

Via electronic filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex N)
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Secretary Clark,

Yahoo! welcomes the opportunity to comment on the Federal Trade Commission's proposed changes to the Children's Online Privacy Protection ("COPPA") Rule as presented in the Notice of Proposed Rulemaking ("Notice"). Yahoo! shares the Commission's commitment to protect the privacy of children under 13 and appreciates the Commission's efforts to ensure the COPPA Rule adapts to changes in online technology and other marketplace developments.

The safety and privacy of children is extremely important to Yahoo!. We encourage parents and kids to use Yahoo! Kids, Yahoo!'s entertainment and education site for children aged 6 through 12. Launched in 1996 as "Yahooligans!," Yahoo! Kids uniquely combines the latest technology from Yahoo! Search with the wisdom and experience of our editors to help ensure a child-safe internet environment. Human editors review and select content on Yahoo! Kids—from our editorial features to movie reviews, to homework help. Advertising present on the site comes from select, age and content appropriate advertisers.¹ Yahoo! Kids' mission is to connect parents and their children with the best—and safest—content on the Web. Yahoo! Kids does not include any features that permit children under 13 to communicate online, and does not collect personal information from kids.²

Yahoo!'s general audience web site is also designed with COPPA in mind. When children under age 13 attempt to register with Yahoo!, we ask them to have a parent or guardian establish a Yahoo! Family Account. A Yahoo! Family Account feature allows Yahoo! to obtain verifiable consent from a parent or guardian before we collect any registration information from a child. In addition, Yahoo! Family Accounts allows a parent to access their child's Yahoo! account, edit account information, and better control their child's personal information. In addition, when an account has been set up in this way, Yahoo! creates age appropriate default settings, such as safe search settings or prohibiting children from participating in chat or creating profiles. For older

¹ In fact, we do not create interest categories for children under 13 who are registered with Yahoo! Family Accounts, nor do we display any interest-based advertising to these users.

² Yahoo! Kids does permit children to send child-appropriate e-cards to family and friends, however, the site only requests the sender's first name and Yahoo! does not retain this information after the card is sent.

teens, profiles may be created with restrictions. Yahoo! does not collect any more information from a child than is needed to participate in an activity or game. Yahoo! also adheres to the Network Advertising Initiative's Self-Regulatory Code of Conduct.³ Among those principles is a pledge not to create online behavioral advertising segments on its networks for children under the age of 13.

For the past fifteen years, Yahoo! has offered a broad array of educational and entertaining content and services to children aged 6-12 and their families. We have invested a great deal of effort and money to develop new ways to provide those services and content while protecting the privacy of our users, especially those users who are children under 13. As a company dedicated to bringing users of all ages the online products and services they want, Yahoo! encourages the Commission to ensure that any revisions to the existing COPPA Rule advance the goal of protecting children's privacy without: (i) making compliance with the Rule too burdensome to continue offering online services and content to children under 13; or (ii) discouraging or inhibiting innovation in the development of new services and content.

Yahoo! supports several of the Commission's findings regarding the scope of the current Rule. We believe that the Commission's conclusion that the term "website or online service" is broad enough to apply to traditional websites, mobile applications, Internet-enabled gaming platforms, and Internet-based technologies is correct, and that the term does not need to be defined further in the Rule. Yahoo! agrees with the assessment that the "actual knowledge" standard should not be changed, and emphatically supports the Commission's finding that Congress should not expand the COPPA statute to include teens. Yahoo! also supports the Commission's proposed addition of new parental consent mechanisms and an expedited process by which additional mechanisms may be approved.

Yahoo! has fundamental concerns with several of the Commission's other proposed revisions. These include the proposal to dramatically expand the scope of the definition of "personal information" to include certain information not tied to personally identifiable information, such as IP addresses, persistent identifiers, and identifiers that could be used to link the activities of a child across different websites or online services. Expanding the definition of "personal information" as the Commission proposes will have considerable negative effects, including significant disruption of the Internet business model of offering free services and content paid for by targeted advertising; and dramatically reducing the range of websites, content, and online services available to children under 13. Worse yet, if the definition of "personal information" is amended as proposed, operators will be forced to collect more personally identifiable information to comply with the COPPA Rule, resulting in less privacy for both children and other consumers.⁴

³ See the NAI's "Self-Regulatory Code of Conduct," available at http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf

⁴ For example, under the current Rule, the operator of a website or online service that could be deemed to be "directed at children" that does not collect personally identifiable information, but collects unique device identifiers in order to operate the service and serve advertisements, is not required to obtain parental consent or otherwise comply with the other requirements of the Rule. If the Commission's proposed revisions to the Rule are

Yahoo! is also concerned that the Commission’s proposal to allow use of persistent identifiers only for “support for internal operations of the website or online service,” if enacted, would likely be read very narrowly and would require operators to get parental consent to use screen names or persistent identifiers for vital functions such as improving the features or content of or developing new websites or online services. Yahoo!’s position is that if such information cannot be used to contact a child except through on-screen display of content while the child is accessing a website or online service, operators should not be discouraged or prohibited from using such information for non-contact activities, including development of future products and services.⁵ By proposing to aggressively broaden the definition of “personal information” subject to the COPPA Rule, while simultaneously providing such a narrowly-defined exception for use to support the “internal operations of the website or online service,” the Commission has strayed from the mandate and purpose of the COPPA statute into the realm of regulating online behavioral advertising.

1. Scope of the COPPA Rule

In the Notice, the Commission analyzed proposals from certain parties to expand the scope of the COPPA Rule to cover teens, to lower the existing “actual knowledge” standard, and to revise the term “websites or online services” to cover new technologies such as mobile applications and Internet-enabled gaming platforms. In each of these three areas, the Commission concluded that amending the COPPA Rule or asking Congress to amend the COPPA statute is neither advisable nor necessary at this time. Yahoo! agrees with the Commission’s conclusions.

Yahoo! supports the Commission’s decision not to recommend that Congress expand COPPA to cover teens. We also agree with the Commission’s statement that teens, like adults should be clearly informed about how their data is used and given “meaningful choices about such uses.” Our belief that all users should be easily able to find information about, and exercise choices regarding, the collection and use of their information has driven us to implement the following:

- The Yahoo! Privacy Center, which provides users easy-to-find information on many privacy topics, including how to exercise a persistent opt-out option for interest-based advertising for Yahoo!’s ad networks;
- Yahoo!’s Ad Interest Manager (“AIM”), which allows users to see which interest categories they are placed in on the Yahoo! ad networks for interest-based advertising purposes and allows users to modify those categories;
- The “About Our Ads” link, which, along with a link to our Privacy Policy, is included on nearly every page on Yahoo.com, so users can find information about Yahoo!’s ad personalization and serving practices with one click; and

implemented, that same operator would be forced to collect personally identifiable information from the child for purposes of obtaining parental consent for the collection of such information.

⁵ See the Digital Advertising Alliance’s “Self-Regulatory Principles for Multi-Site Data,” available at <http://www.aboutads.info/resource/download/Multi-Site-Data-Principles.pdf>.

- As part of the Digital Advertising Alliance’s Advertising Option Program, labeling ads appearing on our website with the “Ad Choices” link, which allows users one-click access to information about ads and their ability to opt-out.

Yahoo! agrees with the Commission’s finding that the “actual knowledge” standard of the Rule should not be changed. In the Notice, the Commission pointed out that COPPA “...was never intended to apply to the entire Internet, but rather to a subset of websites and online services.” Limiting the reach of COPPA to those general audience sites with “actual knowledge” that they are collecting personal information from children under 13 is critical for two reasons. First, lowering the standard to “constructive” or “implied knowledge” would force operators to collect more personally identifiable information from all users to ensure compliance with COPPA. Second, making compliance more burdensome will likely cause many operators of general audience sites and online services currently available to children under 13 to restrict access to those sites and services to only those users ages 13 and older.

Finally, Yahoo! also agrees with the Commission’s assessment that there is no need to further define the term “website or online service” as included in the current Rule. Yahoo! believes that all operators of Internet-based services directed at children under 13 or that have actual knowledge they are collecting personal information of children under 13 should be covered by COPPA, regardless of whether such services are provided via traditional websites, mobile device applications, or Internet-connected gaming platforms. As the Commission pointed out in the Notice, the term “website or online service” is broad enough to cover both existing technologies and Internet-based technologies yet to be developed.

2. Parental Consent Mechanisms

Yahoo supports the Commission’s proposal to add new mechanisms for obtaining parental consent to the existing Rule. We also applaud the Commission’s proposal to amend the Rule to include a new expedited process by which operators and others may seek the Commission’s approval for new parental consent mechanisms. In our opinion, increasing the available range of approved parental consent mechanisms is necessary to ensure operators continue to offer valuable content and services to children under 13. Likewise, adding a more streamlined process for obtaining approval for new parental consent mechanisms should encourage more innovation in that area. We believe that the Commission’s recognition of the importance of leaving room for innovation in developing new parental consent mechanisms is critical, and should also carry over to other parts of the proposed rulemaking in which innovation could be encouraged by the Commission’s proposed changes.

3. Proposed Changes to the Definition of “Personal Information”

Yahoo! has several fundamental concerns about Commission’s proposed changes to the existing definition of “personal information” in the COPPA Rule. In the Notice, the Commission recommends modifying the existing definition of “personal information” in the Rule to include (i) persistent identifiers (e.g., IP address, unique device identifiers, or cookie information); and (ii) other identifiers used to link activities of a child across different websites or online services, **even when those identifiers are not linked to “personal information” of a specific individual.** Rather, the revised definition of “personal information” as proposed by the

Commission would be based on links to a particular device (which may be used by multiple individuals) rather than links to a specific person.

The inclusion of basic, non-personally identifiable information in the definition of “personal information” subject to COPPA is a significant expansion of the types of information typically included as “personal information” or “personally identifiable information” and regulated under well-established federal and state privacy laws in the U.S.⁶ While the definition of “personally identifiable information” may vary among those laws, it generally requires a connection to a specific individual, not a specific device. This is especially true where the governing statute, like COPPA, applies to certain individuals who might use the device and not others. Likewise, operators have created privacy policies and established internal procedures predicated on the use of data sets that specifically identify users in such areas as name, address, Social Security number (“SSN”), credit card number, etc.

Yahoo!, along with many other companies, has gone to great lengths and has incurred substantial costs to implement a model that allows it to offer an extraordinary array of free content and services to users. The content and services are supported by the revenue Yahoo! is able to generate from advertising while minimizing, or, in many cases, eliminating the amount of personally identifiable information collected from or about specific users. In this model, Yahoo! uses persistent identifiers in cookies to collect information about the preferences or interests of users of a device based on the websites visited, searches conducted, and online services used on the Yahoo! network of sites. Yahoo! may also use a user’s Internet Protocol address (“IP address”) to get a general idea about the location of the device used to access the online services that is far less specific than GPS-based location information. For example, the GPS-based geolocation information might reveal a device to be at the intersection of Louisiana and Constitution Streets in Northwest Washington, DC, while the IP address would only identify the device as being somewhere in the Washington, DC metropolitan area.

This information allows Yahoo! to provide content and advertising that may be more relevant to the user(s) of the device. This tailored content may be location-based, such as showing ads for local businesses in the general area of the device’s IP address, or preference-based, such as sending ads for cooking websites or retailers to a device where users have visited numerous cooking articles. Most significantly, the persistent identifiers used in this model (e.g., persistent identifiers in cookies, mobile device identifiers, and IP addresses) cannot be used to directly contact or even identify specific individuals unless they are combined with associated personally identifiable information, such as an individual’s name, address, email address, or mobile phone number. Historically, this use of unique identifiers has been privacy-protective, as it allowed companies to assess users’ activity without having to create databases containing personally identifiable information that could cause potential harm to users if stolen or lost. The Commission’s proposed changes would remove any benefit from using such identifiers because such identifiers would still be subject to the Rule, in which case companies may as well track users by using traditional forms of personally identifiable information. Yahoo! believes that

⁶ For example, state data breach notification laws typically define “personal information” as a person’s first and last name or first initial and last name in combination with other data elements tied to that individual, such as Social Security number, driver’s license number, credit or debit card number, or bank account number.

information that is not directly linked with personally identifiable information is not the same, and should not be treated the same, as information that is directly linked to such information.

A. The Commission’s proposed revisions exceed its statutory authority to modify the definition of “personal information.”

The Commission’s proposal to include persistent identifiers and other identifiers used to link activities of a child across different websites or online services, even when those identifiers are not linked to “personal information” of a specific individual, exceeds its statutory authority to modify the definition of “personal information.” The statutory definition of “personal information” only grants the Commission authority to include “any other identifier Commission determines permits the **physical or online contacting of a specific individual.**”⁷

The language in the current definition of “personal information” in the Rule demonstrates the Commission’s awareness of these statutory limits:

16 C.F.R. § 312.2(f) A persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information; or a combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting.

However, despite proposing to remove the language limiting the applicability of the “personal information” definition to: (i) persistent identifiers combined with individually identifiable information; or (ii) information that can be used to contact a specific individual, the Commission goes on to assert that IP addresses, device identifiers, and other persistent identifiers can be used to contact specific individuals as a means to justify its proposed revisions. The Commission states that it “believes this reflects the judgment of Congress that an operator who collects this information is reasonably likely to be able to contact a specific individual, even without having collected other identifying information.”⁸ This assertion is flawed for two reasons: first, as demonstrated by the quote included above, the “reasonably likely” standard was not included in the language of the COPPA statute; and second, such identifiers cannot be used by an operator to *contact* a specific individual.

i. Persistent and unique identifiers do not always equate to personal information and many cannot be used to *contact* specific individuals.

Unique identifiers contained as a string of text within a cookie do not permit an operator to contact a specific individual like an email address can. Web servers merely read the identifier that is contained within the cookie once a browser has already navigated to a webpage – the operator is not using the cookie to initiate contact with an individual. Other unique identifiers like GUIDs and local shared objects share these same characteristics.⁹ This is an important

⁷ 15 U.S.C. § 6501(8)(F).

⁸ See Children’s Online Privacy Protection Rule, 76 FR 59804, 59811 (Sept. 27, 2011).

⁹ *Supra* n.15.

distinction when the statute limits the Commission's authority to modify the definition of personal information to only those items that allow for contacting.

Mobile phones provide another particularly instructive example of the difference between the types of identifiers that can be used to initiate contact with a specific individual (e.g., a phone number) and those that cannot (e.g., unique device identifier, or unique, anonymous cookie identifier). If an operator has an individual's mobile phone number, it can contact the individual directly by calling the individual or sending text messages. In contrast, the unique device identifier would not allow the operator to contact a specific individual, but would only allow the operator to: a) potentially discern that the user(s) of that particular mobile device may have certain preferences (e.g., that they like to view travel-related websites) when the user initiates contact; and b) possibly deliver targeted content or advertising to the online services on that specific device.

ii. Persistent identifiers are used to deliver content to *specific devices*, rather than contact *specific individuals*.

Persistent identifiers are used to identify specific devices, not individuals. In many cases, particularly in households with children under the age of 13, devices such as tablets, desktop or laptop computers, or other mobile devices are shared among the various members of the household. Moreover, with most wireless providers' upgrade programs, which allow users to upgrade to newer devices as often as every 18 months, personal wireless devices change hands frequently even when initially used by a single individual. An operator using a persistent identifier to collect non-personally identifiable information about users is not able to distinguish between different users of a single device or a change in users from these identifiers alone, and would thus not be able to contact a "specific individual" as required under the statute.

The Commission compares IP addresses and unique device identifiers to home address and phone number, both of which are included in the current definition of "personal information," stating that though multiple individuals in a household often share a single home address and phone number, that home address and/or phone number permits operators to contact specific individuals in that household.¹⁰ However, this comparison is flawed. An operator attempting to contact a specific individual using a home address would generally address information *to a specific individual* at that address or ask to speak to a specific individual on the phone. By contrast, communications cannot be initiated by operators to specific individuals using just an IP address, web cookie, or device identifier. Moreover, IP addresses are often dynamically assigned and are thus changed much more frequently than most home addresses or phone numbers.

iii. The definition of "personal information" should not depend on the purposes for which the information is used.

The Commission's proposal to make the inclusion of IP addresses, unique device identifiers, or persistent identifiers in the definition of "personal information" dependent on the purposes for

¹⁰ See Children's Online Privacy Protection Rule, 76 FR 59804, 59811 (Sept. 27, 2011).

which those identifiers are used, rather than whether they can be used to contact a specific individual is also problematic. As stated above, the COPPA statute does not give the Commission the authority to modify the definition of “personal information” to include identifiers used for purposes other than contacting of a specific individual, such as online behavioral advertising.

The Commission’s proposed revisions are clearly targeted at prohibiting the collection and use of children’s information for online behavioral advertising purposes, which, as stated above, is arguably not within the scope of the Commission’s authority under the COPPA statute. In addition, the Commission’s statement that using persistent identifiers to serve **contextual** advertising would be considered “support for the internal operations of the website or online service,” and thus would not be covered by COPPA, seems inconsistent when followed by a statement that the same identifiers would be considered “personal information” if used for “behaviorally targeting advertising to the child.”¹¹

In contextual advertising systems, the text of a website is scanned for keywords and advertisements are displayed based on what the user is viewing - for example, users browsing a cooking website might see ads for kitchen appliances. Search engines also use contextual advertising to display ads on search results pages based on the keywords in the user’s query. In short, contextual advertising displays advertisements based on the content the user views or the searches the user enters into search engines, much like behavioral advertising, which displays advertisements based on content the user has already viewed and the searches the user has entered into search engines. If the Commission’s proposed changes are implemented, there would be many scenarios in which the same piece of information (e.g., a persistent identifier) used for the same purpose (to deliver advertising) would receive disparate treatment depending on the type of advertising delivered with no statutory justification for doing so. Given that there is little logical difference between the two methods – both support internal operations by subsidizing the cost of content on Yahoo! sites and the underlying identifiers involved are exactly the same in each method - the Commission’s proposal to allow operators to serve contextual advertisements without triggering the application of COPPA requirements while making online behavioral advertising subject to COPPA is inconsistent and is not supported by the COPPA statute itself.

However, Yahoo! agrees with the Commission that children under 13 should have some protection from interest-based advertising and we have designed our practices with this in mind. Yahoo! does not use “personal information” (as defined in the current COPPA Rule) of children under 13 to deliver advertising. We also support the behavioral advertising codes promulgated by the Digital Advertising Alliance (“DAA”) and the Network Advertising Initiative (“NAI”), as well as the multi-site code promulgated by the DAA.¹² As stated previously, it is our policy not to create interest segments or profiles for registered Yahoo! users under the age of 13, nor do we

¹¹ See Children’s Online Privacy Protection Rule, 76 FR 59804, 59812 (Sept. 27, 2011).

¹² See the NAI’s “Self-Regulatory Code of Conduct,” available at http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf; see also the Digital Advertising Alliance’s “Self-Regulatory Principles for Multi-Site Data,” available at <http://www.aboutads.info/resource/download/Multi-Site-Data-Principles.pdf>.

create interest categories designed to target such children. Though we believe that children should have some protection from interest-based advertising, we do not believe the COPPA Rule is the appropriate mechanism for providing such protection, and using it to do so hurts COPPA more than it benefits children.

B. The Commission’s proposals are a departure from its prior statements about what constitutes “personal information.”

The Commission’s proposals to expand the current definition of “personal information” in the Rule to include persistent identifiers (e.g., IP address, unique device identifiers, or cookie information) and other identifiers that could be used to link activities of a child’s device across different websites or online services, **even when those identifiers are not linked to “personal information” of a specific individual**, is in direct opposition to its prior statements. In its comments to the original COPPA Rule release in November of 1999, the Commission made several statements about the fact that identifiers not correlated with individually identifiable information would not be covered by the scope of the Rule:

One commenter asked the Commission to clarify that operators are not required to provide parental notice or seek parental consent for collection of non-individually identifiable information that is not and will not be associated with an identifier. **The Commission believes that this is clear in both the Act and the Rule.**

Several commenters sought further guidance on whether the use of screen names would trigger the Act’s requirements. **If a screen name is not associated with any individually identifiable information, it is not considered “personal information” under this Rule.**

[...]

One commenter noted that there are some persistent identifiers that are automatically collected by websites and can be considered individually identifying information, such as a static IP address or processor serial number. [...] **The Commission believes that unless such identifiers are associated with other individually identifiable personal information, they would not fall within the Rule’s definition of “personal information.”**

Several commenters asked whether information stored in cookies falls within the definition of personal information. **If the operator either collects individually identifiable information using the cookie or collects non-individually identifiable information using the cookie that is combined with an identifier, then the information constitutes “personal information” under the Rule, regardless of where it is stored.**¹³

In explaining its decision to recommend changes from its earlier stance, the Commission merely states that technological developments since the original COPPA Rule was published “have led to a widespread re-examination of the concept of ‘personal information’ and the types of

¹³ See Children’s Online Privacy Protection Rule, 64 FR 59888, 59892 (Nov. 3, 1999)

information COPPA should cover.”¹⁴ There are two fundamental flaws with this assertion: First, the assertion that technical developments underlying the Internet have radically changed is simply not accurate – cookies, IP addresses, global unique identifiers,¹⁵ and local shared objects (“LSOs”)¹⁶ have been used by all participants in the Internet ecosystem (web developers, publishers, advertisers, ad networks) since before 1999, as the Commission’s guidance (restated above) makes quite clear. Second, this assertion does not account for the fact that the Commission’s statutory authority to modify the definition of “personal information” is limited: the information that the Commission is given authority to include in the definition must permit “physical or online contacting of a specific individual.”

C. The proposed revisions would negatively affect the current Internet business model and decrease the content, protections and online services available to children.

As previously explained, Yahoo! and many other operators have gone to great lengths (and great expense) to implement a business model that minimizes or eliminates the collection of personally identifiable information from users while still allowing operators to generate revenue from advertising and other sources. The law has encouraged the development of the model by allowing companies greater latitude in the use of data when the company substitutes unique identifiers for actual personally identifiable information. This in turn enables operators to continue to offer a wide variety of free content and services to users. The use of persistent identifiers not tied to personally identifiable information (e.g., unique device identifiers, persistent identifiers in browser cookies, etc.) is absolutely critical to the continued ability of operators to offer a robust array of free products and services while minimizing the amount of personally identifiable information collected from users.

Expanding the definition of “personal information” as proposed by the Commission would thus have a severe impact on this model, and remove a major perceived benefit from not tracking users based on traditional forms of personally identifiable information. The Commission not only does not deny a severe impact on the model, but explicitly acknowledges it in the portion of the Notice discussing the Commission’s decision not to recommend changes to the current “actual knowledge” standard.¹⁷ If the “actual knowledge” standard were changed to a broader “constructive” or “implied knowledge” standard, the Commission states, the expansion of the standard in combination with “the changes the Commission proposes to the Rule’s definitions might prove infeasible if applied across the entire Internet.”¹⁸ The Commission goes on to say that “the impact of the proposed changes to the definition of personal information are

¹⁴ See Children’s Online Privacy Protection Rule, 76 FR 59804, 59811 (Sept. 27, 2011).

¹⁵ See *RealNetworks changes privacy policy under scrutiny*, CNET News (Nov 1, 1999), retrieved at: http://news.cnet.com/RealNetworks-changes-privacy-policy-under-scrutiny/2100-1040_3-232238.html (discussion of privacy implications of GUID usage).

¹⁶ LSOs were first introduced in Flash Player 6, released in 2002. See *What are third-party locally shared objects?*, retrieved at: <http://www.adobe.com/sea/special/products/flashplayer/articles/thirdparty/lsos/>.

¹⁷ *Id.* at 59806, 59807.

¹⁸ *Id.* at 59807.

significantly narrowed by the fact that COPPA only applies to the finite universe of websites and online services directed to children and websites and online services with actual knowledge.”¹⁹

We disagree with the Commission’s assertion that the impact of proposed changes to the definition “personal information” will be limited to only those “websites and online services directed to children and online services with actual knowledge.” To avoid any potential COPPA issues, many general audience websites and online services already screen users for age before allowing them to use their services. The Commission’s proposed changes to the COPPA Rule will likely cause other operators of general audience websites and online services (many of which do not currently collect “personally identifiable information” from users) to do the same, which will: (i) cause those websites to collect at least some personally identifiable information from users to ensure compliance with COPPA;²⁰ and (ii) even further reduce the number of general audience websites and online services available to children under 13.

The proposed revisions to the definition of “personal information” will also impose even greater requirements on currently COPPA-compliant operators of websites and online services directed to children. Operating a COPPA-compliant website or online service can be quite expensive, as operators have to handle parental consents, answer parental inquiries, monitor chat rooms, and ensure children’s information is deleted if parents request it. In Yahoo!’s case, we have created family accounts and accompanying default settings for use of certain features of the site based on the age of the registered user. The costs involved with COPPA compliance already act as a deterrent to operators considering offering websites and services directed to children, with the end result being fewer websites and online services available to children under 13. If the proposed revisions take effect, sites would likely be forced to build systems to comply with the new requirements, such as linking systems that track parental consent with the systems that track information based on persistent identifiers such as those in cookies or other non-personally identifiable information.

In addition to increasing the cost of complying with COPPA, the proposed revisions would also have a potentially significant impact on the operator’s ability to earn revenue from the operation of the website or online service. Yahoo! thinks the determining factors listed in the COPPA Rule’s definition of “website or online service directed to children” are appropriate. However, the nature of the fact-specific test in the definition makes it quite difficult for ad networks to know for certain whether the websites or online services they are working with will ultimately be considered to be “directed to children.” Consequently, if the FTC’s proposed changes to the definition of “personal information” subject to the COPPA Rule take effect, any website or online service that could be deemed to be directed at children would no longer be able to work with ad networks in the same way as sites clearly aimed at users over the age of 13. This will be

¹⁹ *Id.*

²⁰ As we stated previously, Yahoo! agrees with the Commission that when an operator has actual knowledge that a user is a child, that child should receive some protection from interest-based advertising. However, using COPPA to provide such protections is problematic not only because the FTC’s proposed revisions exceed its statutory authority to revise the COPPA rule, but because the resulting increase in the collection of personal information from children under 13 (as well as other users) would interfere with the primary aim of COPPA, which is to protect the privacy of children under 13.

the case because ad networks would likely stop working with any site that might be considered to be directed towards children.²¹

Increasing the burdens associated with compliance while simultaneously decreasing the operator's ability to earn revenue from the operation of the website or online service will create even more reasons for operators to either stop allowing children under 13 to use their websites or online services or to avoid providing child-directed services in the first place. Even more problematic is the fact that there would also be a reduction in the tools available to protect children under 13 generally. For example, Yahoo!'s Family Accounts include default settings for registered users under 13 that prevent such users from creating profiles, participating in chat, or posting information and photos to certain other Yahoo! services. If it becomes too expensive or burdensome for Yahoo! to comply with COPPA while maintaining these services, Yahoo! may be forced to stop offering such services and to block children under 13 from officially registering for a Yahoo! account altogether. It is our fear that if the proposed revisions take effect, age-related default settings and other tools used to create a safer environment for children under 13 will be eliminated as many online services and websites make similar decisions.

Recent studies have shown that many children under 13 already falsify their age (often with the help of their parents) to register for general audience services like Facebook and Twitter, which officially ban children under 13 from using their sites.²² If the number of websites and online services available to children under 13 decreases, it is logical to assume that an increasing number of children under 13 will try to use websites and online services no longer "officially" available to them. The unfortunate consequence of the proposed revisions would mean that children under 13 would still be participating in online activities and accessing online content, but would be doing so with potentially far fewer default settings triggered by age and other protections than are available today.

D. The proposed revisions will actually result in a decrease in privacy.

A decrease in the number of websites and online services available to children under 13 might seem like an acceptable consequence if accompanied by a corresponding increase in privacy protections for children and their parents. However, if persistent identifiers and identifiers that track a user's behavior across different websites and online services are considered "personal information" subject to COPPA even when not combined with information that identifies an individual, operators will likely be forced to either start collecting or increase their collection of actual personally identifiable information in order to ensure they know which users are under 13 so they can ensure the persistent identifiers that might be associated with those users are not used

²¹ Flurry, one of the most used analytics platforms for mobile applications, has already announced that it will no longer allow its platform to be used with applications that are: (i) labeled as "Kids" or "Children" apps; (ii) in connection with any application, advertisement, or service directed towards children, or to collect any personal information of children. <http://www.flurry.com/about-us/legal/privacy.html> (last accessed Nov. 22, 2011). *See*: <http://blog.privacychoice.org/2011/10/25/developer-alert-flurry-analytics-adopts-new-child-privacy-rule/> (last accessed Nov. 22, 2011).

²² *See* danah boyd, Eszter Hargittai, Jason Schultz, and John Palfrey, "Why parents help their children lie to Facebook about age: Unintended consequences of the Children's Online Privacy Protection Act," available at <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3850/3075>.

in violation of COPPA. The direct result of this will be less privacy protection, not only for children under 13, but for their parents and other users as well.

This result would be diametrically opposed to the original goal of COPPA, which was to protect the privacy of children under 13. A decrease in privacy would also be in opposition to the goals laid out by the Commission's in its Staff Report on Privacy ("Staff Report").²³ In the Staff Report, the Commission stated that one of its main goals was to encourage companies to implement the "Privacy by Design" philosophy. Two of the main elements of Privacy by Design are: (i) limiting data collection to only that necessary to fulfill a legitimate business need; and (ii) retaining consumer data only as long as needed for legitimate business purposes. Yahoo!, like many operators, has already invested a great deal of effort and expense to minimize the amount of personal information it collects and retains. If the FTC's proposed definition of "personal information" takes effect, Yahoo! would: (i) be forced to decide whether to continue to offer the services available via Yahoo! Kids despite the increased burden of compliance that would entail; (ii) have to consider getting rid of its family accounts, including deleting existing family accounts and the protection for children under 13 provided through the default settings on such accounts; and (iii) likely have to collect more personal information from all of its users to comply with COPPA.

E. The Commission's proposed inclusion of identifiers linking a child's activities across various websites and online services in the definition of "personal information" is problematic.

The Commission's proposal to include in the definition of "personal information" identifiers "that link the activities of a child across different websites or online services" without those identifiers being linked to personally identifiable information is also problematic and could have severe implications for the current Internet business model. As explained above, many operators contract with third parties to serve customized advertisements and other content based on such identifiers. Defining such information alone as "personal information" will be very problematic on a practical level, as there are many scenarios in which neither the operator nor third parties delivering content/ads would have any way of knowing whether a specific persistent identifier was associated with or used by a child under 13, but the website may be deemed to be directed, at least in part, at children. This could implicate third parties who: (i) do not operate websites or online services; and (b) do not have "actual knowledge" that those identifiers are associated with a child under 13. In fact, the Commission specifically acknowledges this issue in the Notice, stating that "an advertising network or analytics service that tracks a child user across a set of websites or online services, but stores this information in a separate database rather than with the persistent identifier, would be deemed to have collected personal information from the child under this proposed paragraph."²⁴ This would be true if the network collects information that are later determined to be directed at children. If that becomes true, all of the advertising network's data would have been collected in violation of COPPA, even though the result was not contemplated at the time.

²³ See *A Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (Dec. 1, 2010).

²⁴ See *Children's Online Privacy Protection Rule*, 76 FR 59804, 59812 (Sept. 27, 2011).

The Commission's assertion that ad networks would be implicated by the collection of information even though such ad networks would not: (i) be operating websites or online services; or (ii) have actual knowledge that such information was associated with a child under 13 is somewhat inconsistent with its prior assertion that websites and online services not deemed to be targeted to children under 13 would not be covered by COPPA absent "actual knowledge" that they were collecting personal information of children under 13. In reality, the proposed revisions to the rule would mean that ad networks would refuse to work with any website or online service that might possibly be deemed to be "directed to children" for fear of becoming liable for COPPA violations. As previously stated, this would have a severe impact on the ability of operators, particularly small operators more reliant on advertising revenue, to continue to provide innovative services and content appropriate for children under 13.

In essence, the Commission seems to be saying that the Internet has become particularly unsafe for children under 13 if they are tracked with persistent identifiers (again, many of which have been designed to enhance privacy by not using traditional personally identifiable information), and that the COPPA Rule should be changed to prevent any tracking of children's behavior online. The unintended consequence of this position will be to reduce the online safety of children under 13, as the elimination of many websites and online services directed at children under 13 will also result in the elimination of the corresponding privacy and safety controls those websites and online services currently provide. To prevent this result, the Commission should exclude persistent identifiers from the definition of personal information in the Rule.

In addition to the potentially severe impact on the operation of websites in general, the proposed revisions also exceed the Commission's statutory authority to amend the COPPA Rule's definition of "personal information." The ability to include identifiers permitting operators to contact specific individuals was not intended to include information used only to serve targeted content and/or advertisements. The online delivery of targeted content and advertisements to users is analogous to the practices of many newspapers when they include in newspapers delivered to subscribers living in different neighborhoods advertising inserts tailored to particular subscribers. The third parties creating and delivering customized content and online advertisements are no more "contacting" the end user than the retailer placing the ads and the vendor that creates the different targeted advertising inserts for the newspaper publisher is "contacting" individual newspaper subscribers. Simply put, displaying different content on a device based on persistent identifiers is not the same as contacting a child.

F. The retroactive effect of the proposed changes to the definition of "personal information" on parental notice and consent requirements is unclear.

The Commission's proposed changes to the definition of personal information would materially change the scope of information currently covered by the COPPA Rule. Such a material change would have the (potentially unintended) result of forcing operators to go back to parents who had previously consented to allow the operator to collect personal information (as defined in the current Rule) to obtain those parents' consent to collect those new elements added to the definition of personal information in the revised Rule. In Yahoo!'s view, this is another example of how the Commission's proposed revisions to the definition of personal information would increase the costs associated with COPPA compliance without providing a corresponding increase in privacy protection for children. At the very least, Yahoo! suggests the Commission

clarify that the revisions to the definition of “personal information” would be prospective and would thus not require operators to re-obtain parental consent for collection of children’s information, or that the greater consent to collect personally identifiable information includes the lesser consent to use persistent identifiers.

4. Proposed definition of “support for internal operations of the website”

In various sections of the Notice, including the sections on actual knowledge and parental consent mechanisms, the Commission states that it wants to encourage innovation on the part of operators. The narrow language in the Commission’s proposed definition of “support for internal operations of the website,” however, would not necessarily allow operators to use screen names or persistent identifiers of children under 13 to improve existing features of a website or online service or to develop features or services without obtaining parental consent for such use. This would put an additional compliance burden on operators and hinder innovation in the development of new content and services for children.

Rather than defining a narrow set of uses that are allowed for “support for internal operations of the website,” Yahoo! suggests that the Commission take a different approach and define those uses that would not be considered “support for internal operations of the website,” leaving other options that would not violate the purpose of the COPPA Rule available for operators. As an alternative suggestion, Yahoo! proposes amending the Commission’s proposed language as follows:

Support for the internal operations of the website or online service means those activities necessary to maintain the technical functioning of the website or online service, to improve the features of the website or online service or develop new features or services, to protect the security or integrity of the website or online service, to fulfill a request of a child as permitted by §§ 312.5(c)(3) and (4), or used in any other way for internal purposes and not for the purpose of initiating contact to a user or disclosing the information to a third party.

5. Proposed data retention and deletion requirements.

The Commission proposes to add a requirement for operators to only retain “personal information” collected online from a child for as long as “reasonably necessary” for the purpose for which it was collected, and further proposes to require operators to securely delete the information using “reasonable measures” to protect against unauthorized access to the information. Yahoo! supports this recommendation, as it believes it already complies with these proposed requirements with regards to information falling under the current definition of “personal information” in the COPPA Rule.

However, implementation of both the data retention and deletion requirements and the Commission’s proposed revisions to the definition of “personal information” subject to the COPPA Rule would significantly increase the burden of compliance on entities that, like Yahoo!, have already gone to the effort and expense of implementing processes to minimize the retention of personally identifiable information. Those entities would be forced to develop and implement additional procedures and processes to identify those IP addresses and persistent identifiers collected from children under 13 not otherwise linked to identifiable users, which would be considered “personal information” under the Commission’s proposed revisions. In order to

accomplish this, Yahoo! would likely need to: (i) collect personally identifiable information from children under 13 and/or their parents in order to segregate the information and ensure it was deleted in a timely and secure fashion; or (ii) associate IP addresses and persistent identifiers not otherwise linked to an identifiable user with personally identifiable information in order to ensure timely deletion. In either case, the privacy of users will be diminished.

Again, thank you for the opportunity to comment on the proposed revisions. Yahoo! looks forward to working with the Commission as it drafts a final COPPA Rule during the coming months.

Respectfully submitted,

A small, dark, handwritten mark or signature, possibly a stylized letter or symbol, located below the "Respectfully submitted," text.

Leslie S. Dunlap

Vice President, Privacy, Policy and Trust

Yahoo! Inc.