

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

In the Matter of

Implementation of the
Children's Online Privacy Protection Rule

)
)
)
)

Docket No. 339
Project No. P104503

**SUPPLEMENTAL COMMENTS OF THE
CENTER FOR DEMOCRACY & TECHNOLOGY**

John B. Morris, Jr
Emma J. Llansó
Mangesh Kulkarni
Center for Democracy & Technology
1634 I Street, NW, Suite 1100
Washington, DC 20006
(202) 637-9800

Dated: July 12, 2010

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

In the Matter of

Implementation of the
Children's Online Privacy Protection Rule

)
)
)
)

Docket No. 339
Project No. P104503

**SUPPLEMENTAL COMMENTS OF THE
CENTER FOR DEMOCRACY & TECHNOLOGY**

The Center for Democracy & Technology ("CDT") respectfully submits these supplemental comments in response to the Request for Public Comment ("RFC") on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule ("COPPA Rule" or "the Rule").¹ CDT has also submitted a set of individual comments addressing specific questions raised by the Commission in the RFC, along with a broader set of Joint Comments on behalf of itself, The Progress & Freedom Foundation, and the Electronic Frontier Foundation.² This document provides additional discussion of the constitutional and privacy problems raised by recommendations to expand COPPA to cover older minors. CDT's earlier submitted comments addressed the problems briefly, but now that several commenters to the FTC are specifically urging statutory modifications to COPPA to cover communications by and with older minors, it is appropriate to address the concerns in greater detail. We appreciate the opportunity to express our views on these vital questions.

By its statutory terms, COPPA is limited to addressing the collection of information from young minors – children who are 12 years old or younger. The Commission, of course, lacks the authority to alter this statutory term or to extend COPPA-like rules to cover older age groups. Nevertheless, two sets of comments urge the Commission to extend COPPA to older minors, or at a minimum to recommend to Congress that COPPA be extended. One set of comments specifically assert that COPPA or the COPPA Rule should simply be extended to reach the speech of and with minors up to age 17 (with a variation of the COPPA Rule for 16 and 17 year olds).³ A second set of comments argued not to extend COPPA, but instead to create an additional data privacy framework that would apply only to teens.⁴

A threshold question is whether it is part of the Commission's mandate to make recommendations to Congress about older minors. In 1998, Congress rejected the idea of applying COPPA to older minors, and Congress has not asked the Commission to reconsider that decision.⁵ As any proposal to restrict speech by and to older minors

¹ 16 C.F.R. § 312.

² See Individual Comments of Center for Democracy & Technology (submitted June 30, 2010), *available at* <http://www.ftc.gov/os/comments/copparulerev2010/547597-00049.pdf>; Joint Comments of Center for Democracy & Technology, The Progress & Freedom Foundation, and Electronic Frontier Foundation (submitted June 30, 2010), *available at* www.ftc.gov/os/comments/copparulerev2010/547597-00050.pdf.

³ See Comments of Common Sense Media (submitted June 30, 2010), *available at* <http://www.ftc.gov/os/comments/copparulerev2010/547597-00036.pdf>.

⁴ See Comments of Center for Digital Democracy et al. (submitted June 30, 2010), *available at* <http://www.ftc.gov/os/comments/copparulerev2010/547597-00046.pdf>.

⁵ Congress may, of course, direct an agency to reconsider the statutory authority given to it by Congress, and can appropriate funds for such a study with clear parameters to cabin it. As PFF and EFF noted in their

would raise serious constitutional concerns, the Commission should be cautious about addressing these issues. If commenters believe that Congress should enact a privacy regime to cover older minors, Congress is of course the proper venue for such a discussion.

If the Commission does choose to opine about possible legislation relating to older minors, then it must carefully weigh the constitutional and other concerns set out below. The suggestions to enact a regime covering older minors are of course well intentioned, but such regime would unconstitutionally burden the free speech rights of minors, adults, and website operators. Many (but not all) of the problems flow from the fact that one cannot easily or reliably identify minors or adults online; the Commission should thus avoid proposals that specifically target the teen age group. Instead, if it makes changes to its rules or recommendations to Congress, the Commission should consider what it can do, outside of the COPPA context, to extend protections for *all* Internet users' personal information through a combination of increased educational efforts, promoting technology empowerment solutions, and the adoption of Fair Information Practices.

I. COPPA expansion would violate the rights of older minors.

The First Amendment rights of older minors would be unconstitutionally burdened by an expanded COPPA regime. When faced with a COPPA Rule extended to cover 17-year-olds, or any other type of teen-specific privacy regime, websites that have any significant user base of older minors will take one of two actions. Many websites will simply seek to totally prohibit any minors from accessing the site, which is exactly what happened for younger minors after the original COPPA was enacted. This will lead to a direct and likely very significant reduction of the online content and services available to older minors. Alternatively, websites that decide to try to permit minors to continue to visit their sites would be forced to implement some sort of age and/or identity verification system and then seek parental permission for the minor's use of the site. In either scenario, older minors' constitutional rights would be harmed in at least two ways.

First, because COPPA defines "collect" to include allowing a child to make personal information publicly available, an expanded COPPA would infringe on older minors' First Amendment rights to publish their own speech online.⁶ Teens would not be able to post a comment on a YouTube video or a newspaper article, or create their own blogs, or talk with one another on social networking sites without first obtaining their parents' permission to do so – if those sites even allowed older minors to participate in the first place.

Second, in addition to this clear infringement on minors' right to speak, an expanded COPPA framework would also infringe on older minors' right to receive information. Older minors have a general right to receive information just as adults do.⁷

joint comments on the FCC's recent proceeding "Empowering Parents and Protecting Children in an Evolving Media Landscape," Congress has requested agency opinion in a number of recent proceedings involving the Internet, including the Commission's report on children's involvement in online virtual worlds (*Virtual Worlds and Kids: Mapping the Risks*), and the FCC's review of the Child Safe Viewing Act and the drafting of the National Broadband Plan. Joint Comments of Progress & Freedom Foundation and Electronic Frontier Foundation 6, available at http://www.pff.org/issues-pubs/filings/2010/2010-02-24-PFF-EFF_Response_to_FCC_Empowering_Parents_Protecting_Children_NOI_MB_09-194.pdf.

⁶ See *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

⁷ See, e.g., *In re Gault*, 387 U.S. 1, 13 (1967) ("Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 ("In most circumstances, the values

Minors' right to access information has been recognized as a necessary component of their intellectual development, vital to their ability to fully exercise the rights of speech, press, and political freedom as adults.⁸ Minors' access to constitutionally protected material – that is, material that is not legally obscene or otherwise illegal for adults to receive – can only be restricted “in relatively narrow and well-defined circumstances.”⁹ Because many sites would respond to an expanded COPPA by prohibiting minors from accessing their sites or registering for their services, such an expansion would restrict older minors' access to significant amounts of material that is constitutionally protected to them.

Moreover, older minors not only have a First Amendment right to access information, they have the right to do so without first obtaining parental consent. Requiring a parent's consent or supervision of a minor when that minor is exercising his First Amendment rights is “a curtailment of those rights.”¹⁰ This problem is highlighted in the area of medical care, where older minors have a clear right to obtain treatment without their parents' permission or even knowledge.¹¹ It would be both unconstitutional and exceedingly poor policy for Congress to prevent older minors from going online to educate themselves about medical issues before exercising their right to make medical decisions. But the problem is not limited to medical information – older minors have a clear right to receive information without parental permission more generally.

The Commission should not recommend to Congress that it expand COPPA in a manner that violates older minors' constitutional rights.

II. COPPA expansion would require operators to verify the ages of all users, violating the First Amendment rights – and privacy – of adult users, as well as of web site operators.

To the extent that websites do not simply seek to bar all minors in response to raising the COPPA age to 17, such a change would greatly increase the number of websites required to implement age verification procedures in order to comply with COPPA's verifiable parental consent obligations. If COPPA were expanded to cover teenage minors, a significant number of general interest sites and services could be considered “directed to” teens based on criteria comparable to that used for younger minors – perhaps even if they attempted to prohibit access by minors in their terms of service or by asking for minors' age.¹² Older minors share many interest in common with adults and are attracted to many of the same sites, including major news publications, email services, and video- and blog-hosting sites. These sites would need to obtain

protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”).

⁸ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (“The right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.”).

⁹ *Erznoznik*, 422 U.S. at 212-213.

¹⁰ *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

¹¹ Minors' rights to access information pertinent to their sexual and reproductive health have been well established in the “mature minors” line of cases, which hold that mature minors have the right to obtain abortions without parental consent under certain circumstances. See *Bellotti v. Baird*, 443 U.S. 622, 640-643 (1979) (plurality opinion); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992); *Lambert v. Wicklund*, 520 U.S. 292 (1997). In these cases, the defining characteristic of a mature minor is her “ability to make critical decisions in an informed . . . manner.” Minors also have a recognized right to receive information about contraception. See *Bolger v. Youngs Drug Prods. Corp.* 463 U.S. 60, 75 n.30 (1983).

¹² Sites are considered “directed to” children based on their content, the age of the models or people that appear on the site, the level of language used in the site's text, whether the site features cartoon characters, and similar factors. The “directed to” analysis would be even more problematic if the determination for whether a site is “directed to” teens is based on the 20% of site demographics standard suggested by CDD et al. Comments of CDD et al., *supra* note 4, at 33.

parental consent before collecting information from minors, and site operators would thus need to be able to distinguish between minor and adult users. Moreover, operators would have no choice but to seek extensive information from *every* user. This would require site operators either to create an interstitial front page to their site that blocks access to the site as a whole until users to enter their age or birthday, or to request credit card or other identifying information from all users in order to verify that certain users are adults. Either of these responses would create significant constitutional problems.

Requiring adults to disclose personal information in order to access material online is clearly an impermissible burden on free speech. Many adults will likely be deterred from accessing constitutionally protected material because they are unwilling to provide personal information in order to gain access to the content.¹³ Age verification procedures would require adults to compromise their anonymity to access protected speech, which would have a particularly deterrent effect with regard to sensitive or controversial content.¹⁴ This is true when the information requested by the site is simply the user's date of birth, and becomes even more of a concern when sites attempt to use credit card information to verify the age of their users: "Requiring Internet users to provide payment card information or other personally identifiable information to access a Web site would significantly deter many users from entering the site, because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet."¹⁵

Further, courts have concluded that age verification services do not "actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor."¹⁶ "Credit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age."¹⁷ Thus, while site operators who implement age verification procedures would be making a good-faith effort to distinguish the adult users from the minors, they would not have any certainty that they could do so successfully. Operators would undertake costly measures that would limit adults' access to protected speech and result in significantly more collection of information from all users, without any guarantee that this would actually prevent the collection of older minors' personal information without parental consent.

Requiring operators to implement age verification systems is also an impermissible burden on the operators' free speech rights to communicate constitutionally protected material to their audiences.¹⁸ Due to the costs associated with using different methods of age verification, websites would likely have to charge fees for content they otherwise would have provided for free.¹⁹ Web users are often reluctant to provide personal information or to pay for content when there are other, free alternatives available – indeed, if COPPA were expanded, U.S. based sites would likely find themselves at a significant disadvantage to foreign websites that do not charge for content or require

¹³ *ACLU v. Ashcroft*, 322 F.3d 240, 259 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004).

¹⁴ *See, e.g., ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008) (discussing the difference between online and offline methods of restricting minors' access to material that is constitutionally protected as to adults: "Blinder racks do not require adults to pay for speech that otherwise would be accessible for free, they do not require adults to relinquish their anonymity to access protected speech, and they do not create a potentially permanent electronic record. Blinder racks simply do not involve the privacy and security concerns that" age verification procedures raise.).

¹⁵ *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007), *aff'd*, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008)).

¹⁶ *Gonzales* 478 F. Supp. 2d at 800; *see also Mukasey*, 534 F.3d at 196.

¹⁷ *Gonzales*, 478 F. Supp. 2d at 811.

¹⁸ *Mukasey*, 534 F.3d at 197.

¹⁹ *Gonzales*, 478 F. Supp. 2d at 804.

registration. As the district court found in *ACLU v. Gonzales*, “Because requiring age verification would lead to a significant loss of users, content providers would have to either self-censor, risk prosecution, or shoulder the large financial burden of age verification.”²⁰ “Many 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.”²¹ 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 plaintiffs who provide their content for free.”²²

The costs of expanding COPPA to cover 17-year-olds, in terms of both free speech and privacy, are substantial, and the harm flows to older minors, adults, and website operators. The Commission should not recommend such an expansion to Congress.

III. Baseline privacy legislation, including Fair Information Practices, should be extended to all users and not only to teens.

One group of commenters recommends that the Commission ensure that operators employ Fair Information Practices (FIPs) with regard to teens’ data.²³ While the motivation behind this suggestion is admirable, its implementation would lead to the same age verification issues discussed above. Site operators who are required to treat teens’ data differently from adults’ data will need to differentiate among their users, which will require some form of age verification that will place a burden on the free speech rights of users and operators (and the privacy rights of both minors and adults). Further, providing teens and children only with the protections of FIPs would lead to unintended adverse consequences: children and teens would benefit from the highest level of privacy protection right up until they turn 18, but then would be expected to fend for themselves, without ever having learned how to navigate the less privacy-protective environment they will face as adults.

Of course, the answer is not to leave children and teens with no protections for their personal information. Rather, the Commission should pursue ways to apply a full set of FIPs to protect the privacy of *all* Internet users (and recommend that Congress pursue this goal as well).²⁴ The FIPs, first developed by the Department of HEW in the 1970s, are now universally recognized. These principles have been embodied to varying degrees in the Privacy Act, Fair Credit Reporting Act, and the other “sectoral” federal privacy laws that govern commercial uses of information online and offline in the US. We strongly believe that the FIPs remain relevant for the digital age and now need to be re-emphasized and codified to address the dramatic advancements in information technology that are underway.

More recently, a comprehensive set of FIPs was endorsed by the Department of Homeland Security (DHS). DHS’s formulation of the FIPs offers a robust set of modernized principles that should serve as the foundation for any discussion of

²⁰ *Id.* at 804-805

²¹ *Id.* at 806.

²² *Id.* at 812-813.

²³ Comments of CDD et al., *supra* note 4, 42.

²⁴ CDT has made similar recommendations to the Commission in other proceedings. See, e.g., Center for Democracy & Technology, Refocusing the FTC’s Role in Privacy Protection (Nov. 9, 2009), available at http://www.cdt.org/files/pdfs/20091105_ftc_priv_comments.pdf.

legislation, regulation, or self-regulation in the online sector.²⁵ These principles, as articulated by DHS,²⁶ include: transparency, individual participation, purpose specification, data minimization, use limitation, data quality and integrity, security, and accountability and auditing.

At the end of the day, it does not make sense to provide FIPs-based protection to teenagers, but not to adults. Most, if not all, of the privacy protections that would be valuable for teens would also be valuable for adults. And by extending a robust privacy framework for *all* Internet users, we can avoid the serious harms for both free speech and privacy that would flow from a teen-specific approach. We urge the Commission to endorse the FIPs and to recommend them to policymakers as the best available basis for policy guidelines of all types.²⁷

* * *

We appreciate the opportunity to comment on the important questions raised in the RFC, and we look forward to working further with the Commission as it continues its COPPA review.

Respectfully submitted by,

John B. Morris, Jr
Emma J. Llansó
Mangesh Kulkarni
Center for Democracy & Technology
1634 I Street, NW, Suite 1100
Washington, DC 20006
(202) 637-9800

²⁵ See U.S. Department of Homeland Security, *Privacy Policy Guidelines Memorandum, The Fair Information Practice Principles: Framework for Privacy Policy at the Department of Homeland Security* (Dec. 2008), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2008-01.pdf.

²⁶ However, here we apply the DHS principles more broadly to data collecting entities in general.

²⁷ Joint Comments of Public Interest Groups, *In the Matter of A National Broadband Plan for our Future*, before the Federal Communications Commission, Comments – NBP Public Notice (Jan. 22, 2010), available at http://www.cdt.org/files/pdfs/20100122_fcc_general.pdf.