

**Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580**

In the Matter of

COPPA Rule Review,
16 CFR Part 312
Project No. P104503

COMMENTS OF GRAY TELEVISION, INC.

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Gray Television, Inc. (“Gray” or “Company”) appreciates this opportunity to comment on the proposed regulations implementing the Children’s Online Privacy Protection Act (“COPPA”), released by the Federal Trade Commission (“FTC” or “Commission”).¹ Gray currently owns and operates 36 network affiliate television stations in 19 states, serving 30 markets throughout the United States. For fifty years, Gray has served the public interest by bringing high quality, community-oriented news coverage to small and mid-sized markets.² Gray has also been a leader in the broadcast industry for its innovative use of the internet and new digital technology to deliver to viewers without charge timely and quality news, information

¹ Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59,804 (proposed Sept. 27, 2011) (to be codified at 16 C.F.R. pt. 312).

² Gray’s television stations are ranked number one in local news in 21 of 30 Designated Market Areas (“DMAs”), number two in local news in eight additional markets, and number one overall in 21 DMAs. Gray’s television stations have earned more than 500 national state, and local news and community service awards since 2003 to date, including multiple Edward R. Murrow awards, Associated Press awards, regional Emmy awards, such as “Station of the Year,” “Most Outstanding News Operations” and “Best Documentary” awards. Awards received this year also include various state Radio-Television Digital News Association awards, Associated Press awards, and state Broadcaster Association awards for “Best TV Website” and “Best Web Journalism.”

and entertainment content. As detailed in Gray's comments on the FTC's Preliminary Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (December 2010) ("*FTC Staff 2010 Privacy Report*"), Gray distributes its content via multiple platforms including: terrestrial digital broadcasts (primary and multicast streams), internet, mobile/WAP sites, mobile Android and iPhone apps, and SMS/text messaging.³

Gray is very supportive of the FTC's efforts to protect children's privacy and to prevent the exploitation of a child's personally identifiable information ("Personal Information") for commercial purposes. The Company respects the privacy of all of its viewers and website users, and takes care to protect and secure such information. Notwithstanding this support, Gray respectfully requests clarification or modification of several proposed rules because of the practical difficulty in implementing several requirements and the negative consequences on the standard business operations of commercial websites that provide free content supported by advertising. Clarification or modification is also requested because certain proposed rules, if adopted, will effectively eliminate certain content or features from websites, webpages or online services intended to educate or entertain children that are not currently deemed to be collecting Personal Information but which will be deemed to do so under the proposed rules.

The Commission has recognized the value and importance of websites and online services that provide ad-supported free content to consumers. "Online advertising helps to support much of the content available to consumers online and allows personalized advertising that many consumers value."⁴ Content such as news, information and entertainment often cannot

³ Gray Comments on *FTC Staff 2010 Privacy Report*, at 2-4.

⁴ *FTC Staff 2010 Privacy Report*, at 33-34; see also *FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising, Behavioral Advertising Tracking, Targeting &*

be provided unless there is significant revenue to support them.⁵ Indeed, Gray has previously emphasized that its continued ability to offer quality programming and free news and information to the public via its multiple platforms, as well as its “capacity to expand and improve such services, relies on revenue generated via these offerings – usually from advertising.”⁶

Gray has previously expressed its concerns that the proposed privacy framework described in the FTC Staff 2010 Privacy Report “will significantly impair online advertising revenues, and thus, the Company’s ability to serve local communities with online service, which are overwhelmingly made available without charge.”⁷ The proposed amendments to the COPPA rules have increased these concerns. The practical operational issues raised by the proposed amendments and their negative impact on universally accepted business practices are addressed in greater detail below.

I. Defining Persistent Identifiers as Personal Information for Websites, or Webpages Targeted to Children, Would Effectively Prohibit Dynamic Display, First Party, as well as Third Party Targeted Advertising.

COPPA governs (i) websites and online services that are targeted to children and (ii) general audience websites or online services if the operator has actual knowledge that Personal

Technology (February 2009), at 30 (recognizing that a benefit of revenue generated from the sale of contextually relevant advertising is free content) (“*FTC Staff 2009 Behavioral Advertising Report*”).

⁵ *FTC Staff 2010 Privacy Report*, at 34 n.90 (citing to Written Comment of Microsoft Corp., cmt. #544506-00020, at 1 (“stating that online advertising is the engine that drives the Internet economy, allowing thousands of websites to offer their content and services for free”)).

⁶ Gray Comments on *FTC Staff 2010 Privacy Report*, at 5.

⁷ *Id.* at 2.

Information has been collected from a child under the age of thirteen.⁸ A portion of a website or online feature targeted to children is also subject to COPPA under the current rules.⁹

Gray television stations occasionally provide webpages or website features that are targeted to children and parents, but such webpages or features do not affirmatively solicit or collect Personal Information as currently defined by the COPPA rules. COPPA's coverage of persistent identifiers is currently limited "solely to those identifiers that are otherwise linked to 'personal information' as defined by the Rule." 76 Fed. Reg. 59,811 (citing to 1999 Statement of Basis and Purpose, 64 Fed. Reg. 59,888, 59,892-93). Gray TV uses a "framed" webpage format, in which a part of the webpage remains static or fixed, allowing for navigation to different webpages within a consistent format and design.¹⁰ This use of framed webpages to provide viewers with easily navigable sites is common on radio and television station websites, many of which provide news and other valuable information to consumers. Gray's websites currently feature ads targeted to persons over the age of 18 served by a third party in a fixed position within its framed format, although the content in that ad space will rotate among advertisers. Therefore, all webpages or features will include a dynamic banner and other display ads in a framed format that links to a splash page, the sponsor's website, or that access rich media, which may serve a cookie or collect an IP address when clicked open, but will not necessarily collect any other Personal Information or behavioral information about a user. Depending on the design

⁸ See 15 U.S.C. § 6503(a)(1).

⁹ 16 C.F.R. § 312.2 ("Website or online service directed to children means a commercial website or online service, *or portion thereof*, that is targeted to children." (emphasis added)).

¹⁰ Framing is beneficial because it provides an opportunity for Gray to brand each webpage with its corporate and station identification in a cost effective manner by reducing bandwidth and server load when the same content does not need to be loaded every time a new page is visited.

of the ad, such persistent identifiers are necessary for the ad to be customized to the user. Gray does not use the IP address or cookie information for any other purpose.

Gray websites currently serve contextual and/or third party behavioral advertising but the Company plans to commence first party targeted advertising next year throughout its websites, which would include a children's targeted webpage or feature.¹¹ In addition to ads targeted to adults served in a framed format, advertising support may also include sponsorship of a specific component on the children's webpage or feature, such as a game designed for children, editorial content for parents and children, homework study tips, or best Halloween costume ideas. No Personal Information such as name, postal or email address is currently collected on such pages or features, although the first party ad may contain a cookie to determine whether a user opened a particular ad. Sponsors of a webpage or feature are likely also to be advertisers on Gray's television stations, which provide multi-platform advertising vehicles based on a traditional advertising-based business model.

Gray's concerns are based on the FTC's proposal to modify its definition of "Personal Information" to include persistent identifiers, such as an IP address, a customer code held in a cookie, a processor or device serial number, or unique device identifier (without the collection of any other personally identifying information) when used for purposes other than support of the internal operations of the website or online service. 76 Fed. Reg. 59,812. Specifically, the Commission proposes that a persistent identifier will not be considered Personal Information when used for "those activities necessary to maintain the technical functioning of the website or

¹¹ First party advertising, as referred to in this Comment, is defined as marketing to a consumer with whom the website or online service operator interacts directly for purpose of marketing to that consumer. No Personal Information or data would be shared with a third party other than a service provider acting on the operator's behalf, unless the consumer provided his affirmative consent.

online service, to protect the security or integrity of the website or online service, or to fulfill a request of a child as permitted by §§ 312.5(c)(3) and (4), and the information collected for such purposes is not used or disclosed for any other purpose.” 76 Fed. Reg. 59,810. The Commission also forewarns that serving ads is not necessary to the technical operations of a website because persistent identifiers used to serve any form of behavioral advertising to children would require advance parental notification and verifiable parental consent. *Id.* at 59,812. The issue, therefore, is whether the collection and use of persistent identifiers via third party dynamic display ads (that use a cookie or another mechanism only to determine whether the ad has been viewed) served in a framed format or on a contextual or First Party basis on a webpage or feature targeted to children would be subject to the proposed definition of Personal Information.

If such collection of IP addresses or cookie data is considered Personal Information under COPPA, Gray submits that this broad classification of the use of any persistent identifiers for advertising purposes subject to parental notice and consent would severely restrict, if not prohibit, certain forms of advertising on websites that are geared toward children. Moreover, such a classification would be inconsistent with the FTC’s previous acknowledgement that both contextual and first party advertising do not trigger the same concerns or harms present in third party behavioral advertising.¹²

¹² “[F]irst party’ behavioral advertising practices are more likely to be consistent with consumer expectations, and less likely to lead to consumer harm, than practices involving the sharing of data with third parties or across multiple websites.” *FTC Staff 2009 Behavioral Advertising Report*, at 26. Contextual advertising, defined as the delivery of ads based on a consumer’s current visit to a single web page or single search query, “presents minimal privacy intrusion when weighed against the potential benefits to consumers,” and therefore, is exempt from the FTC’s self-regulatory principles for behavioral advertising. *Id.* at 30. Contextual advertising is also recognized as a “commonly accepted practice” and is deemed to be “more transparent by consumers.” *FTC Staff 2010 Privacy Report*, at 55 n.134 (citations omitted).

Furthermore, if a website, or a portion of a website, is targeted to children, and persistent identifiers were used to serve or operate ads, it would be impossible to identify the child visitor in advance in order to provide the requisite notice to parents and secure parental consent prior to a cookie being served or collecting an IP address. In fact, in its proposed rulemaking, the Commission rejected a proposal to classify an IP address as Personal Information, without more, as “over-broad and unworkable” because “a site or service would be liable for collecting personal information as soon as a child landed on its home page or screen.” 76 Fed. Reg. 59,812. It would be “impracticable” for the operator to obtain verifiable consent prior to the collection of the IP address when the operator would not know at any point in time that the website visitor was a child. *Id.* at 59,812 n.81. This same problem exists if there is advertising on the targeted website or online service (or any portion of a website or online service that is targeted to children) that collects a persistent identifier for either behavioral marketing or to facilitate functioning of an ad.

Consistent with the *FTC Staff 2009 Behavioral Advertising Report* and *FTC Staff 2010 Privacy Report*, the FTC explicitly exempts the use of a persistent identifier for contextual advertising in this COPPA proceeding. 76 Fed. Reg. 59,812. Gray submits that first party targeted advertising should also be exempt and allowed on websites and webpages targeted to children. The FTC has analogized first party advertising to contextual advertising because both are “transparent and consistent with consumers’ expectations.”¹³ The collection and use of consumer data intra-site provides a variety of consumer benefits and services, including

¹³ *FTC Staff 2009 Behavioral Advertising Report*, at 29.

“personalized content and other elements of the interactive online experience that consumers may value.”¹⁴

The Commission has also recognized that there are vast differences between first party targeted advertising compared to third party advertising. For example, there is no collection or sharing of Personal Information over multiple websites for first party advertising; therefore, the inability of a parent to register his or her concerns with a website or online service operator is not present.¹⁵ Moreover, the danger of publicly disclosing Personal Information of children to third parties is not present. In fact, the FTC’s references to the impermissible use of persistent identifiers for behavioral advertising without parental notice and consent all refer to what is classified as third party advertising, i.e., advertising by a network advertiser,¹⁶ an advertising network,¹⁷ or the collection of Personal Information over multiple websites or online services¹⁸ – not to a single website operator using a persistent identifier to support advertising content on that single website. Such advertising practices by single website operators are also recognized as “commonly accepted”¹⁹ and should be allowed.

¹⁴ *Id.* at 27.

¹⁵ *See id.* at 27.

¹⁶ 76 Fed. Reg. 59,812 (“operators such as network advertisers may not claim the collection of persistent identifiers as a technical function under the ‘support for internal operations’ exemption”).

¹⁷ *Id.* at 59,815 (“in the case of a mobile application that grants permission to an advertising network to collect user information from within the application”).

¹⁸ *Id.* at 59,812 (“an advertising network or analytics service that tracks a child user across a set of Web sites or online services”).

¹⁹ *See FTC Staff 2010 Privacy Report*, at 55.

Significantly, the Commission also stated that the expansion of persistent identifiers as Personal Information subject to COPPA “is designed not to interfere with operators’ ability to deliver content to children within the ordinary operation of their websites or phone services.” As illustrated above, the proposed amendment would have the opposite effect. The new definition of Personal Information would restrict, if not prohibit, the ability for Gray to advertise on webpages or features targeted to children, especially if the ads served are delivered in a framed format.

II. Additional Privacy Notice Requirements are Impracticable and Unreasonable.

The Commission has proposed to change the online privacy notice requirements to include, at a minimum, each operator’s name, physical address, telephone number, and email address. 76 Fed. Reg. 59,815. No longer would Gray, as a website operator, be allowed to serve as the single contact point for multiple operators on its website. *Id.* The requirement to list name and contact information for all operators is extremely problematic if Gray engages individual advertisers for display ads or a third party advertising networking on its website. The Commission has stated that a single website can have multiple operators and has classified both network advertisers and advertising networks as one of such “operators” of a single website or online service.²⁰ Under the proposed rule, it appears that any entity in the complex advertising network ecosystem (e.g., ad exchange providers, network ad servers and advertisers) would need to be disclosed if that entity collected or maintained Personal Information (including a persistent

²⁰ “Therefore, operators such as network advertisers may not claim the collection of persistent identifiers as a technical function under the ‘support for internal operations’ exemption.” 76 Fed. Reg. 59,812. “Given the possibility of a child interacting with multiple operators on a single Web site or online service (e.g., in the case of a mobile application that grants permission to an advertising network to collect user information from within the application), the Commission believes that the identification of each operator will aid parents in finding the appropriate party to whom to direct any inquiry.” *Id.* at 59,815.

identifier), or on whose behalf such information was collected or maintained, or any person offering products or services for sale through that website or online service.²¹

Gray is concerned with the practical implementation of this proposed rule. First, the requirement to list all advertisers, and particularly members of an ad network, is extremely burdensome and not practical for the primary website operator on whose website the ads appear. The primary website operator may engage a specific service provider to facilitate the service of advertising by an ad network, which could have hundreds of entities engaged in serving targeted ads. Moreover, members of an ad network change constantly and without notice to a host website. The advertiser whose content is served to a specific user is selected by the network advertising server in a virtual auction, conducted in milliseconds, among many parties. The selected ad is delivered to the targeted user without notice or confirmation to the user or website operator. The primary website operator has no notice or record of the advertiser – before or after the ad is served. It would be impractical, if not impossible, for any website or online service operator to have an accurate list of all entities that collect or use a child’s Personal Information as newly defined. The primary website operator therefore can never reliably maintain current information, making its privacy notice materially inaccurate and arguably, an unfair or deceptive trade practice under the FTC Act.²²

The requirement to list all operators in a privacy notice is burdensome, contrary to recent FTC guidelines and is therefore, unreasonable. A lengthy list of operators to include ad exchange providers, network advertising servers, and network advertisers would undermine the Commission’s requirement to keep privacy notices short and easily understandable to provide

²¹ 15 U.S.C. § 6502(2).

²² See 15 U.S.C. § 45; see e.g., *In re Microsoft Corp.*, Docket No. C-4069 (December 20, 2002) (consent order) (failure to comply with security measures as detailed in posted privacy policy).

effective consumer choice.²³ Gray also questions whether this lengthy notice requirement would actually be beneficial to parents. How would a parent know which one of the hundreds of ad servers or ad exchange providers was involved in serving a particular ad to his or her child? The parent may remember the advertiser's name, goods or service but would not know the entities behind the ad nor understand the ad server or ad exchange provider's role sufficiently to lodge an effective complaint or seek additional information. Gray believes that the increased burden and costs to the primary website operator for this requirement far outweighs any benefits. Gray also questions whether such a notice requirement imposes on Gray's First Amendment rights, notwithstanding that this may be commercial speech with lesser First Amendment protection.²⁴

III. The Proposed Rules Unreasonably Restrict the Facebook "Like" Button.

The Commission's proposed amendments to the definition of "collects or collection" create implications for social media tools such as the Facebook "Like" button that also requires further consideration or modification. These proposed amendments would, in relevant part, expand the current definition as follows (changes *italicized*):

- (a) Requesting, *prompting, or encouraging a child to* submit personal information online;
- (b) Enabling children to make personal information publicly available *in identifiable form . . .* 16 C.F.R. § 312.2.

²³ See *FTC Staff 2010 Privacy Report*, at 26-27 ("privacy policies have become long and incomprehensible, placing too high a burden on consumers to read, understand, and then exercise meaningful choice based on them") (citations omitted); see *id.* at 52 ("Consumers face considerable burdens in understanding lengthy privacy policies and effectively exercising any available choices based on those policies.").

²⁴ See *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Gray is concerned that the expansion of this definition to include “prompting or encouraging” could be interpreted to apply to any website or online service provider that displays a social media mechanism such as a Facebook “Like” button” on its webpage, through which the user can publicly share information, especially when taken in conjunction with the “enabling” language of subparagraph (b).

Specifically, when utilizing these mechanisms, a user’s name – and perhaps his/her image – is posted on the user’s friends’ news feeds. In the case of Facebook’s “Like” button, the news feed post will contain a link back to the user’s Facebook profile, in addition to a link to the source webpage on which the “Like” button appeared. The user’s name is unquestionably Personal Information. Under the amended definition, the mere act of placing a Facebook “Like” button or similar mechanism on a website could, without further clarification, could be deemed an attempt to prompt or encourage a child to submit Personal Information in violation of COPPA.

Such an interpretation would be unreasonable and overly burdensome. Indeed, the costs and harm to website and online service providers of applying COPPA’s restrictions to such mechanisms would far outweigh any benefits that would be created by doing so. First, these types of social media mechanisms have become ubiquitous and are universally accepted, and expected, by consumers. Such mechanisms have become an essential tool for website and online service providers to use to build and maintain their user bases, and otherwise to encourage and engage users of all ages in this rapidly evolving technological environment.

Second, these mechanisms have also become a key channel for content distribution – a function that is the life blood of website and online service providers such as Gray – especially those operating in the field of broadcast media and providing free news, information and

entertainment content supported by advertising. Users regularly click on these mechanisms to share news articles, photographs, videos and other items with members of his or her community, thereby expanding the size of the audience for such content, and most importantly in this Internet age, generating increased traffic to the source website.

Third, in strict terms, to the extent posting a Facebook “Like” button or similar mechanism is viewed as an attempt to prompt or encourage a child to submit Personal Information, it is critical to note that the prompt or encouragement does not originate with the website or online service provider posting the mechanism. Rather, it comes from the social media provider whose mechanism is posted on the webpage of the website or online service provider. Users must, in the first instance, be a member of the particular social media service in order to fully utilize any of these mechanisms. Indeed, clicking on a Facebook “Like” button or similar mechanism generates a pop-up window from the social media provider’s server requiring the user to log in.²⁵

Moreover, given that the terms of use of many of these social media services prohibit use by children under the age of 13 and under, such as Reddit, Tumblr., and Twitter, website and online service providers should be entitled to presume that those terms of use are being adhered to by users or that the social network service operator reasonably enforces its own terms of use. The issue, however, is whether a Like button can be used without violating COPPA on a website targeted to children, or portion of a website targeted to children. Gray certainly hopes so, as the value of the Like button far outweighs the risk.

In view of these observations, the FTC must carefully consider the implications of amending the definition of “collects or collection” before imposing additional burdens that

²⁵ If a user is not a member, the user will need to register.

would, given the ubiquity of social media mechanism, unduly interfere with the ordinary operation of websites and online services. To do so would be unreasonable, especially given the near impossibility for website and online service providers to monitor in any verifiable way the age of users clicking on Facebook “Like” buttons or similar mechanisms. Gray therefore respectfully requests that the Commission consider the full implications of the amendments to the definition of “collects or collection” before finalizing these proposed rules.

IV. Dual Classification of Photographs, Videos or Audio Files under Personal Information is Impracticable to Implement Given Automated Online Content Delivery Mechanisms.

Finally, Gray respectfully seeks clarification and modification of the proposed definition that would classify photographs, videos and audio files (collectively, “Photos”) submitted by a child that contain a child’s image or voice as standalone Personal Information. 76 Fed. Reg. 59,813. First, it is not clear from the plain language of the proposed rule whether COPPA applies to only Photos submitted by children, or any Photo that contains the image of a child. It would be helpful to clarify this provision.

Second, presumably, Photos that do not contain a child’s image or voice but instead contain the image or voice of other individual(s) would continue to be classified under the existing definition of Personal Information and therefore would require a name, email address or “other information such that the combination permits the physical or online contacting” of a child to be collected contemporaneous with the Photo. *Id.*²⁶ The proposed amendment establishes a dual classification of Photos as Personal Information. How would an operator of a

²⁶ The FTC’s existing definition of “collects or collection” means “the gathering of *any* personal information from a child by any means.” 16 C.F.R. § 312.2 (emphasis added). Personal Information means “individually identifiable information *about an individual* collected online.” *Id.* (emphasis added). Therefore, Personal Information collected online from a child about any individual, not just the child’s own Personal Information, is subject to COPPA. The proposed changes to the definitions do not modify this interpretation.

website or online service targeted to children (or a portion of a website or online service targeted to children), know which category a Photo is classified under when a third party service provider is used to automate the uploading of Photos? For example, there are several online photo sharing platforms that allow users to upload their own photos and videos directly to the website for publication on the internet and/or via terrestrial, cable or satellite broadcasts. Cell Journalist, Broadcast News Interactive Media's YouNewsTV™ feature and Second Street Media Solution, Inc.'s MyCapture platform are such services that have enhanced news reporting and online journalism, as well as aided in the safety and security for communities during weather emergencies, natural disasters and outbreaks of criminal activity. User generated photos and videos are a "hallmark" of citizen journalism and citizen journalism has changed the world. Witness the recent events in Egypt, Libya and here in the United States where the sending of photos and videos by protestors and liberators using new digital technology has not only toppled leaders but opened minds.

Gray television stations employ the MyCapture service primarily to facilitate the ability of its viewers to submit user generated photos and videos for breaking news and to serve as additional "boots on the ground" during newsworthy events such as weather emergencies, natural disasters, crimes in progress, and the exercise of democratic rights and free speech. An ancillary benefit of the service is to provide a platform for user generated photos and videos for entertainment and community outreach purposes. A Gray television station does not have actual knowledge about the age of the user using the MyCapture tool. For some automated services, a registration page may or may not be required. Under the proposed new rules, a Photo submitted by a child with a child's image requires parental notice and verifiable consent in advance, but a Photo with no such image does not require any such consent unless other Personal Information

used to contact the child accompanies the Photo. As a website operator that engages automated user generated Photo platforms such as MyCapture, Gray respectfully seeks modification of the proposed new definition of Photos as Personal Information, or clarification on how the rule operates in this situation.

V. Conclusion.

In summary, Gray understands the need to protect children's privacy and that the FTC's objective is to balance any such harms associated with certain advertising and marketing practices with the benefits of new digital innovations and personalization of the online experience. The Company respectfully requests that the Commission take real world business and technical realities, as well as commonly-accepted universal practices, into consideration before adopting rules that will hamper free expression using new technologies, and hamper, if not prevent, the ability of media organizations to financially support quality news, information and entertainment content delivered to consumers for free.

Respectfully submitted,

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