Phyllis Marcus
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
USA

29th June, 2010

Dear Phyllis,

Re: Submission to the FTC Review of the COPPA Rule

Please find attached our submission to the review of the COPPA rule. We are very grateful to have had the opportunity to present our evidence and our views. Although we are over here in Europe, we certainly feel we are one of your stakeholders. Let me briefly explain what I mean by that.

Social networking sites are the predominant online medium among the young the world over. In many European countries US based sites of this kind are the clear market leaders, attracting tens of millions of legal minors as users. The US social networking companies, entirely understandably, take US domestic law and practice as their default position. This in effect means US domestic law and practice becomes the default for us too.

This is of more than passing importance because, typically, the same companies will sometimes go to considerable lengths to try to maintain a single service, uniformly presented in every jurisdiction. Any deviation from the US determined norm implies a need for extra expenditure and introduces new levels of administrative complexity. Resistance to such change is therefore common, again understandably. Far better, then, to get in on the ground floor and try to influence what those defaults might look like.

Of course in a given overseas territory, particularly where it is unambiguous on the face of the record, a US company will always make changes to its service or the terms of service in order to bring itself into line with local law. Spain is a good example where the regulations clearly stipulate that a child must be 14 years of age, not 13, before they can sign up to an internet service without the provider first having to obtain verifiable parental consent. However the processes involved in affecting such changes can sometimes lead to inordinate and very frustrating delays which we should all seek to avoid wherever humanly possible.

Thank you very much for reaching out to us. We wish you well with your review and rest assured we will watch its progress with great interest.

Yours sincerely,

Executive Board Member
eNACSO

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Submission to the FTC Review of the COPPA Rule

The internet is not what it was

When the COPPA Rule was first formulated the internet was still an edgy arriviste. Today in many countries broadband is spoken of as the fourth utility, essential to modern living in the same way as access to gas, electricity and running water.

Moreover it is now apparent that the demand for internet access and services has moved into and become a permanent feature of a highly diverse range of markets. Some of these markets are not obvious or easy bedfellows. It is becoming increasingly difficult to imagine how they can continue to be governed by the same set of rules and expectations.

An obvious and potentially useful line of demarcation is between internet connectivity and internet services which are sold into or are used in overwhelmingly adult environments e.g. at work or within Universities or research institutes, and those which operate largely in domestic settings where families with children are perhaps the largest segment. Very often in both environments one will be accessing services or sites where the age of the person is completely irrelevant. But in others it will be relevant. That is where the unresolved difficulty still lies.

So how did we get here?

When the COPPA rule was first formulated there were comparatively few policymakers or public commentators around, mainstream journalists and the like, in the USA and elsewhere, who felt they understood the internet sufficiently to question some of the then rapidly evolving, rapidly changing practices associated with the emergence of the new medium. No one really wanted to jump in with strict or close regulation for fear of choking off growth in the brave new world that seemed to be opening up. Fewer still felt confident enough to challenge the powerful, rich companies and their highly technically literate spokespeople who were assiduously promoting the internet, marketing it as a democratic agent of liberation, a symbol of modernity, an endless source of fun and games, culture, knowledge, even wisdom. The internet was the ultimate in cool. Doubters, critical questioners were dismissed or marginalized as fuddy duddy Luddites or spoilsports who just didn't get it. We were dazzled by the sheer scale, ambition and evident financial success of the new technological behemoths that were clearly on a fast track to Master of the Universe status.

Today the halo that hovered over Silicon Valley hasn't entirely evaporated but it's a lot thinner than it was. Many aspects of how the internet works are more settled, even if innovation around the edges continues apace. Certainly there are lots more people, particularly in the public policy space, who can now disentangle the hype from the reality, who understand the technology and are more ready to query the claims and the business practices of internet companies, just as they would do any other industrial or commercial sector.

In 2010 the internet is many different things but part of it is unquestionably a consumer commodity. Individual online services and internet connectivity packages are frequently promoted by advertisements in mainstream family media, often linked to such things as cable TV packages, sometimes sold or presented in brightly coloured eye-catching boxes in shops

on the High Street, displayed on shelves next to kettles and radio alarm clocks. We need to start thinking about the internet and online services in those terms.

Above all we need to stop thinking about the internet as if it were, essentially, an adult medium for which special (meaning "irritating") provisions need to be made to take account of the fact that children will use it from time to time. Children and young people are a large, persistent and permanent group of internet users. They need to be central to all of our thinking about how we evolve policy across the whole of the space.

The internet is now more akin to a modern city. In the modern city we have planning and zoning laws to govern who can do what, and where and when they can do it. We have laws about who can buy and consume different products and services. We need to put much more effort into developing cyber equivalents. We need to embrace the internet wholeheartedly as a social place, populated and used by many different interests of which families with children are one, and not the least one.

It is pointless and dispiriting for internet company executives and Government officials to continue repeating the mantra about how everyone accepts that what is legal in the real world is legal in the online world, and what is illegal in one is equally illegal in the other when we have hitherto so very obviously failed to match that rhetoric with the reality.

A new legal obligation?

In our view every technology company should be put under a legally binding, explicit obligation to carry out a child safety audit prior to the launch of any new product or service which they propose to release on to the internet, particularly (not exclusively) where it is proposed to supply it "free" to the end user. This is because we know from very long experience that on the "free" internet[1] there is a high probability that children will be able to access and use the product and there are also potentially weak to non-existent audit trails to act as a brake on misuse. Perhaps the FTC or some other agency should be given a power to call in and inspect these child safety audits either on their own volition or following a complaint?

It should not be possible for any company to launch a new service or product and walk away from or avoid any potential liability for its actions by the trivial expedient of cutting and pasting a notice saying "This service is only available to persons over the age of 13" or "This service is only available to persons over the age of 18" when they know perfectly well they will make no serious attempt to police or enforce such an age related rule. Some companies do make serious attempts, but few are required to do so so most don't.

There is more than one type of family

We also need to start thinking about the vast range of families and individuals who are already or will soon become internet users or users of specific online services. We need to acknowledge the extremely broad range of competencies, skills and aptitudes that exist among internet users. Companies that accept subscriptions or allow people to start using their service owe a duty of care to every one of them, taking them as they find them. The industry's duty of care is not solely to the notional ideal family of highly literate and numerate engaged, techno-savvy communicative parents in the middle of the market. Acres of densely worded legal jargon in contract documents that are never read are an escape route from liability. They do not constitute a reasonable child protection policy or discharge the duty of care.

[1] Nothing, of course is truly "free". By this we normally mean paid for by advertising, which is simply another mechanism of collecting revenues.

The chilling effect of the COPPA Rule

We have to find a way to allow adults to continue doing whatever they are currently doing with the internet but also to improve the safety and privacy aspects of the environment in relation to how children and young people have access to it and use it. In that connection we are afraid the operation of the COPPA Rule has had a chilling effect on innovation.

In particular the "actual knowledge" requirement provides US companies with no incentive to improve their ability to determine whether or not the age related rules they appear to espouse are achieving their seemingly intended goals. It creates a legal fiction. This plainly has many advantages for businesses. It has none at all for child protection.

No incentive to change

The "actual knowledge" rule encourages laziness. When companies apply a blanket age limit across all of their services it suggests that every service is equally risky to every child but we know that's not true and it devalues the meaning of the caveat implied by the age limit in the first place. In part we suspect this is also why some parents collude in allowing, perhaps they even encourage, their children to lie about their age to online service providers when, for example, all the parents think they are doing is enabling their children to have an email account to stay in touch with Grandma.

Investing in the development and roll out of a system to make the age rules work better makes no sense if you are never going to have any liability for the ineffectiveness of what you are currently doing. Even if internet companies were to light upon or develop a solution, they might worry that if they were the only ones to deploy it they could lose business to their less fastidious competitors. Everybody has to do it or nobody will.

From a public policy perspective aspects of the current system are a disaster

In the UK, for example, in March 2010 OFCOM, the statutory telecoms regulator, published research showing that 19% of all children aged 8-12 have a social networking profile on either Bebo, Facebook or MySpace, all of which have a policy of not allowing anyone below the age of 13 to be members. This proportion rises to 22% when looking at all social networking sites, most of which also stipulate a minimum age of 13. If you limit the cohort to children of 8-12 who used the internet at home the proportion using Facebook, Bebo or MySpace rises to 25%. 11% of these children have made or left their profiles open for anyone to see or visit. It is great that 89% didn't, but 11% is still far too large a proportion and let's not forget the 89% shouldn't have been there in the first place either.

In the same study OFCOM showed that 37% of 5-7 year olds in the UK who use the internet at home had visited Facebook, although they did not necessarily have or establish a profile[2]. We do not have immediately to hand comparable figures for other countries, but anecdotally from our network of national members we are fairly certain that the UK figures for underage usage are mirrored or exceeded in many other jurisdictions in Europe and further afield.

We have known for a considerable period of time that very substantial numbers of sub-13 year olds are regular users of sites which are not meant to accept anyone below that age and many if not all of these sites adopted 13 as their minimum age rule solely or overwhelmingly because of a simple desire to avoid becoming enmeshed with, as they see it, the off-putting and expensive business of seeking verifiable parental consent as required by the COPPA Rule. Had the COPPA Rule specified 12 or 15, that's where they would have pitched their tent.

[2] http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ukchildrensml/

Of course internet companies are entitled to rely on the research, knowledge and insight that led Congress and the FTC to formulate the rule and set 13 as the limit, and we do not dispute that 13 is probably the right level, but now that we know the operation of the rule is failing on such a significant scale it behoves us all to pitch in and find a better way of doing things. We hope no one will settle for the status quo.

Should the rule be abolished or made to work?

We are almost, stress *almost*, of the view that you should abolish the legal basis of the 13 rule altogether, and make it clear that it is only advisory. But we would much prefer that a way is found to make the 13 rule truly effective. It cannot be good public policy for children to see or be shown not only that lying works and gets you what you want, but also that lying works and gets you what you want so easily, pretty much immediately and with impunity, even when backed up by the apparent majesty of the law. It discredits not only the rule, but also it discredits the idea of rulemaking and possibly also the rulemaker. It is a very bad example to serve up to young people in whom we are all trying to inculcate a sense of respect for the law and the democratic processes which lie behind law making.

We acknowledge and accept that there are important privacy and other issues raised by this debate but we have never sensed there has ever been any real appetite or determination by any major players in the internet industry to address them. A million alibis for inaction are regularly trotted out, underpinned and comforted by the legal immunity conferred by the current rule. What we need is a high level steely determination to find a solution that works.

Companies sometimes speak of there being little evidence of a demand for this kind of approach by parents. We are not sure we accept that proposition in quite the way it is often intended, not least because it implies the companies themselves are passive, helpless bystanders. However, we know that companies can and often do shape markets and can greatly influence consumer expectations. If the quest for a safer online environment for children and young people had attracted anything like the level of resources that are devoted to some other aspects of internet companies' mainstream activities, we might all be in a very different place today.

Age verification needs to be revisited

The way in which the question of age verification and social networking first presented itself in the USA was in our view very unfortunate. It muddied the waters to a considerable degree. We broadly agreed with the main conclusions of the ISTTF. Age verification systems can never be used to create an environment which is "guaranteed" to contain only persons of a certain age or be guaranteed to be free of paedophiles. But age verification systems can be used to demonstrate that a company has taken reasonable steps to ensure that only persons *above* a certain age are enabled to access or use particular services or parts of the internet which have some kind of age rule linked to them. This can be done without having to create vast "hackable" databases of children or to create child-only environments which would act as a magnet for paedophiles. It may inconvenience people the first time they go to visit an area of the internet that imposes an age requirement. First time out it could lead to several seconds of delay in them getting what they want, but there is a valuable prize lying beyond that narrow and incredibly selfish horizon. And if everybody did it the potential for any one company to lose business to a rival would vanish.

In the UK, until quite recently, most gambling web sites simply asked their would-be customers to tick a box to confirm they were 18 or above. Lots of young people well below that age did just that and were later found to have developed problematic gambling behaviours, in some cases amounting to addiction. The Gambling Act, 2005, changed everything. Now in order to obtain a licence to run an online gambling web site every

gambling company must put in place a robust online age verification system to determine that anyone wishing to place a bet with them is at least 18 years old.

Since the law came into effect in September 2007 we are not aware of a single case where a child has beaten the system. Of course we still hear about parents or older siblings who leave their credit cards about the place together with much of their Personal Identifying Information, thus allowing unqualified children to present themselves to gambling or other web sites as being their parent or older sibling. There is little or nothing any legislature can do about that kind of behaviour. But what children in the UK cannot now do is invent an age or a persona for themselves, claim to be over 18 and get away with it. Not on a gambling web site. But they can still do it in a heartbeat on Yahoo and YouTube.

A second working example comes from the way many mobile phone networks now operate. This arose pursuant to an agreement originally negotiated between the EU and the GSMA (the global trade association for mobile phone network operators).

In a number of countries when a new mobile phone network subscription is taken out[3], the operator automatically assumes that the customer is a child. This means it is impossible for the user of that phone to access straight away any pornography, any dating services, chat services, gambling or other services or content which has been put behind an "adult bar". Premium rate services are also barred and a very wide range of advertisements cannot be presented to the user. If the owner of the mobile phone number is an adult and wants to be able to access any or all of those sites or services, he or she does not have to ring up and ask for the porn to be turned on. All he or she has to do is go through a procedure to establish that they are over 18 then all of the adult services become accessible. Many of the networks apply the same principle to internet content i.e. by default all adult sites and services on the internet are rendered inaccessible through the mobile handset until the adult bar has been lifted.

The introduction of these measures has not led to a fall off in the number of mobile phone users. Nor does it appear to have affected the overall levels of operational efficiency or profitability of the networks. But we do have millions of very grateful parents and children. Again part of the key to this was that in the countries where these measures are now operational the majority of large operators decided to do it more or less together, though each in their own individual way.

The arrival of location aware applications makes this question more urgent

There needs to be a sense of urgency injected into this discussion. "Location aware" applications are starting to come on to the market. They are widely said to be the drivers for a whole new wave of innovation on the internet. Almost universally these applications are being marketed as being for persons aged 18 or above but they are capable of being linked to, for example, social networking sites which specify 13 as the minimum age. See above. All of the location services we know of are free to the end user because they are paid for by advertising. Thus it is clear that anyone below the age of 18 will in fact be able to download and use them. This means children below the age of 13 will be able to use them.

Into a social networking environment which is already well known to generate concerns and anxieties about children's and young people's privacy and safety, parts of the internet industry now seem ready to introduce location based services which clearly bring with them a whole new layer of risk, particularly to those young people who are not mature enough to evaluate or assess the potential consequences of using them.

[3] It was also applied retrospectively to the existing customer base.

Location data requires higher standards of security

The standards which should be applied to data about a person's physical whereabouts are, or should be, of a different order of magnitude from those which apply to most other types of data which an internet company might routinely process or allow to be broadcast on their sites. When that location data applies to the physical location of a child, the expectations in relation to the security standards to be observed are that much greater again.

If adults wish to make available information about their whereabouts, that is a matter for them, but companies who provide what is effectively free access to location aware services should find a way to prevent children's naiveté from putting themselves and others at risk.

If the companies that are sponsoring location applications had had to complete a child safety audit before they sent these applications out on to the internet we are sure they would have tried a great deal harder to find a convincing way of reassuring us that children would not be able to access, download or use them.

Other issues in the COPPA Review

We appreciate that the review of the COPPA rule is looking at many other detailed questions, for example about how the system works in relation to verifying parental consent for children who are acknowledged to be under 13. We have no substantial concrete experience which indicates that there are any pressing or major problems in that area although some of the potential weaknesses are self-evident. For this reason in this submission we have focused on what, to us, seems to be the most glaring deficiencies which urgently require redress. If you mend them in the USA, they will be mended here too.

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