

July __, 2010

Before the
FEDERAL TRADE COMMISSION
IN THE MATTER OF COPPA RULE REVIEW

Project No: P104503

COMMENTS OF THE PROMOTION MARKETING ASSOCIATION, INC.

COMMENTS OF:

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The Promotion Marketing Association, Inc. (“PMA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC” or “Commission”) for public comments on the implementation of the Children’s Online Privacy Protection Act (“COPPA”), 15 U.S.C. §§ 6501-06, through the Children’s Online Privacy Protection Rules (“COPPA Rule”) 16 C.F.R. § 312 (1999). *See Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule*, 75 Fed. Reg. 17089 (Fed. Trade Comm’n Apr. 5, 2010).

Established in 1911, the PMA is the premier not-for-profit organization and resource for research, education and collaboration for marketing professionals. Representing the over \$1 trillion integrated marketing industry, the organization is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service providers and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, the PMA’s objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process.

The PMA recognizes the importance of the underlying intent of COPPA: to provide reasonable and practical safeguards to foster efforts to protect young children online and give their parents reasonable tools to help them guide their children’s online activities. The PMA believes that COPPA and the COPPA Rule establish an appropriate and now well known scheme that strikes a proper balance between protecting children and recognizing the practicalities and challenges of operating within an online environment and the importance and benefits of the Internet and e-commerce to the consumers of the United States. As part of its recognition of the importance of COPPA, the PMA provides educational programming on COPPA and the COPPA Rule for its members at its annual Promotion Marketing Law Conference, which this year features an opening keynote speech from FTC Director of the Bureau of Consumer Protection, David Vladeck as well as a second day keynote from FTC Commissioner Julie Brill. The PMA supports the retention of COPPA and the COPPA Rule, with minor revisions to better facilitate compliance, taking practical considerations and current technology and consumer and industry customs and practices into account.

Changes to be Limited and Carefully Considered

The PMA believes that the current implementation of COPPA successfully protects children and gives parents appropriate tools over the collection and use of their children's information. Thus, the PMA believes that COPPA and the COPPA Rule do not require significant changes. The PMA recommends, however, that if any changes are to be made by the Commission to the COPPA Rule, or if the Commission recommends that Congress make changes to COPPA, that such changes must be measured and practical and instituted only after significant consideration and further public comment. In making any changes, the PMA respectfully submits that the FTC must consider not only the purpose and intent of COPPA but also the impact of any changes, including alterations that challenge compliant businesses to either spend significant amounts of money to maintain compliance or drastically alter their business structures to exclude children. Such changes could place a significant burden on industry and result in constricted content and service offerings for children who are now reliant on online services for education, community, and communications.

Ways to Improve Protections and Implementation of COPPA

Although the PMA believes that COPPA and the COPPA Rule presently provide a very high level of protection for young children, the PMA does find that certain refinements could make the operation of the current scheme more practical and thereby foster increased compliance and increase online offerings available to children, as well as greater and more useful tools for parents.

First, the FTC should expand the present methods of parental verification, as recently discussed at the FTC COPPA Roundtable. With more and easier opportunities to obtain parental consent, the online content and activities made available to children could expand, while remaining age appropriate and increasing parental supervision and control. Additional methods of parental verification will also decrease the rampant manipulation of "age gating" by savvy children who learn how to lie about their age to avoid even the most neutral and carefully implemented age gating.

The rationale and justification for expanding parental verification methods is also supported by the declining use of other methods, such as credit card verification. As evident from the recent FTC COPPA Roundtable, both parents and industry disfavor the credit card

method of verification. Consumers are concerned about identity theft and credit card fraud and as a result, may be hesitant to provide a credit card number online. Furthermore, as credit card processors disfavor or prohibit verification without a sale, this form of verification is impossible where there is no sale or subscription payment. This form of verification also is not available to millions of households that do not have credit cards, and thus deepens the class-based digital divide in this country.

COPPA provides for “*any reasonable effort* (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to *ensure* that a parent of a child receives notice of the operator’s personal information collection, use, and disclosure practices . . . of personal information and the subsequent use of that information before that information is collected from the child.” 15 U.S.C. § 6501(9) (emphasis added). As the Commission has broad discretion regarding what are reasonable methods to achieve this goal, this is an area where changes and improvements would be appropriate and welcome.

The PMA recommends that, to further this goal, the FTC clearly express that the currently articulated list of methods of parental notice and verified consent is non-exhaustive. This is consistent with past FTC expression of its policy, but the COPPA Rule as written could be more clear in this regard. Such clarification can spur the creation of innovative and more successful methods of parental consent.

The COPPA Rule currently allows for so-called “e-mail plus” verification. This method weighs practicality and safety and recognizes that e-mail is the primary way we communicate today and gives parents a tool they can easily use. At the same time, the “plus” aspect provides a reasonable safeguard no more vulnerable to manipulation or circumvention than the neutral age gating that is used to exclude children from content and activities. This method allows a marketer or operator to send an e-mail to the parent giving notice of the information collection, allows the parent to consent by return email and requires a follow up verification by e-mail, phone call or other method.

Currently, e-mail plus is permitted for certain internal uses of information not shared with third parties or subject to public disclosure. 16 C.F.R. § 312.5(b)(2). This method should not only be retained, but expanded to allow for external sharing and use if specifically and clearly

disclosed in the notice and request to the parent. Further, this method should be expanded to allow communications with parents via new technologies other than e-mail, such as SMS text. In addition, other variations of e-mail plus could be implemented similar to services such as Facebook Connect, parental control pages on televisions and cable boxes and game consoles and the development of verification clearinghouse services.

Finally, the FTC should allow and encourage FTC certified safe harbor groups to expand the use of new verification methods. The comfort of the safe harbor will encourage industry to develop better methods under the supervision of the safe harbor certification authority, and ultimately FTC oversight will serve as a means to prevent inappropriate methods.

Preventing Harmful Changes to COPPA

While the changes and clarifications above can improve COPPA and further its purpose, some of the changes that have been proposed by others will likely result in significant harm to industry without any corresponding benefit to consumers.

The applicable age of COPPA should not be changed. The current age is a result of careful consideration based on extensive studies and data. *See* S. Rep. No. 105-8482-84 (1998). Increasing the applicable age of COPPA not only requires drastic restructuring of online access, but would also limit access by those of an appropriate age, implicating their First Amendment rights. *See Maine Independent Colleges Assn, et al v. Governor John Balducci and Attorney General Janet Mills*, CV 09-396-B-W (D.C. Maine, September 9, 2009). To the extent measures to protect teenagers from certain adult content or communications are desired, COPPA is not the appropriate vehicle to address this concern. Furthermore, changing the COPPA age would sweep up sites and services not of an adult nature. Indeed, the attorneys general of 49 states have reached agreement with MySpace and Facebook regarding certain online safety measures for children between the ages of 13 and 18. Joint Statement on Key Principles of Social Networking Sites Safety (Jan. 14, 2008) (signing an agreement between 49 states and the District of Columbia and MySpace.com), Joint Statement On Key Principles Of Social Networking Sites Safety (May 8, 2008) (signing an agreement between 49 states and the District of Columbia and Facebook.com).

The FTC should not alter the definition of “personal information” to include IP addresses. COPPA is intended to apply only when it is clear that a child under 13 years of age is engaging

in online activities. Treating an IP address as personal information offers negligible increased protections to children and would likely be unworkable in a practical sense. An IP address applies to a computer not a person. *Johnson v. Microsoft Corp.*, No. C06-0900 RAJ, 2009 WL 17934400 (W.D. Wash. June 23, 2009) (“When a person uses a computer to access the Internet, the computer is assigned an IP address by the user's Internet service provider.”). Computers may be shared by an entire family or, in the case of libraries and other public use computers, an entire community. Furthermore, an IP address does not transmit any sensitive information. In addition, unlike the submission of a child’s name or address, an IP address is transmitted automatically upon any individual’s accessing a web page. *Klimas v. Comcast Cable Commc’ns, Inc.*, 465 F.3d 271, 276 n.2 (6th Cir. 2006) (“IP addresses do not in and of themselves reveal ‘a subscriber's name, address, [or] social security number.’”). In addition, an IP address is collected automatically by all web servers when they serve a web page to a computer. There is no ability to serve the web page without “knowing” the IP address where to send it. Thus, even for a web site directed toward children, it is technologically impossible to obtain parental consent prior to collecting an IP address. This makes the treatment of IP addresses as personal information under COPPA unworkable as part of the type of verified parental consent scheme that is the heart of COPPA.

In conclusion, the PMA looks forward to the maintenance of COPPA and the COPPA Rule with only minor changes and clarifications that will make it easier to communicate with parents and for parents to exercise control over their young children’s activities in an online environment.