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VIA ONLINE SUBMISSION

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: In the Matter of COPPA Rule Review, 16 CFR Part 312, Project No. P-104503

The Walt Disney Company (“Disney”) is pleased to submit these comments in response to the Federal Trade Commission’s (“FTC”) request for comments on proposed revisions to the Children’s Online Privacy Protection Act (“COPPA”) Rule.¹ Disney’s comments, which are intended to provide constructive feedback on the COPPA Rule and the Commission’s proposed changes to it, are framed in part by changes in the Internet experience, an analysis of how the online industry, parents, and children have responded to the existing COPPA framework over the past several years, and the practical effect that this has had on fulfilling COPPA’s privacy objectives under the current Rule. Disney also provides these comments in light of its role as a provider of family entertainment and premium content on and off the Internet, and its commitment to achieving the privacy goals of COPPA and the FTC.

Disney’s comments address how the COPPA Rule and the FTC’s proposed revisions to it would affect, in particular, family-friendly websites and online services that attract users of all ages, and concerns over the extent to which the proposed Rule changes may inadvertently affect online innovation and children’s privacy protections going forward. The comments introduce several solutions for the Commission’s consideration that would meet the Commission’s objective for furthering the Rule’s privacy goals. Specifically, Disney proposes an expanded approach that aims to: better protect children’s privacy and encourage parental engagement in light of the reality of children’s current Internet use; provide online operators that offer content and services that appeal to families with appropriate incentives to invest in both child-oriented content and an engaging family context; and result in a greater number of online services that proactively protect the privacy of children where they now traverse the Internet. The comments further set forth legal frameworks within COPPA by which the Commission can implement Disney’s proposed solutions.

In addition, the comments also describe new parental verification mechanisms that can leverage current platform technologies to improve transparency and parental control, and we encourage the Commission to use its leadership position to foster continued dialogue between industry and consumers on new verification solutions. Lastly, the comments highlight proposed

¹ Children’s Online Privacy Protection Rule, 16 C.F.R. Part 312.

changes to definitions within the Rule that Disney believes would benefit from further modification, clarification, or review.

I. The State of Children's Online Privacy

A. COPPA's Early Legacy

The ongoing and rapid evolution of the Internet during the past ten years — recently punctuated by the broad adoption of social networking and mobile platforms and an increase in the amount of time that people of all ages spend online — has proven the FTC prescient when it supported Congressional efforts in the late 1990s to pass children's online privacy protection legislation. In 1997, only 3.5 million U.S. children ages 12 and under were online,² which represents a fraction of the more than 20 million children under age 11 who are online today,³ or the 25.7 million children expected to be online by 2015.⁴ Moreover, when COPPA was enacted in 1998, digital media, interactive games and activities, social media, and the mobile Internet were still nascent forms of communication, and online interaction was limited primarily to chat rooms, instant messaging, and email accessed through a family's home desktop computer. Nevertheless, the FTC rightly recognized that emerging web-based information collection practices had “real world consequences for family privacy and security.”⁵

The Commission's support for COPPA was largely a response to two principal concerns: (1) children's personal safety and protection from online predators in light of the increased access to children's personal information; and (2) parents' lack of visibility with respect to the information that online merchants were collecting from children using active methods (questions posed directly to children online) and passive methods (persistent identifiers such as cookies). The Commission's concerns were based on its own survey research involving more than 1,400 websites, which showed that few websites directed to children had meaningful mechanisms to engage parents before collecting their children's information.⁶ In addition to these concerns, the FTC was mindful about ensuring that the COPPA Rule maintained children's access to the Internet, preserved the interactivity of the online medium, and minimized the burdens of compliance on companies, parents, and children.⁷ In response to these concerns and objectives, and pursuant to the COPPA statute, the FTC implemented the COPPA Rule in April 2000.

² *Protection of Children's Privacy on the World Wide Web Before the Subcomm. On Commerce, Science, and Transportation of the Sen. Comm. On Commerce, Science and Transportation* (Sept. 23, 1998) (statement of Robert Pitofsky, Chairman, Federal Trade Commission).

³ Stephanie Reese, *Report Roundup – Demographics*, eMarketer (Mar. 21, 2011), available at <http://www.emarketer.com/blog/index.php/tag/number-of-children-online/>.

⁴ *Id.*

⁵ Pitofsky (Sept. 23, 1998).

⁶ Martha K. Landesberg, Toby Milgrom Levin, Caroline G. Curtin, Ori Lev, *Privacy Online: A Report to Congress*, Federal Trade Commission (June 1998) at iii.

⁷ Children's Online Privacy Protection Rule; Final Rule, 64 Fed. Reg. 59889 (Nov. 3, 1999).

In 2006, the FTC declined to modify the COPPA Rule after concluding that the Rule provided “a workable system” to help protect the online safety and privacy of children using the Internet.⁸ Among its findings, the Commission determined that the Rule did not adversely affect the number of websites directed to children and had proven “effective in applying [its] flexible standard . . . to new online services.”⁹ The Commission, however, was cognizant of the initial shifts in Internet use trends brought about by the availability of new services and platforms and the convergence of wireless and landline communications with the Internet.¹⁰ Indeed, the FTC recently cited these factors as the rationale for the current accelerated review of the COPPA Rule.¹¹

B. As the Internet Has Evolved, the COPPA Rule Has Resulted in Unintended Consequences that Do Not Advance the FTC’s COPPA Objectives

As noted above, the FTC originally sought to structure the COPPA Rule to ensure that it would maintain children’s access to the Internet, encourage the interactivity of the online medium, and minimize the burdens of compliance on companies, parents, and children.¹² In 1998, for example, the Commission recognized that “the Internet presents children with an extraordinary new means to tap into rich sources of information that previously were difficult to access, and to communicate with their peers and others in ways never before imaginable.”¹³ Yet even with the technological advancements at that point in time, the FTC could not have anticipated the extent to which the Internet would soon be interwoven in daily life, how consumers of all ages would embrace online services and new platforms, or the degree to which consumers would come to expect and demand increasingly interactive online content.

The extent to which children now use the Internet, including the wide variety of online services and social networks not specifically designed for them and available through a variety of platforms, is a prime example of user trends that could not have been anticipated when the COPPA Rule was first promulgated. Today, 22 percent of children between the ages of 5 and 8 use a computer at least once a day, with another 46 percent who use a computer at least once a week, to watch videos, play video games, or listen to music.¹⁴ Indeed, research published in

⁸ *Consumer Privacy on the World Wide Web Before the Subcomm. On Telecommunications, Trade and Consumer Protection of the H. Comm. On Commerce* (July 21, 1998) (statement by Robert Pitofsky, Chairman, Federal Trade Commission) at p.28.

⁹ *Implementing the Children’s Online Privacy Protection Act*, Federal Trade Commission Report to Congress (Feb. 2007) at 2.

¹⁰ *Id.* at 27.

¹¹ *An Examination of Children’s Privacy: New Technology and the Children’s Online Privacy Protection Rule Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. On Commerce, Science and Transportation* (statement by Jessica Rich, Deputy Director of the Bureau of Consumer Protection at the Federal Trade Commission) (Apr. 2010).

¹² Children’s Online Privacy Protection Rule; Final Rule, 64 Fed. Reg. 59889 (Nov. 3, 1999).

¹³ Pitofsky (Sept. 23, 1998).

¹⁴ Common Sense Media, *Zero to Eight: Children’s Media Use in America* (Fall 2011), available at <http://www.commonsensemedia.org/sites/default/files/research/zerotoeightfinal2011.pdf>.

2011 shows that children between the ages of 8 and 10 spend at least 46 minutes each day on a computer, with the primary activities including social networking, playing games, visiting websites, and watching online videos.¹⁵ Children also are increasingly using mobile devices to access online services. Eleven percent of all children between the ages of 0 and 8 use a cell phone, Mp3 music player, mobile tablet, or similar device for media consumption, spending an average of 43 minutes each day on these devices.¹⁶ Notably, the wireless mobile tablet is the most desired consumer electronic product among children for the holiday season of 2011, with interest in the tablet significantly greater among younger children (44 percent for children ages 6-12), than it is for consumers age 13 and older (24 percent).¹⁷

In short, the Internet is now inextricably woven into the fabric of daily life for most families. Moreover, as the Internet has become increasingly embedded in the household, social norms with respect to Internet use have shifted, and the content viewed online is increasingly done so in a multi-generational context. In 2008, the Pew Research Center conducted a study which found that technology is enabling new forms of family connectedness that revolve around “communal Internet experiences.”¹⁸ Twenty-five percent of respondents in the study said that their family is closer, in part, due to the Internet, versus less than 14 percent who said that the Internet has contributed to the family becoming more distant.¹⁹ A prime example of this multi-generational dynamic is the online video game industry, where the average player is 33 years old. A 2007 survey of adult “gamers” — including parents who themselves grew up playing video games — indicated that 27 percent of the respondents spend more than one hour per week playing online video games together with their children.²⁰

The evolving patterns of Internet use among family members, coupled with the emergence of highly-interactive online platforms, inevitably means that more children frequent general audience online sites that are not designed for or directed to children. Importantly, evidence suggests that these trends are consistent with parent’s expectations. Forty-five percent of 12-year old children now use a social network site to communicate with friends and family,²¹ and many do so with their parents’ direct involvement and consent. Panelists in the FTC’s 2010 COPPA Rule Review Roundtable, for example, described parents’ desire for their children to

¹⁵ Victoria J. Rideout, Ulla G. Foehr, and Donald F. Roberts, *Generation M² – Media in the Lives of 8- to 18-Year Olds*, Kaiser Family Foundation (Jan. 2010).

¹⁶ Common Sense Media (Fall 2011) at 9.

¹⁷ Nielsenwire, *U.S. Kids Looking Forward to “iHoliday” 2011* (Nov. 17, 2011), available at <http://blog.nielsen.com/nielsenwire/consumer/us-kids-looking-forward-to-iholiday-2011/>.

¹⁸ Tracy L.M. Kennedy, Aaron Smith, Amy Tracy Wells, Barry Wellman, *Networked Families: Parents and Spouses Are Using the Internet and Cell Phones to Create a “New Connectedness” that Builds on Remote Connections and Shared Internet Experiences*, Pew Internet & American Life Project (Oct. 19, 2008)

¹⁹ *Id.* at 29.

²⁰ Alexandra Macgill, *Is Video Gaming Becoming the Next Family Bonding Activity?*, Pew Research Center (Nov. 19, 2007).

²¹ Amanda Lenhart, Mary Madden, Aaron Smith, Kristen Purcell, Kathryn Zickuhr, Lee Rainie, *Teens, Kindness and Cruelty on Social Network Sites*, Pew Research Center (Nov. 9, 2011) at 17.

more easily connect with family members as a catalyst for young children to create accounts on general audience social network sites.²²

Similarly, in a recent national study of parents with children ages 10-14 that was presented in the peer-reviewed online journal *First Monday*, 78 percent of the respondents believed that communicating with family and friends, educational purposes, and keeping pace with classmates' online habits provided adequate justification for a child to register for an online service even if the child does not meet the minimum age requirements.²³ The survey, which was conducted by researchers at Harvard, Northwestern, New York University, and University of California, Berkeley, also revealed that more than half of the parents with a 12-year old child were aware that their child maintained a social networking site account — 82 percent of the parents knew when their child had registered their account, and 76 percent of the parents assisted the child in creating the account.²⁴ In questioning the efficacy of the current COPPA framework in light of children's gravitation to Internet content not directed to them, the researchers noted that most parents prefer “an emphasis on better mechanisms for getting parents involved in [children's online privacy] while only about a tenth wanted the focus to be on restricting access for children.”²⁵ In other words, most parents want enhanced transparency and parental control with respect to their child's use of general audience websites and online services, rather than restrictions against using them.

In addition to the types of websites and online services now used by children, how online content is accessed and delivered also has changed. Today, online content and services are developed and delivered through a variety of systems, platforms and devices, largely as a result of collaboration among numerous entities, including content providers, Internet-based platforms, telecommunications carriers, device manufacturers, mobile and desktop application developers, and service providers. This multi-party structure, while expanding innovation and enabling new types of online services, features, and accessibility, presents challenges for how a website operator can address transparency and parental control under COPPA. Namely, not all parties in this multi-party structure have incentives under COPPA to invest in transparency and parental control tools, but their efforts and investment are necessary for development of an ecosystem that enables operators to effectively develop and deliver services that best meet the goals of COPPA. Collaboration also is important to ensure that these same principles are achieved regardless of which platform, device or other means in which the online service or site is accessed by the user. Not surprisingly then, it is this collaborative group of entities that may be best-positioned to leverage the cooperative nature of service delivery and implement real-time communications

²² COPPA Rule Review Roundtable, Wed. June 2, 2010 (Comments of Denise Tayloe) at p. 119. (“[T]here are people who advocate kids shouldn't be on social networks, but there are lots of parents who want their kids to have a Facebook account to talk to their cousin or talk to their father who's in the military or whoever it might be . . .”).

²³ Danah Boyd, Eszter Hargittai, Jason Schultz, John Palfrey, *What 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 p. 15.

²⁴ *Id.* at pp. 11-13.

²⁵ *Id.* at p. 22.

with parents, robust parental controls, and innovative platform-based consent mechanisms, provided that adequate incentives exist to encourage investment in these areas.

User expectations regarding speed and ease of use of online services and content also have evolved. Operators are keenly aware that consumers will quickly move on if websites are slow to load, functionality is delayed, or registration-type processes stand between users and their content. Unfortunately, the reality is that parental permission processes themselves can discourage children from accessing services, driving them instead to services that are accessible immediately and without permission processes that result in delay. This reality further discourages operators from seeking to determine which of their users are children.

In addition to these challenges, there is an inherent ambiguity as to whether some websites and online services are in fact “directed to children” because they involve one or more of the factors under the COPPA Rule’s “totality of factors” test.²⁶ And because the COPPA Rule’s implementing requirements that apply to “websites directed to children” do not work well for websites and online services that are used by individuals of all ages (providing a potentially confusing and poor user experience by treating all users as children for the reasons described above), the result is that operators may seek to avoid populating their websites and online services with content that even potentially could be considered family-friendly and, thus, potentially “directed to children.”

Accordingly, the current COPPA framework does not provide incentives for operators to invest in websites and online services that are “directed to children” or those that may be construed as a “website or online service directed to children” based on some interpretations of the “totality of factors” test. This also means that many operators do not invest in solutions for online transparency and parental controls as originally intended by COPPA. Nor do they actively practice data minimization by limiting the need for the collection of personal information at the outset. Rather, the reality is that operators have strong incentives to comply with COPPA by designing their online websites and services so that the sites and services are clearly *not* directed to children, and for the operators to either avoid actual knowledge of a user’s age or block children from participating in their service or accessing their site. Indeed, at present, it is far easier for operators to exclude family-friendly content on their websites and online services, and to avoid actual knowledge of a user’s age or restrict users to those over age 12, than to invest in data minimization and parental consent mechanisms and engender the risk of potential violations under COPPA.

The *First Monday* researchers noted this paradox created by what they termed as “fundamental flaws” in COPPA’s design:

²⁶ Children’s Online Privacy Protection Rule, 16 CFR 312.2 (within the definition of “website or online service directed to children,” the Rule provides that “*In determining whether a commercial website or online service, or a portion thereof, is targeted to children, the Commission will consider the subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities.*”)(current, non-amended version).

By creating this environment, COPPA inadvertently hampers the very population it seeks to assist and forces parents and children to forgo COPPA's protection and take greater risks in order to get access to the educational and communication sites they want to be part of their online experiences.²⁷

The FTC's proposed changes, however, do not address these fundamental challenges because the proposed changes to the Rule are focused on child-directed sites and do not help resolve the ambiguity surrounding online destinations that are frequented by children. Thus, the amended COPPA Rule does not change, increase, or encourage the implementation of further privacy protections by such sites and services, so long as they lack actual knowledge that users are children. Additionally, the FTC's proposed changes to the Rule create new restrictions for websites and online services that are construed as directed to children, which are likely to drive even more operators of websites and online services to forgo investing in family-friendly content and services, and instead focus on controls to avoid knowledge that a user is a child, or to restrict its users to those over 12 years. Panelists in the FTC COPPA Rule Review Roundtables in 2010 discussed the need to avoid perpetuating such "reverse incentives" for operators and, instead, find new ways to engage them in adopting privacy protections.²⁸

Separately, the Commission's proposed changes to the COPPA Rule also may have the unintended consequence of making it more difficult for operators to provide children with rich interactive services directed to them because the Commission's proposal is overly restrictive on the type of data that can be collected to provide basic website or online service functionality. For example, the proposed exception under "*support for the internal operations of the website or online service*" relating to technical support raises concerns because the limitation for technical support does not clearly encompass actions and use of information necessary to provide a positive interactive user experience. Similarly, the proposed broadening of the "*personal information*" definition to include "persistent identifier" will restrict the ability of websites and online services to deliver the desired personalized and optimized content and services expected and demanded by users through the use of first-party cookies, including, for example, providing direct access to a favorite game or feature on the homepage (rather than forcing the user to click through the website on each visit to find the preferred game, service or activity).

Further, the proposed change to include "*screen or user name*" within the definition of "*personal information*," if used other than for supporting the internal operations of the website or online service, may be read to restrict or eliminate certain popular website features that involve the use of an anonymous screen or user name. This interpretation of the proposed change to the Rule is the case even when the screen or user name is not associated with any personal information and does not allow for the user to be directly contacted online by anyone. The proposed change to screen or user name also may be read to restrict the use of a single screen or

²⁷ *Id.* at p. 23.

²⁸ See Comments of Jeffrey Greenbaum, FTC COPPA Rule Review Roundtables transcript at p. 91 (June 2, 2010).

user name on the same website or online service, but which is made available on different platforms.

In sum, while just a few years ago in its 2007 report to Congress, the FTC concluded that the COPPA Rule did not adversely affect “the number of websites directed to children or the ability of children to access online information of their choice,”²⁹ the same can not be said about the outcome with the FTC’s current proposed changes to the COPPA Rule given what we now know about the way that children and families use the Internet. The current proposed changes and resulting unintended consequences would further restrict information collection and use (and thereby stifle innovation and the delivery of content and interactive services that engage users of all ages). This, as a result, will drive children to more sites and online services that are not designed and intended to be used by them, and which lack the types of privacy controls that are on sites and services that are designed for and directed to children. The more restrictive Rule is also likely to dampen incentives for the creation of online services intended for all audiences — children, teens and adults alike — by increasing the risk of being construed as sites or services “directed to children” under the revised Rule.

Thus, the end result of the proposed changes is likely to be an outcome that would undermine two key objectives of the COPPA Rule: (1) placing parents “in control of the online collection and use of personal information from their children,”³⁰ and (2) minimizing the burden on operators that provide interactive online content for children.³¹

II. A Refined Approach Would Foster Privacy Protections and Family-Friendly Content on More Websites and Online Services Used by Children than the Current COPPA Framework

Industry and the Commission should collaborate to address these serious public policy challenges in ways that encourage privacy safeguards and parental controls on the use of children’s information on websites and online services in a manner that facilitates the development and delivery of innovative, interactive online content and services that are enjoyed by users of all ages. To that end, Disney proposes that the Commission recognize an additional classification of websites and online services that will (a) foster an environment where online operators are encouraged to construct and operate websites and online services “directed to children” and (b) contribute to the development of family-friendly websites and online services that achieve COPPA’s essential goals by embracing the Rule’s data minimization, transparency, and parental consent-based privacy protections. The FTC could accomplish this end by providing a clear path for operators of “family-friendly” websites and online services to be assured that they are in compliance with COPPA without having to treat all users of the site and service as though they are children. The Commission could create this path by clarifying within the COPPA Rule that a website or online service that includes family-friendly content attractive to users of all ages, and protects the privacy interests of children who access the site or service in

²⁹ FTC Report to Congress (Feb. 2007) at p. 2.

³⁰ Pitofsky (Sept. 23, 1998).

³¹ J. Rich (Apr. 29, 2010).

a manner that is consistent with the COPPA goals, but does not treat all users as though they are children, would not be in violation of COPPA.

To qualify under this clarification, such family-friendly websites and online services would have to satisfy robust privacy protections that would extend *to all users*, as well as satisfy COPPA's statutory and implementing regulatory requirement that makes it "unlawful for an operator of a website or online service directed to children ... to collect personal information *from a child*"³² without first obtaining verifiable parental consent, thereby exceeding the protections generally extended by general audience websites. In direct recognition of the fact that children are some of the users of these sites, the relevant rules would be designed specifically to determine which users are children before any personal information is collected. When the operator determines a user is a child, the COPPA requirements for treatment of children would then be triggered and applied. However, in direct recognition that the website or online service is designed to span family demographics, unlike for websites and online services directed to children, not all users would be presumed to be children. Rather, these websites and online services would be required to be designed deliberately to avoid the collection of personal information until age of the user is ascertained.

Specifically, under the family-friendly framework recommended by Disney, the FTC could specify a series of requirements that are consistent with COPPA's privacy objectives. For example, first, the operator of a family-friendly website or online service would be required to establish age prior to the collection of personal information³³ from any user in order to obtain the appropriate parental permissions. Prior to the collection of personal information, an operator would be required to request the user's age using an approach that is consistent with current guidance on the proper implementation of age verification questions.³⁴ In instances where the user is identified as being under 13, the operator would then be required to provide an age appropriate experience by either avoiding the collection of personal information for these children, or by providing notice to the child's parent and obtaining affirmative verifiable consent for the collection of the child's personal information in a manner consistent with the COPPA Rule requirements.

Second, the operator would be required to take reasonable measures to delete personal information from postings (*e.g.*, through moderated or filtered chat) within the website or online service to prevent the disclosure of personal information by children under age 13. The operator

³² The Children's Online Privacy Protection Act of 1998, Pub. L. 105-277, at Sec. 1303(a)(1)(emphasis added).

³³ As discussed in greater detail in Section V(B) and (C) below, irrespective of the Commission's decision on whether to adopt the family-friendly website or online service distinction, Disney urges the Commission to modify the definition of "personal information" and "screen or user name" under the proposed changes to the COPPA Rule to exclude first-party tracking of a persistent identifier, and allow screen or user names to be used for participating in interactive website features and to access more than a single website or online service.

³⁴ See TRUSTe, *Complying with COPPA, TRUSTe's Guidelines for General Audience Websites* at 2-3, available at http://www.truste.org/docs/How_to_Comply_with_COPPA.doc.

would be excluded from the moderator requirement only in instances where the operator has actual knowledge that the user of the chat feature is 13 or older.

Third, unless the operator had actual knowledge the user is a child, the operator would not be required to obtain prior parental consent for passive tracking through a persistent identifier on a family-friendly site or online service, and this exception would only apply to those family-friendly websites or online services that meet certain well-defined conditions designed to enhance opportunities for parental control, such as:

- The website or online service provides a clear and prominent opportunity throughout the website and online service for users, including parents, to opt-out of passive tracking by third-party advertisers;
- The website or online service adheres to the Digital Advertising Alliance’s (“DAA’s”) Self-Regulatory Principles for Online Behavioral Advertising.³⁵ Among other terms, these self-regulatory principles provide for ad-based enhanced notice and control opportunities, and do not permit behaviorally targeted advertising directed to children without parental consent;
- The website or online service does not sell or rent children’s personal information, including geolocational data, to third parties without obtaining prior affirmative parental consent.

The following chart helps illustrate how this family-friendly framework would extend and encourage more robust privacy protections, including data minimization, transparency and parental controls, by operators of the different kinds of websites and online services with which children are engaging.

Rules by Type of Website / Online Service

			General Audience
Collection of Personal Information (“PI”)	<ul style="list-style-type: none"> • No collection of children’s PI without prior verifiable parental consent 	<ul style="list-style-type: none"> • Must verify age before collection of PI and obtain verifiable parental consent where user is under age 13 • Take reasonable measures to prevent the disclosure of PI (e.g., through moderated or filtered chat) unless operator has actual knowledge user is an adult 	<ul style="list-style-type: none"> • Collect PI without parental permission or asking age • Moderation of chat is not required

³⁵ See Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009), available at www.aboutads.info/resource/download/seven-principles-07-01-09.pdf.

Passive Tracking	<ul style="list-style-type: none"> • No passive tracking without verifiable parental consent 	<ul style="list-style-type: none"> • Except where the operator has actual knowledge the user is a child, limited exception to consent rule for passive tracking, only if: <ul style="list-style-type: none"> ○ website provides prominent opt-out opportunity ○ Adherence to DAA Principles for Online Behavioral Advertising ○ Does not disclose PI without affirmative parental consent ○ Passive tracking cannot be used for behavioral ads targeted to children, per DAA requirements • Where the operator has actual knowledge the user is a child, no passive tracking without verifiable parental consent 	<ul style="list-style-type: none"> • Allowed for any purpose • No enhanced control options required • Adherence to DAA Principles for Online Behavioral Advertising not required
Precise Location	<ul style="list-style-type: none"> • No collection of precise geolocation information without parental permission 	<ul style="list-style-type: none"> • No collection of precise geolocation information without parental permission 	<ul style="list-style-type: none"> • No restrictions on collection of precise geolocation information

The family-friendly framework proposed by Disney would directly address the public policy challenges confronting all parties affected by the current COPPA framework. Specifically, the approach ensures that there is no dilution of any existing COPPA requirements. That is, where the operator of a family-friendly website or online service is interacting with a user under the age of 13, it must comply with all applicable Rule provisions. But the family-friendly framework encourages enhanced child-sensitive and protective privacy measures by operators of the many sites and online services that are popular with children. The family-friendly framework thus would promote data minimization by restricting the collection of children’s personal information unless obtained with verifiable parental consent, and increase transparency and parental control on such sites by requiring that parental choice mechanisms appear in a prominent, relevant, and easily accessible location on the website or online service. In this way, the framework would give fuller meaning to the privacy protections intended by COPPA by reaching children wherever they are on the Internet. At the same time, by creating greater certainty that doing so would not run afoul of COPPA, this would encourage a larger number and more diverse scope of companies and online platforms to participate in the creation

of family-friendly sites and online services, and embrace principles of parental engagement and privacy by design.

In particular, the proposed framework would facilitate and encourage operators to develop and deliver more online content and services that are family friendly, which directly supports the Commission’s objective of “maintaining children’s access to the Internet, preserving the interactivity of the medium, and minimizing the potential burdens of compliance on companies, parents, and children.”³⁶ The proposed framework would fulfill these objectives by providing a rational path for the development of family-friendly, privacy-protective Internet content and services, which would in turn encourage greater investment in family-friendly services such as premium content incorporated into a family-oriented service. The resulting increase in family-friendly options would provide greater privacy protection to children by giving them more appropriate online outlets than are available today.

Thus, by adopting a new family-friendly option for COPPA compliance, the Commission would provide needed compliance flexibility to encourage a range of business models under which companies could offer valuable interactive content to users of various ages, while at the same time ensuring that children are afforded the privacy protections demanded by COPPA, regardless of the path pursued by the operator. Importantly, however, this proposal would not dispense with the need for rules for website and other online services directed to children where it is appropriate to treat all users as children. For example, some operators may develop a value proposition for a service directed to children, obtain verifiable parental consent at the outset and collect personal information consistent with that consent. Others may choose to develop a family-focused experience and invest in the ability to provide an age differentiated experience that purposefully treats users of various ages differently. Indeed, a new class of websites and services likely some of which today operate as general audience websites, would take advantage of the new opportunity and invest in the creation of family-friendly experiences embracing principles of data minimization, parental control and transparency. The end result, from a public policy perspective, is that children would not be subject to data collection without parental permission and a greater number of websites and online services would incorporate measures that are protective of children’s privacy.

III. Proposed Implementation Approaches for a “Family-Friendly” Framework

The family-friendly framework recommended by Disney would represent a new approach that would advance the COPPA Rule’s principal objectives. As such, Disney respectfully recommends three potential options to implement the framework pursuant to the Commission’s existing authority under the COPPA statute.

³⁶ Children’s Online Privacy Protection Rule; Final Rule, 64 Fed. Reg. 59804, 59889 (Nov. 3, 1999) (to be codified at 16 C.F.R. pt. 312).

A. Clarify A “Family-Friendly” Exclusion Within the COPPA Rule’s Definition of a “Website or Online Service Directed to Children”

As noted previously, many operators struggle with determining whether their website or online service is, in fact, “directed to children” because the site or online service includes one or more of the factors under the COPPA Rule’s “totality of factors” test.³⁷ One way that operators take steps to be confident that they are in compliance with COPPA is to make changes to their site or online service to ensure that it will not be construed as one that is “directed to children” by eliminating from their site or online service some or all of the factors that are part of the Rule’s “totality of factors” test. Because this manner of complying with COPPA (a) deters the creation of family-friendly websites and online services, and (b) does not embrace the privacy protections intended by COPPA on these sites and online services even when children use them, Disney believes that the Commission should implement a family-friendly framework by clarifying within the COPPA Rule that a “family-friendly” website or online service falls within an express exclusion from the definition of a “*website or online service directed to children.*”

The Commission could provide this clarification through its discretion under COPPA by inserting a narrowly-drawn family-friendly distinction into the current definition of “*website or online service directed to children*” that would mandate the framework’s requirements as detailed *supra* in Section II of these Comments. The Commission is well-situated to create such a distinction within the COPPA Rule definitions, as the proposed clarification is supported both by the Act and by precedent where the FTC has instituted carve-outs from regulatory definitions or new requirements within other FTC rules, even where such distinctions were not expressly called for in the implementing statute.

For example, in the current COPPA Rule, the definition of “website or online service directed to children” already provides a clarification of what would not be considered such a website or online service. The Rule provides that “a commercial website or online service, or a portion thereof, shall not be deemed directed to children solely because it refers or links to a commercial website or online service directed to children by using information location tools, including a director, index, reference, pointer, or hypertext link.”³⁸ The family-friendly framework proposed by Disney could be added to this existing exception within the definition of a “website or online service directed to children.”

Similar examples are present in other FTC Rules. For example, the FTC instituted changes within the Telemarketing Sales Rule (“TSR”),³⁹ which are particularly instructive and

³⁷ Children’s Online Privacy Protection Rule, 16 CFR 312.2 (within the definition of “website or online service directed to children,” the Rule provides that “*In determining whether a commercial website or online service, or a portion thereof, is targeted to children, the Commission will consider the subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities.*”)(current, non-amended version).

³⁸ *Id.*

³⁹ Telemarketing Sales Rule, 16 C.F.R. Part 310.

provide an appropriate guide for the proposed revision to the COPPA Rule. The changes to the then-existing TSR Rule, which the FTC believed were necessary to achieve the consumer protection objectives of the TSR, were not based on express language within the implementing statute,⁴⁰ but were made pursuant to the Commission’s authority to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”⁴¹

These include, for example, in 2002, the Commission instituted the national “Do Not Call” (“DNC”) registry.⁴² Despite a legal challenge to the FTC’s authority to create the registry, the Tenth Circuit held that the FTC’s conclusion that it had authority under the Telemarketing Act to enact the registry was a permissible construction of the statute and was entitled to deference.⁴³ The FTC also created a carve-out provision in the TSR by instituting the established business relationship (“EBR”) exception, even though the implementing statute did not provide for such an exception. The exception was instituted by the FTC to avoid detrimental effects to merchants who would be unable to place phone calls to customers with whom they had engaged in a recent transaction.⁴⁴ The FTC reasoned that the EBR exception was “consistent with consumer expectations” and was acceptable as long as it was “narrowly tailored and clearly defined to avoid a loophole that could defeat the purpose of the national do-not-call registry.”⁴⁵

The COPPA statute presents the Commission with a similar opportunity to enhance the COPPA Rule to better protect children while encouraging innovation. And like the EBR exception in the TSR Rule, the family-friendly framework proposed by Disney is wholly consistent with consumer expectations, particularly given the increasingly multigenerational online viewing patterns and parents’ interest in maintaining some form of control over their children’s online experiences on the websites and online services their children use, while also not requiring that all the adult users on a family-friendly site be treated as a child for COPPA purposes. The proposed clarification that the family-friendly category be excluded from the definition of a “website or online service directed to children” can be narrowly-crafted and clearly defined to both align with consumer expectations and fulfill the privacy objectives of the COPPA Rule.

Indeed, in many respects, the Commission’s recognition of the appropriateness of an “age gate” for “teen-directed” websites (*i.e.*, an age verification question that blocks users under 13

⁴⁰ Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. § 6101.

⁴¹ Pub. L. 103-297, 108 Stat. 1545 §3.

⁴² 16 C.F.R. § 310.4(b)(ii)(B).

⁴³ *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228, 1250 (2004); the FTC’s Established Business Relationship Rule was not challenged, although the 10th Circuit did address the FCC’s creation of a similar Established Business Relationship Rule as used within the Telephone Consumer Protection Act, finding it was an appropriate use of the agency’s discretion in furthering the intent of the statute.

⁴⁴ 16 C.F.R. §310.4(b)(iii)(B)(ii).

⁴⁵ Telemarketing Sales Rule, 68 Fed. Reg. 4591 (Jan. 29, 2003).

from using the site), as reflected in the FTC’s COPPA “Frequently Asked Questions,”⁴⁶ demonstrates that the discretion to define websites and online services “directed to children” can include an exclusion for a new category (teen-directed) so long as it includes appropriate protections for children (an age gate). Further, the COPPA Rule provides other exceptions that are not expressly called for in the statute, but nevertheless were instituted by the FTC after weighing factors including cost, the desired child privacy protections, and available technology. For example, the COPPA statute does not distinguish between external and internal uses of personal information, yet the COPPA Rule adopted a sliding scale approach whereby an operator, when collecting personal information only for its internal use, may obtain verifiable parental consent through an email from the parent, so long as the email is coupled with an additional step (the “email plus” method). Notably, the Commission instituted the sliding scale approach after it was “persuaded by commenters’ views that internal uses of information, such as marketing to children, presented less risk than external disclosures of the information to third parties or through public postings.”⁴⁷ Such past actions by the Commission with respect to COPPA provide the appropriate basis under which the Commission can implement the family-friendly framework proposed by Disney.

History supports the FTC’s use of its discretion to provide clarification of specific practices or types of entities that do not fall within a regulatory definition, even where such exceptions were not expressly authorized by the implementing statute but, nevertheless, were deemed by the Commission to be necessary and appropriate to accomplish the statutory mandate in light of dynamics occurring within the environment in which the rule operates.⁴⁸ As we have described, a clarification that provides for a family-friendly, narrowly-crafted exception within the definition of “website or online service directed to children” will position the COPPA Rule to respond more effectively to the present and still-changing online environment for the reasons described above.

B. Safe Harbor for Family-Friendly Websites and Online Services

As an alternative to the definitional approach within the COPPA Rule discussed above, Disney respectfully requests that the Commission consider supporting and encouraging submissions for a safe harbor proposal based on Disney’s proposed family-friendly framework. The FTC has long recognized that industry self-regulation “can respond more quickly and flexibly than traditional statutory regulation to consumer needs, industry needs, and a dynamic marketplace.”⁴⁹ Moreover, the FTC has previously stated that it prefers self-regulation instead of a detailed legislative mandate “because of the rapidly evolving nature of the Internet and

⁴⁶ See FTC, *Frequently Asked Questions about the Children's Online Privacy Protection Rule* at Q. 39, available at <http://www.ftc.gov/privacy/coppafaqs.shtm>

⁴⁷ 76 Fed. Reg. 59819 (Sept. 27, 2011) at n.147.

⁴⁸ In addition to the examples provided, see the Comprehensive Smokeless Tobacco Health Education Act (16 C.F.R. §307.4(b)) (exempts certain advertising from ban on advertising; *see also* the Textile Fiber Products Identification Act (16 C.F.R. §303.43) (provides a due care exception for certain misbranded products).

⁴⁹ FTC Report to Congress, *Implementing the Children’s Online Privacy Protection Act* (Feb. 2007) at p. 22.

computer technology.”⁵⁰ As discussed, given the increasing use of the Internet by children and the speed with which new and highly-interactive online platforms are being introduced into the market, a safe harbor based on the family-friendly framework merits strong consideration.

The COPPA statute allows the FTC to establish a safe harbor for participants in FTC-approved, COPPA self-regulatory programs. To be approved, among other requirements, the self-regulatory program must contain guidelines that protect children’s online privacy to the same or greater extent as the COPPA Rule and ensure that each potential participant complies with the guidelines. Disney’s proposed family-friendly category of websites and online services and corresponding obligations would achieve the requirements for a safe harbor, and would protect children’s online privacy *to a greater extent* than under the COPPA Rule for multiple reasons.

First, if a family-friendly website or online service has actual knowledge that it is collecting a child’s information, it must comply with the Rule’s requirements accordingly. In this way, the family-friendly safe harbor would not permit a work-around of COPPA privacy protections. Rather, the safe harbor could extend privacy protections to more websites and online services than are currently covered by the Rule because the websites and online services lack actual knowledge that some users are children. These additional privacy protections include establishing age prior to the collection of personal information from any user in order to obtain the appropriate parental permissions, and moderating online chat features by all users unless the operator has actual knowledge the user is an adult to prevent the disclosure of personal information—a privacy safeguard that is not required or provided even by many child-directed sites, and thus would protect children’s online privacy to a greater extent than under the COPPA Rule.

Further, a family-friendly website or online service would not sell or rent children’s personal information to third parties unless it had obtained prior affirmative parental consent to do so, would be restricted from using information collected through third-party cookies to deliver behaviorally-targeted advertising unless it provides a clear and prominent opportunity throughout the website or online service for users, including parents, to opt-out of passive tracking by third-party advertisers, and would need to adhere to the Digital Advertising Alliance’s (“DAA’s”) Self-Regulatory Principles for Online Behavioral Advertising, which provide ad-based enhanced notice and control opportunities and do not permit behaviorally targeted advertising directed to children without parental consent. These restrictions on use of third-party cookies also would protect children’s online privacy to a greater extent than under the COPPA Rule.

In sum, these safeguards are far more robust and protective of privacy than what is done currently by many general audience websites and online services that children frequent. Further, because the family-friendly safe harbor would provide greater certainty of COPPA compliance, it would be an attractive option for general audience sites and online services that children are using and will continue to use. At the same time, it would encourage such operators to invest in responsible privacy practices and safeguards, and to create more content and services that are

⁵⁰ Pitofsky (Jul. 21, 1998).

intended for users of all ages, including families. Disney therefore seeks the Commission’s support for a new safe harbor category based on the family-friendly framework.

C. Advisory Opinion that Distinguishes a “Family-Friendly” Website from a “Website Directed to Children”

As an additional alternative to the above-stated proposals, Disney requests that the FTC issue an advisory opinion that would clarify that a family-friendly website or online service is not a “website directed to children” in instances where the website or online service meets the criteria and safeguards described above.

The Commission will consider a request for an advisory opinion in instances where (1) the matter involves a substantial or novel question of fact or law and there is no clear Commission precedent; or (2) the subject matter of the request is of significant public interest.⁵¹ A request for the Commission’s clarification on the family-friendly framework would meet both of these requirements. Specifically, the family-friendly framework is a new proposal that is not currently addressed in the COPPA Rule. However, its adoption or endorsement by the Commission would have significant implications for online operators that offer content that is attractive to a multigenerational audience. Further, as discussed above, consumer involvement in the online environment continues to expand and there is significant public interest in identifying new approaches through which a broader base of online operators can embrace principles of parental engagement and invest in privacy protections for children.

IV. A Cooperative Consent Mechanism May Enhance Parental Verification Efforts

As discussed above, children increasingly are accessing websites and online services through web-based platforms and other online portals that involve collaboration between operators, carriers, manufacturers, developers and service providers. This shift away from direct access to each individual website and online service necessitates the creation of new parental outreach and consent mechanisms that leverage these cooperative service delivery technologies to offer prominent and convenient verification mechanisms that will increase transparency. At the same time, these new technologies create opportunities for improved platform-based parental controls.⁵²

The lack of effective verification methods to determine a child’s age and identify parental relationships remains a vexing public policy challenge and acts as a barrier to broader implementation of COPPA. Parents, children, the online industry, and the Commission have an equally vested interest in this topic, and developing solutions that are appropriate for the online platform environment will require sustained cooperative action. The Commission is in the

⁵¹ 16 C.F.R. § 1.1(a)(2).

⁵² For instance, CTIA, the wireless industry trade association, recently announced the creation of a mobile application rating system that ultimately will lead to member storefronts offering new tools that will provide parents with greater transparency as to the data collection practices of mobile applications and greater ability to control the applications children can access. *See* www.ctia.org/media/press/body.cfm.prid/2147.

unique position to stimulate dialogue and encourage the industry action that is necessary to shift from the present verification model — which requires outreach by each individual website, online service, and platform — to a more streamlined, contextual approach that can better achieve the privacy objectives of COPPA as young children continue to expand their online footprint.

One practical approach to verification that is well-suited to the web-based platform environment would involve creating a simple ecosystem solution — a “Kids Privacy Portal” — through which parents can express privacy preferences in one place for multiple online activities. Participating operators would agree to abide by the privacy permissions established by the parent, providing parents with a one-stop control center.

A Kids Privacy Portal solution would allow parents to grant permission for their child to participate in an online service that intends to collect personal information from their child. Parents could obtain a username and password that allows them to register directly on the centralized portal, or through a corresponding mobile application, to input their consent preferences for multiple online destinations that may be of interest to their child. The parent also could be prompted to visit the portal or mobile application by an operator seeking permission in relation to its website or online services. The parent would need only his or her username and password to later modify or update the consent preferences, and the updates would occur in real-time. Such a solution would be developed in a manner so that operators could rely on this authentication as COPPA-compliant verifiable parental consent. As an additional feature (not required by COPPA), the portal solution could, through appropriate interfaces with member companies, enable parents to log-in to the solution to generate an aggregated view or report of their consent activities over time and make modifications that they feel are appropriate.⁵³

Another possible approach would allow a platform operator to obtain verifiable parental consent on behalf of application providers under a joint agreement that determines how data will be collected and used, and how parents exercise control. Under this approach, the platform could acquire parent contact information and obtain verifiable parental consent after providing parents with the required notice on behalf of the operators who agree to collect, use, and disclose children’s personal information only in the manner described in the notice. Operators interested in additional collection or use would have to provide parents with a separate notice and obtain additional verifiable parental consent that covers such further collection, use, or disclosure of the child’s information. Also, a platform provider potentially could leverage its platform to provide parents with new just-in-time transparency and control features, such as real-time notice on when and how a child is using an application, that go well beyond the one-time consent model of COPPA. Such an approach could significantly improve parental control.

Disney recognizes that implementing joint approaches to consent would require extensive collaboration and cooperation among all key stakeholders. An ecosystem solution, however, would yield a number of benefits. It would address the Commission’s concern over the lack of innovation with respect to verification methods by offering users an approach that is consistent

⁵³ Such a mechanism could also be expanded to include other functionality that may be of interest to parents, including controls for access to age-restricted services, or interaction with age-rated services.

with other meaningful choice mechanisms supported by the Commission (including the Commission's support of a single, easy to use, universal, and persistent Do Not Track mechanism). Moreover, a portal or cooperative consent solution would more strongly engage parents by providing an efficient, streamlined mechanism enabling greater control and visibility into their child's online activities.

As such, we strongly urge the Commission to exercise its leadership on this issue and encourage operators to develop such approaches. We believe the Commission can play an important role in encouraging industry to innovate in this area by developing baseline criteria for the creation of a cooperative verification mechanism that would comply with COPPA. The Commission also could solicit input on improved parental controls, convene stakeholders to address any technological barriers, and facilitate greater innovation on this issue. The ultimate objective of the Commission's efforts would be to encourage adoption of cooperative consent mechanisms that comply with the Commission's rules, promote COPPA's goals of empowering parents to become more active in their children's online activities, and provide sufficient flexibility for companies to develop robust interactive experiences in which children can participate in safe and secure ways.

V. Proposed Definitions of "Personal Information" and "Support for Internal Operations" Are Too Restrictive to Provide Robust Interactive Services

A. "Support for Internal Operations" Definition Should Encompass Use of Persistent Identifier Information to Improve Site and Service Functionality and Enhance the User Experience Through Greater Personalization

In the proposed changes to the COPPA Rule, the FTC recognizes that the definition for "support for the internal operations of the website or online service" is intended to be a limiting term that would exclude data that is collected under this definition from triggering COPPA's "disclose or disclosure" defined term, or "screen or user name" or "persistent identifier" terms within the definition of "personal information" (and thus exclude the verifiable parental consent requirement).

The FTC's proposed definition of "support for the internal operations of the website or online service" provides that the term, in part, "means those activities necessary to maintain the technical functioning of the website or online service." The Commission's comments further explain that "operators use persistent identifiers and screen names to aid the functionality and technical stability of websites and online services and *to provide a good user experience*, and that the Commission did not intend to limit operators' ability to collect such information from children for these purposes."⁵⁴

Disney respects that the Commission is mindful of allowing a single website or online service to continue to collect persistent identifiers without verifiable parental consent if such information is used to aid the functionality and technical stability of the website or online service

⁵⁴ Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804, 59809-59810 (Sept. 27, 2011) (to be codified at 16 C.F.R. pt. 312).

and to provide a good user experience. Disney, however, respectfully notes that to actually achieve these goals and to have the ability to personalize the online experience and to develop and foster dynamic, interesting online content that engages children, it is critical that a company be able to collect and analyze persistent identifier information, and that this information can be collected and analyzed without interfering with privacy protections. Disney therefore requests that the Commission clarify the definition of “support for internal operations” so that it expressly incorporates usage of persistent identifier information to improve site and service functionality and user experience.

B. The COPPA Rule Should Permit Reasonable Use of Persistent Identifiers Consistent with Self-Regulatory and FTC Policy on First-Party Use of Such Information

Companies that provide content or service online may do so through a single online destination, or they may offer multiple web-based channels that are intended to appeal to a range of audiences. Such companies that have invested in creating online platforms that offer a range of content should not be precluded from offering users a unified, personalized experience across these multiple services. This is particularly true — and consistent with privacy objectives — when the only identifier used for such purposes is a persistent identifier that is not linked to personal information and is not used for third-party online behavioral advertising directed to children.

The Commission’s proposed changes to include “persistent identifier” within the “personal information” definition *if used other than/or in addition to “support for internal operations of ... the website or online service,”* and to expand the definition of “personal information” to include identifiers that link the activities of a child across different websites or online services, means that a company, irrespective of the privacy protections incorporated into its site, may no longer be able to provide a user with personalized, optimized content or through multiple centrally-controlled websites or online services unless the operator collects more (not less) personal information, and obtains verifiable parental consent. This type of restriction is not beneficial to consumers because it will inevitably reduce the amount of personalized online content and feature-rich functionality developed for children and families, and stifle innovation.

A more practical and, therefore, preferable approach is to keep the COPPA Rule revisions consistent with self-regulatory and FTC policy statements concerning first-party use of persistent identifier information, which recognize that first-party data collection and use is within consumers’ reasonable expectations and is therefore permissible.⁵⁵ This approach would promote better understanding and compliance by industry as to the acceptable use of persistent identifier information, including within the area of online behavioral advertising. In contrast, prohibiting the use of persistent identifiers under COPPA (even if not associated with any personal information and not used to direct behavioral advertising to children), in contrast to the DAA’s self-regulatory principles and the Commission’s other statements regarding first-party

⁵⁵ See, e.g., Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009), available at www.aboutads.info/resource/download/seven-principles-07-01-09.pdf; FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (Dec. 2010); FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising* (Feb. 2009).

use of persistent identifier information may create confusion by consumers and businesses and lead to inconsistent compliance and further unintended adverse consequences in the marketplace.

In addition, as a practical matter, if collection of a persistent identifier alone triggers collection of children’s personal information under COPPA, it is unclear how a company would be able to comply with the Rule, given that a persistent identifier is collected at the initial point of visitation — when the operator of a general audience website likely would not know if the user is a child or, if it later discovers that the visitor is a child, would face challenges in identifying and deleting persistent identifiers stored and amassed elsewhere if disassociated with any personal information. Panelists at the FTC’s COPPA Rule Review Roundtable in 2010 discussed how expanding the scope of “personal information” to include certain persistent identifiers would actually force operators to collect *more* personal information prior to obtaining verifiable parental consent since IP addresses alone, for example, would not provide the operator with sufficient data to contact a parent.⁵⁶

Therefore, Disney recommends modifications to the Commission’s proposed definitions of “*personal information*” and “*support for the internal operations of the website or online service*” to allow for reasonable first-party use of persistent identifiers that will enable operators to create a personalized, optimized experience. Further, Disney recommends that the Commission modify the definition of “personal information” so that a single business entity will not be precluded from creating a more unified online experience across its multiple online outlets based on first-party use of persistent identifiers.

C. The Commission’s Proposed Change to “Screen or User Name” within the Definition of “Personal Information” Should Not Be Adopted as Proposed

Screen or user names are widely used in the online environment and provide the most effective tool available for operators to allow sign-on to (1) a single website; (2) a single online service that runs on multiple platforms; (3) multiple distinct websites or online services controlled by a single operator; and (4) interactive online features, such as moderated chat functionality within an online game, or for a user to post an anonymous “shout out” message on a website or online service. Moreover, screen names can be a significant contributor to an operator’s consumer data minimization strategy by eliminating the need to collect personal information before allowing access to the interactive features of an online destination.

The Commission’s proposed change in the COPPA Rule to include “screen or user name” within the “personal information” definition *if used other than/or in addition to “support for internal operations of ... the website or online service,”* can be read to mean that a company would be unable to allow a single screen or user name to be used across more than a single website or online service, or potentially for the same service across different platforms, including

⁵⁶ FTC COPPA Rule Review Roundtable transcript, comments of panelist Sheila A. Millar at p. 185-86 (June 2, 2010) (“If suddenly those items are personal information, plus the IP address, you undercut this assumption of how you provide a pretty anonymous experience to a child and you force the website to turn to a more privacy-invasive model, perhaps, because you have to collect more personal information. The IP address alone will not allow that website to contact the parent and to get parental consent . . .”).

for basic functionality, such as pausing a game that was initiated on one platform (online) and continuing it on a different platform (mobile application). Also, the proposed change is unclear even with respect to the use of screen or user names within a single website. For example, the text of the Commission’s proposal states that screen names may be used “to identify users to each other,” such as within a chat feature that is part of an online game;⁵⁷ however, the proposed revised Rule may be interpreted as precluding this type of screen name use. Similarly, popular interactive features, such as leaderboards for online games or applications that enable “shout outs” to other site users, rely on screen names to maintain user anonymity, and without allowing anyone to directly contact that user. Based on the proposed revised Rule, it is unclear whether use of screen names for these purposes would be permitted.

The Commission explains that its proposed expansion of the term is necessary based on the assumption that, if a screen or user name can be portable across multiple websites or online services, then the screen or user name would permit the direct contact of a specific individual online.⁵⁸ This nexus is required by COPPA, given that the definition of “online contact information,” by statute, can only include an identifier “that permits the direct contact with a person online.”⁵⁹ The Commission’s characterization that a screen or user name, in fact, permits the direct contacting of a child online, however, is not supported by any evidence or analysis that details the scope of the perceived public policy concern or indicates how a person necessarily can be directly contacted based on their screen name. Nor does it acknowledge the range of appropriate circumstances in which screen or user names are used. While screen or user names can be used to access basic site functionality on one or sometimes multiple online services, or perhaps a single service on multiple platforms — which facilitates and encourages children to continue to explore and interact with appropriate websites and online services — this does not present the ability for others to directly contact the child.

For these reasons, the Commission’s proposed change is overly broad and could result in new, unnecessary burdens for children who could be restricted from certain popular website features and may discourage operators from providing interactive online content even when such content does not involve personal information or permit the direct contacting of a child. Additionally, parents would now have to provide verifiable parental consent on each website or online service (and for each platform that the website or online service is made available, such as website, console, and/or mobile), even when the parent is comfortable with the privacy practices of the operator (regardless of platform in which the service is used), and again even where the screen or user name does not permit the direct contacting of the child.

Precautions can be taken in the design and use of the screen name to address the concerns raised by the Commission and still allow the screen name to be used to participate in popular chat and interactive website features, and to access more than a single website or online service, or the same website and online service that is available on more than one platform.⁶⁰ And if such

⁵⁷ Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59804, 59810 (Sept. 27, 2011).

⁵⁸ *Id.*

⁵⁹ The Children’s Online Privacy Protection Act of 1998, Pub. L. 105-277, at Sec. 1302(12).

⁶⁰ For example, the screen name creation feature can (1) require special character and number combinations to inhibit the use of real names; and (2) include prominently-placed statements/warnings

precautions can be taken, there is limited reason to encompass the term within the broad definition of “personal information” as currently proposed, and subject the collection of the screen or user name to verifiable parental consent requirements.

The consequence of triggering prior verifiable parental consent before collecting user name information will create unnecessary challenges and obstacles that could discourage the development of child-directed and family-friendly sites. For example, some child-directed websites and online services available today are designed not to collect any personal information from children, but which provide interactivity through the use of anonymous user and screen names. The benefits of this feature include allowing children to immediately access interactive content upon their visit to the website or online service, without first requiring the child’s parent to complete the verifiable parental consent process. If obtaining verifiable parental consent were to be required in order for an operator to provide such an interactive experience, this additional step — and resulting burden on the operator, parent, and child, and delay in the child’s ability to access the interactive feature — may deter operators from developing and providing such features, and deter children from accessing such child-directed and family-friendly websites and online services with privacy controls. And if the availability of interactive options decreases on child-directed and family-friendly online destinations, children are more likely to forego such destinations, and instead explore general audience websites and online services that do not invest in similar privacy protections.

Another consequence of requiring prior verifiable parental consent before collecting user name information ironically may result in an *increase* in the collection and disclosure of children’s personal information. For example, operators that currently moderate user and screen names on child-directed and family-friendly websites and online services to ensure that they do not include personal information may conclude that the expense of moderating the site or online service is unwarranted. Rather, the focus by such operators could simply shift to obtaining verifiable parental consent, which, if the parent provides consent to collect and disclose the child’s personal information, would result in an increase of children’s user and screen names that contain personal information. This result would run counter to the data minimization principles of COPPA.

Balance is critical in this area. Given the many safeguards readily available to address the Commission’s stated concerns regarding screen and user names, and the many benefits that result from a framework that encourages the use of privacy-protective anonymous screen and user names without first obtaining verifiable parental consent, we recommend that the Commission reconsider or further qualify how it has currently positioned the term “screen or user name” within the definition of “personal information.”

* * * * *

Ongoing changes with respect to the manner and extent to which children now interact on the Internet require that industry and the Commission continue to reexamine existing online

that users should avoid real names, and to avoid using the same screen or user name on different websites and online services.

privacy protections, as well as identify and implement new solutions. Disney greatly appreciates the Commission's efforts to see that children can leverage increasingly interactive online content in a safe environment. Disney recommends that the Commission consider a new framework that will create the necessary incentives for a larger share and more diverse scope of businesses to embrace robust privacy protections, including transparency and parental controls. Disney also recommends that the Commission use its leadership position to foster continued dialogue between industry and consumers on new parental verification mechanisms that can leverage current and evolving platform technologies to improve transparency and parental control. Lastly, Disney recommends that the Commission clarify or consider further revisions to key definitions within the COPPA Rule to avoid inhibiting the development of appropriate and compelling family-friendly websites and online services.

Disney looks forward to continuing to engage with the Commission on these important issues.

Respectfully Submitted,

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