

Before the
Federal Trade Commission
Washington, D.C.

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

COMMENTS OF
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

In response to the Federal Trade Commission (FTC) release of a proposed *Children’s Online Privacy Protection Rule*, and request for comments, the Computer and Communications Industry Association (CCIA) submits the following comments.¹

CCIA is an international non-profit trade association dedicated to open markets, open systems, and open networks. CCIA members participate in many sectors of the computer, information technology, and telecommunications industries and range in size from small entrepreneurial firms to some of the largest in the industry. CCIA members employ nearly one million people and generate annual revenues exceeding \$220 billion.²

The FTC’s proposed rule was obviously the result of many hours of thoughtful consideration and CCIA thanks the staff for their hard work. These comments will focus on two areas of the proposed rule in particular: the new proposed definitions of “personal information” and the public comment structure for official pre-approval of methods to acquire verifiable consent.

I. Introduction

The protection of children’s privacy online is one of the most vital endeavors that government can undertake. The Children’s Online Privacy Protection Act was a landmark bill that drew careful lines with the goal of protecting children and informing parents, while still

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

² A complete list of CCIA’s members is available online at <http://www.ccianet.org/members>.

promoting innovation and the delivery of content and interactive services to children.³ By no means is it perfect, which is why we are glad to see the FTC revisiting the accompanying rules from time to time, but it does much to accomplish sometimes conflicting goals.

As the Internet continues to grow in scope and access expands to a greater number of households, more and more children are finding their way online. In so many ways, this is an positive development. The opportunities for education, socialization, and play for children are unprecedented. Websites such as the Khan Academy are using videos and interactive exercises to teach children from around the world everything from arithmetic to cosmology.⁴ Children are also using video chat services such as Google Chat to keep in touch with grandparents who are out of state, siblings off at college, and parents deployed to war zones.⁵

Balancing the potential of these services with the need to protect the privacy of young children is a delicate act. CCIA appreciates the hard work of the Federal Trade Commission in this area. We also appreciate the FTC's willingness to explore innovative solutions to these problems, and to encourage industry to seek out the best ways to respect children's privacy while bringing them new services to help them learn and play.

II. Two Notes of Support

While CCIA has two places where we believe the FTC needs to revisit their proposed rule, there are also a number of issues where we believe the Commission took the correct approach. The FTC took an important step toward promoting Internet innovation and children's freedoms when they declined to recommend raising the COPPA age limit above 13, and by keeping an actual knowledge standard, rather than calling for a constructive knowledge standard.

The original age limit of 13 in COPPA is the result of a careful negotiation that happened during the time that COPPA was first written. It is carefully crafted to protect those most vulnerable without burdening those beginning to grow into adulthood. While some have argued that COPPA should also apply to teenagers, adolescents in their teens are no longer quite as impressionable as those below thirteen, and are increasingly able to decide for themselves how they wish to manage their online privacy.⁶ The FTC also clearly recognized that raising the

³ Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506 (2011)

⁴ Khan Academy, <http://www.khanacademy.com/>.

⁵ Google Talk, <http://www.google.com/talk/>.

⁶ *E.g.* comment in response to the FTC's April 5, 2010 Federal Register document by Common Sense Media, at 1.

applicable age in COPPA threatens to run afoul of Constitutional protections for the free speech of teenagers.⁷ We are encouraged to see that these concerns have been kept in mind, and that the Commission affirmatively decided not to advocate for raising the COPPA age limit.

The proposed rules would also maintain the current requirement for actual knowledge of children using a site as a prerequisite for coverage under COPPA. Some observers have recommended in the past that the rule should cover sites that ought to have knowledge of children's access. While it may seem appealing to expand the scope of websites covered by COPPA to include those where children may visit or probably visit, the burden that such a change would place on the everyday operation of the Internet would be simply untenable. Such a change would require a vast increase in the amount of data each website would be forced to gather on all of its visitors, just to ascertain who among them were below 13 and how to contact their parents. The proposed rule shows that the FTC understands the difficulties that a constructive knowledge standard would pose and we are glad to see that they declined to advocate that approach.

III. Expanding the Definition of Personal Information

The proposed rule intends to expand the definition of personal information to cover a number of new items. In particular it would now include items such as IP address and other unique IDs such as cookie identifiers. While CCIA supports the overarching goal of preventing interest-based advertising of children, we are worried that accomplishing that goal in this way may have other unintended affects.

First, it is important to point out that given modern technological realities, such as Dynamic Host Control Protocol and Network Address Translation (both of which are protocols for distributing IP addresses), not to mention houses in which multiple people share one computer or handheld device such as a tablet, it simply cannot be said that an IP address defines one particular person. The Commission is correct when it states in its commentary to the proposed rule that the COPPA statute clearly considers address and phone number to be personal information, despite the fact that both may only describe a household and not an individual. IP addresses, however, are distinct from both addresses and phone numbers. Neither of those will

⁷ See, e.g., Adam Thierer, *Kids, Privacy, Free Speech & The Internet: Finding the Right Balance*, 6-7 (Mercatus Center) (2011) available at http://mercatus.org/sites/default/files/publication/Kids_Privacy_Free_Speech_and_the_Internet_Thierer_WP32.pdf

change much in the long term. An IP address, on the other hand, is generally shared among all of the customers of a particular Internet Access Provider (IAP), and may be rotated among those customers with some regularity, depending on the policies of the IAP.

Furthermore, even if such a definition facilitates some policy goal within the framework of COPPA, it is a dangerous step because of the unintended consequences that will ensue when others look to the COPPA Rule and use that definition in a different context where it may be misused. Even if there were no risk of unintended consequences, the fact would remain that the FTC is restricted to defining within the scope laid out by COPPA, and there would be a serious question (as laid out above) about whether having an IP address alone could make it possible to contact an individual.

The primary policy concern that CCIA has with the proposed approach is that it focuses its attention on a particular technology rather than the undesired use of the technology. As the Commission pointed out in its proposal, IP addresses, cookies, and other similar technologies have plenty of uses that pose no privacy implications. The proposed rule aims to account for that fact by carving out an exception to the rule. While we appreciate the existence of this exception, CCIA is still worried that this approach to dealing with the problem is overbroad in its attention to the entirety of a particular technology.

The proposal runs the risk of being overbroad because of its focus on technology rather than policy. By sweeping in all uses of cookies, or all uses of IP addresses, the proposal casts too wide a net, and runs a very real risk of creating unintended side effects. While the proposal includes a few exceptions for behaviors that the Commission does not consider to be harmful to children, these are narrow and, more importantly, immobile short of another rulemaking. If an innovative use of these technologies arises that provides some benefit but poses little or no privacy threat, its use may still be swept in by the proposed language.

The new definition of personal information also raises the concern that it may cause some websites to begin collecting information about its visitors where it had not done so before. Websites that fall under COPPA and are using unique identifiers other than for internal site operations, but who gather no additional personal information, will have to obtain parental consent under the proposed rule. Obtaining that consent will, of course, require collecting contact information from the user, and in some cases more sensitive data from the parent (e.g., credit card number, driver's license number, or Social Security number). While COPPA restricts

how that contact information may be used, it remains the fact that data that is not collected cannot be lost, misused, or abused.

Finally, this proposed change to the personal information definition raises a number of collateral questions about advertising networks that must be explored as well. For example, if an advertising network is going to use a persistent identifier to serve interest-based advertising on a variety of websites subject to COPPA, how does the consent process operate? Must each individual website operator that serves an advertisement obtain parental consent? Or is it the advertising network's job to do so? If the network is responsible, do they need to get a separate consent for each site on which they place ads or is once enough?

Similarly, there are unanswered questions about the exception within the definition of personal information. What constitutes "support for the internal operations of a website?" To give what is a quite mundane example in today's web, imagine a video sharing website that permits individual videos to be embedded in other websites and uses unique but anonymous cookies to gather statistics about how many separate people viewed each video, across the web. If a video is embedded in a website subject to COPPA, what is the result (setting aside for the moment how the video site operator would even know whether the hosting site is covered)? The cookie in question could be said to be used for the internal operations of the video sharing site. It could just as reasonably be said to be an extraneous feature not strictly necessary for sharing video. If it is the latter case, must some lawyer for the video sharing site now visit every single web page where its videos are embedded and attempt to make a determination about whether each one is somehow subject to COPPA?

These questions (and the many others like them) illustrate how complex this change is. Unfortunately, the proposed rule doesn't go nearly as far as would be needed to answer them. This uncertainty will discourage the generation of content for children, and will go far to bury the ad supported model for children's web sites. Unfortunately that change can only be bad for children. COPPA today is already difficult for web providers to navigate and we see the results in the small number of companies participating in self-regulatory programs.⁸ CCIA hopes that the FTC will keep in mind the possibilities that the ad-supported model allows and work to

⁸ Compare Children's Advertising Review Unit Safe Harbor Program Participants, <http://www.caru.org/support/supporters.aspx> with Digital Advertising Alliance Participating Companies, <http://www.aboutads.info/participating> (showing a large number of companies participating in the online behavioral advertising self-regulation program and relatively few participating in the COPPA safe harbor program).

balance children's privacy and children's access to content and services.

IV. Methods of Obtaining Consent

The FTC has taken great steps to encourage innovation in the methods of obtaining verifiable parental consent, and CCIA is encouraged to see progress being made in this area. In particular, the idea of obtaining formal FTC approval of proposed means of obtaining consent encourages innovation while providing the sort of definite answers that can be relied on when starting new businesses and looking for investment. Two relatively small concerns bear mentioning in this context that, if addressed, could make the approval process immensely valuable.

First, the Commission should revisit the 180-day time span in the proposed rule. In the world of Washington, DC policy-making, six months may seem like a fantastically quick turn around. The development of online services, on the other hand, moves at a much quicker pace. Whole industries can shift and opportunities can fly by in six months. In order to be relevant and useful to industry, the Commission should find a way to make the proposed process workable in a shorter time period, if possible.

Secondly, by and large CCIA is a strong believer in the public comment process and the openness that comes along with it. Therefore, using such a process to evaluate consent mechanism proposals is an excellent suggestion. However, the Commission might consider an alternate private track that would not involve publishing the consent method, at least immediately. This alternative would be useful in cases where the method itself could be considered proprietary technology or a competitive advantage. Even if it is only seldom used, the existence of this option may encourage the development of innovative consent technologies.

This approach to approving methods of gaining consent is an excellent step toward encouraging innovation in the application of COPPA, providing assurances to companies interested in engaging in children's web services, and ensuring that parents are engaged in the handling of their children's information. With the few small changes outlined above, it could be a powerful tool. Without them, however, there is a great risk of stagnation in the development of novel consent tools. We are confident the Commission desires that as little as the industry does.

In addition, the Commission could further empower parents and foster innovation by clarifying that a platform provider may streamline the notice and parental consent requirements

where a number of different operators offer separate online services through its platform. The online environment today increasingly involves multiple operators offering various applications, games, and other services through a single online platform. In these “multiple operator” scenarios, a platform operator could notify parents that a number of operators provide online services through the platform, generically describe the types of online services that these operators provide, and explain that these operators may collect and maintain the child’s personal information to engage in support for the internal operations of the online service. What constitutes “support for the internal operations” of the online service will necessarily depend on the context, but, at minimum, should include service fulfillment, user authentication, improving navigation within the online service, maintaining user preferences, serving first-party and contextual advertisements, and protecting against fraud and theft.

In addition, the platform operator or the third-party service provider could provide the parent with just-in-time notice whenever the parent’s child uses or installs an online service offered by the operator for the first time. This just-in-time notice could include, for example, a brief description of the online service and a link to the other operator’s online privacy policy for children’s information.

To the extent the other operator would like to use the child’s personal information for purposes beyond support for internal operations, that operator would be responsible for independently providing the parent with notice of these uses and obtaining verifiable parental consent, consistent with the COPPA Rule.

This approach empowers parents in several different ways. First, it ensures that the parent receives accurate notice at the time when notice is most relevant to the parent—i.e., when the child actually wants to use, play, or install the online service in question. Second, it couples just-in-time notice with an opportunity for the parent to exercise choice over how his or her child’s personal information is collected, used, or disclosed by third-party operators who use a single platform. This approach advances COPPA’s aim of enhancing parents’ ability to understand, control, and supervise their child’s online activities. It also is consistent with foundational principles discussed in the Commission’s recent preliminary staff report, including simplified notice for commonly accepted practices, just-in-time notice for practices requiring choice, and clearer and shorter privacy notices.

The streamlined approach described above also would promote COPPA’s goals in

another way: it would encourage developers to create content and services for children. Many developers who create applications or features for integrated online platforms do not have the resources to independently acquire verifiable parental consent, which continues to be a costly process. By allowing platform operators to provide notice and obtain consent on behalf of developers who agree to only use children's information for commonly accepted practices, the Commission could promote innovation and the production of rich online content for children.

V. Conclusion

Many of the new rules that the Commission has proposed are common sense changes to update an old rule for a new era, however a few of them, while no doubt well meaning, should be revisited. Seeking to prevent the online tracking of children without parental consent is a goal that CCIA agrees with. Doing so by twisting definitions to encompass what they clearly were not intended to address, however, invites confusion and unintended consequences. The FTC's rules should straightforwardly regulate what needs to be regulated and construct definitions to serve that purpose, rather than the other way around.

Similarly, CCIA is excited about the prospects for official recognition and approval of innovative means of obtaining parental consent. It could be a great incentive to innovation in the area, and could provide much needed assurance to companies seeking to enter the space. A few small tweaks to the Commission's proposal, however, could do much toward making sure that the proposed program is used to its fullest extent.

By and large, however, the proposed rule is a welcome update and the Commission is to be congratulated on taking a measured but fruitful approach to modernizing the COPPA rule. In particular, CCIA is happy to see the FTC decline to advocate for a change to the threshold age and the actual knowledge standard in the law. We look forward to the opportunity to work with the FTC in the future on this and other important privacy issues.