generally that run contrary to the Administration's Internet Policymaking Principles.

With regard to each proposed change to the COPPA rule, we set forth in bold text alternative language that would advance the Commission's goal in a more narrowly tailored way. We share the Commission's concerns about addressing collection of information from children by third parties and cross-site behavioral targeting of specifically identifiable children on sites or services targeted to children. However, we urge the Commission to address these concerns through the narrower approaches suggested in these comments.

II. The FTC's COPPA Rulemaking Authority Is Limited

The supplemental NPRM rests on the mistaken assumption that "Congress granted the FTC broad rulemaking authority under COPPA" 77 Fed. Reg. at 44644.

When Congress enacted COPPA, it was careful to reserve COPPA's verifiable parental consent and other requirements for "operator[s] of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child." 15 U.S.C. § 6502(a)(1). Congress defined the term "operator" in relevant part as:

> ". . . any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service . . .

15 U.S.C. § 6501(2)(A).

Nowhere in COPPA does Congress grant the FTC plenary rulemaking authority to interpret the statute. Instead, the FTC's rulemaking authority is created only through a requirement to issue rules that impose specific requirements on "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." 15 U.S.C. § 6502(a)(1)(A). Regulating any other operators would be contrary to law. *See Chevron v. NRDC,* 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also ABA v. FTC,* 671 F. Supp. 2d 64, 75 (D.D.C. 2009) (FTC lacked authority to subject lawyers to Red Flags Rule as "financial institutions . . . or creditors"), *vacated as moot due to intervening legislation confirming the District Court's decision,* 636 F.3d 641 (D.C. Cir. 2011); *S.E.C. v. Sloan*, 436

U.S. 103, 118 (1978) ("The courts are the final authorities on issues of statutory construction, [citation omitted], and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.").

III. Expansion of the definition of "operator" to include collection by third parties "in the interest of, as a representative of, or for the benefit of, the operator"

We understand and agree with the Commission's concern over a potential loophole in the COPPA Rule for collection of personal information by third parties through a website or online service targeted to children. However, the proposed solution to this issue is totally unworkable and contrary to the statute.

This aspect of the proposed Rule would hold first party operators strictly liable for information collected by third parties, even where the first party operator does not collect, use or even have access to the personal information collected. This standard is unworkable. It would apply regardless of whether the first party operators knew of the third party's collection of personal information and would make the first party operators vicariously liable for the third party's compliance with the statute when they are powerless to effectuate compliance.

The supplemental NPRM states that its proposed definition of "on behalf of" covering information collection "in the interest of" or "for the benefit of the operator" is consistent with the plain and common meaning of the terms. In support of this proposition, the Commission points only to positions it has urged in the context of an FCC telemarketing proceeding, and one 9th Circuit case, which found that, in the context of a securities fraud claim, a communication was made on behalf of an issuer of a class of securities when "made in the interest of, as a representative of, or for the benefit of" the issuer. This interpretation is strained, and as we will explain below, contrary to the structure of the statute.

But even assuming that this definition is accurate, it cannot support the strict liability rule that the further NPRM would impose on first party operators and mobile application platforms.

First, the statute covers operators "on whose behalf [the] information is collected or maintained." Even under the NPRM's expansive reading of "on whose behalf", it means *that the actual collection or maintaining of the information* must be "in the interest of, as a representative of, or for the benefit of" the first party operator. The NPRM instead focuses on whether *the function performed by the third party* benefits the first party operator. Thus, it assumes that plug-in providers or ad networks are collecting information on behalf of the first party operator. This interpretation is contrary to the plain language of the statute, as these entities are collecting information on their own behalf and not for the first party operator.

For example, it defies reason to argue that a third party operator that acts in violation of forum rules or contractual obligations imposed by a first party website operator or online service is acting on the first party's behalf, in their interests, as their representative, or for their benefit."

Congress intended the "on behalf of" formulation to apply where a third party is collecting or maintaining information for the first party operator and the first party operator thus has access to the personal data *and* control over COPPA compliance. (In other words, in the framework of EU data protection law, the first party operator is acting as a "data controller.")

Any other interpretation cannot be squared with the structure of the statute and the extensive obligations it places on operators in § 6502. For example, a first party operator cannot comply with parental access or deletion requests regarding personal data held by a genuinely independent third party. Nor can it control uses or disclosures of the personal data. Had Congress intended this improbable result, it would have included language to that effect, and

would not, as the supplemental NPRM assumes, have packed this meaning into the "on whose behalf" clause that the supplemental NPRM relies upon so heavily.

Furthermore, the strict and vicarious liability approach is diametrically opposed to the principles of intermediary liability that have been an essential feature of U.S. Internet policy and have been essential to the growth of the Internet as forum for free expression and innovation. COPPA was enacted in 1998 after 47 U.S.C. § 230 and the online service provider liability limitations of the Digital Millennium Copyright Act, 17 U.S.C. § 512. Had Congress decided to impose the sort of strict or vicarious liability on Internet companies, it would have said so forthrightly. We urge the FTC to be extremely careful in attempting to alter this policy framework through revisions to the COPPA Rule, as it is critical to the scalability of online platforms.

Instead of straining under the fiction that the plug-in or behavioral advertising operators are acting "on behalf" of the operator, the Commission should state that operators whose sites or services are targeted to children should bind third party operators whom they know are collecting personal information through their sites or services to comply with COPPA with regard to that information collection. This could be accomplished by creating a new subsection at the end of 15 C.F.R. § 312.3 as follows:

> **(f) An operator of a website or online service that is targeted to children that has actual knowledge that another operator is collecting personal information from children on such website or online service shall require such other operator by contract to comply with the requirements of this Rule.**

Alternatively, the Commission could create an exception to its proposed rule revision specifying that where the first party operator adopts policies that prohibit third party operators from collecting personal information from children from their site or platform without obtaining

verifiable parental consent as required by COPPA, the information collection is not "on behalf of" the first party operator.

Either alternative would incentivize first party operators to provide actual knowledge to third party operators that COPPA applies to their activities. Thus, the safe harbor would successfully give third party operators the information necessary to make these third parties responsible. It would also avoid imposing unworkable obligations and liability on first party sites and services to actually comply with COPPA with regard to personal data that they never access and do not control. The current rule would impose unjust and chilling liability on first party websites and platforms, discouraging them from even allowing plug-ins on their sites and services.

IV. Direct Regulation of Third Parties Who Collect Personal Information from a WebSite or Online Service

The supplemental NPRM would also impose COPPA compliance obligations on third party operators of ad networks or plug-ins who collect personal information from sites or online services that are directed towards children, even if the third party's overall service is not targeted to children.

In enacting COPPA, Congress was careful to give the FTC authority to regulate only information collection by or on behalf of "operators" whose sites or services are "targeted to children." Extending the scope to plug in and ad network operators whose services aren't directed towards children and who lack actual knowledge that they are collecting personal information from children clearly exceeds the authority granted the FTC by COPPA.

The Commission's suggestion of a "reason to know" standard for third party operators, such as plug-ins and third party advertising networks, is equally unworkable and contrary to law. The "reason to know" standard is utterly foreign to COPPA, which applies only to sites or online

services that are "targeted to children" or have "actual knowledge" that they are collecting personal information from children.

What is more, the standard is wholly unworkable. For example, would an over the transom email to an employee constitute reason to know? Would a comment on a user feedback form? Furthermore, even a formalized notice structure would be subject to potential abuse from competitors or misguided commenters who wrongfully allege that a site or online service is targeted to children. Sites and platforms would have further incentives not to offer content appropriate to minor children to avoid this difficult compliance burden.

For very good reasons, Congress has consistently rejected this standard in setting up Internet liability regimes – including when it enacted COPPA. The Commission should not *and cannot* impose this regime on third party operators. Instead, it should adopt the contracts and policies approach for first party operators we describe above in Section III.

Our specific request is that the Commission amend the proposed rule as follows:

Web site or online service directed to children **means a commercial Web site or online service, or portion thereof, that:**

(a) Knowingly targets children under age 13 as its primary audience; or,

(b) based on the overall content of the Web site or online service, is likely to attract children under age 13 as its primary audience; or . . .

~~**(d) knows or has reason to know that it is collecting personal information through any Web site or online service covered under paragraphs (a)–(c).**~~

V. Proposed Expansion of the Definition of "Web site or online service directed to children."

The ICC strongly supports Disney's proposal included in the supplemental NPRM to allow sites that are targeted to children *and* targeted to adults to do age screening as a way to comply with COPPA.

However, the Commission's proposal containing this change also adds a third (and new) class of "directed towards children" sites and services – those that are likely to attract a disproportionately large percentage of users under 13 years old, based on overall content. This standard is confusing and unclear.

As currently phrased, the new third category appears to apply in a way that would result in a large number of sites that are genuinely not targeted to children, but may have some content that interests them, being subject to COPPA.

The words "disproportionately large" are vague and potentially quite broad. It is unclear whether this phrase is intended to convey having content that attracts a higher percentage of children than are found in the general population, or more children than adults. If the former, then sites targeted to adults that address a subject of interest to children under 13 (for example, sites with content on how to be a sports coach, sites that discuss ballet, or even the iPhone site) would need to age screen. Having content that is likely to attract 5% or 15% more children than are present in the general population is very different than "targeting." Targeting is a word that strongly implies *intent* to attract an audience of children, not an effects test. The NPRM's proposed subsection (c) would be a major expansion of COPPA to sites that are not targeted to children and do not have actual knowledge that they are collecting personal information from a child – an expansion that plainly exceeds the FTC's authority.

The proposal would chill general audience sites and services from including content that might be of interest to children as well as adults. It implies that, to protect themselves from liability, such sites and services need to commission studies of the age of their audiences or else need to expand age-screening. Age-screening is a positive and appropriate alternative to verifiable parental consent for sites that actually target children and adults. However, it slows

users' online experience on general audience sites, and should not be imposed on this larger universe of sites that have content that is likely to interest children, but are actually targeted to adults. The impact would be particularly difficult in the e-commerce context. Such sites typically require payment with credit card or Pay Pal (mechanisms that screen out children under age 13) and target adults. However, children may view these sites in greater numbers than their percentage of the general population. The expansion of entities subject to COPPA would be significant – something that the proposed regulatory burden analysis in the supplemental NPRM ignores.

Taken together with the expansion of the definition of "operator," this would subject a large number of entities that currently are unaffected by COPPA to some COPPA compliance obligations – likely many more than the "approximately 500 additional Web site or online services that the supplemental NPRM estimates would newly qualify as *operators* under the proposed modifications to the Rule's definitions." 77 Fed. Reg. at 46650. The cost of these burdens would need to be carefully examined both by the FTC and by OMB.

A much better approach, consistent with the statutory language and with an ordinary understanding of this issue, would be to tie this category to sites that are targeted to children *and* also targeted to adults, removing any reference to disproportionate numbers and any language on a different test than in categories (1) and (2).

We suggest specifically that the supplemental NPRM's definition of "Web site or online service directed to children" be amended as follows:

Web site or online service directed to children **means a commercial Web site or online service, or portion thereof, that:**

(a) Knowingly targets children under age 13 as its primary audience; or,

(b) based on the overall content of the Web site or online service, is likely to attract children under age 13 as its primary audience; or . . .

(c) based on the overall content of the Web site or online service, the website knowingly targets children under age 13 and knowingly targets an audience of users over age 13~~is 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;~~

(d) *provided however that* such Web site or online service shall not be deemed to be directed to children if it:

(i) Does not collect personal information from any visitor prior to collecting age information; and

(ii) prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first obtaining verifiable parental consent.~~; or,~~

VI. Modifications to definition of "personal information" and "persistent identifiers" and "support for internal operations"

We appreciate the supplemental NPRM's proposed clarification of what it means by "support for internal operations," as an exemption to the "persistent identifiers" included in the definition of "personal information." However, the proposed rule would still regulate any collection of IP addresses and device identifiers as personal information, regardless of whether a child is individually identifiable unless a specific exception applies – instead of specifically regulating their collection for the specific purposes that the FTC wants to control for, such as cross-site behavioral advertising using individually identifiable information, or contacting a specific child.

Viewed in conjunction with the other modifications, the proposed Rule as a whole would subject a large number of new websites and online services to COPPA. For example, sites, services and third-party ad networks that display behavioral ads on a child-directed site or service would all be subject to the Rule, even if the only information collected was an IP address.

While this approach is consistent with the FTC privacy report, it is inconsistent with COPPA, which limits non-statutory elements of personal information regulated under COPPA to

those that are sufficient to locate or to contact a specific child. 15 U.S.C. § 6501(8)(F). Again, COPPA does not give the Commission discretion to regulate beyond the scope of the statute. *See* Section II above.

The proposal creates a significant risk of harming innovation by spelling out a finite list of "support for internal operations" exceptions that is fixed in time. Website and online service functions continue to evolve rapidly, as shown by the long list of exceptions that the Commission has had to develop in this proceeding, many of which were not relevant 10 years ago. A fixed list of exceptions is likely to become outmoded soon, making the finite exception list unworkable.

We are not asking the Commission to modify the current Rule's definition of personal information. However, should the Commission decide to make modifications, we urge the Commission to tailor those changes to its concern regarding third party behavioral advertising within the limits of the COPPA definition. Specifically, we urge the Commission to modify the definition of personal information in the proposed Rule to apply it to IP addresses and device identifiers to the extent collected for the purpose of or used to locate or contact a specific child, including by presenting cross-site behavioral advertising to such child over time using individually identifiable information.

For the same reasons, the Commission should delete "photographs, videos or voice files" from the definition of "personal information." The proposed Rule defines location information as personal data. *See* proposed § 312.2(i). The fact that those items "may contain geo-location information, " 2011 NPRM at 38-39, cannot justify designating all such content as personal information, as it is the geo-location information itself, not the photo, video or audio content, that may enable locating the child. Instead, the Commission should make clear that files containing

geo-location information are personal information. The changes to the proposed definition of "personal information", § 312.2, would read as follows:

> **(g) A persistent identifier that can be used to recognize a user over time, or across different Web sites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the Web site or online service. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier, where such persistent identifier is used or disclosed to contact a specific individual, including to engage in cross-site behavioral advertising to that individual using individually identifiable information;**
>
> **(h) ~~A photograph, video, or audio file where such file contains a child's image or voice;~~**
>
> **~~(i)~~ Geolocation information, or any file containing geolocation information, sufficient to identify street name and name of a city or town; or . . . ,**

If the Commission does not wish to make our proposed change to § 312.2(h), as an alternative we urge it to modify the definition of "internal operations" to make clear that the exception "includes, but is not limited to" the proposed elements of the definition. This would allow the list of internal operations functions to evolve over time, and would thereby avoid interfering with innovations in Internet and online services that fit the "context" exception in the FTC Privacy Report:

> ***Support for the internal operations of the website or online service*** **means ~~those~~ activities, including but not limited to those, necessary to: (a) maintain or analyze the functioning of the website or online service; (b) perform network communications; (c) authenticate users of, or personalize the content on, the website or online service; (d) serve contextual advertising on the website or online service; (e) protect the security or integrity of the user, website, or online service; ~~or~~ (f) fulfill a request of a child as permitted by §§ 312.5(c)(3) and (4); so long as the information collected for the activities listed in (a)-(f) is not used or disclosed to contact a specific individual or for any other purpose.**

VII. CONCLUSION

The result of the proposed rule changes would be to hinder innovation, to stifle the dissemination of online content that would appeal to children, particularly content that may also

appeal to adults and users over 12. As the Center for Democracy and Technology's comments observe, the proposals would fundamentally undermine the "delicate balance" between the equally important values of privacy and all users freedom of speech rights that Congress struck in COPPA. They would expose the revised COPPA Rule to strong legal challenges not only for exceeding the Commission's authority under COPPA, but also for violating the First Amendment.

We urge the Commission to opt instead for the balanced solutions proposed in these comments which achieve most of the Commission's goals without violating the important statutory, constitutional and practical interests explained in these comments.

Respectfully submitted,

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