

July 12, 2010

Via electronic filing: <https://public.commentworks.com/ftc/2010copparulereview>

Hon. Donald S. Clark
Federal Trade Commission
Office of the Secretary, Room H-135 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: COPPA Rule Review, Project No. P104503

Dear Secretary Clark:

The Interactive Advertising Bureau (“IAB”) welcomes this opportunity to provide comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) request for comments on the Commission’s implementation of the Children’s Online Privacy Protection Rule (“Rule”).¹ IAB shares the Commission’s commitment to protecting children online and looks forward to working with the FTC as it seeks to ensure that the Rule provides adequate protections to children as technologies evolve.

Founded in 1996 and headquartered in New York City, the IAB (www.iab.net) represents over 460 leading companies that actively engage in and support the sale of interactive advertising, including leading search engines and online publishers. Collectively, our members are responsible for selling over 86% of online advertising in the United States. The IAB educates policymakers, consumers, marketers, agencies, media companies and the wider business community about the value of interactive advertising. Working with its member companies, the IAB evaluates and recommends standards and practices and fields critical research on interactive advertising. The IAB is committed to promoting best practices in interactive advertising, and is one of the leading trade associations that released cross-industry self-regulatory privacy principles for online behavioral advertising in July 2009.

I. The Rule Has Enabled Children to Enjoy the Internet in a Safe Environment

The Commission begins its review of the Rule by asking whether there is a continuing need for the Rule as currently promulgated and inquiring into the effect that the Rule has had on operators, including small businesses. IAB’s membership is comprised of many consumer-facing companies, ranging in size from our General Members, who are corporate entities whose revenue is significantly based on the sale of interactive advertising inventory, to our Long Tail Members, who are independent sites

¹ Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule, 75 Fed. Reg. 17089 (Apr. 5, 2010).

and companies that act as publishers and have revenues under \$1 million per year. To our knowledge, those members that have elected to offer sites directed to children have adapted to the requirements of the Rule. When such sites have sought to collect information from children under 13 for internal purposes, they have often used the “email plus” system of obtaining verifiable parental consent or have used the email exceptions to verifiable consent to provide such offerings as contests or newsletters to children.

While the current framework has enabled our members to provide meaningful content to children, the requirement to obtain verifiable consent from parents may also have impacted the ability of our members to provide innovative offerings to children. Some companies may have chosen to forego developing children’s sites due to the complexities of obtaining verifiable consent or have limited themselves to providing activities that fall under the email exceptions. Rather than developing content for children, some companies have instead focused on providing offerings that are suitable for general audiences. As a result, the Rule may have had the unintended effect of reducing children’s offerings online.

We support the Commission’s goal of ensuring children’s safety online and would welcome proposals by the FTC that would facilitate innovative children’s offerings online. In order to strike the right balance between protecting children and promoting interactive online experiences for children, one possible approach would be for the Commission to shift the focus from obtaining parental consent to placing more focus on educating children about how to make smart decisions when they are online. When the Children’s Online Privacy Protection Act (“COPPA” or “Act”) was introduced in 1998, its primary sponsor indicated: “The fact that deceptive acts may be committed on the Internet, is not a reason to avoid using the service. To tell children to stop using the Internet would be like telling them to forgo attending college because students are sometimes victimized on campus. A better strategy is for children to learn how to be street smart in order to better safeguard themselves from potentially deceptive situations.”² We recognize that the Commission is well versed in promoting educational initiatives, and has done much to provide educational materials on the COPPA Rule.³

IAB Members have also played an active role in educating children in the online space. For example, in early 2010, IAB Member Disney partnered with Common Sense Media to develop a comprehensive educational campaign. The campaign, which takes place both online and on the Disney Channel, uses Disney characters to encourage smart and safe practices online. The campaign is directed towards both children and parents, encouraging educational dialogue about Internet usage and linking to more information from Common Sense Media. The tips include guarding privacy and protecting identity while online, balancing time spent in cyberspace, and keeping in mind the potential

² 144 Cong. Rec. S8483 (daily ed. July 17, 1998) (statement of Sen. Bryan).

³ The Commission has prepared a number of educational initiatives. See Privacy Initiatives – Education & Guidance, http://www.ftc.gov/privacy/privacyinitiatives/childrens_educ.html. See also FTC, YouAreHere – Where Kids Learn to Be Smarter Consumers!, available at <http://www.ftc.gov/YouAreHere/>.

permanence of information posted online.⁴ This is just one of industry's many educational efforts.

II. The COPPA Rule Was Not Intended to Apply to Network Advertising Companies That Serve Ads

The Commission has expressed an interest in exploring whether the scope of the Rule should be expanded to cover specific identifiers that it determines would “permit the physical or online contacting of a specific individual.”⁵ More specifically, the Commission has asked whether operators, including *network advertising companies*, have the ability to contact specific individuals through using one or more pieces of information collected from children online, such as, among other items, information collected in connection with online behavioral advertising.⁶ If such identifiers would allow for the contacting of an individual, the Commission has asked whether they should be enumerated in the Rule's definition of “personal information.”⁷

As the request for comments notes, the COPPA statute provides the Commission with discretion to include within the definition of “personal information” any identifier that would permit such physical or online contacting of a specific individual.⁸ We believe, however, that such granting of authority was not intended to capture information used to serve targeted online advertisements. The delivery of online advertisements involves no more “contact” with an individual by a network advertiser than the advertising department of a city newspaper has with its subscribers as a result of including inserts tailored for locals residing in particular suburban neighborhoods. This is not the type of communication capacity that COPPA was intended to address.

When considering whether to modify the kinds of information subject to the Rule, we encourage the Commission not to lose sight of the original purpose of the COPPA statute and its implementing regulation. In 1998, the Commission brought to Congress' attention safety concerns associated with children's online activity in its report to Congress entitled *Privacy Online: A Report to Congress*, in which the Commission found that “online services and bulletin boards are quickly becoming the most powerful resources used by predators to identify and contact children.”⁹ It was with this backdrop of wanting to protect children from predators that the Children's Online Privacy Protection Act of 1998 was introduced and enacted.¹⁰ Entities that serve ads do not pose such a danger to children.

Moreover, self-regulation already addresses concerns with children and online advertising. Specifically with respect to online behavioral advertising, the Commission

⁴ To learn more about the campaign, see www.disney.com/commonsense.

⁵ 75 Fed. Reg. at 17089, 17090.

⁶ 75 Fed. Reg. at 17090.

⁷ *Id.*

⁸ 15 U.S.C. § 6501(8)(F); 75 Fed. Reg. at 17090.

⁹ Federal Trade Commission, *Privacy Online: A Report to Congress* (1998) (emphasis added), available at <http://www.ftc.gov/reports/privacy3/history.shtm>.

¹⁰ See 144 Cong. Rec. S8483 (daily ed. July 17, 1998) (statement of Sen. Bryan).

has long recognized, and reiterated in its February 2009 Staff Report, that self-regulation is the preferred approach for such a practice.¹¹ To that end, IAB was centrally involved in developing the *Self-Regulatory Principles for Online Behavioral Advertising* (“Principles”) that were released in July 2009.¹² These Principles apply broadly to a diverse set of actors that work interdependently to deliver relevant advertising, and include a principle that specifically addresses children.¹³

IAB Members, including network advertisers and publishers, worked together extensively to develop a principle that embraces COPPA and underscores the special concerns regarding children’s information. This principle directs entities not to collect personal information from children when such entities have actual knowledge that the children are under 13 or from sites directed to children under 13 for online behavioral advertising purposes.¹⁴ Additionally, the principle provides that entities may not engage in online behavioral advertising directed to children when the entities have actual knowledge that a child is under 13 except as compliant with COPPA.¹⁵ In line with the staff’s earlier stated “support [for] self-regulation because it provides the necessary flexibility to address evolving online business models,”¹⁶ we encourage the Commission’s continued support for this approach in the online behavioral advertising arena. We therefore recommend refraining from expanding the definition of “personal information” to include information collected to serve ads and information collected in connection with online behavioral advertising.

III. The Rule Should Capture Only Information That Is Personally Identifiable

In addition to asking whether “personal information” should include information collected in connection with online behavioral advertising, the Commission has also inquired into whether the term should include persistent IP addresses.¹⁷ “Personal information” should capture only information about a specific individual that is used to identify the individual. Currently, the definition of “personal information” under COPPA means individually identifiable information about a person that is collected online, such as full name, home address, email address, telephone number or any other information that would allow someone to identify or contact the person, either online or physically. The Act and Rule also cover other types of information, *e.g.*, hobbies, interests, and information collected through cookies or other types of tracking mechanisms, only when they are tied to individually identifiable information.

¹¹ FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising*, at 11 (Feb. 2009) (“Staff supported self-regulation because it provides the necessary flexibility to address evolving online business models.”), available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

¹² American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, Interactive Bureau, and Council of Better Business Bureaus, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009) (hereinafter “Principles”), available at <http://www.iab.net/media/file/ven-principles-07-01-09.pdf>.

¹³ Principles at 16-17.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Supra* note 11.

¹⁷ 75 Fed. Reg. at 17090.

We believe that expanding the current definition of “personal information” under COPPA to include other categories of information, such as behavioral advertising data or persistent IP addresses, would be detrimental to the underlying goal of the regulation. Under the current model, third parties such as ad networks only collect certain pieces of anonymous data about a user and never merge the anonymous data to individually identifiable information. These ad networks have no way of knowing whether a website is being accessed by a child under the age of 13 or an adult, since such ad networks are not the website operator. If the definition of “personal information” were expanded to include anonymous data obtained through behavioral advertising, third parties would be forced to collect individually identifiable information about the user in order to effectuate the verifiable parental consent notice requirements. In other words, the data that ad networks collect would have to be significantly broadened to fulfill COPPA’s requirements. As this does not provide any benefits to ad networks, and are actually harmful to the privacy interests of children, we believe the current definition of COPPA should not be expanded to include anonymous behavioral advertising data.

On the issue of whether a persistent IP address should be considered “personal information,” we advocate that it should not. The current parental consent requirements of COPPA help to highlight the issues associated with classifying IP addresses as personally identifiable information in a larger policy context. Assuming, *arguendo*, that IP addresses are indeed “individually identifiable,” a company should be able to contact the parent or the child by using an IP address alone. This is certainly not the case: an IP address can only identify a particular geographic area or a particular computer, at best. There is no way to identify and contact the person behind the computer with this information alone. In fact, to determine the identity of the person, the third party would need to gain access to the ISP records (only available via subpoena) to obtain the name and contact information associated with that particular persistent IP address. Without such identifiable information, a third party who collects only anonymous data would have no way to obtain verifiable consent, and would in fact, have to broaden the information they collect to include contact and identifiable information. Such an expansion of the definition of “personal information” would actually result in perverse incentives.

COPPA was specifically designed to protect a child’s privacy and safety online. If companies only have anonymous data and do not merge such data with any identifiable data, a child’s privacy is protected. Parental consent is only necessary when a marketer wants to market specifically to a child through sites directed to children (or has actual knowledge the person is a child) and when allowing the purchase of a product by a child – such safety considerations should be and are addressed by the website operator, who is in the best position to implement the safety considerations, and is already covered under the scope of COPPA. The protections that COPPA affords have been, and continue to be, adequate to protect the privacy and safety of children while balancing legitimate business interests.

IV. The Rule Should Maintain an Actual Knowledge Standard

Currently, COPPA requires that website operators and online service providers have “actual knowledge” that the age of a particular visitor using their site is under 13 before they must obtain parental consent. In response to requests to expand coverage, Congress has considered and rejected a standard that would have allowed the FTC to take action with respect to sites that could be assumed to have users under 13, but that site operators would realistically have no actual knowledge that a user was under 13.

Given the fact that very few sites are explicitly directed to children under the age of 13, a standard calling for website operators and online service providers to be held liable for the “constructive knowledge” of a site visitor’s age would place an enormous burden on publishers of general audience websites. A “constructive knowledge” standard would essentially require website operators and online service providers to “guess” a site visitor’s age, potentially on the basis as something as vague as knowing that the site visitor likes the CBS sitcom “Two and a Half Men.” Requiring website operators and online service providers to routinely make these kinds of speculative assessments would introduce an enormous burden on operators of general audience websites, who have no practical way to make such determinations.

With the threat of FTC action, general audience website operators could be forced to operate from a defensive position, denying access to anyone they suspect of being under the age of 13 – a position that dramatically diminishes choices for all consumers. Of the top ten trafficked websites in the United States, not a single one is directed at children, yet they all could be affected by a “constructive knowledge” standard that requires website operators and online service providers to make a “constructive guess” as to whether or not they could potentially be collecting personal information from children under 13.¹⁸

COPPA was never meant to apply to the entire Internet, but was intended to apply to sites directed to children under the age of 13 or where operators have actual knowledge that a visitor is a child. The Commission should preserve the current “actual knowledge” standard, ensuring continued access to premium online content for both adults and children.

V. COPPA Should Not Be Expanded to Include Teenagers

When COPPA was first enacted in 1998, the decision to require verifiable parental consent to collect personal information from children online was carefully deliberated by advocates, educators, and industry. At that time the consensus was that children beyond the age of 12 had sufficiently developed cognitive skills to be able to form reasonable judgments and opinions when presented with the unfamiliar. Congress also considered the fact that extending the age range beyond 12 would impact too many

¹⁸ Quantcast, which ranks websites by traffic, recently identified the top ten trafficked websites in the U.S. as being (in order): Google, Facebook, Yahoo, YouTube, MSN, Wikipedia, Live, Amazon, Microsoft, and eBay. For a full list; www.quantcast.com/top-sites-1.

general audience websites, negatively effecting the development of a rapidly-growing medium for communication.

In the years since COPPA was enacted, the online landscape has changed drastically. Today's teenagers came of age in an era where the Internet is a part of everyday life, and is accessible in a variety of platforms. Unlike the previous generation, which came of age in an era where the Internet was dial-up and largely just a place to look-up information (information which was essentially just the text-based version pasted online), teenagers today see the Internet as a source for communicating (Facebook, MySpace, Skype, *etc.*), interactive gaming (Electronic Arts, LucastArts, Konami,*etc.*), research (Google, Yahoo, Bing, Wikipedia, AOL, *etc.*), music (Apple, Pandora, eMusic, *etc.*) news and information (New York Times, Washington Post, CNN, MSN, Fox, *etc.*) as well as the information source for endless personal activities (schedules and updates for school activities, church activities, civic and community involvement, *etc.*). Unlike their predecessors from over a decade ago, today's teenagers are what are known as "digital natives" – people for whom digital technologies such as computers, the Internet, and mobile phones have always been available.¹⁹

Teenagers today are decidedly more technologically-savvy than their predecessors. They have come of age in an online environment that provides them with a rich source of information and communication opportunities – and they are also much more savvy about the risks and potential for harm that can exist in the online environment. To extend COPPA to the 13 and above age group would go above and beyond what Congress intended to do when it enacted the Act – protecting children in an environment where they cannot be assumed to have the capacity to understand the impact of their actions – hardly a scenario that can be said to describe today's teenagers.

As a practical matter, requiring teenagers to obtain verifiable parental consent would have the effect of imposing COPPA compliance costs on virtually all of the most popular online sites and services. The economics of the advertising-supported online publisher model depend on a publisher's ability to attract site visitors – if a publisher is required to obtain verifiable parental consent from all site visitors between 13-18, then the publisher could potentially lose 25-28 million site visitors (estimated teenage population in the 2000 Census) – a significant percentage of the audience of many general audience websites.

In 1998, Congress made a carefully considered decision only to require verifiable parental consent to collect personal information when a child was under the age of 13. While that age standard might even be somewhat dated given the increasing technological sophistication of today's children, 13 remains an appropriate benchmark. The Commission should maintain the standard of requiring verifiable parental consent to collect personal information for site visitors under 13.

¹⁹ The term "digital native" is credited to author Marc Prensky in his work *Digital Natives, Digital Immigrants*, published in 2001.

VI. Applying the Rule as Currently Constructed to New Media Would Present Challenges

The Commission has explained that it expedited review of the Rule due to changes in the way people access the Internet,²⁰ and has inquired into whether the Rule should apply to mobile communications, interactive television, interactive gaming, or other similar interactive media.²¹ In 1999, the Commission stated that it was “persuaded that the Congress intended the COPPA to apply only to information collected online by an operator.”²² Upon the release of the Final Rule that year, the Commission cited to Senator Bryan’s floor statement in which he stated “[t]his is an online children’s privacy bill, and its reach is limited to information collected online from a child.”²³ Just as it did back in 1999, we believe that the Rule should continue to apply only to children’s information collected over the Internet. The Commission’s FAQ #6 on the Rule reiterates that “COPPA applies to personal information collected online by websites and online services located *on the Internet*.”²⁴ FAQ #34 further explains that “[r]egardless of how you initiate it, if the actual collection of personal information from children is conducted over the Internet, it is subject to the requirements of COPPA and the rule.”²⁵

In the last decade, advancements in technology have certainly been made in the areas that the Commission notes, namely mobile communications, interactive television, interactive gaming, and other interactive media. Such advancements, however, may or may not transfer information over the Internet. To the extent that such technologies do not use the Internet, we submit that they should not be covered by the Rule. Even if these new media do use the Internet, however, the Commission should carefully consider whether it can modify the Rule as written to work for the new technologies. As presently constructed, the Rule would present technological challenges to entities seeking to comply with the Rule. For instance, mobile devices are small and do not provide the same amount of physical space provided by computer or laptop screens for disclosures. Mobile devices also present challenges for how to obtain verifiable parental consent from parents. These are real issues that the Commission should carefully consider and address before applying the Rule to technologies beyond the traditional websites and online services that existed at the time of COPPA’s enactment.

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²⁰ Press Release, FTC Seeks Comment on Children’s Online Privacy Protections (Mar. 24, 2010), *available at* <http://www.ftc.gov/opa/2010/03/coppa.shtm>.

²¹ 75 Fed. Reg. at 17090.

²² Children’s Online Privacy Protection Rule: Final Rule, 64 Fed. Reg. 59888, 59889 (Nov. 3, 1999).

²³ 64 Fed. Reg. at 59889 n.15.

²⁴ COPPA Rule FAQ #6 (emphasis added), *available at* <http://www.ftc.gov/privacy/coppafaqs.shtm>.

²⁵ COPPA Rule FAQ #34, *available at* <http://www.ftc.gov/privacy/coppafaqs.shtm>.

The IAB thanks the Commission for this opportunity to submit these comments, and looks forward to working closely with the Commission on this important topic. Please do not hesitate to contact me at (202) 253-1466 with any questions.

Sincerely,

Michael Zaneis
Vice President of Public Policy
Interactive Advertising Bureau