

**Before the  
FEDERAL TRADE COMMISSION**

COPPA Rule Review	)	Project No. P104503
16 CFR Part 312	)	
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**COMMENTS OF VERIZON AND VERIZON WIRELESS**

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## EXECUTIVE SUMMARY

Verizon supports the Commission’s efforts to propose COPPA Rule changes<sup>1</sup> that keep pace with online technological advancement. However, Verizon cautions the Commission to ensure that those changes adhere to Congress’ intent – which is to regulate parental notice and consent requirements involving the collection and use of children’s *personal* information. Congress has explicitly defined personal information to mean individually identifiable information; therefore, information that does not identify an individual is outside the scope of COPPA.

Two of the Commission’s proposed rule changes fall outside the scope of COPPA: the proposal to treat persistent identifiers, without more, as personal information and the proposal to add geolocation information that identifies a street name and city or town, but not an individual, to the definition of personal information. These elements, standing alone, neither individually identify a person nor permit the physical or online contacting of a person – which is what the statute requires before the Commission can modify the personal information definition.

The Commission should also modify its proposal to except internal website operational functions, such as user authentication, from the personal information definition. While helpful, it is not clear why the exception applies only to persistent identifiers and not to other elements in the personal information definition that site operators may use to authenticate users. The exception would not permit operators to use persistent identifiers – even on an anonymous or aggregate basis – to conduct market analytics and research and development needed to provide better products and services.

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<sup>1</sup> See COPPA Rule Review, 16 C.F.R. Part 312, Project No. P104503, 76 Fed. Reg. 59804 (2011) (“COPPA Rule Review”).

Moreover, the internal operations exception still does not solve the larger problem of treating persistent identifiers and geolocation information as personal information even when they are not tied to individually identifiable information.

Finally, the Commission's proposal to consider factors such as musical content and the presence of child celebrities or celebrities who appeal to children, when determining whether a site or service is directed to children, must be measured against Congressional intent and also must be balanced with other factors. Congress has said that a site or service is directed to children when that site or service targets children. But the Commission's proposal to consider the presence of musical content and child celebrities on a site appears to be based on the belief that those elements are strong indicators of a website's "appeal" to children. The test is not whether elements on a particular site *appeal* to children; rather, the test, as Congress has defined it, is whether a site *targets* children. Moreover, the presence of music or certain celebrities should not be weighed disproportionately against other factors the Commission takes into consideration; otherwise, general purpose websites that do not target children could become subject to COPPA's parental notice and consent regime.

## DISCUSSION

### I. **TREATING PERSISTENT IDENTIFIERS AND GEOLOCATION INFORMATION AS PERSONAL INFORMATION ON A STANDALONE BASIS WILL UNDERMINE COPPA’S STATUTORY INTENT AND ADVERSELY IMPACT PRIVACY PROTECTIONS.**

#### A. **Congress did not intend for personal information to include data elements that do not identify an individual.**

##### 1. *Persistent identifiers.*

COPPA defines personal information as “individually identifiable information about an individual collected online, including—

- (A) a first and last name;
- (B) a home or other physical address including street name and name of a city or town;
- (C) an e-mail address;
- (D) a telephone number;
- (E) a Social Security number;
- (F) *any other identifier that the Commission determines permits the physical or online contacting of a specific individual;* or
- (G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.”

15 U.S.C. § 6501(8) (emphasis supplied). Consistent with the statutory language, the current COPPA Rule provides that a persistent identifier is considered personal information only “where such identifier is associated with individually identifiable information.”<sup>2</sup> The Commission’s proposal to modify the definition of “personal information” and treat persistent identifiers, without more, as “personal information” is

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<sup>2</sup> 16 C.F.R. § 312.2 (“Personal information means individually identifiable information about an individual collected online, including . . .(f) [a] persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information . . .”).

inconsistent with the statutory requirement that the Commission may add identifiers only when they permit the “contacting of a *specific individual*.”<sup>3</sup>

The Commission explains that identification at the computer or device level is no different than identification at the home or physical address level (including street name and city or town), which, standing alone, already is personal information under Congress’ definition.<sup>4</sup> By extension, the Commission reasons, if information applicable to an entire household is personal information under the statute, then a persistent identifier applicable to a computer or device and not a single individual can also be considered personal information under the statute.<sup>5</sup> This analysis conflicts with COPPA’s plain language. COPPA gives the Commission discretion to apply the personal information definition to other identifiers only where they “permit the physical or online contacting of a specific individual.”<sup>6</sup> A persistent identifier alone does not permit the physical or online contacting of a specific individual. Rather, persistent identifiers identify a computer or device – which could be used by several individuals whose identity is unknown. Thus, the Commission’s proposed rule change exceeds the authority Congress granted under COPPA.

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<sup>3</sup> 15 U.S.C. § 6501(8)(F) (emphasis supplied).

<sup>4</sup> See COPPA Rule Review at 59811.

<sup>5</sup> See *id.* at 59812.

<sup>6</sup> 15 U.S.C. § 6501(8)(F). The analysis also overlooks the primary intent of COPPA, which is to control “attempts to communicate directly with a *specific, identifiable individual* . . . .” 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of COPPA co-sponsor Sen. Bryan) (emphasis supplied). “Anonymous, aggregate information – information that cannot be linked by the operator to a specific individual – is not covered.” *Id.*

The Commission got it right in 2000 when it treated persistent identifiers as personal information under the COPPA Rule only when tied to individually identifiable data. That definition was written in a sufficiently flexible manner to account for technological change while still adhering to Congressional intent. It is instructive that Congress did not define all the key terms in COPPA, but did expressly define personal information and the parameters in which the Commission would be permitted to add personal information identifiers. Those parameters – which limit all personal information subject to the COPPA Rule to “individually identifiable information *about an individual,*” and further which limit personal information expansion to “any other identifier that . . . permits the physical or online contacting of a specific individual” – prevent the personal information definition expansion the Commission proposes here.<sup>7</sup>

Even if the Commission’s proposed change to the personal information definition were authorized under COPPA, however, the change could adversely impact user privacy protections. Persistent identifiers often are used in place of personal information in order to enhance a user’s privacy protections. If persistent identifiers alone are treated as personal information, site operators may need to collect more personal information in order to determine whether the persistent identifiers belong to a user under the age of 13.

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<sup>7</sup> See 15 U.S.C. § 6501(8); *id.* at (F). For the same reasons, the Commission reached the correct conclusion in deciding not to add “zip code plus 4” as a standalone personal information element, or to add date of birth, gender, and zip code either alone or in combination as personal information elements. See COPPA Rule Review at 59813-814. Zip code plus 4 is not the equivalent of a physical address, and date of birth, gender, and zip code, alone or combined, do not individually identify a person.

## 2. *Geolocation information.*

The Commission’s proposal to add “geolocation information sufficient to identify street name and name of a city or town”<sup>8</sup> as a new, stand-alone personal information element under the definition is flawed for the same reasons discussed above.<sup>9</sup>

Geolocation at the street name and city/town level would neither permit the physical contacting of a specific individual nor individually identify a person. An operator who knows only that a device is located on Route 68 in Seattle still does not know, without more, where along Route 68 the device is located, much less the identity of the individual using the device. Further compounding the issue, as the Commission acknowledges, is the fact that technologies that collect geolocation information communicate that information with varying levels of precision.<sup>10</sup> Without more, street name and city/town level data do not individually identify a person and do not permit the online or physical contacting of a *specific individual*. Consistent with Congressional intent, geolocation information should be treated as personal information only when the data is tied to a specific individual.

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<sup>8</sup> *Id.* at 59830.

<sup>9</sup> *See id.* at 59813. The Commission explains that geolocation information already is covered under §6501(8)(B), which provides that a “home or other physical address including street name and name of a city or town” is personal information. *Id.* However, the Commission proposes to add geolocation as a standalone category within the personal information definition because “geolocation information may be presented in a variety of formats (e.g., coordinates on a map), and in some instances may be more precise than street name and name of city or town.” *Id.* The variation in geolocation data precision is one of the reasons why geolocation information should *not* be considered personal information unless the information is linked to an individual, and the existing COPPA Rule definition already addresses those circumstances in which geolocation falls within the scope of COPPA’s personal information definition.

<sup>10</sup> *See id.*

**B. The exception for internal website operation functions is too narrow and does not resolve the statutory conflict.**

The proposal to treat persistent identifiers and geolocation information alone as personal information also has significant and wide-reaching policy implications that the Commission should examine carefully. Indeed, the Chair of the House Subcommittee on Commerce, Manufacturing and Trade queried in opening remarks at a recent privacy hearing whether the Commission’s proposal to expand the personal information definition in the COPPA Rule is appropriate for use as precedent in the broader online privacy context.<sup>11</sup> Overly broad rules that the Commission adopts here could complicate functions as basic and routine as delivering content to a requested web page, and could impact Internet ecosystem functionality beyond COPPA.

Recognizing this risk, the Commission proposes to limit the wholesale inclusion of persistent identifiers in the personal information definition so that a persistent identifier is treated as personal information “where such persistent identifier is used for functions other than or in addition to support for the internal operations of the Web site or online service.”<sup>12</sup> According to the Commission, this language would permit functions such as user authentication, improving site navigation, maintaining user preferences, serving contextual advertisements, and protecting against fraud or theft.<sup>13</sup> But the language would *not* permit operators to use persistent identifiers – even on an anonymous

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<sup>11</sup> See Opening Statement of the Hon. Mary Bono Mack, Subcommittee on Commerce, Manufacturing, and Trade, “Protecting Children’s Privacy in an Electronic World,” <http://republicans.energycommerce.house.gov/Media/file/Hearings/CMT/100511/BonoMack.pdf> (Oct. 5, 2011).

<sup>12</sup> COPPA Rule Review at 59812.

<sup>13</sup> See *id.*



or aggregate basis – to conduct market analytics and research and development needed to provide better products and services. Those too are important operator functions that should not be limited by overly broad treatment of persistent identifiers.

In addition, the proposed exception for internal website operations inexplicably applies only to persistent identifiers. It is not clear why the same reason that led the Commission to carve out internal website operation functions as permissible uses for persistent identifiers – they “aid the functionality and technical stability of Web sites and online services and . . . provide a good user experience” – does not also apply to other personal information elements in the definition.<sup>14</sup>

Moreover, the internal operations exception still does not solve the larger problem of treating persistent identifiers and geolocation information as personal information even when they are not tied to individually identifiable information. Industry efforts such as those in the CTIA – the Wireless Association<sup>®</sup> *Best Practices and Guidelines for Location Based Services* strike the appropriate balance. The LBS Guidelines recognize that many geolocation uses drive the Internet economy but simultaneously afford that information appropriate protection in the contexts where that treatment is warranted.<sup>15</sup> For example, the LBS Guidelines apply whenever a location-based service provider links location information to a specific device or a specific person.<sup>16</sup> The guidelines do *not* apply where location information is used or disclosed anonymously or aggregately – or,

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<sup>14</sup> *Id.* at 59809.

<sup>15</sup> CTIA – The Wireless Association,<sup>®</sup> *Best Practices and Guidelines for Location Based Services*, [http://files.ctia.org/pdf/CTIA\\_LBS\\_Best\\_Practices\\_Adopted\\_03\\_10.pdf](http://files.ctia.org/pdf/CTIA_LBS_Best_Practices_Adopted_03_10.pdf) (“LBS Guidelines”).

<sup>16</sup> *See id.* at 2, “Scope of Coverage.”

in other words, in a manner that does not *identify an individual* or permit the physical or online contact of a specific individual.<sup>17</sup> The LBS Guidelines target the same concerns Congress targeted when it defined personal information. The Commission should continue to follow that approach.

**II. THE COMMISSION SHOULD ADHERE TO COPPA’S DEFINITION AND SHOULD NOT RELY TOO HEAVILY ON SUBJECTIVE FACTORS, SUCH AS THE PRESENCE OF CELEBRITIES WHO APPEAL TO CHILDREN, WHEN DETERMINING WHETHER A SITE OR SERVICE IS DIRECTED TOWARD CHILDREN.**

Under the COPPA statute and rule, a “website or online service directed to children” means a site or service (or a portion of it) that is targeted to children.<sup>18</sup> When considering whether a site or service is directed to children, the Commission takes a number of factors into consideration, including the site or service’s “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.”<sup>19</sup> The Commission proposes to modify these factors so that “audio content” is replaced with “musical content,” and proposes to add to the list of factors “the presence of child celebrities, and celebrities who appeal to children.”<sup>20</sup> In the Commission’s view, “both music and the presence of celebrities are strong indicators of a website or online service’s appeal to children.”<sup>21</sup>

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<sup>17</sup> *See id.*

<sup>18</sup> 15 U.S.C. § 6501(10); 16 C.F.R. § 312.2.

<sup>19</sup> 16 C.F.R. § 312.2. The Commission also considers “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 and incentives.” *Id.*

<sup>20</sup> COPPA Rule Review at 59814.

However, for COPPA purposes, the relevant query is not whether music or a particular celebrity “appeals” to a child. Rather, the query for the Commission is whether a site or service is “targeted” to children. The Commission should exercise care and ensure that any new rules adhere to the statutory requirement that a site or service is deemed directed to children only if it targets them. In addition, if the Commission adds these new factors to its totality of circumstances analysis, the Commission should not accord disproportionate weight to these new – and inherently subjective – factors.

### **CONCLUSION**

Verizon respectfully requests that any rules the Commission adopts or modifies be consistent with these comments.

Respectfully submitted,

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<sup>21</sup> *Id.*