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Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex E)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: COPPA Rule Review P104503

Dear Secretary Clark:

Motion Picture Association of America (“MPAA”)¹ is pleased to submit these comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) request for public comment on its implementation of the Children’s Online Privacy Protection Act (“COPPA”) through the Children’s Online Privacy Protection Rule (“COPPA Rule” or “the Rule”), the costs and benefits of the Rule, and whether the Rule should be retained, eliminated, or modified.²

MPAA champions intellectual property rights, free and fair trade, innovative consumer choices, freedom of expression, and the enduring power of movies to enrich and enhance people’s lives. Because we believe that parents are in the best position to determine the content their children see, MPAA and its members strive to give parents the tools they need to make and effect responsible decisions for their children. Thus, for over forty years, the Classification and Rating Administration (“CARA”) has turned to panels of parents to provide independent ratings

¹ The Motion Picture Association of America, Inc. (MPAA), together with the Motion Picture Association (MPA) and MPAA’s other subsidiaries and affiliates, serves as the voice and advocate of the American motion picture, home video, and television industries in the United States and around the world. MPAA’s members are the six major U.S. motion picture studios: The Walt Disney Studios; Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios, LLLP; and Warner Bros. Entertainment Inc.

² These comments are in response to the Commission’s request for public comment published in 75 Fed. Reg. 17089 (April 5, 2010), available at <http://www.ftc.gov/os/2010/03/100324coppa.pdf>.

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for films shown in the United States, and to review all advertising associated with those films. Similarly, MPAA companies were early supporters of COPPA, and MPAA has participated in and commented on previous reviews of the COPPA Rule.³

I. Introduction

COPPA is the product of a unique collaboration among child advocates, business, regulators, and lawmakers to protect the privacy and safety of young children online while respecting the potential of the Internet to deliver high quality educational content and entertainment to American children, teens, and adults.⁴ It reflects the collective judgment of industry, advocates, legislators, and regulators that the best way to protect young children on the Internet is to encourage and support parental awareness of and involvement in the online activities of their children.⁵ Congress also understood the importance of achieving these important goals without undermining the vibrancy of the emerging Internet.⁶

II. Summary of Conclusions

While a great deal has changed since 1998, the Commission's rule implementing COPPA continues to provide a workable architecture that safeguards the privacy and safety of young

³ See, e.g., MPAA Comments Re COPPA Rule Review 2005, Project No. P054505 (June 27, 2005) ("MPAA Comments June 27, 2005").

⁴ Indeed, Senator Bryan noted that the legislative language was crafted "with the participation of the marketing and online industries, the Federal Trade Commission, privacy groups, and first amendment organizations." Statement of Sen. Bryan, 144 Cong. Rec. at S11657 (Oct. 7, 1998).

⁵ As Senator Bryan stated at the time of enactment, COPPA was designed: "(1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chat rooms, home pages, and penpal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent." *Id.*

⁶ *Id.* (These goals must be accomplished "in a manner that preserves the interactivity of children's experience on the Internet and preserves children's access to information in this rich and valuable medium").

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online users, preserves the degree of certainty and predictability required to support innovation by online operators, and faithfully implements the statutory goal of empowering parents to control whether and under what circumstances online companies may collect personally identifiable information from their young children. Accordingly, MPAA believes that substantial modifications in the Rule are unnecessary and specifically urges the FTC to resist calls to expand COPPA and/or the Rule (i) to encompass collection of non-PII that enables web site operators and online service providers to deliver relevant and interesting content to individual but unidentified children, (ii) to expand coverage to teens, and/or (iii) to impose liability on the basis of inferred or constructive knowledge regarding the presence of children on a particular site. We also encourage the Commission to exercise caution with respect to application of COPPA to media such as mobile communications and interactive television, and to use the Rule review process to identify appropriate circumstances to permit real-time access by children to compelling content while still providing effective notice to parents — either because the activity is sufficiently low risk, or because the site operator or service provider has adopted sufficiently robust processes and procedures to safeguard children.

III. COPPA Continues to Enhance the Privacy and Safety of Young Children Online

MPAA companies commit significant resources to online child safety, employing multiple privacy professionals to design and operate COPPA compliant sites. MPAA members are investing in sophisticated filtering technology, often augmented by appropriate levels of human monitoring and review, depending upon the particular circumstances, to prevent the collection or disclosure of personally identifiable information from children under 13. MPAA members use a variety of mechanisms to secure verifiable parental consent under the sliding scale, which permits businesses to identify cost effective mechanisms to secure parental consent that are appropriately tailored to a particular setting. In some cases, MPAA members facilitate interactivity without collection or disclosure of personal information, for example by offering registration and personalized content tied to unique screen names or other information that

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contain no personally identifiable information. In other settings, MPAA members limit data collection consistent with COPPA's exceptions under the single and multiple e-mail response exceptions to the requirement for obtaining parental consent. As the FTC noted in its 2007 report to Congress, the single and multiple e-mail exceptions remain critical tools for providing "safe, interactive, and fun children's content"⁷ such as newsletters, homework help, contests and sweepstakes.

As reported by MPAA members in previous COPPA Rule reviews, and as reflected by the Commission's own experience,⁸ the near complete absence of complaints from parents regarding the use of personally identifiable information about children collected online suggests that the COPPA Rule continues to serve the goals for which COPPA was enacted. In particular, the definitions of a "child" and of "personal information" under the Act have stood the test of time, as has the "actual knowledge" standard. Specifically, these three elements have worked together to enhance parental involvement in the online activities of young Internet users without creating uncertainty about expansive liability, which would artificially constrain online content creation, chill innovation by site operators and service providers, and limit access to important digital resources. In short, these standards continue, as MPAA reported in 2005, to provide protection for children, peace of mind to parents, and certainty to operators.⁹

IV. Expansion of COPPA is Not Needed

There is no reason to expand COPPA, as some have urged, to cover information that does not permit the operator in question to contact a specific individual, or to expand parental consent requirements to data about teenagers. Similarly, adoption of a "constructive knowledge" standard would create significant uncertainty for website operators and online service providers,

⁷ Implementing the Children's Online Privacy Protection Act: A Report to Congress, Federal Trade Commission (Feb. 2007) at 8, *available at* http://www.ftc.gov/reports/coppa/07COPPA_Report_to_Congress.pdf.

⁸ *Id.*

⁹ MPAA Comments June 27, 2005 at 4.

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and would undermine the vitality of the online environment. None of those changes would serve children, families, or the public interest.

A. The Current Definition of “Personal Information” Should be Retained

“Personal information” is defined in the Rule to include “individually identifiable information about an individual collected online,” including (a) A first and last name; (b) A home or other physical address including street name and name of a city or town; (c) An e-mail address or other online contact information, including but not limited to an instant messaging user identifier or a screen name that reveals and individual’s email address; (d) A telephone number; (e) A social security number; (f) A persistent identifier [that is] associated with individually identifiable information; (g) A combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting; or (h) Information concerning the child or the parents of that child that an operator collects online from the child and combines with an identifier described [above].¹⁰

This definition of personal information is consistent with well established fair information practices as well as the statutory goals of protecting children’s privacy and safety in the online environment. MPAA believes that the definition of “personal information” in the Rule is broad and flexible enough to protect children’s privacy depending on the context, and in connection with emerging technologies, and does not require modification at this time.

Aside from certain inherently personally identifiable information such as name, address, telephone number, etc., whether information is personally identifying or not is context-specific. The *theoretical* possibility that one could acquire sufficient bits of information from diverse sources to convert information that does not identify an individual (Non-PII) into information

¹⁰ Children’s Online Privacy Protection Rule, 16 C.F.R. §312.2, 64 F.R. 59888, 59912

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that does (PII) should not, however, preclude the use of information that is Non-PII in the relevant context to deliver a rich, stimulating, and engaging online experience to our children.

A website cannot identify a specific individual with just an IP address. Accordingly, an IP address is only “personally identifiable” where one has the means to correlate that number with a specific, identifiable user.¹¹ There are a variety of ways in which an IP address can be used to enhance a child’s online experience — for example to deliver relevant, accessible, or age appropriate content — without diminishing his or her privacy or safety. On the other hand, where an IP address is correlated with the kind of identifying information listed in the Rule, it is already covered under the definition of personal information as a persistent identifier that is associated with individually identifiable information. Accordingly, the current definition of personal information in the Rule is sufficiently flexible to serve the privacy and safety goals of COPPA in a variety of situations, and need not be expanded to include screen names, birth dates, zip codes, or static IP addresses as a matter of course.

Geolocation data is another good example of the importance of context in determining whether or not a piece of data is PII. As Matt Galligan, an expert on geolocation data said at the COPPA Workshop, “On its own, a coordinate doesn’t necessarily speak to who somebody is. It might speak to where they are at that given time. . . It could mean anything. It could mean the coffee shop down the street that they frequent. It could mean the park that they like to go to. But just a coordinate doesn’t necessarily identify a specific individual.”¹² Under the existing Rule, geolocation data would be personal information for purposes of the Act if combined with any of the identifiers specified in the definition (e.g., name, email address, phone number, etc.), but not

¹¹ Comment of Jules Polonetsky, Future of Privacy Foundation, COPPA Workshop (June 2, 2010), Session III, Transcript at 15.

¹² Comment of Matt Galligan, COPPA Workshop (June 2, 2010), Session III, Transcript at 6.

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otherwise. Accordingly, the definition in the Rule need not be changed to include geolocation data, standing alone, as personal information.

B. COPPA Should Continue to Apply to Data Collection from Children under 13

Congress carefully considered the circumstances under which verifiable parental consent would be required to collect personal information from children online. As originally proposed by Senator Bryan, S. 2326 would have required parental notification for the collection of personal information from children under 16.¹³ Based on input from advocates, educators, and industry, Congress determined that the requirement should apply only to operators of sites or services directed to children or where an operator has actual knowledge that a particular user was under 13. This decision reflected the collective judgment of those participating in the policy development process that extending the age range beyond 12 would impact too many general audience web sites, at too great a cost both in terms of access to content and the emerging digital economy, without offsetting benefits.¹⁴ This has not changed in the past ten years: As the Pew Internet & American Life Project reports, “the Internet is a central and indispensable element in the lives of American teens and young adults.”¹⁵ Like their parents, teens use the Internet to

¹³ S. 2326 IS, 105th Congress, 2nd Session (July 17, 1998), available at <http://thomas.loc.gov/cgi-bin/query/z?c105:S.2326>.

¹⁴ See, e.g., Written testimony of Deirdre Mulligan, Staff Counsel, Ctr. For Democracy & Technology, before the Subcommittee on Commerce, Science, and Transportation Subcommittee on Commerce, U.S. Senate (Sep. 23, 1998) <http://www.cdt.org/testimony/testimony-deirdre-mulligan-senate-committee-commerce-science-and-transportation-subcommitt> (recommending that the definition of “child” in COPPA should be lowered from 16-13 to protect First Amendment, privacy, and access to information rights of teenagers).

¹⁵ *Part 1: Internet adoption and trends* <http://www.pewinternet.org/Reports/2010/Social-Media-And-Young-Adults/Part-1.aspx?r=1>. Fully 95% of American teens aged 14-17 are online, and use the Internet to communicate with friends, follow current events, or get other information.

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communicate with friends and relatives, follow current events and popular culture, and gather important information.¹⁶

Expanding the definition of a child under COPPA to cover teens would require Congressional action and would dictate, for the most part, that general audience web sites comply with COPPA by requiring consent or prohibiting registration by teens. This would almost certainly diminish access to high quality digital content by the first generation of “born digital” teens and increase unnecessary data collection, which ultimately would not serve the goals of COPPA.¹⁷

Moreover, teenagers are concerned and educated about online privacy issues. While there is little doubt that some teens engage in risky behavior online, research also shows that:

[m]ost teenagers are taking steps to protect themselves online from the most obvious areas of risk ... many youth actively manage their personal information as they perform a balancing act between keeping some important pieces of information confined to their network of trusted friends and, at the same time, participating in a new, exciting process of creating content for their profiles and making new friends. Most teens believe some information seems acceptable — even desirable — to share, while other information needs to be protected.”¹⁸

¹⁶ According to a study conducted by the Newspaper Association of America Foundation, a “healthy component” of web usage by those age 15 – 29 is information related. *Youth Media DNA: In Search of Lifelong Readers* (2008) (“Of young people who reported using Web sites at least once a week, information sites were visited by 35 percent of the group, 29 percent said they visited online news aggregators such as Google or MSN or Yahoo, and 20 percent said they visited online newspaper sites.”), available at <http://www.naa.org/docs/Foundation/Research/Youthmediadna.pdf>

¹⁷ See “Comments of Center for Democracy & Technology,” at 6-8 (citing likelihood of increased “false positives” when applying “directed to children” standard to sites intended for older minors and noting that “[e]fforts to expand COPPA would bring general-interest websites ... within the Rule’s application and require operators of websites and online services to collect information from every user to distinguish adult users from children.”)

¹⁸ Amanda Lenhart and Mary Madden, *Teens, Privacy & Online Social Networks: How teens manage their online identities and personal information in the age of MySpace*, Pew Internet & American Life Project (April, 2007). http://www.pewinternet.org/~media/Files/Reports/2007/PIP_Teens_Privacy_SNS_Report_Final.pdf.pdf

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Finally, research conducted by the Pew Internet & American Life Project reflects a higher degree of parental awareness of and involvement in the online activities of their teenage children than is commonly supposed. “Despite the stereotype of the clueless parent, parents of today’s online teens are staying involved in their children’s online lives. Some 65% of parents report that after their child has been on the internet, they check to see what websites he or she viewed. In addition, almost three quarters of parents (74%) can correctly identify whether or not their online teen has ever created his/her own social networking site profile that others can see at sites such as MySpace or Facebook.”¹⁹ Under the circumstances, investing in digital literacy programs that educate parents and enable teens to use and hone their emerging reasoning and decision-making skills is likely to pay better dividends than expanding the definition of a child under COPPA to cover teens, which would likely reduce the availability of high quality digital content, diminish the online experience of teenagers who already rely on the Internet for myriad educational, interpersonal, and entertainment purposes, and impose significant costs on US business.²⁰

C. The Actual Knowledge Standard Should be Retained

The Commission should resist calls to convert COPPA’s actual knowledge standard into a constructive knowledge standard, particularly via regulation. This standard plays a critical role in striking the balance sought by Congress in enacting COPPA and in ensuring the availability of high quality content and interactivity without imposing unnecessary, expensive, and ineffective

¹⁹ <http://pewresearch.org/pubs/621/parents-teens-and-technology>.

²⁰ According to Danah Boyd: “The key to making COPPA work is not to make it stricter or to force the technology companies to be better at confirming that the kids on their site are not underage. Not only is this technologically unfeasible without violating privacy at an even greater level, doing so would fail to recognize what’s actually happening on the ground. Parents want to be able to parent, to be able to decide what services are appropriate for their children. At the same time, we shouldn’t forget that not all parents are present and we don’t want to shut teens out of crucial media spaces because their parents are absent, as would often be the case if we upped the age to 18. The key to improving COPPA is to go back to the table and think about how children’s data is being used, whether it’s collected implicitly or explicitly.” Danah Boyd, *How COPPA Fails Parents, Educators, Youth*, available at <http://dm/central.net/blog/danah-boyd/how-COPPA-fails-parents-educators-youth>.<http://dm/central.net/blog/danah-boyd/how-COPPA-fails-parents-educators-youth>.

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burdens on web site operators and online service providers. Holding operators responsible for inferences and constructive knowledge would have the effect of applying COPPA requirements to most of the Internet, with all of the negative side-effects Congress sought to avoid in 1999.

As originally drafted, COPPA applied only to web sites and online services specifically “directed to children.” In response to requests to expand coverage, Congress considered and affirmatively rejected a standard that would have permitted the FTC to take action with respect to sites that could be assumed to have users under thirteen but that nonetheless had no *actual knowledge* of the age of a particular individual using their site or service. Congress deliberately selected the actual knowledge standard because it served the objective of protecting young children without constraining appropriate data collection and use by operators of general audience websites. This standard was selected to serve the goals of COPPA without imposing excessive burdens — including burdens that could easily constrain innovation - on general audience sites and online services.

Actual knowledge is “direct and clear knowledge of a fact, as distinguished from constructive knowledge; e.g., the employer, having witnessed the accident, had actual knowledge of the worker’s injury.²¹ Implied knowledge, on the other hand, is knowledge reasonably inferred from a known fact,²² while other courts refer to this same standard as *constructive knowledge*.²³ Courts routinely distinguish actual knowledge and implied or constructive

²¹ Actual knowledge is also referred to as *express actual knowledge*. See Black’s Law Dictionary (8th ed. 2004). See also *Colby v. Riggs Nat. Bank*, 92 F.2d 183 (App. D.C. 1937); *In re Webber*, 35 B.R. 344 (Bankr. D. Tex. 2006); *In re Rey*, 324 B.R. 449 (Bankr. D.N.Y. 2005).

²² Some, but not all, courts refer to this as *implied actual knowledge*. See, e.g., *Vass v. Compaq Computer Corp.*, 953 F. Supp. 114 (D. Md. 1997); *In re U.S.A. Diversified Prods.*, 196 B.R. 801 (D. Ind. 1996).

²³ See, e.g., *Keenum v. Huntsville*, 575 So. 2d 1075, 1076 (Ala. 1991) (finding the two standards to be interchangeable). Regulation and case law establish at least two additional standards including (i) “inquiry knowledge” or knowledge that would be discovered by reasonable investigation, where a known fact gives rise to a duty to investigate and (ii) “constructive knowledge” or knowledge that one using reasonable care or diligence should have, which is therefore attributed by law to a given person. See, e.g., *The Tompkins*, 13 F.2d 552, 554 (2d Cir 1926), quoting *Fidelity & Deposit Co. v. Queens County Trust Co.*, 123 N.E. 370 (N.Y. Ct. App. 1919) (discussing implied knowledge); *In re Kensington Int’l, Ltd.*, 368 F.3d 289 (3d Cir. 2004) (discussing constructive knowledge); *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999) (discussing constructive knowledge).

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knowledge, and the decision of Congress to replace the reference to “knowledge” in Senator Bryan’s text with the term “actual knowledge” should be respected as a deliberate Congressional choice.²⁴ Adoption of a constructive knowledge standard would be counterproductive, and would make it far more difficult — and hence less likely — for operators of sites or services that are not appropriate for young children to take steps to identify and remove young children. Adoption of such a standard, or aggressive enforcement of the Rule based on an “implied actual knowledge” standard²⁵ would require operators of general audience sites to investigate the ages of their site’s visitors, necessitate age screening in sites that are not currently collecting age information and, as a result, increase data collection and reinforce undesirable activity by children.

V. Use Caution in Applying COPPA to Additional Technology Platforms

We are experiencing a period of rapid growth and innovation in new media such as mobile communications and interactive television. These technologies are new, complex, and not necessarily akin to the online technologies contemplated when the Rule was formed. These technologies hold great potential, including for the development of content in safe, age appropriate media. Before applying COPPA to emerging technologies, the Commission should undertake the analysis required to ensure an appropriate level of access and interactivity for children, and to continue to permit Operators the flexibility to experiment and innovate within the boundaries and protections afforded by COPPA.

²⁴ See, e.g., *Powers v. Professional Credit Servs.*, 107 F. Supp. 2d 166, 169 (D.N.Y. 2000); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 729 (7th Cir. 2004). “...there can be no doubt that there is a marked distinction between actual knowledge and constructive or implied knowledge. The former consists in express information of a fact. The latter is in the nature of a legal inference.” *Colby*, 92 F.2d at 194. See also *Attys. Title Guar. Fund v. Goodman*, 179 F. Supp. 2d 1268, 1275 (D. Utah 2001)

²⁵ See discussion of this in Note 22 above.

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VI. Reducing the Costs and Supporting Innovation

Mechanisms for acquiring affirmative verifiable consent continue to be cumbersome, and even without embracing new technologies, are likely to remain so for some time to come. As discussed above, children and parents are increasingly comfortable with and reliant upon the Internet for education, communication, commerce, and entertainment, and parents are, in fact, more involved and aware of their children's online activities than might have been anticipated.

Congress empowered the Federal Trade Commission to adjust through rulemaking the requirements for verifiable parental consent as appropriate, taking into consideration the technology involved,²⁶ and indicated that the consent requirements for COPPA "be interpreted flexibly, encompassing 'reasonable effort' and 'taking into consideration available technology.'"²⁷ In addition, the safe harbor process set forth in COPPA permits the Commission to provide incentives for and approve various industry developed standards deemed to satisfy the requirements of the Act, including the verifiable parental consent requirements.²⁸ Accordingly, we encourage the Commission to use this flexibility to support innovative approaches to reduce the burden of consent requirements where the benefits to the child of access to information and services outweigh risks to the security and privacy of the child based on the site's practices.

VI. Conclusion

The COPPA Rules continues to provide a workable architecture that safeguards the privacy and safety of young online users, preserves the degree of certainty and predictability required to support innovation by online operators, and faithfully implements the statutory goal of empowering parents to control whether and under what circumstances online companies may collect personally identifiable information from their young children. Accordingly, MPAA

²⁶ 15 U.S.C. 6501(9)

²⁷ 144 Cong. Rec. S11657 (Oct. 7, 1998)

²⁸ 15 U.S.C. 6504

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believes that substantial modifications in the Rule are unnecessary and specifically urges the FTC to resist calls to expand COPPA and/or the Rule (i) to encompass collection of non-PII that enables web site operators and online service providers to deliver relevant and interesting content to individual but unidentified children, (ii) to expand coverage to teens, and/or (iii) to impose liability on the basis of inferred or constructive knowledge, regarding the presence of children on a particular site. Moreover, particularly in light of research demonstrating that parents are aware of and involved in the online activities of their children, we believe that there are many cases - either by virtue of the nature of the site or the practices of the operator — where the level of parental consent required could be less burdensome, and we encourage the Commission to identify additional circumstances where operators may rely on a simple parental notice and opt-out mechanism to fulfill their obligations with respect to parental consent.

Sincerely,

J. Beckwith Bur
Counsel to MPAA