



September 24, 2012

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

Re: COPPA Rule Review, 16 CFR Part 312, Project No. P104503

Dear Secretary Clark:

WiredTrust, an Internet risk management consulting firm (“WiredTrust”), and WiredSafety, the world’s oldest all volunteer Internet safety group (“WiredSafety”), are filing this comment jointly on behalf of themselves and with contributions from certain children’s Internet industry clients of WiredTrust. In addition to the comments below, we also adopt the points contained in the Comment of Parry Aftab, Esq., submitted in her individual capacity (as the “Kids Internet Lawyer”).¹ We appreciate the willingness of the FTC to solicit comments from the public, advocacy groups and policy and industry leaders to the Supplemental Notice of Proposed Rulemaking (the “SNPRM”).²

We also would like to recognize the hard work of FTC staff and their continued commitment to engage all stakeholders and remain accessible over the years. We especially appreciate the time certain FTC Staff members, especially Mamie Kresses and Phyllis Marcus, have devoted to the industry and to our inquiries. These discussions have been invaluable and we value this access.

We previously filed comments on the Commission’s Notice of Proposed Rulemaking published on September 27, 2011 (the “2011 NPRM”), many points of which were referenced by the Commission in the SNPRM. Those comments contained our thoughts on a few of the issues addressed herein, and we respectfully point the Commission to those comments as well.

While we are not strangers to the FTC and Congressional Representatives, it may be helpful to put our comments into perspective once again. We approached this Comment from both the risk management and legal compliance perspective, as well as child and family advocacy and safety perspective. In addition, WiredSafety receives emails from parents and young people alike

¹ Note that these comments were prepared with Ms. Aftab’s assistance.

² Federal Trade Commission, Supplemental Notice of Proposed Rulemaking and Request for Comment, Children’s Online Privacy Protection Rule, 77 Fed. Reg. 46643 (Aug. 6, 2012).

requesting help on COPPA, privacy and problems encountered online and through the use of digital technologies, so we also address the public’s concerns and confusion. And WiredTrust, a private best practices and risk management consulting firm, offers practical insight and input from its many clients in the children’s digital industry and online gaming.

Our comments to the SNPRM include discussions of the following proposed changes:

- Proposed Changes to the COPPA Definition of “Operator”
- The Proposed Expansion of the Definition of “Web Site or Online Service Directed Toward Children”

1) Proposed Changes to the COPPA Definition of “Operator”

COPPA currently defines *operator*, in pertinent part, as

Any person who operates a Web site 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 Web site or online service, or on whose behalf such information is collected or maintained, where such Web site or online service is operated for commercial purposes, including any person offering products or services for sale through that Web site or online service, involving commerce.³

The newly proposed definition of *operator* leaves the old definition unchanged with the exception of one proviso:

“Personal information is *collected or maintained on behalf of* an operator where it is collected in the interest of, as a representative of, or for the benefit of, the operator.”⁴

The old definition of *operator* assumed that all stakeholders were included in either the website’s or online service’s operator role or offered commercial products or services through the website or online service. The roles and expectations were clear. However, the development of new digital technologies has brought Internet plug-ins such as Facebook’s “Like” button and various “Share” style buttons that allow content to be quoted or shared from any site to others. Along with these technical developments and services came an expectation from users that websites and services are both interactive and social.

Until now, plug-in providers and software providers were not tainted by the nature of the site or service using their utilities or technologies. The Commission now proposes that they are subjected to COPPA by their mere adoption by a COPPA-governed site. This is unfair. It is also unworkable.

During discussions with the Staff, we learned that a majority of the child-directed sites felt they must contain Like and Share buttons to remain competitive. The Commission has taken this to mean that the sites receive a direct benefit. The Commission explains, “Sites and services whose content is directed to children, and who permit others to collect personal information from their

³ SNPRM at 46644.

⁴ Id.

child visitors, benefit from that collection and thus should be responsible under COPPA for providing notice to and obtaining consent from parents.”⁵ They also receive more attention and brand promotion because of the “likes” and “shares.” We believe this is at best an indirect consequence and certainly not what COPPA was designed to address. Instead, we believe the inclusion of the buttons is more about meeting user expectations.

Users expect to be able to Like content wherever they go on the Internet in the same way they expect websites to display properly on different browsers and devices, including increasingly ever more mobile devices. Websites without these services are seen as lagging behind the industry. Crucially, these new embedded plug-ins do not offer products or services for sale.

The Commission assumed that all plug-ins benefit the host sites by providing them with content, functionality, and/or advertising revenue. This assumption is over-broad and, in many cases, faulty. In current practice, many plug-ins, such as Like and Share buttons, are designed to provide a benefit and functionality to the *user* or third parties and not to the *site* or service itself. It is disingenuous to think that share buttons on a child-directed site are only used by children and should therefore require the underlying plug-in service to be COPPA compliant. This would prevent a teacher from liking a new child-friendly game site to share with other teachers, or parents sharing resources with family-members or 13 year olds sharing things they discover with other teens.

We believe that if there are data collection abuses seen by the FTC by child-sites and plug-in providers, the Commission should address those directly. This proposed change, when coupled with the others, could require all general audience, kid-friendly, sites to comply with COPPA’s child-site requirements.

2) The Proposed Expansion of the Definition of “Web Site or Online Service Directed Toward Children”

The current COPPA definition of a “website or online service directed to children” is:

- (A) IN GENERAL. The term “website or online service directed to children” means
 - (i) a commercial website or online service that is targeted to children; or
 - (ii) that portion of a commercial website or online service that is targeted to children.

- (B) LIMITATION. A commercial website or online service, or a portion of a commercial website or online service, shall not be deemed directed to children solely for referring or linking to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link.

The Commission proposes to expand the definition of “web site or online service directed toward children” so that the proposed definition now reads in its entirety:

⁵ SNPRM at 46643.

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, 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; 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;
- (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).

In determining whether a commercial Web site or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience. A commercial Web site or online service, or a portion thereof, shall not be deemed directed to children solely because it refers or links to a commercial Web site or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link.⁶

These proposed changes enlarge the COPPA-covered community exponentially.

The proposed section (a) changes the definition from a website or online service that is “targeted to children” to a website or service that *knowingly* targets children as its *primary audience*.

With regard to adding the word “knowingly” we support this change as we believe it more accurately represents the spirit of the law. It reiterates the “actual knowledge” standard of COPPA. However, with regard to the phrase “primary audience” we believe this requires measurable standards. Is a primary audience 50%+? 30%? Some quantitative measure is required to avoid being overly broad and vague.

Does “primary audience” mean the largest group of users or could it be interpreted to mean the group that generates the most revenue or otherwise meets the operator’s priorities? Without clarification, website and online service operators may mistakenly think that COPPA is not implicated when in fact it is, and equally, they may go through great expense in becoming COPPA compliant for no reason. The chilling result is that websites and online services will direct their services further away from younger users to avoid being tangled in the confusion the

⁶ SNPRM at 46653.

revised definition introduces. Children are immediately and seriously hurt by this possible reaction.

The proposed section (b) clarifies that a website or online service is deemed to be directed to children after a review of the overall content of the website or online service confirms that it is likely to attract children under age 13 as its primary audience. Again, we have the same issues with the phrase “primary audience” as discussed above. Our more complete comments on the “likely to attract” guidance, previously submitted on December 29, 2011, are reiterated herein.⁷

The proposed section (c) proposes to qualify a website or online service as “directed to children” if, after reviewing the overall content, it is determined that it “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...” (emphasis added). The phrase, beginning with, “disproportionately large percentage of children...” is vague because it is qualitative rather than quantitative. The goal of this definition is for website and online service operators to self identify as those who direct their services toward children without the assistance of an expert set of reviewers. The vague term allows for the same dangers discussed above in

⁷ (c) Site directed toward children:

The FTC proposes a number of minor changes to the definition of a “Web site or online service directed to children” and we agree with the addition of the phrase “child-oriented activities,” however, we oppose the inclusion of “music” and “animated characters” without more clarity. We also oppose the phrase “presence of child celebrities or celebrities who appeal to children” on two grounds:

- First, we disagree that the mere presence of a child celebrity is indicative that a site is directed toward children, even as only one of many enumerated indicators. Many fan sites are set up on existing preteen sites by representatives of young celebrities. If a fifteen-year-old pop star has an account on a general audience teen site, does that indicate that the site is for preteens and COPPA applies? If the change is accepted, sites will be reluctant to permit popular young celebrities to create a fan page on their site for fear that their presence will make it more likely they are deemed “directed toward children.”
- Second, as the title of the section states, we are looking to define what makes a site “directed toward children.” The additional of this new proposed enumerator including the use of celebrities who “appeal” to children sets a new standard. Does Lady Gaga appeal to children? Does Katy Perry? What about Taylor Swift? Beyonce? Rihanna? Maroon Five or One Republic? Justin Bieber? Adele? Lady Antebellum?

The same argument holds true with “music” and “animated characters.” All we need to do is listen to the bands and singers our preteens enjoy to understand that they like what their older siblings and counterparts like. What about movies? Is Twilight a problem? War Horse? What about animated features, such as UP, American Dad, Family Guy or South Park? If we can’t figure this out, and few marketers can distinguish between 11 and 12 year olds and 13 year olds for the purposes of advertising campaigns and marketing, how will a site operator be able to do so? The addition of “music” and “animated characters” and even celebrity spokespeople may be more effective when seeking sites for younger children. If Big Bird is used on a site, or Blues Clues’ Steve, we can assume it is directed at children (or their parents for their children). The same is true with the Disney Princesses. But these are already covered under the non-exclusive list of enumerators. This applies equally to music, as well. Cute jingles, Barney songs, sing-a-longs can help distinguish a site for younger children. But they tend to be more obvious. Applying “music,” “animated characters” and the presence or use of celebrities for tween sites will only cause confusion. How do operators struggle to determine whether a particular celebrity “appeals” to children. We believe the standard should be unchanged so that operators can understand when they are considered to be directing themselves towards children and purposely avail themselves of that market rather than whether children find a celebrity appealing or not. Directed at children must be a decision made by the site, not the preteens themselves. Those acting in good faith are obvious, as are those trying to hide behind a “no users under thirteen” age-gating intended to be ignored by preteens.

section (a). (Please see Parry Aftab's submission as to percentages of preteen users and preteen population numbers. Her submission is incorporated by reference herein, in its entirety.)

The revised section (d) adds a knowledge component, specifically that a website or online service "knows or has reason to know" to sections (a) through (c). Please see the Comment submitted by Parry Aftab, in her personal capacity, on September 24, 2012 for a discussion of this point. We join in all of her comments.

Finally, please see Parry Aftab's Comment, submitted in her personal capacity, for a discussion of the "Internal Operations" exception.

Conclusion:

WiredTrust and WiredSafety again thank the Commission for providing us with the opportunity to comment and for including many of our previous thoughts into the SNPRM. We reiterate our previous comments by reference here and sincerely hope COPPA is revised in a manner that protects children and provides a balanced approach for industry alike. We are always available to the Commission to answer any questions and look forward to continued discussion about the COPPA rule and other privacy and consumer protection issues.