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

In the Matter of	)	
	)	
COPPA Rule Review	)	Project No. P104503
16 C.F.R. Part 312	)	
	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association (NCTA)[1] hereby submits its comments in response to the Request for Public Comment ("*Notice*") issued by the Commission in the above-captioned proceeding.[2] In the *Notice*, the Commission proposes to significantly expand the Children's Online Privacy Protection Rule ("COPPA Rule" or "the Rule"), which was issued pursuant to the Children's Online Privacy Protection Act ("COPPA" or "the Act").

INTRODUCTION AND SUMMARY

The cable industry shares the Commission's commitment "to helping to create a safer, more secure online experience for children" and ensuring that COPPA continues to meet its goals in light of the rapid pace of technological change.[3] Furthermore, the cable industry is committed to empowering parents to exercise greater control over their children's online experiences while preserving the unique interactivity of the digital world and providing high quality content for children and families. Our member companies have expended significant time and resources to develop engaging and innovative online content for children and families

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[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of high-speed Internet service ("broadband") after investing over $170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

[2] *See In re Children's Online Privacy Protection Rule,* Proposed Rule; Request for Comment, 76 Fed. Reg. 59804 (Sept. 27, 2011) ("*Notice*").

[3] *See Notice* at 59804.

in a responsible and COPPA-compliant manner. Based on the experiences of these companies, the current COPPA Rule has proven effective at limiting the collection of personal information from children while maintaining the integrity of children's interactive experiences on the Internet.

The *Notice* proposes significant changes to the COPPA regime without record evidence that such changes are needed. NCTA urges the Commission to proceed cautiously, ensuring that any changes to the COPPA Rule are consistent with the Act, are technologically appropriate, reflect sound public policy, and truly foster children's interests (including those in developing critical digital media literacy skills) without overburdening the development of new creative content or triggering other problematic effects. NCTA opposes sweeping changes to the Rule, including the proposed expansion of the definition of "personal information," that would recast the COPPA regime beyond the original intent of the Act and risk disrupting the existing equilibrium by significantly increasing obligations both for parents and for operators of child-directed websites. Such an expansion could adversely impact the quality and viability of age-appropriate online content, or make it less appealing to children, which could inadvertently drive children to websites and platforms that have far less (if any) age-appropriate content and fewer protections for children. Until such time as the Commission has developed a record that demonstrates that significant alteration of the COPPA regime is within its authority and warranted, the Commission should not make such dramatic changes. As Chairman Leibowitz explained upon release of the *Notice*, the Commission should take care to "ensure that the

COPPA Rule is effective in helping parents protect their children online, without unnecessarily burdening online businesses."[4]

I. THE CABLE INDUSTRY IS COMMITTED TO HELPING PROTECT CHILDREN'S PRIVACY ONLINE WHILE PROVIDING HIGH QUALITY CONTENT FOR CHILDREN AND FAMILIES.

The cable industry is committed to helping protect the safety of children online and empowering parents to exercise greater control over their children's online experiences while preserving the unique interactivity of the digital world and providing the high-quality content that can entertain, educate, and inform children and families.[5] As we reported to the Commission in June 2010, our member companies have expended significant time and resources to develop engaging and innovative online content for children and families in a COPPA-compliant manner, with online data entry points that encourage accurate age identification and parental consent mechanisms as appropriate.[6]

Many of NCTA's member companies that own and operate cable programming networks maintain engaging and dynamic websites and online services in addition to their video programming offerings. For example, Cartoon Network, Disney Channel, Nickelodeon, and

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[4] Press Release, FTC, *FTC Seeks Comment on Proposed Revisions to Children's Online Privacy Protection Rule* (Sept. 15, 2011) (quoting FTC Chairman Jon Leibowitz), *available at* http://www.ftc.gov/opa/2011/09/coppa.shtm.

[5] In fact, the cable industry has taken the lead on efforts to enrich media use by children, including through the *PointSmart.ClickSafe.* effort, whereby the cable industry has convened key players into an ecosystem of shared responsibility for the safety of children online, and Cable in the Classroom, the cable industry's educational foundation, which helps educate parents and teachers about media literacy, both with respect to cable programming and Internet content. *See In re Empowering Parents and Protecting Children in an Evolving Media Landscape*, NCTA Comments, FCC Docket No. 09-194 at 14-20 (filed Feb. 24, 2010). Moreover, several of NCTA's member companies support the Council of Better Business Bureau's Children's Advertising Review Unit ("CARU"), which has established industry self-regulatory guidelines regarding children's advertising and online data collection practices. *See* Children's Advertising Review Unit, *Supporters*, *at* http://www.caru.org/support/supporters.aspx (last visited Dec. 21, 2011). Cartoon Network also has participated in the beta testing of a new online safety certification program, which has developed guidelines around safely-designed chat and community features in addition to COPPA compliance oversight. *See* kidSAFE Seal Program, *Certified Products*, *at* http://www.kidsafeseal.com/certifiedproducts.html (last visited Dec. 19, 2011).

[6] *See* NCTA Comments, Project No. P104503 at 2-3, 8-9 (filed June 30, 2010) ("NCTA Comments").

PBS KIDS Sprout have created some of the most popular online destinations for children and families, offering videos, games, music, virtual worlds, fan forums, promotions, contests, mobile applications, and other interactive content that complements their children and family-oriented programming.[7]

Indeed, several of these websites have been recognized for the valued content they provide. For example, Common Sense Media has recommended several of these websites as part of their "Best Websites of the Decade" lists.[8] Likewise, the Parents' Choice Foundation has included Disney.com, National Geographic Kids, Sprout Online, Nick.com, and NickJr.com among "the very best products for children of different ages and backgrounds, and of varied skill and interest levels."[9] Websites offered by NCTA member companies have also been identified as providing helpful materials for parents about online safety. For example, the Family Online Safety Institute ("FOSI") has described the Disney Online Safety website as one of "the many

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[7] eBizMBA provides a list of the most popular kids websites based on traffic. *See* eBizMBA, *Top 15 Most Popular Kids Websites*, Dec. 2011 (listing, among others, the Nick, Nick Jr., and Cartoon Network websites), *at* http://www.ebizmba.com/articles/kids-websites (last visited Dec. 7, 2011).

[8] *See, e.g.*, Common Sense Media, *Best Websites of the Decade (2000-2009): Top 10 for Preschoolers* (recommending, among others, the Nick Jr. and SproutOnline websites), *at* http://www.commonsensemedia.org/website-lists/best-websites-decade-2000-2009-top-10-preschoolers (last visited Dec. 7, 2011); Common Sense Media, *Best Websites of the Decade (2000-2009): Top 10 for Kids 6-10* (recommending, among others, the DisneyFairies, Dora Links, and iCarly websites), *at* http://www.commonsensemedia.org/website-lists/best-websites-decade-2000-2009-top-10-kids-6-10 (last visited Dec. 7, 2011).

[9] The Parents' Choice Awards is "the nation's oldest nonprofit program created to recognize quality children's media. The Parents' Choice Awards program honors the best material for children: books, toys, music and storytelling, magazines, software, videogames, television and websites. Parents' Choice Foundation's panels of educators, scientists, performing artists, librarians, parents and, yes, kids themselves, identify the very best products for children of different ages and backgrounds, and of varied skill and interest levels." *See* Parent's Choice, *Parent's Choice Award Program*, *at* http://www.parents-choice.org/aboutawards.cfm (last visited Dec. 13, 2011).

terrific web sites designed to help families get the best of the internet.[10] In addition, Cartoon Network has been praised for its online initiative to raise awareness about bullying.[11]

II. THE COPPA RULE HAS ACHIEVED A WORKABLE BALANCE OF PROTECTING CHILDREN WHILE MAINTAINING THE INEGRITY OF CHILDREN'S INTERACTIVE EXPERIENCES ON THE INTERNET.

The COPPA Rule imposes certain requirements on operators of websites or online services directed to children under 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age (collectively, "website operators").[12] In general, the Rule requires that website operators subject to COPPA provide notice to parents and obtain verifiable parental consent before collecting, using, or disclosing personal information from children.[13] The Commission has a strong COPPA enforcement record and has effectively educated both businesses and consumers about the COPPA requirements.[14]

The Commission generally reviews each of its trade regulation rules approximately every ten years.[15] Although the Commission reviewed the COPPA Rule in 2005 and retained it

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[10] *See, e.g.*, Family Online Safety Institute, *Resources*, *at* http://www.fosi.org/north-america-webdir.html (last visited Dec. 13, 2011).

[11] *See* Jason Koebler, *Media Giants Raise Awareness of Bullying*, U.S.News & World Report, Oct. 7, 2011 (praising Cartoon Network's *Stop Bullying: Speak Up* initiative), *available at* http://www.usnews.com/education/blogs/high-school-notes/2011/10/07/media-giants-raise-awareness-of-bullying.

[12] *See* 16 C.F.R. §§ 312.2, 312.3; *see also* 15 U.S.C. §§ 6501(1), 6502 (a)(1).

[13] *See generally* 16 C.F.R. §§ 312.3; *see also* 15 U.S.C. §§ 6502(b)(1)(A).

[14] As recently described by a Commission staffer: "[i]n the eleven years since the COPPA Rule first became effective, the Commission has actively engaged in law enforcement as well as business and consumer education to promote knowledge of, and adherence to, COPPA." Mary Engle, Associate Director for Advertising Practices, Bureau of Consumer Protection, FTC, Before the U.S. House Comm. on Energy & Commerce, Subcomm. On Commerce, Manufacturing, and Trade, *Protecting Children's Privacy in an Electronic World*, at 2, 5 (Oct. 5, 2011) (noting that the Commission's seventeen COPPA actions garnered more than $6.2 million in civil penalties), *available at* http://www.ftc.gov/os/testimony/111005coppatestimony.pdf. Since October, the Commission has continued its COPPA enforcement efforts. *See* Press Release, FTC, *Operator of Social Networking Website for Kids Settles FTC Charges Site Collected Kids' Personal Information Without Parental Consent* (Nov. 8, 2011), *available at* http://www.ftc.gov/opa/2011/11/skidekids.shtm.

[15] *See Notice* at 59804, n.6.

without modification, it accelerated its current review "[i]n light of the rapid-fire pace of technological change . . . including an explosion in children's use of mobile devices, the proliferation of online social networking and interactive gaming."[16] As the Commission explained, the instant *Notice* was informed by comments received in response to a Commission request for public comment released in April 2010 and the dialogue at a public roundtable held on June 2, 2010.[17]

At the culmination of its last COPPA review, the Commission reported to Congress in 2007 that the COPPA requirements had improved website operators' information practices concerning children and that the requirements continued to play an important role in protecting children's online safety and privacy.[18] The Commission cited evidence that the Rule provided website operators with clear standards to follow, and that the cost of compliance had not been overly burdensome or disproportionate to the Rule's benefits.[19] Finally, the Commission reported that website operators receive few complaints from parents about COPPA compliance.[20] These conclusions remain consistent with the experiences of our member companies who operate websites that are subject to COPPA, and the Commission has not compiled a record demonstrating that its 2007 conclusion is no longer correct.

According to the *Notice*, the Commission found a consensus, "given its flexibility and coverage," that "the COPPA Rule continues to be useful in helping to protect children as they

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[16] *Id.* at 59804.

[17] *Id.*

[18] *See* FTC, *Implementing the Children's Online Privacy Protection Act, A Report to Congress*, Feb. 2007 at 2 ("*2007 FTC COPPA Report*"), *available at* http://www.ftc.gov/reports/coppa/07COPPA_Report_to_Congress.pdf.

[19] *See id.*

[20] *See id.* at 7-8. The Commission also reported that it receives relatively few complaints from parents about the implementation of the COPPA standards. *See id.*

engage in a wide variety of online activities."[21] To that end, NCTA applauds the Commission for rejecting calls for statutory changes and for proposing certain changes to the Rule that have the potential to promote further development of child- and family-friendly features, such as revising any requirement for a "100% deletion" standard to allow for "reasonable measures" and blessing additional mechanisms for website operators to obtain parental consent.

A. The Commission Appropriately Rejected Proposed Statutory Changes.

With respect to statutory changes, the Commission made two important decisions in the *Notice*. First, the Commission has continued to be appropriately steadfast in declining to advocate for a change to the statutory definition of "child."[22] This is a prudent approach, considering that expanding COPPA to children between 13 and 18 may be ineffective for numerous reasons, including: (1) the COPPA model would be difficult to implement for teens, as they have greater access to the Internet outside of the home than young children do; (2) teens seeking to bypass the COPPA parental notification and consent requirements may be less likely than young children to provide accurate information about their age or their parents' contact information; (3) courts have recognized that as children age, they have an increased constitutional right to access information and express themselves publicly; and (4) the practical difficulties in expanding COPPA's reach to adolescents might unintentionally burden the right of adults to engage in online speech.[23]

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[21] *Notice* at 59807-08.

[22] *See id.* at 59805.

[23] *See id.*; *see also Protecting Youths in an Online World: Before the Subcomm. on Consumer Protection, Product Safety & Insurance of the S. Comm. on Commerce, Science & Transportation* (July 15, 2010) (statement of Jessica Rich, Deputy Director, Bureau of Consumer Protection, FTC, at 14-15), *available at* http://www.ftc.gov/os/testimony/100715toopatestimony.pdf.

Second, the Commission properly rejected statutory changes to the "actual knowledge" standard that would integrate elements of an imputed or constructive knowledge standard and would significantly extend the reach of the COPPA regime far beyond what Congress intended.[24]

B. The Commission Should Adopt Proposals that Provide Additional Flexibility to Operators.

We support proposals in the *Notice* that would provide additional flexibility to operators in their provision of content for children and families. For example, the *Notice* proposes to promote innovation in filtering technologies by adopting a "reasonable measures" standard and to bless additional methods to obtain verifiable parental consent.[25] Adoption of these proposals has the potential to incentivize the creation of additional rich, interactive online content tailored to children and families. In particular, we believe it is appropriate to revise what some have interpreted as a "100% deletion" standard (whereby operators that enable children to post personal information in public forums are deemed not to have collected the information only if the operator deletes all personal information from a posting before it is made public) by recognizing "reasonable measures" to delete "virtually all" personal information, as the *Notice* proposes. This approach would provide operators additional flexibility to deploy automated approaches that can provide rich and meaningful content to children and families and offer interactivity in a "non-identifiable" way.[26] Automated filtering approaches may also offer increased consistency and more effective monitoring than human monitors.[27]

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[24] *See Notice* at 59806 ("Actual knowledge is far more workable, and provides greater certainty, than other legal standards that might be applied to the universe of general audience Web sites and online services.").

[25] *See id.* at 59808, 59818.

[26] *See* NCTA Comments at 10-11 & n.32.

[27] *See id* at 11, n.32 (citing Dean Takahashi, *Crisp Thinking's NetModerator Blocks Pervs in Real Time*, GamesBeat, Feb. 23, 2010, *available at* http://venturebeat.com/2010/02/23/crisp-thinkings-netmoderator-blocks-pervs-in-real-time/).

We likewise agree with the goal of expanding options for obtaining parental consent while preserving existing options, particularly those that are consumer-friendly and reasonable for operators to implement. Electronic scans and video conferencing should be approved parental consent options, as they are functionally equivalent to the written and telephonic methods of consent that are part of the Rule today. To the extent that such parental consent methods are time-, labor- and/or cost-intensive for both parents and operators, other methods should also be given further consideration.[28] We also support the addition of other, more automated methods of consent, such as "sign and send" and the use of text messages -- particularly if they can be used for the one-time use and newsletter types of exceptions -- as reasonable approaches for obtaining parental consent given the rapid adoption and reliance upon mobile devices by consumers.

III. SEVERAL PROPOSALS IN THE NOTICE ARE UNSUPPORTED, UNNECESSARY, AND RISK DISCOURAGING OPERATORS FROM OFFERING HIGH QUALITY INTERACTIVE EXPERIENCES FOR CHILDREN AND FAMILIES.

Although the Commission reported that "the COPPA Rule continues to be useful in helping to protect children as they engage in a wide variety of online activities,"[29] the *Notice* proposes significant changes to the Rule. These changes risk providing a strong disincentive for the development of online content that is tailored to children and families, without record evidence justifying their need. We urge the Commission to reject these proposals.

[28] The costs of manually managing consent forms, whether sent by facsimile or electronically scanned, are significant. Such costs include the labor costs allocated to customer support representatives as well as the equipment or software needed to manage receipt of the consents. Moreover, the time required for tending to these manual methods of consent is substantial. For example, Cartoon Network reported to us that when it obtained parental consent for a free beta-version of one of its online games, it estimated that it took network personnel approximately 10 minutes to process each faxed paper consent form. Such an approach simply is not a scalable or sustainable business model for most operators with significant numbers of visitors. As a result, the amount of child-directed websites offering this type of interactivity and functionality available at no cost is extremely limited and could decline further if operators are required to obtain heightened verifiable parental consent for the new categories of "personal information" identified by the Commission.

[29] *Notice* at 59807-08.

A. The Commission Should Refrain From Adopting Expansive Changes to Rule Definitions That Lack Justification and Risk Unintended Consequences.

The *Notice* proposes "to modify particular definitions to update the Rule's coverage and, in certain cases, to streamline the Rule's language."[30] In fact, the proposed definitional changes would result in a significant expansion of what is covered by the Rule. For example, the *Notice* proposes to consider several new items as "personal information," including screen or user names; persistent identifiers such as IP addresses; identifiers linking a child's online activities; and photos, videos, and audio files that contain a child's image or voice.[31] The *Notice* also proposes to expand the definition of "Collects or collection."[32]

1. The Definition of "Personal Information" Should Not Be Expanded.

As defined by Congress, "personal information" pursuant to COPPA is limited to "individually" identifiable information about an individual collected online including: (1) a first and last name; (2) a home or other physical address including street name and name of a city or town: (3) an email address; (4) a telephone number; (5) a Social Security number; and (6) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier listed above.[33] Additionally, Congress explicitly granted the Commission authority to include within the definition of personal information any other identifier that it determined would permit the physical or online contact of "a *specific* individual."[34] Citing this authority, the *Notice* proposes to significantly expand the definition of

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[30] *Id.* at 59808.

[31] *Id.* at 59810-13.

[32] *See id.* at 59808-09.

[33] 15 U.S.C. § 6501(8).

[34] 15 U.S.C. § 6501(8)(F).

"personal information" to include many types of data that it previously deemed anonymous, including data such as persistent identifiers; screen names; photos, videos and audio files. Such an approach would exceed the Commission's statutory authority. This is particularly true insofar as certain proposals in the *Notice* seek to expand "personal information" to include data that does not identify "a specific individual," including persistent identifiers, geolocation data, and any identifier that links the activities of a child across different websites or online services, even when the data is not combined with any other individual identifier. [35] These proposals have costly ramifications, especially for existing websites directed to children and families, as discussed more fully below. The proposed substantial change in course is not supported by record evidence that would justify such extreme measures.

Screen and User Names. The Commission should not treat screen and user names as "personal information."[36] Expanding the definition in this way would be problematic for websites directed to children that have been carefully designed to use anonymous user names consistent with COPPA while still allowing children to enjoy an interactive, autonomous, and individualized experience involving popular features such as user-generated content, forums, leader boards, blogs, and other activities. As we explained to the Commission previously, allowing children to create a unique screen name and password at a website through a registration process *without* collecting any personally identifiable information has allowed several leading children's websites to offer:

> personalized content (*e.g.*, horoscopes, weather forecasts, customized avatars for game play), attribution (*e.g.*, acknowledgement for a high score or other

[35] The requirements of the Act were specifically not intended to reach "[a]nonymous, aggregate information." 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan). While it is true that the Act includes telephone number and street address as examples of "personal information," such identifiers are qualitatively different than the types of data the *Notice* proposes to classify as "personal information" because they cannot be used to contact a specific identifiable individual in the same way.

[36] *Notice* at 59810.

> achievement), as well as a way to express opinions and participate in online activities in an interactive fashion (*e.g.*, jokes, stories, letters to the editor, polls, challenging others to gameplay, swapping digital collectibles, participating in monitored "chat" with celebrities).[37]

A unique screen name and password may relate to an IP address to facilitate the user experience (*i.e.*, the ability to remain logged in to other websites within a family of company websites) and may relate to a single individual. Unlike an email address, however, a user or screen name would not necessarily allow a website to contact that individual.

The Commission states in the *Notice* that it recognizes that screen names play a part in providing "a good user experience" and that it "does not intend to limit operators' ability to collect such information from children for those purposes."[38] Nevertheless, the proposed definition of "personal information," even when tempered by the proposed "internal operations" language, does not go far enough to preserve the ability of operators of child-directed websites to offer these rich activities and features without heavy new regulatory burdens.

Companies that have developed innovative websites using unique screen names consistent with COPPA will face significant economic burdens and business challenges if the Commission determines that such screen names are "personal information" requiring parental consent. As described more fully below, such operators will have to expend substantial time and resources to redesign their websites to eliminate the use of user or screen names and incur significant costs to obtain parental consent for existing and new registered members. Such changes would disrupt the interactive experience that consumers have come to expect and enjoy when they visit these websites. Moreover, companies may be faced with a requirement to

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[37] NCTA Comments at 8.

[38] *Notice* at 59809-10.

eliminate entire databases of anonymous registration information already collected from millions of users – action that would likely result in consumer confusion and annoyance.[39]

In addition, pursuant to the *Notice*, the proposed expanded treatment of screen/user names would seemingly not allow the same screen or user name to be used to facilitate interactive experiences across multiple commonly-owned websites or mobile platforms.[40] Some companies that provide websites directed to children and families use one screen or user name to offer an easy log-in experience with personalized content across differing platforms without undermining safety or privacy (for example, settings under a user name established on a child-directed website accessed on a personal computer can seamlessly translate to that website when accessed via a mobile device by the same user). Consumers – particularly younger children – benefit from simpler access to interactive experiences designed for them through the use of common credentials through a screen or user name that allows them to access a family of sites or online services that are commonly-owned or operated. The Commission should ensure that any new rules preserve and promote such functionality and do not require a significant overhaul of operators' website infrastructure.

Persistent Identifiers and Identifiers that Link Activity Across Different Websites. The *Notice* proposes to significantly reformulate the Rule's current approach to persistent identifiers, which currently requires that such identifiers be "associated with individually identifiable

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[39] Cartoon Network, for example, has an average of 9 million unique visitors to its website each month, and an even greater number of unique user or screen names associated with its registered users within its Cartoon Network and FusionFall websites. Source: comScore media metrix Jan – Nov 2011.

[40] This depends upon how a "website" is defined. It is unclear whether the Commission is proposing that an identifier that links the activities of a child outside of an initial domain to a related website would be considered personal information. The Commission should clarify that it is only concerned with identifiers that link the activities of a child across *third-party* websites operated independently of a corporate family of companies and in a manner unrelated to providing services to the parent or affiliate.

information."[41] The proposed revision would expand the provision to deem as personal information "a persistent identifier, including but not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier, where such persistent identifier is used for functions other than or in addition to support for the internal operations of, or protection of the security or integrity of, the Web site or online service."[42] Several of NCTA's member companies incorporate functions into their websites that generally rely on IP addresses, numeric identifiers stored in cookies, and device identifiers to support advertising, analytics, and other activities. These functions are essential not just to the pure *technical* functioning of their websites and online services, but also to building and maintaining positive user experiences and the continued viability, development, and appeal of such advertiser-supported websites.

The proposed changes would significantly limit these important functions, even though the data at issue cannot be used to make contact with a specific individual. An IP address, for example, cannot inherently identify an individual. Indeed, a *dynamic* IP address may never be used again by the same computer. At most, a *static* IP address may indicate the use of a particular computer or device, but not a particular individual. For this reason, several U.S. courts have concluded that IP addresses do not constitute personal information.[43] Indeed, most

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[41] 16 C.F.R. § 312.2 (emphasis added).

[42] *Notice* at 59810-13, 59830.

[43] *See e.g., In re Application of the United States of America for an Order Pursuant to 18 U.S.C. §2703(d)*, Nos. 11-DM-3, 10-GJ-3793, 11-EC-3, *6-7 (E.D. Va., Nov. 10, 2011) (Memorandum Opinion) ("IP address information, by itself, cannot identify a particular person. . . . IP address information can identify a particular personal computer, subject to the possibility of dynamic addressing . . . but it can also identify a device that connects to another network, such as an internal home or office network. Moreover, though IP addresses can assist in identification, they have been found inadequate to identify a particular defendant for the purposes of service of process. . . . Even if certain actions are traceable to an IP address, therefore, attributing those actions to a real person requires evidence associating a real world person with the residuum of his more transient and diaphanous presence in cyberspace"); *see also Klimas v. Comcast Cable Comm'cns, Inc.*, 465 F.3d 271, 276 n.2 (6th Cir. 2006); *Columbia Pictures Indus. v. Bunnell*, No. 06-1093, at *3 n.10 (C.D. Cal. May 29, 2007).

households with young children use shared computers and, as such, these devices do not generally identify a specific individual. Consistent with the authority granted to it by Congress, the Commission must abide by the limitation in the statute that identifiers considered to be "personal information" must "permit[] the physical or online contacting *of a specific individual*."[44] Thus, the Commission must retain its current approach to persistent identifiers.

We recognize that the *Notice* has attempted to anticipate and address operator concerns by specifying that the collection of persistent identifiers would not be subject to the Rule when used as "support for internal operations,"[45] however, as explained herein, the proposed definition of "support for internal operations" is far too narrow to operate as intended.

The *Notice* also proposes to expand the definition of "personal information" to include "an identifier that links the activities of a child across different Web sites or online services."[46] This proposal raises concerns for companies that may utilize software to collect anonymous aggregate data to measure and analyze consumer use of websites. Such data is typically used for conventional advertising reporting and delivery, as well as to support product development efforts. A requirement that an operator obtain parental consent before performing such tasks would be unnecessary and unworkable.[47]

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[44] 15 U.S.C. § 6501(8)(F) (emphasis added).

[45] *See Notice* at 59812 (explaining that the following would be permissible: (1) user authentication; (2) improving site navigation; (3) maintaining user preferences; (4) serving contextual advertisements; and (5) protecting against fraud or theft).

[46] *Id.* at 59830.

[47] Proposed Rule changes in this area are seemingly driven by a concern about third party tracking for online behavioral advertising purposes. At a minimum, the Commission should take into consideration the self-regulatory efforts already in place regarding the use of online behavioral advertising targeting children. For example, the Network Advertising Initiative ("NAI") Code prohibits the use of personally identifiable information ("PII") or non-PII to create online behavioral advertising segments specifically targeted at children under thirteen without verifiable parental consent. *See* NAI, *2008 NAI Principles* 9, *available at* http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf.

Photograph, Video, or Audio File Containing Child's Image or Voice. In the *Notice*, the Commission proposes to add a "photograph, video, or audio file where such file contains a child's image or voice" to the definition of personal information even though it acknowledges (at least with respect to photographs), having received "little comment on this topic."[48] The proposal to make such files "personal information," even when such files do not permit contact with a specific child, would undermine the industry's ability to enable children to participate in fun, safe, and age appropriate user-generated content activities, contests, and promotions on websites directed to children and families. Before defining these items as "personal information," the Commission should build a record that justifies such Commission action. Indeed, with respect to concerns related to facial recognition, the Commission has just begun to examine the nascent technologies that may at some point be able to glean individually identifiable information from a photograph or video alone.[49]

Moreover, with respect to the potential concerns the Commission may have about hidden "metadata" in images or other files, the Commission should consider alternative approaches to address these concerns before requiring prior parental consent. For example, consistent with the Commission's current approach to the definition of "collects or collection," it could allow operators the option of removing any metadata, perhaps in an automated fashion, that may contain individually identifiable information before a posting is made public.[50] By contrast, requiring operators to obtain prior parental consent for this type of information will result in

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[48] *See Notice* at 59813, n.89.

[49] *See, e.g.*, Jon Leibowitz, Chairman, FTC, Opening Remarks as Prepared For Delivery, Face Facts Forum at 2 (Dec. 8, 2011) ("We must confront openly the real possibility that these technologies, if not now, then soon, may be able to put a name with the face, so to speak, and have an impact on our careers, credit, health, and families."), *available at* http://www.ftc.gov/speeches/leibowitz/111208facefactsopeningremarks.pdf; *see also* Press Release, FTC, *FTC Announces Agenda, Panelists for Facial Recognition Workshop* (Nov. 21, 2011), *available at* http://www.ftc.gov/opa/2011/11/facefacts.shtm.

[50] *See* 16 C.F.R. § 312.2.

steeply reducing the content uploaded by users at websites designed for children and families, and will ultimately redirect children to websites that do not necessarily have child-appropriate content or, most importantly, protections. As the *Notice* recognizes,

> [c]hildren increasingly seek interactive online environments where they can express themselves, and operators should be encouraged to develop innovative technologies to attract children to age-appropriate online communities while preventing them from divulging their personal information. Unfortunately, websites that provide children with only limited communications options often fail to capture their imaginations for very long.[51]

Indeed, it is already the case that children have significant interest in using websites not designed for them, and that many parents are willing to allow their children to use these websites.[52]

2. The Definition of "Collection" Should Not Be Expanded.

The *Notice* proposes to reformulate the definition of "Collects or collection" to expand the phrase "requesting that children submit personal information online" to "requesting, *prompting, or encouraging* a child to submit personal information online" as well as to cover any "[p]assive tracking of a child online."[53] Modifying the definition in such a way could be read to suggest that COPPA obligations are triggered even *without* the actual or intended collection of personal information. Such a change would not be consistent with the statutory language which directs the Commission to promulgate regulations pertaining to website or online service operators "that collect[] personal information from children" or have "actual knowledge that

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[51] *Notice* at 59808.

[52] *See Danah Boyd et al., Why Parents Help their Children Lie to Facebook About Age: Unintended Consequences of the 'Children's Online Privacy Protection Act'*, First Monday, Nov. 7, 2011 at 2, *available at* http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3850/3075; *That Facebook Friend May Be 10 Years Old and Other Troubling News*, Consumer Reports, June 2011 ("Of the 20 million minors who actively used Facebook in the past year, 7.5 million—or more than one-third—were younger than 13 and not supposed to be able to use the site."), *available at* http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/facebook-concerns/index.htm.

[53] *Notice* at 59808.

[they are] collecting personal information from a child."[54] At the very least, if the Commission ultimately adopts this proposal, it should clarify that "prompting" or "encouraging" does not trigger the COPPA requirements unless personal information is actually collected from a child. Moreover, a mere link from one website to another website or online service where an individual submits personal information should not trigger an operator's liability for practices of a linked website.

B. The Proposed Definition of "Support for Internal Operations" Must Be Expanded Significantly to Provide the Clarity and Meaningful Limitation Intended by the Commission.

The *Notice* explains that the proposed definition of "support for the internal operations of the Web site or online service" is "an important limiting concept" to the proposed COPPA Rule expansion because the Commission recognizes "that information that is collected by operators for the sole purpose of support for internal operations should be treated differently than information that is used for broader purposes."[55] However, the language proposed in the *Notice* undermines the stated purpose. As currently structured, the proposed exception is defined to only cover those activities that are "*necessary*" to "maintain the *technical* functioning" or for the security or integrity "of the website or online service."[56] While the *Notice* reflects a view that this phrase would allow the use of persistent identifiers for purposes such as user authentication, maintaining user preferences, serving contextual advertisements, or protecting against theft or fraud, the proposed language does not provide sufficient clarity for practical purposes.

In addition, the approach in the *Notice* is ambiguous as to how the functions necessary to provide popular features and activities such as leader boards, accolades, tell-a-friend functions,

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[54] 13 U.S.C. § 1303(b)(1)(A).

[55] *Notice* at 59809.

[56] *Id.* at 59810.

and the like (which may involve user-to-user communication within public chat rooms or forums on a moderated website[57] as well as external or public use of a unique screen name on commonly-owned websites or online services)[58] would be considered "internal operations."

Finally, while not literally "necessary" for the "technical" functioning of a website, advertiser-supported websites use persistent identifiers across their family of websites for legitimate purposes such as executing online campaigns in accordance with contractual requirements (*e.g.* territorial licensing restrictions or brand/category exclusivity commitments), capping the frequency with which a particular advertisement is displayed, ensuring the advertising content is delivered in an appropriate language for the intended audience, and performing backend analytics, delivery, and reporting functions for contextual and run-of-site advertisements. These legitimate activities enable operators to provide a more effective and economically-sustainable user experience without sacrificing consumer privacy.

The definition of "support for the internal operations of the Web site or online service" must preserve an operator's ability to provide services and functions that improve the user's online experience. This should include basic analytics as well as the ability to customize, synchronize, and sequence a variety of content that a user may encounter. A better approach to the definition, therefore, would be to delete any potentially vague and narrow restrictions that the data must be "necessary," limited to "technical" purposes, or used on a single website or online service, and to define "Support for internal operations" more broadly to encompass all current practices that support the creation, promotion, and delivery of rich, interactive content and

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[57] The *Notice* recognizes that user names or screen names should be allowed to "identify users to each other." *Notice* at 59810.

[58] This would include, for example, exhibiting promotional spots featuring artwork and comments from fans, or game scores in connection with unique screen names that do not include first and last name, or other online contact information on a website and in multiplatform campaigns that also are shown on television and various online services beyond a single website.

services. Such practices include intellectual property protection, regulatory compliance, consumer safety, authentication/verification, fraud prevention, security, reporting and delivery, billing, service fulfillment, market research, analytics, product development and situations in which information is de-identified within a reasonable amount of time after collection within a family of sites or online services.[59] These practices enable operators to provide high quality interactive experiences for children and families without risking the safety- or privacy-related harms that COPPA was intended to address.

C. Innovation in Parental Consent Mechanisms Should Be Encouraged, but Existing Mechanisms Should Not Be Abruptly Removed.

The Commission is right to encourage innovation in parental consent mechanisms, but the proposed abrupt removal of the "email plus" mechanism would have unintended negative consequences and would leave some operators without a viable alternative. As acknowledged in the *Notice*, email plus is a popular parental consent mechanism relied upon by numerous businesses.[60] No substitute for email plus currently exists, leaving operators who currently use the mechanism in a lurch until new methods of parental consent can be developed. At the least, the Commission should further develop the record on whether removing email plus would be appropriate, and the option should not be removed until cost-effective and efficient alternatives are developed and ready to be deployed.

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[59] Such an approach would be familiar to industry as it is consistent with the recently announced Digital Advertising Alliance multi-site data principles. *See* Digital Advertising Alliance, *Self-Regulatory Principles for Multi-Site Data* at 2-3 (Nov. 2011), *available at* http://www.aboutads.info/resource/download/DAA_MSD-Principles-Release_FINAL.pdf.

[60] *Notice* at 59819 ("E-mail plus has enjoyed wide appeal among operators, who credit its simplicity.").

D. It is Unnecessary to Add a Data Retention and Deletion Requirement to the Rule.

Without any demonstrated need for such a provision, *the Notice* proposes to add a data retention and deletion requirement to the COPPA Rule.[61] Adoption of such a rule is unnecessary, particularly in light of the fact that COPPA already includes numerous provisions that limit the collection, use, and retention of information.[62] Moreover, the Commission has found that operators of websites subject to COPPA tend to collect very little, if any, personal information from children.[63] As described above, many children's websites offer customized user experiences by employing screen or user names and, thus, do not collect personal information from website visitors.[64] Websites that do collect personal information typically limit the collection to information specified in the COPPA e-mail exceptions to parental consent, which include built-in limits on the type, use, and retention of the information collected. For example, where the operator collects online contact information from a child pursuant to the "one-time use" exception contained in Section 312.5(c)(2) of the Rule, the operator may use the contact information for the sole purpose of responding directly on a one-time basis to a specific request from the child – afterwards, the operator must delete the information from its records.[65]

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[61] *See id.* at 59822.

[62] *See, e.g.*, 16 C.F.R. § 312.3(d) (requiring that operators limit the data collected from children to that which is reasonably necessary to participate in an activity; § 312.6(a)(2) (requiring that operators honor any parental requests to delete personally identifiable information); § 312.8 (requiring that operators maintain the confidentiality and security of data); 312.5(c) (specifying the circumstances where prior parental consent is not required).

[63] *See 2007 FTC COPPA Report* at 8 (explaining that website operators "have developed more innovative ways to offer the interactive online experiences children want without collecting any personal information or collecting very little personal information, such as only an email address. In particular, they identified as useful two of the Rule's exceptions to verifiable parental consent.").

[64] *See infra* p. 11-13; *see also* NCTA Comments at 10.

[65] *See* § 312.5(c)(2).

E. The Notice of Information Practices Should Be More Consumer-Friendly, Not Unwieldy or Confusing.

In an effort to make the required COPPA notice of information practices pursuant to Section 312.4(b) more consumer-friendly, the *Notice* proposes several changes.[66] Many of the proposed changes are likely to result in a simpler, more concise, and more consumer-friendly notice. For instance, we support the proposals to eliminate certain language required by regulation today and to simplify the language contained in the required notice.[67]

On the other hand, the *Notice*'s proposal to require that the notice include a list of the contact information of *all* operators of a website or online service, rather than permitting the designation of a single operator as a contact point, is likely to result in consumer confusion.[68] The proposed change could be interpreted to encompass a broad range of activities such as analytics, promotions fulfillment, plug-ins, video serving, and first-party ad serving. The interplay of an expansive definition of personal information and a narrow definition of the "internal operations" exclusion could be interpreted to require entities that operators now consider as agents or third party service providers for a website or its affiliated companies as additional "operators," thus triggering new and ongoing revisions to disclosures with ever-changing commercial relationships. Such a change would not only impose significant costs, burdens, and technical challenges on companies operating child-directed services but also could be burdensome and confusing to the parents receiving such frequent notices. We therefore urge the Commission to reject this proposal, which ultimately would run counter to its goal to make the notice more clear, concise, and consumer-friendly.

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66 *See Notice* at 59815.

67 *See id.*

68 *See id.* (proposing to require a listing of all "contact information, including, at a minimum, the operator's name, physical address, telephone number, and e-mail address" for each operator involved in a website or online service").

IV. THE COMMISSION MUST RECOGNIZE THE POTENTIAL COSTS AND BURDENS OF THE PROPOSALS.

NCTA's member companies have demonstrated their commitment to implementing reasonable and effective procedures designed to protect the privacy of children online. Many of the instant proposals, however, would have costly ramifications that warrant further consideration. To continue to provide the rich content that children and families have become accustomed to, website operators would be forced to incur significant and ongoing compliance costs related to newly-mandated processes and procedures, along with other costly measures, such as organizational management and employee training and significant website redesign and testing.[69]

It does not appear that the Commission has taken these costs into consideration with the *Notice*'s 60-hour estimate.[70] The estimate also does not include the costs and burdens of "ensuring" security procedures of third parties, securing deletion, managing parental consents received through electronic or facsimile methods or phone/video conferencing, or updating

[69] Costs related to redeveloping child-directed websites include: consultant fees for advice regarding new website design; expenses incurred to implement methods necessary to obtain parental consent for a significantly larger range of website activities; new equipment and software required by the expanded regulatory regime; attorney's fees related to the drafting of new or revised privacy policies and terms of service agreements; increased data storage costs; and expenses related to new hires. If forced to redesign its website to eliminate its current use of unique screen or user names, one leading children's website operator told NCTA that it estimates it could take a technical staff from numerous departments a period of at least 6 months to adequately architect, design, develop, test, integrate and deploy these types of changes within its current website structure. The operator estimates that the related costs would exceed hundreds of thousands of dollars and result in the required deletion of the information of millions of registered users. These efforts would also be burdensome in that resources would be necessarily diverted from the development of new projects.

[70] The Commission asserts that the proposed amendments to the COPPA Rule will impose a one-time burden on existing operators to re-design their privacy policies and direct notice procedures and to convert to a more reliable method of parental consent in lieu of e-mail plus. *See Notice* at 59827. The Commission estimates the total burden of complying will be only 60 hours, affecting 2,000 websites. Annualized to 20 hours per year for 3 years, the total estimated burden is 40,000 hours at a cost of $5,240,000. This estimate is based on an assumed labor rate of $150 for lawyers and $36 for technical personnel. While it is difficult to assess the hours that would be involved without knowing the extent of the proposed changes that will be adopted, it is clear that the Commission has grossly understated the costs. Moreover, the proposed changes would present ongoing costs and burdens. In addition, NCTA members typically consult with attorneys who specialize in data privacy and security laws and whose average rates are 2-3 times the Commission's estimates. Similarly, engaging expert technical personnel can, on average, involve substantially higher hourly costs than the Commission's estimates.

policies to disclose changes in "operators." In addition, although the *Notice* seems to base its estimates on top level domains, each "website" may have many lower level web pages that will be affected by any changes to the parent site. As such, the estimates for implementation of new verifiable parental consent requirements are very low. Furthermore, it will be increasingly difficult to obtain parental consent for these types of mechanisms and may potentially require the collection of more information from or about parents, or force more companies to move to subscription models. Thus, as companies evaluate their ability to comply with these new responsibilities, such new obligations could ultimately result in steep declines in the amount of online content tailored to children and their families, particularly that which is currently provided free of charge, without necessarily enhancing the privacy of children.[71] The *Notice*'s proposed substantial change in course is not supported by record evidence that would justify such measures.

If the Commission ultimately concludes that substantial Rule changes are warranted, it must provide a reasonable amount of time for operators to implement the new requirements. As described above, the adoption of new COPPA requirements could require extensive changes to existing websites. For example, in the event that the regulatory treatment of screen or user names is changed, substantial time to implement the new rules may be warranted.

[71] Studies have found that companies have shown a preference to avoid COPPA obligations even as they exist today. *See* Boyd *supra* note 52, at 6 ("Companies' preference for avoiding these obligations are understandable, given the economic costs, social concerns, and technical issues involved in verifying children's age and parental consent.").

CONCLUSION

The proposed rule changes, especially the expansion of the "personal information" definition, raise significant technology-related and other implementation issues that will be difficult to resolve and for which the Commission has little or no record. If the Commission ultimately decides to revise the COPPA regime substantially, it should first develop a record justifying the need for such changes and accounting for the potential unintended consequences that may result. In particular, the proposed changes would likely have a negative impact on the amount of child- and family-directed content available online. Consistent with the statement in the *Notice* that "the Commission has undertaken this Rule review with an eye towards encouraging the continuing growth of engaging, diverse, and appropriate content for children,"[72] the Commission should proceed cautiously in adopting any proposed changes that wholly recast the COPPA regime.

Respectfully submitted,

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[72] *Id.* at 59808.