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The Association of Magazine Media

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FEDERAL TRADE COMMISSION
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COPPA RULE REVIEW, 16 CFR PART 312
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COMMENTS OF MAGAZINE PUBLISHERS OF AMERICA

The Magazine Publishers of America (MPA), the national association for magazine media companies, is pleased to comment on the Federal Trade Commission's ("FTC" or "Commission") supplemental proposed changes to the Children's Online Privacy Protection Rule ("Rule").[1]

MPA, established in 1919, represents close to 200 U.S. magazine media companies with approximately 1000 titles, about 30 international publishing companies and more than 100 associate members. Our members are multi-platform publishers who create content for print, online, and mobile platforms. MPA members publish some of the nation's best known and most loved magazines. Our diverse membership also includes publishers of many small, regional, and niche titles serving very diverse communities and interests, including several iconic titles for children.

MPA members have extensive experience with COPPA, and believe the current Rule works well. In these comments, we discuss MPA's concerns regarding the proposed changes in the supplemental notice ("SNPRM") to the definitions of the terms "operator" and "Web site or online service directed to children", and how these changes could significantly expand the reach of COPPA and thereby negatively reshape the magazine user experience online. We also reiterate our support set forth in comments to the Commission's 2011 NPRM for the existing

[1] Supplemental Notice of Proposed Rulemaking for the Children's Online Privacy Protection Rule, 77 Fed. Reg. 46643 (Aug. 6, 2012).

email plus sliding scale method of obtaining parental consent, and associate ourselves with the comments of the Direct Marketing Association.

The Changes Proposed in the SNPRM Have the Potential to Significantly Increase the Number of Web Sites and Online Services Subject to COPPA's Notice and Consent Requirements

Changes proposed in the SNPRM (and the NPRM) could vastly expand the universe of Web sites subject to COPPA. Specifically, these include the expanded definition of "operator;"[2] the revised definition of personal information to include persistent identifiers;[3] and the expansion of the definition of "Web site or online service directed to children."[4] While each change individually would expand COPPA's potential reach, the combined effect of the changes is even larger than the expansion from each change if made alone. Under the proposed definitions, an operator of a children's site that does not collect personal information would have new COPPA obligations if a third party ad network or plug in collects persistent identifiers but no other "personal information." In addition, a site whose primary audience is adult, but who may nonetheless fall within the new category of "disproportionately large percentage of children under age 13" would also have to comply with COPPA in instances where the data collected is only persistent identifiers.

As a result of these proposed changes, an untold number of Web sites would fall victim to a host of negative consequences. We are concerned that the changes will result in a diminished interactive experience for children and adults on Web sites seeking to avoid regulatory burdens and potential liability issues, increased friction and annoyance if Web sites with primarily adult audiences implement age verification for all users, and increased costs for Web sites that result from the implementation of notice and consent protocols. We believe that the proposed changes would also have a chilling effect on publishers that want to bring new and innovative content offerings to market. These negative consequences would all occur without any defined compensating enhancement to children's privacy.

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[2] 77 Fed. Reg. at 46643-46644.
[3] *Id.* at 46647.
[4] *Id.* at 46645-46646.

The Commission's Proposal to Expand the Definition of "Operator" Burdens Businesses Without Providing Additional Protection to Children Under 13

MPA is sympathetic to the Commission's goals of protecting against the collection and use of personal information from children under 13. We strongly disagree, however, with the expansion proposed by the Commission that would impose liability on first-party operators of child-directed sites for the responsibility of COPPA compliance for third parties that are present on their sites. This approach would have the effect of imposing additional compliance obligations on both businesses and consumers where there has not been a rationale or any evidence put forward by the Commission that it would result in any additional protection to children under 13.

The Commission Incorrectly Asserts that Data Collected Using [Persistent Identifiers] by Third Parties Is "Collected or Maintained on Behalf of" the First Party "Operator" of the Site or Service.

The Commission's addition of the proviso to the definition of operator that interprets the phrase "on behalf of" to describe the relationship between first and third parties is not supported by the statute and does not accurately represent the nature of the relationship between these parties or the reasons for the data collection. It is not the experience of MPA's members that first parties control or benefit directly from third party collection of data through their sites such that the data can be characterized as being collected "on behalf of" the first party. Despite the fact that the Commission itself indicates that "the child-directed site or service does not own, control, or have access to the information collected...," the Commission subsequently states with certainty that the information is collected "on [the first party's] behalf."[5] This conclusion is not supported by the Commission's legal analysis, which relies on a single case from the securities fraud context and on the Commission's own filings in unrelated regulatory proceedings,[6] nor does it accurately reflect how online advertising works. If a third party is collecting personal information or persistent identifiers, it is for its own benefit, not for the benefit of the publisher who does not have access to the information obtained by the third party.

[5] *Id.* at 46644.
[6] *Id.*

In the SNPRM, the Commission states that a Web site may "benefit" from its use of integrated services because the service provides the site with advertising revenue, content or functionality.[7] But the phrase "for the benefit of," especially when used to interpret the term "on behalf of," implies that the third party is acting in the interest of the first party, with the goal of benefiting the first party. As explained above, third parties in the online advertising scenario retain data ownership and are acting in their own interests. By interpreting the phrase "on behalf of" to include any incidental benefit to a first party, the SNPRM goes beyond the "plain and common" meaning of the phrase. In the offline world, the Commission does not treat an advertisement for a luxury car in the print edition of a high-end cooking magazine as if it were put there "on behalf of" a magazine publisher. With similar economics and choices at play in the online world, it is unreasonable to assume that a third party ad network is advertising on a Web site "on behalf of" the Web site.

MPA also asks the Commission to understand the burden that its proposed approach would place on first parties and their users. As described in the NPRM,[8] and reinforced in the SNPRM, the Commission seems to imply that all parties present on a site who must comply with COPPA can "cooperate" to achieve the notice provision proposed, based in part upon how "easy and commonplace" integration between first and third parties has become.[9] However, contractual and logistical arrangements between first and third parties are not simple, as the Commission acknowledges in noting that "the strict liability standard ... is unworkable for advertising networks or plug-ins because of the logistical difficulties such services face in controlling or monitoring which sites incorporate their online services".[10] The SNPRM therefore proposes that third parties should not be covered by COPPA unless they know or have reason to know that their services are incorporated into a site or service that is directed to children, and specifically notes that this proposal would not impose on third parties any duty to monitor or investigate where their services are incorporated.[11] Yet the Commission makes no modifications to its consent procedures to facilitate easy arrangements between the parties. Nor does it provide similar "relief" to first parties as it provides to third parties due to their lack of control over first

[7] *Id.*
[8] Federal Trade Commission, Proposed Rule Request for Comment, Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804 (Sept. 27. 2011).
[9] 77 Fed. Reg. at 46644.
[10] *Id.*
[11] *Id.*

party activity. First parties face the same operational challenges in controlling or monitoring data collection by ad networks and plug-ins. We encourage the Commission to afford similar consideration to first parties in this regard as the Commission has granted in other similar contexts.[12]

As noted, the ability of first and third parties to coordinate notice, consent, and verification of data collection would be subject to both technical and legal challenges. As a result the only solution would be, in many cases, for consent to be obtained multiple times from multiple different parties for their practices, all occurring from a child's activities on one site. The Commission has not done any analysis of the potential impact of such a result. We believe that users would find a Web site or online service containing multiple, separate consents to be annoying and frustrating. This approach would also leave first parties open to enormous potential liability for third parties' failure to comply, despite their lack of direct control over third party actions.

Further, MPA believes that this scenario would ironically be less protective of children's privacy. First party child-directed sites that are not currently collecting any data may be required to undertake all of the steps necessary to be COPPA compliant, which would necessitate that these sites collect personal information where they previously had not done so. The implications of this fundamental change in approach are far reaching and we urge the Commission to reconsider this proposed approach.

The Commission's Expanded Definition of Web site or Online Service Directed to Children Would Significantly Increase the Number of Web sites Subject to COPPA, Is Impractical to Implement, and Raises First Amendment Concerns

Concerns with the proposed three-prong definition of "directed to children"

In the NPRM, the Commission proposed only minor modifications to the definition of a "Web site or online service directed to children." As noted by the Commission in the NPRM, the current definition is "largely a 'totality of the circumstances' test that provides sufficient coverage and clarity to enable Web sites to comply with COPPA and the Commission and its

[12] For example, in its review of online behavioral advertising, the Commission has recognized the difficulty of putting the burden on first parties for potentially unknown data collection activities of third parties, when the first party does not own, control, or have access to that data, and has declined to impose that burden on the first party.

state partners to enforce COPPA."[13] The totality of the circumstances analysis takes into account many aspects of the site, subject matter, visual content, and use of animated characters or child-oriented activities and incentives among them.[14] With respect to audience composition characteristics, the definition concludes, "The Commission will also consider competent and reliable empirical evidence regarding audience composition; [and] evidence regarding the intended audience[.]"[15] Notably, in response to a suggestion for a strict audience composition measure, the Commission correctly concludes in the NPRM that online audience demographic data is "neither available for all Web sites and online services, nor is it sufficiently reliable to adopt it as a per se legal standard."[16]

In the SNPRM, however, the Commission ignores this rationale and proposes a profound change in the definition of a "Web site or online service directed to children" that creates significant concern to MPA. The new proposed definition set forth in the SNPRM has three parts. The first two parts are well defined by the totality of the circumstances test. However, the third part of the definition is a new concept that significantly broadens the definition beyond Web sites that are intended to reach, or whose content is likely to attract, children under age 13 as a *primary* audience. The new definition proposes to pull into COPPA's purview any Web site whose content 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."[17]

The most recent Census Bureau data indicates that the percentage of children under age 13 in the general population is approximately 17 percent.[18] As a result, an enormous chasm exists between the current standard of whether a site is "targeted to children" and the broad sweep of the third prong of the proposed standard.[19] The proposed change would likely capture far more new sites within the purview of COPPA than the total sites currently captured. The

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[13] 76 Fed. Reg. at 59814.
[14] 16 C.F.R. § 312.2.
[15] *Id.*
[16] 76 Fed. Reg. at 59814.
[17] 77 Fed. Reg. at 46653.
[18] U.S. Census Bureau, C2010BR-03, Age and Sex Composition: 2010 (May 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.
[19] 16 C.F.R. § 312.2.

corresponding implications and liability for Web sites and online services are unworkable and not commensurate to any yet to be quantified potential consumer protection.

In addition to the clear lack of statutory authority for the Commission to broaden the coverage of COPPA in this manner,[20] there are also critical practical considerations that we urge the Commission to consider. First, many magazine media Web sites that are not targeted to children do not expend resources to measure the size of their under 13 audience and therefore do not know whether and by how much their audience composition differs from that of the general population.

Second, even for magazine publishers that may measure their under 13 audience, small sample sizes are likely to fall far short of measures that are "sufficiently reliable" to serve as a legal standard as noted by the Commission in the NPRM.

Third, for magazine Web sites that are not targeted to children, there may still be occasions when the content on the Web site temporarily appeals to and therefore attracts a younger audience for that snapshot in time. For example, a sports magazine Web site may attract a younger audience during the Olympics or a music magazine Web site's audience may skew younger when a youth-oriented musical group is featured. This temporary increase in younger visitors does not change the general audience nature of the Web site or online service. Yet, under the current proposal, the site could be interpreted as subject to COPPA in all instances.

To avoid being subject to COPPA, all magazine Web sites would face a stark choice – to stop collecting any personal information (including persistent identifiers) or to age verify all visitors to the Web site. In addition to exceeding the Commission's statutory authority and raising First Amendment concerns as discussed below, this is an approach that could be less protective of privacy than the current regulatory regime.

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[20] The term "Web site or online service directed to children" is already defined in the COPPA statute, and the existing COPPA rule accordingly restates this statutory definition and sets out a "totality of the circumstances" test to evaluate if a site or service falls within the statutory definition. 15 U.S.C. § 6501(10); 16 C.F.R. § 312.2. The SNPRM would replace the statutory definition with the four new standards crafted by the Commission, which are not drawn from the language of the statute. Despite the SNPRM's assertion that the statute gives the Commission broad discretion to define "Web site or online service directed to children," there is no explicit grant of rulemaking authority under this statutory definition. In contrast, the statute specifically provides the Commission with rulemaking authority under the definition of "personal information." 15 U.S.C. § 6501.

One commenter responded to the NPRM by suggesting that mixed audience sites or services could use age verification to differentiate among users, and the SNPRM explicitly builds on this suggestion.[21] Age verification for Web sites that have primarily adult audiences is not workable. An age verification system would result in considerable expense to design, implement and manage for the broader set of sites that would be covered under the Commission's proposal. Equally troubling is that such a scenario would set up an incredibly disruptive experience whereby all users must endure considerable "friction" with the site itself. Any user visiting such a site, regardless of age, would need to provide age data such as a birthdate before routine activities such as, for example, making an e-commerce purchase, entering a shipping address, receiving targeted advertising or merchandise recommendations tied to an IP address or cookie, or requesting an e-mail subscription. Consumers would likely be confused or concerned about their privacy if they receive an age verification request for services that did not previously require any personal data.[22] For these reasons, we urge the Commission to reconsider age verification as a mandate under this proposal. In recognition that age verification may be a desirable and suitable process for some mixed-age Web sites, we suggest that offering age verification as a safe harbor may be a more workable solution.

While these comments are primarily focused on the Commission's proposals with respect to the first party content provider Web sites that compose our membership, we would mention that similar concerns to those expressed here are raised by the Commission's proposal to impose a "know or has reason to know" standard for ad networks and plug-ins, many of which appear on the sites of our members. As with the change in the definition of Web site or online service directed to children, there are statutory authority, legal, and practical issues with the proposed "know or has reason to know" standard. As noted above, it is not clear that the Commission has authority to redefine the statutory term "Web site or online service directed to children," including by adding a scienter standard that does not exist in the statute.

Moreover, the "know or have reason to know" standard, which is borrowed from tort and agency law,[23] is intended to be used with respect to "existent facts."[24] In the COPPA context, whether a

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[21] 77 Fed. Reg. at 46645-46646.
[22] *ACLU v. Ashcroft*, 534 F.3d 181, 196 (3d Cir. 2008) ("Requiring users to go through an age verification process [to access online content] would lead to a distinct loss of personal privacy.")
[23] 77 Fed. Reg. at 46645 n. 18.

site or service is "directed to children" is not an existent fact that a third party can "know," but a subjective assessment based on a "totality of circumstances" that may evolve rapidly over time. As a result, the proposed standard is open to legal challenge on the ground that it is unconstitutionally vague. It does not provide third parties with fair notice of liability, because it is unclear what fact or facts must be proved in order to trigger liability.[25]

Finally, the standard is technically unworkable and undermines existing market incentives for operators to achieve efficiencies through collaboration. Given the shortfalls and lack of availability of accurate audience data, the "know or has reason to know" subjective standard could lead different ad network and social plug-in operators to draw different conclusions with respect to a Web site's COPPA situation. Instead of relying on facts and "actual knowledge," potential "co-operators" would be left open to liability for the subjective judgment of one another. Discouraging integration between first parties and third parties would place small, independent, and niche publishers at a particular disadvantage, because they are less likely than large businesses to have the resources or expertise to replicate the services offered by third parties.

First Amendment Concerns

In addition to statutory authority considerations and limitations, the Commission's vastly expanded definition of Web sites directed to children also raises serious First Amendment concerns, both with respect to commercial and non-commercial speech. Commercial speech receives considerable First Amendment protection. Under the test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, restrictions on commercial speech are permissible only if narrowly tailored to directly advance a substantial governmental interest.[26] The potential that the expanded definition of a site or service that is "directed to children" will reach sites with large teen or adult audiences, because they may attract a "disproportionate number of children compared to the general population," raises

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[24] Restatement (Second) of Torts § 12 cmt. A.

[25] *Fed. Communications Comm'n et al. v. Fox Television Stations, Inc. et al.*, 567 U.S. ___, slip op. at 12 (2012) (quoting *United States* v. *Williams*, 553 U. S. 285, 304 (2008)) (A regulation is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. ... [A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.").

[26] 447 U.S. 557 (1980).

concerns under this standard. The net effects of the SNPRM are likely to reduce the commercial content available to Internet users on mixed audience sites, and place burdens on consumers' ability to access the remaining content. To overcome First Amendment scrutiny, the Commission would need to demonstrate that these restrictions on commercial speech – including, for example, not allowing targeted ads to reach the teens and adults in a Web site audience – meet the constitutional test set forth above.

The proposed expansion of potentially covered Web sites not only will impact commercial speech, such as advertisements and e-commerce, but the non-commercial speech at the core of our business as well. The SNPRM's restrictions on speech would be triggered based on the content offered by a Web site or service – specifically, whether it is "directed to children" under the "totality of the circumstances" test – and accordingly would be subject to close constitutional scrutiny.[27] As the Commission recognized when it endorsed COPPA's definition of a "child" in the NPRM, extending the reach of COPPA to sites and services that appeal to teens and adults, as the SNPRM effectively does, raises serious First Amendment concerns because it would burden teens' and adults' ability to access and engage in online speech.[28] The SNPRM also creates a possibility that content decisions could push Web site viewership past an arbitrary threshold that would necessitate COPPA compliance, which could create a "chilling effect" that leads sites to reduce their coverage of topics that may appeal to younger as well as older users.

The age verification requirement contemplated in the SNPRM, although offered as an alternative to full COPPA compliance, likewise implicates the First Amendment because it would burden both the ability of speakers to communicate information to the public, and the ability of the public to access that information.[29] For instance, if users over the age of 13 are looking to avail themselves of popular interactive features such as blogs or community forums found on sites that age verify, the practical effect is a barrier to free speech that courts have and would likely once

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[27] *Reno v. ACLU*, 521 U.S. 844 (1997).
[28] 76 Fed. Reg. at 59805.
[29] *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 804-805 (E.D. Pa. 2007), *aff'd, ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008) ("[M]any users who are not willing to access information non-anonymously will be deterred from accessing the desired information. Web site owners . . . will be deprived of the ability to provide this information to those users.")

again deem unconstitutional.[30] We urge the Commission to avoid such unnecessary and undesirable burdens on the free flow of information.

The "Support for Internal Operations" Exception Should Be Refined

The Commission proposes that persistent identifiers would be "personal information" except when used "for functions other than or in addition to support for the internal operations of the Web site or online service."[31] Notwithstanding the revised definition of "support for internal operations" set forth in the SNPRM,[32] MPA remains concerned that this key exception requires further refinement to avoid inhibiting beneficial data uses or future innovation. To that end, MPA suggests that the list of activities in the "support for internal operations" exception should be illustrative, rather than exhaustive. MPA also encourages the Commission to provide greater clarity by ensuring that the definition explicitly encompasses the range of beneficial internal data uses highlighted by MPA and other industry commenters, including safeguarding intellectual property, legal and regulatory compliance, protecting against fraud or security threats to others as well as to the site or service itself, and analytics related to site or service usage, among others.

MPA Reiterates Its Support for Email Plus

Although not addressed in the SNPRM, MPA wishes to reiterate its support for the "email plus" sliding scale method of obtaining parental consent. Email plus has long been recognized as an efficient method of obtaining consent for limited internal uses of a child's personal information, and the record of its effectiveness remains unchanged. Indeed, when the Commission last examined the sliding scale, it retained it without amendment, finding that "the sliding scale approach has worked well, and that its continued use may foster the development of children's online content."[33] We do not believe that the record has changed in a manner that supports a contrary result. Further, throughout the NPRM and SNPRM, the Commission has shown a recognition for the difference between internal first party uses of data and data collection and use

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[30] Age verification procedures "place substantial economic burdens on the exercise of free speech because all of them involve significant cost and the loss of Web site visitors, especially to those [companies] who provide their content for free." *ACLU v. Gonzales* at 806.

[31] 77 Fed. Reg. at 46647.

[32] *Id.* at 46648.

[33] Federal Trade Commission, Retention of Children's Online Privacy Protection Rule Without Modification (March 15, 2006), available at http://www.ftc.gov/os/2006/03/P054505COPPARuleRetention.pdf.

involving third parties. Retaining email plus for first party uses is consistent with the thrust of the Commission's approach to revising COPPA. For these reasons, and based on the positive experience of magazine publishers with email plus, we fully support retaining the sliding scale method of obtaining parental consent.

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MPA thanks the Commission for the opportunity to provide these comments on behalf of our membership. We remain committed to protecting children's privacy and are willing to work with the Commission to further that goal. If you have any questions or concerns about these comments or any other aspects of the MPA, please feel free to contact us.