

**Before the
Federal Trade Commission
Washington, D.C. 20580**

In the Matter of)	
)	Docket No. 339;
Implementation of the Children’s)	Project No. P104503
Online Privacy Protection Rule)	
)	

**REPLY COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION (“PFF”)**

The Progress & Freedom Foundation (“PFF”) respectfully submits the following comments to supplement the joint comments PFF filed on June 30, 2010, with the Center for Democracy & Technology (“CDT”) and the Electronic Frontier Foundation (“EFF”),¹ as well as PFF’s extensive previous work, publications and Congressional testimony on this subject submitted on July 3, 2010,² and in response to other comments filed in this proceeding.

We reiterate here our repeated warnings about the perils of expanding COPPA’s age scope or diluting the two standards that currently prevent COPPA from requiring age verification of adults: COPPA requires verifiable parental consent only (i) when a site or service that “collects” personal information is “directed to” children or (ii) when the operator has “actual knowledge” it is dealing with a child. In particular, we address COPPA expansion proposals raised by Common Sense Media (“CSM”)³ and a coalition led by the Center for Digital Democracy

¹ Joint Comments available at <http://www.ftc.gov/os/comments/copparulerev2010/547597-00050.pdf>.

² Those comments included the following materials: Berin Szoka & Adam Thierer, *COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety & Free Speech*, Progress on Point 16.11,(June 2009), <http://pff.org/issues-pubs/pops/2009/pop16.11-COPPA-and-age-verification.pdf> [hereinafter *COPPA 2.0*]; Written Testimony of Berin Szoka, at *Hearing on An Examination of Children’s Privacy: New Technologies & the Children’s Online Privacy Protection Act* before the Subcomm. on Consumer Prot., Comm. on Commerce, Sci. & Transp., U.S. Senate (April 29, 2010), www.pff.org/issues-pubs/testimony/2010/2010-04-29-Szoka_Written_COPPA_Testimony.pdf; Berin Szoka, The Progress & Freedom Found., *Response to Questions from Sen. Mark Pryor Regarding Hearing on An Examination of Children’s Privacy: New Technologies & the Children’s Online Privacy Protection Act* (June 1, 2010), http://www.pff.org/issues-pubs/testimony/2010/2010-06-01-Szoka_Responses_to_COPPA_Hearing_Questions.pdf.http://www.pff.org/issues-pubs/testimony/2010/2010-06-01-Szoka_Responses_to_COPPA_Hearing_Questions.pdf.

³ Common Sense Media, Comments, June 2010, <http://www.ftc.gov/os/comments/copparulerev2010/547597-00036.pdf> [hereinafter CSM Comments].

("CDD").⁴ We also note the dangers inherent in a third form of COPPA expansion: re-defining "personal information" so broadly as to make COPPA applicable to any visit by a child to certain sites.

I. Common Sense Media's Proposals

CSM proposes that:

COPPA protections should be extended to all children under 18. Companies and operators must get an opt-in from parents before collecting or using personal information from children under 16. For children aged 16 and 17, companies and operators must get an opt-in from the children themselves.⁵

But nowhere does CSM explain how this would actually work. In fact, their proposal to scale-up COPPA's regulatory coverage would cause COPPA to essentially converge with the Children's Online Protection Act (COPA), a broad age verification mandate that was struck down as unconstitutional.⁶ After a decade-long court battle over the constitutionality of COPA, the U.S. Supreme Court in January 2009 rejected the government's latest request to revive the law, meaning it is essentially dead.⁷ CSM's proposed expansion of COPPA would require a much larger universe of users to be "verified" under COPPA, and therefore has profound First Amendment implications.

First, CSM fails to acknowledge that—in the name of protecting privacy—their COPPA expansion proposal would, in practice, require a massive amount of *additional* information be collected from web users to facilitate their proposed regulatory regime. Expanding age verification mandates requires more information to be collected about kids and their parents, but also about adults (to prove they aren't children.). To the extent COPPA requires adults to provide information about themselves sufficient to overcome an age verification wall (such as credit card information), this will, as COPA did, "likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content..."⁸ This presents essentially the same First Amendment problem as COPA. COPPA's current "under 13" regulatory framework raises few concerns in this regard because sites directed at kids 12 and under represent an "Internet Jr." that is virtually distinct from the rest of the Internet. This is primarily because adults simply do not use these sites in any appreciable numbers (except alongside their children under 13), but

⁴ Ctr. for Digital Democracy, et al., Comments, June 30, 2010, www.democraticmedia.org/files/20100630_COPPA_Final.pdf [*hereinafter* CDD Comments].

⁵ CSM Comments, *supra* note 3, at 4.

⁶ 47 U.S.C. § 231. While COPPA governs sites "directed at" children, COPA would have required age verification for content deemed "harmful to minors."

⁷ See Adam Thierer, *Closing the Book on COPA*, PFF Blog, The Progress & Freedom Found., Jan. 21, 2009, http://blog.pff.org/archives/2009/01/closing_the_book.html. See also Alex Harris, *Child Online Protection Act Still Unconstitutional*, (Nov. 17, 2008), <http://cyberlaw.stanford.edu/packet/200811/child-online-protection-act-still-unconstitutional>.

⁸ *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 259 (3d Cir. 2003).

also because many parents of such young children use parental control software to restrict their child's use of the Internet to such sites. Simply put: the COPPA model breaks down and becomes clearly unconstitutional when applied to sites "directed at" kids 13 and over.

If anything, the speech burdened by COPPA 2.0 deserves *more* protection, not less, than the speech burdened by COPA: Where COPA merely burdened access to content deemed "harmful to minors" (*viz.*, pornography), COPPA expansion would burden access to material by adults as well as minors not because that material is harmful or obscene but merely because it is "directed at" minors. Thus, the content covered by COPPA 2.0 proposals could include not merely pornography, but communications about political nature, which deserve the highest degree of First Amendment protection.

Second, the CSM proposal would burden the speech rights of older minors. Indeed, this is largely why Congress rejected the provisions of COPPA as originally introduced that would have applied to adolescents.⁹ As we have stressed repeatedly in our work, COPPA applies whenever a site "collects" information from kids, but this term is given a peculiar definition in COPPA to include any tool that "enabl[es] children to make personal information publicly available"—in other words, all "Web 2.0" interactive sites that allow sharing of user-generated content.¹⁰ This would also include sites, like NYTimes.com, that require a log-in with an email address not just to comment on content (and thus potentially make public personal information) but merely to access content!

The fact that CSM proposes to extend COPPA's *parental* consent requirement only to kids under 16 (and to require opt-in from kids themselves aged 16-17) does not solve this constitutional problem. Children under 16 *also* have First Amendment rights to access information without parental consent, and it is not difficult to imagine circumstances when parental consent requirements may stifle access to, and participation in online discussions about, valuable yet sensitive information, including suicide prevention, abuse, addiction, sexual orientation and even basic (yet potentially embarrassing) health and puberty-related issues.

⁹ This requirement was contained in the original bill, Children's Online Privacy Protection Act, S. 2326, 105th Cong. § 3(a)(2)(A)(iii), (1998), but was removed when that bill was reintroduced in its final form. In the interim, Congress held a hearing at which testimony was offered by, among others, Deirdre Mulligan, on behalf of the Center for Democracy & Technology, which generally supported COPPA but argued for the very revisions that were ultimately made. In particular, Mulligan argued that:

Under the bill each time a 15 year old signs-up to receive information through email his or her parent would be notified. For example if a 15 year old visits a site, whether a bookstore or a women's health clinic where material is made available for sale and requests information about purchasing a particular book or merely inquires about books on a particular subject (abuse, religion) using their email address the teenager's parent would be notified. This may chill older minors in pursuit of information.

Testimony of Deirdre Mulligan, Staff Counsel, Center for Democracy & Technology, before the Senate Comm. on Commerce, Sci. & Transp. Subcomm. on Commc'ns (Sept. 23, 1998), <http://web.archive.org/web/20080327000913/http://www.cdt.org/testimony/980923mulligan.shtml> [*hereinafter* Mulligan Testimony].

¹⁰ 16 C.F.R. § 312.2 (definition of "collection").

COPPA expansion as proposed by CSM would also increase compliance burdens for small- and even mid-sized websites that do (or might) cater to minors or teens. If expanded regulation crowds out smaller start-ups, the resulting level of creativity and innovation in this market will suffer. Thus, COPPA expansion could lead to unnecessary industry consolidation as smaller operators are forced to sell to (or simply give way to) bigger players more capable of managing regulatory compliance, and thus an overall decline in the vitality and diversity of content and service offerings. While CSM might not consider this economic disincentive worthy of exploration, the Commission should give it close consideration. After all, the FTC is responsible not only for consumer protection but also competition.

Broad age verification mandates would also impose significant costs on the larger Internet. Thus, regulation along the lines CSM suggests could have broader implications for the Internet economy by decimating “free” online sites and services, many of which depend on data collection that could be impeded by CSM’s proposed regime. Importantly, any added compliance burdens for small- or mid-sized websites could adversely impact the ability of those sites to engage in added site moderation or offer additional features and controls that could help parents and keep kids safer online.

On a related note, CSM never bothers exploring the potential direct cost to consumers and parents. Expanding verifiable parental consent requirements will no doubt burden the creators or various sites and services, but those costs will ultimately be borne by the public when they are passed along in the form of a fee for services, many of which were previously free of charge. If previously free-of-charge sites and services suddenly are forced to charge for admission, this could raise the overall cost of enjoying the Internet for many parties.

Finally, CSM claims the mantle of parental empowerment but it ignores the many parental empowerment solutions already in existence that allow parents to restrict the sites their child visits, and even to monitor all their child’s communications, or simply to detect the sharing of certain keywords—such as the “personal information” covered by COPPA.¹¹ Importantly, these tools allow parents with diverse preferences to choose systems and methods for controlling their child’s use of media that match their values and circumstances. By contrast, COPPA is an utterly blunt instrument: A broad mandate that parents must affirmatively consent to their child’s use of much of today’s Internet, even if they would prefer *not* to grant such consent on a site-by-site basis and instead rely on a combination of whitelists, blacklists, monitoring, side-by-side use, and informal household media rules.

II. Center for Digital Democracy Proposals

CDD and others make a number of proposals in their comments. We address the two most disturbing, which are essentially similar to the more overt COPPA expansion demanded by CSM.

¹¹ See Adam Thierer, *Parental Controls & Online Child Protection: A Survey of Tools & Methods*, Ver. 4.0, The Progress & Freedom Found. (Summer 2009) www.pff.org/parentalcontrols [hereinafter Parental Controls]; *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, MB Docket No. 09-26, Report, (rel. Aug. 31, 2009), www.fcc.gov/Daily_Releases/Daily_Business/2009/db0831/FCC-09-69A1.pdf [hereinafter CSVA Report].

A. Diluting the “Directed At” Standard

CDD et al. propose that the definition of “directed at children” be expanded to include the “same definition for websites targeted to children that [the FTC] employed in its Food Marketing Report, i.e., any website or portion of a website that audience demographic data indicates that 20% or more of visitors are children ages 2-11.”¹² They argue that this will “provide greater clarity to advertisers and the public alike about which websites and online services are targeted to children.”¹³

The primary problem with this proposal is that, if 20% of a site’s audience is 11 and under, it necessarily follows that the other 80% are *over* 11. In other words, this standard would require that certain site operators who do *not* clearly direct their sites to children must presume *all* their users *might* be under 13, and therefore age verify *all* users in order to (i) distinguish users 13 and over from users below 13 and (ii) deny access to the latter category until their parents’ consent can be verified. While the path is different from CSM’s proposal, the destination is the same: convergence with COPA, and all the constitutional problems that caused the courts to strike down that ill-advised statute.

The second, but also significant, problem with this proposal is that the clarity cited by CDD as a benefit of a 20% standard depends on the reliability of the underlying demographic data—which are really mere *predictions* about the *likely* audience of a site based on complex statistical models extrapolated from browsing behavior observed in consumer panels. But which data sets would the FTC use? How reliable are they, anyway? Would expanding COPPA actually make this data *less* reliable? Even if these models work well enough for the business purposes of site operators in tailoring content and advertising for the assumed audience of a site, what would their inherent imprecision mean when they become the trigger for significant regulatory burdens? How might such imprecise *predictions* be gamed?

These tough questions probably explain why, as we noted in our *COPPA 2.0* paper published last summer, it appears that not one of the complaints brought by the FTC under COPPA cites demographic evidence in defining whether a site is “directed at” kids.¹⁴ The FTC has been able to make its case on other grounds because sites truly “directed at” kids are generally easy to identify by the other factors listed in COPPA itself, such as the use of cartoon characters.

B. Special Regulations for Adolescents

CDD et al. also propose that “Adolescents should receive protections in line with the Fair Information Practices principles created by the OECD.”¹⁵ Like CSM, their comments offer *no* explanation as to *how* this vague proposal would be implemented. Of course, any such regulations would have to be authorized by Congress, since the FTC has no power to expand COPPA to cover adolescents. But for the reasons explained above, it should already be clear

¹² CDD Comments, *supra* note 4, at 33.

¹³ *Id.*

¹⁴ COPPA 2.0, *supra* note 2, at 20-21.

¹⁵ CDD Comments, *supra* note 4, at 42.

that singling out a particular age bracket of users for special protections is not as easy as it might sound.

Ultimately, the question is simple: Would the law require certain websites considered “directed at” adolescents to presume that all their users might be adolescents (and therefore apply these regulations to everyone) or does it require such additional protections only in cases where the site operator has actual knowledge that a user is an adolescent? The first option cannot, for the reasons explained above, truly be a regulatory regime designed to the special sensitivities of teens, but would instead be a comprehensive regulatory regime for the entire Internet. The second option (“actual knowledge”) *might* be possible in circumstances where, for example, a user completes a profile including his or her age, but should be considered only to the extent that *real* harms can be demonstrated, and that such protections are narrowly tailored to those harms, and that they are the least restrictive means of addressing them. (Of course, if special requirements hinder access or reduce functionality, teens will probably lie about their age to circumvent those requirements—just as kids under 13 commonly lie about their age today to circumvent either COPPA’s verifiable parental consent requirement or minimum age requirements imposed by site operators who want to steer clear of COPPA.)

Indeed, it is worth remembering that COPPA, as originally proposed in Congress in 1998 *did* single out adolescents for a special category of protection, but Congress ultimately dropped the proposal at least in part in recognition of such difficult First Amendment questions it raised. The requirement in the initial legislative draft of COPPA would have required sites to “use reasonable efforts to provide the parents with notice and an opportunity to prevent or curtail the collection or use of personal information collected from children over the age of 12 and under the age of 17.”¹⁶

III. Redefining Personal Information & Existing Parental Empowerment Tools

We have noted that the COPPA statute gives the FTC the flexibility to update the definition of “personal information” in the COPPA Rule, and that this flexibility makes it unnecessary to revise the statute as technology changes. But the statute’s flexibility is not boundless: “Personal information” must be that which “permits the physical or online *contacting* of a *specific* individual.”¹⁷ This standard must be the lodestar of any revision of the critical definition of “personal information,” which stands alongside the age scope, the “directed at” standard, and the “actual knowledge” requirements as the critical legal devices that determine COPPA’s scope. But the FTC must also be wary of the practical challenges raised by redefining this key term, as CDD *et al* propose.¹⁸ We reiterate the particularly lucid explanation of this point raised by the National Cable and Telecommunications Association in its comments:

¹⁶ This requirement was contained in the original bill, but was removed when that bill was reintroduced in its final form. *See supra* note 9.

¹⁷ 15 U.S.C. § 6501(8).

¹⁸ *CDD Comments, supra* note 4 at 25-27.

[B]y placing information that is associated with a particular device or computer on par with information associated with a specific person, the Commission would wholly recast the COPPA regime, requiring affirmative parental consent for many existing offerings at children’s websites (which would be difficult and cost-prohibitive to obtain), requiring more hurdles to access content that does not require children to actively disclose information about themselves, and greatly increasing the number of websites subject to COPPA requirements. Such an expansion is not necessary to achieve Congress’ goals under COPPA and raises a number of practical challenges. For example, the very operation of the Internet and the websites it connects requires ongoing, persistent use of identifiers like IP addresses and other technical information. Because the vast majority of Internet browsers automatically collect a user’s IP address and send it to the website operator, virtually all child-directed websites would automatically trigger the need to obtain prior parental consent in advance of visiting the website.¹⁹

Even if such a sweeping requirement could somehow be implemented (which may simply be impossible), it would do little more than approximate the status quo: Parents have *already* been empowered with great control over the sites their children visit through a mosaic of parental control tools. The difference is simply that CDD would make the default setting “parental consent required,” while today it is *parents* that may choose that default and decide how to implement it. There is simply no need to turn COPPA into a requirement that kids obtain a parental permission slip before using interactive websites—or visiting sites that, like NYTimes.com, require a log-in merely to access content.

Commenter eNASCO (the European NGO Alliance for Child Safety) complains that, in the UK:

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.²⁰

But, again, parents *already* have the ability to restrict which websites their children can visit through parental control tools. Those tools are extremely sophisticated, readily available and

¹⁹ Nat’l Cable & Telecomms. Ass’n Comments, at 7-8, June 30, 2010, www.ftc.gov/os/comments/copparulerev2010/547597-00045.pdf.

²⁰ eNASCO Comments, June 29, 2010, www.ftc.gov/os/comments/copparulerev2010/547597-00027.pdf.

often free in the desktop environment, and are advancing rapidly in the mobile and game console environments.²¹

Ultimately, what kids do and say in a site online is probably more important than whether they gain access in the first place—which is primarily what COPPA focuses on. Thus, filtering *within* sites, games and virtual worlds is the next frontier in parental empowerment, and something the FTC can and should encourage.²² As the Entertainment Software Association, suggested, the Commission should:

Encourage the Use of Robust Automated Filtering Systems to Enable Operators to Offer Interactive Activities to Children in Privacy-Enhancing, Safe, and Cost-Effective Ways. The Commission should clarify that operators can avoid the “collection” or “disclosure” of personal information by using robust, automated filtering systems. This is important to ensuring the continued availability and viability of chat and communications tools appropriate for younger audiences.²³

But COPPA was not designed to be the broad mandate for child safety and privacy online, nor can it be made such, as some commenters seem to believe. COPPA’s Congressional authors made clear their intention was to “enhance parental involvement.”²⁴ When considering revisions to COPPA, the FTC should keep this goal in mind and remember that COPPA’s requirements are not the only—or in some respects, even the primary—vehicle for achieving this end. Technological empowerment and education of kids, parents and others are ultimately the best ways to address concerns about the sites children access online.²⁵

²¹ See *Parental Controls*, *supra* note 11, at 86-143; see generally CSVA Report, *supra* note 11 (describing state of parental controls available in the marketplace).

²² See, e.g., Joshua Fairfield, *Virtual Parentalism*, 66 WASH. & LEE L. REV. 1215 (2009) (discussing in-game filtering in virtual worlds).

²³ Entm’t Software Ass’n, Comments, *Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule* at 2-3 (June 29, 2010), www.ftc.gov/os/comments/copparulerev2010/547597-00048.pdf.

²⁴ The original goals of COPPA, as expressed by its Congressional sponsors, were: “(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 chatrooms, home pages, and pen-pal 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.” See 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan).

²⁵ Six major online safety task forces/blue ribbon commissions—including one that just completed its work last month—have all uniformly concluded that education and empowerment-based efforts are the most important step in protecting children online. See Adam Thierer, *Five Online Safety Task Forces Agree: Education, Empowerment & Self-Regulation Are the Answer*, Progress on Point 16.13, The Progress & Freedom Found. (July 8, 2009), www.pff.org/issues-pubs/pops/2009/pop16.13-five-online-safety-task-forces-agree.pdf; Online Safety and Technology Working Group, *Youth Safety on a Living Internet* (June 2010), www.ntia.doc.gov/reports/2010/OSTWG_Final_Report_060410.pdf.

IV. Conclusion

In conclusion, there are better ways to empower parents and protect children than commenters CSM, CDD et al. have suggested. COPPA can be tweaked to accommodate some emerging concerns and technologies, but the law's flexibility is not boundless. In particular, expanding regulation as proposed by CSM, CDT and others would raise profound First Amendment issues. Thus, it is preferable for the Commission to promote the less-restrictive approaches of parental empowerment and consumer education, as the agency has done so well in a variety of recent education campaigns:

- [AdMongo](http://www.admongo.gov) (tutorial game about advertising and marketing) (www.admongo.gov)²⁶
- On Guard Online (online security, fraud avoidance & privacy tips) (OnGuardOnline.gov);
- *NetCetera: Chatting With Kids About Being Online* (www.onguardonline.gov/topics/net-cetera.aspx); and
- *You Are Here: Where Kids Learn to be Smarter Consumers* (ftc.gov/youarehere/).

If, however, the Commission or Congress expands COPPA as CSM, CDD and others advocate, it will almost certainly trigger litigation challenging not merely the proposed revisions to the COPPA rule, but potentially the entire rule itself—which remains one of the few Internet-related statutes passed over the past 15 years that has not been challenged in court.²⁷

Finally, the Commission must obey its other Congressional charge to promote and protect competition.²⁸ If the Commission adopts the COPPA expansion proposals discussed herein, it will adversely impact market structure by potentially leading to a great deal more industry consolidation and a resulting loss of possible innovation by new, and smaller, players.

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July 12, 2010

²⁶ *Federal Trade Commission to Launch Advertising Literacy Campaign National Program Gives 'Tweens' Ages 8 to 12 Skills to Recognize, Understand Advertising*, April 26, 2010, www.ftc.gov/opa/2010/04/admongo.shtm.

²⁷ Cf. Charlene Simmons, *Protecting Children While Silencing Them: The Children's Online Privacy Protection Act and Children's Free Speech Rights*, 12 COMM. L. & POL'Y 119 (2007) (arguing against COPPA's constitutionality).

²⁸ See, e.g., 15 U.S.C. § 45 (empowering the FTC to prevent the use of unfair methods of competition).