



Family
Online Safety
Institute

Secretary Donald S. Clark
Federal Trade Commission
Office of the Secretary, Room H-135 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

September 24, 2012

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

Dear Secretary Clark,

The Family Online Safety Institute is pleased to submit these comments in response to the Federal Trade Commission's Supplemental Notice of Proposed Rulemaking and request for comment¹ on the proposed modifications to the Children's Online Privacy Protection Act Rule.

The Family Online Safety Institute (FOSI) commends the Federal Trade Commission (FTC) for its ongoing commitment to online privacy, and specifically for its attention to children and their use of the Internet. As a result of the rapid technological developments in recent years, the Commission's active monitoring, enforcing and updating of the impact and

¹ *In Request for Public Comment on the Federal Trade Commission's Supplemental Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule 77 Fed. Reg. 46643 (Aug. 6, 2012) ("Notice" or "NPRM") available at <http://www.ftc.gov/os/2012/08/120801coppaule.pdf>*

effectiveness of the Children’s Online Privacy Protection Act (COPPA) and its corresponding Rule is vital to ensuring that children continue to have safe and healthy online experiences.

FOSI is an international, non-profit organization which works to make the online world safer for kids and their families. FOSI convenes leaders in industry, government and the non-profit sectors to collaborate and innovate new solutions and policies in the field of online safety. Through research, resources, events and special projects, FOSI promotes a culture of responsibility online and encourages a sense of digital citizenship for all.²

In December 2011 FOSI filed comments³ in response to the FTC’s initial Notice of Proposed Rulemaking (NPRM.) FOSI appreciates the Commission’s efforts to provide additional clarity to potential problem areas highlighted in previous filings concerning the suggested revisions. Given the importance of the Rule and the potential repercussions for non-compliance there is an especial need to ensure that definitions are as tailored and precise as possible.

Among the proposed changes to the definitions contained within the COPPA Rule is the expansion of the term ‘operator.’⁴ The Commission proposes to enlarge the term’s definition to extend to third-parties; this will include social networking plug-ins, other downloadable software kits and advertising networks. Previously these third-parties were not subject to the COPPA framework; instead it was the responsibility of the first-party website operator to ensure COPPA compliance. Now these plug-ins and ad-networks will become operators themselves, and will be required to obtain verifiable parental consent to collect information from under-13s when used on sites where they “know or have reason to know”⁵ that their service has been installed on a website directed to children. For example, where a child-orientated website imbeds a video from YouTube on their service, YouTube would become subject to the COPPA Rule if it knows or has reason to know that this is the case. Instead of allowing children access to enriching and educational content from videos, companies are

² For more information see www.fosi.org. FOSI members include AOL, AT&T, BAE Systems Detica, BT Retail, Comcast, Disney, Eclipse, Entertainment Software Association, Facebook, France Telecom, Google, GSM Association, Microsoft, Motion Picture Association of America, NCTA, Nominum, Optenet, RuleSpace, Sprint, Symantec, Time Warner Cable, Telecom Italia, Telefónica, TELMEX, T-Mobile, USTelecom, The Wireless Foundation, Verizon and Yahoo!.

³ See the comments of the Family Online Safety Institute at <http://www.ftc.gov/os/comments/copparulereview2011/00312-82214.pdf>

⁴ NPRM at 46643.

⁵ *Id.*

more likely to remove such videos from their library. Due to fear of COPPA liability, websites with child-friendly content may refrain from including features from third parties or third parties may not want to be included on these websites which may result in children having less access to beneficial online information or rich experiences on websites meant for them.

The current proposed “reason to know”⁶ test will create an untenable regime for companies who allow their services to be incorporated into other sites. What exactly constitutes “reason to know” is an issue that must be further explained by the Commission if it pursues this change. FOSI is seriously concerned that this change could significantly decrease the creation of innovative content achieved through the incorporation of third-party tools as a result of the increased risk of liability for developers who are not in the best position to obtain consent.

Similarly, the proposal advanced by the Commission concerning mixed audience websites, and the possibility that age-screening may be used in order to negate the need to provide COPPA protections to all users, is imprecise. The notion that not all users of general audience sites need to be treated as under-13’s is laudable, and may increase innovation by decreasing compliance costs for these sites. The proposals as written in August 2012 would decrease the amount of personal information that needs to be collected from all users and stored by companies, which is always preferable. The language currently proposed by the Commission, however, may lead to the implementation of a “constructive knowledge” test through the imposition of the requirement to ensure COPPA compliance where a site is “likely to attract an audience that includes a disproportionately large percentage of children.”⁷ This eliminates the existing bright line “actual knowledge” requirement, which provides clear guidelines for those attempting to comply with the Rule. The ensuing vagueness will entangle a large number of websites that were not previously required to be COPPA compliant, including news websites, at great expense. We strongly caution the FTC to reconsider this proposed language; the proposals may raise constitutional concerns and certainly risk-adverse companies will comply unnecessarily. This will result in great cost to the material they publish and they may choose to eliminate all content that may appeal to a younger audience.

⁶ *Id.*

⁷ NPRM at 46646.

In enacting COPPA, one of Congress' objectives was to ensure that there was, and continued to be, adequate age-appropriate content for younger children. This overarching intention must not be forgotten today and any Commission proposal that would adversely decrease the volume of content for this demographic needs to be carefully considered in light of Congressional intention. Allowing for the creation of content designed for children is imperative to ensure that they grow up with the necessary skills and experiences to fully contribute to the digital world in which they live. It is essential that the rules of COPPA do not inhibit the production of innovative, educational and entertaining content for children under and over the age of 13.

Even before the publication of the NPRM, concerns have already been raised around the world about this dearth in material for young children. The European Commission in its 'European Strategy for a Better Internet for Children'⁸ reaffirmed its commitment to 'stimulating the production of creative and educational online content for children and develop platforms which give access to age-appropriate content.'⁹ The EU is working to engage the entire eco-system as part of the program to create more online material for children. They will continue to support projects such as the 'Best Children's Online Content' competition¹⁰ and they are also calling on Member States of the European Union to cooperate with each other to actively promote initiatives aimed at creating high-quality content online for children while implementing high standards for children's content.¹¹ FOSI questions whether the FTC should be acting in a manner that may decrease the volume of high-quality content for children at the same time its sister organizations around the world are supporting policies to encourage the opposite reaction from online content developers and publishers.

In the EU, industry is being asked to develop interactive quality content for children, as well as user-friendly tools that encourage creativity and help children learn. In addition, companies are being asked to provide financial as well as technical support to initiatives emanating from children, schools or non-profits.¹²

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'European Strategy for a Better Internet for Children' (May 2 2012) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF>

⁹ *Id.* at 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

In 2012 the European Commission endorsed¹³ the ‘EU Hackathon’, which called upon entrants to ‘hack’ for children. The event was sponsored by Google, Facebook, Orange and Vodafone¹⁴ and participants were required to create tools, websites or apps that were designed to enhance children’s safety or boost their creativity. Over a 24-hour period, 36 teams coded a wide variety of projects which were ultimately presented to a jury of experts and children and winners for both safety and creativity tools were chosen. This is a good example of the way in which content creation for children can be nurtured and supported.

The FTC should be especially cautious when proposing rules that could diminish the production of content for children and young teens. The need for more websites and apps developed and directed to children around 13 years of age is imperative to ensuring that they consume more age-appropriate material. The Pew Research Center in partnership with FOSI undertook a study in 2011, entitled ‘Teens, Kindness and Cruelty on Social Network Sites: How American teens navigate the new world of "digital citizenship"’¹⁵ and found that 44% of children have lied about their age in order to access an age-restricted service. While we do not posit that creating content for younger children will prevent this deception in its entirety, it would hopefully diminish the number who do and the frequency with which children misstate their ages online. Children will be interested and captivated by content specifically designed for them. Age-appropriate material will aide in the development of children into competent digital citizens who are able to navigate the online world with knowledge and confidence, and who are able to protect themselves and others from online risks.

The technological boom over the past few years has changed the landscape of content creation. The preponderance of rich and innovative content aimed at children that previously came solely from the traditional large multi-national companies is now also being produced by small businesses and individuals.¹⁶ The FTC must carefully consider the burden and impact of these revised proposals on small businesses and individuals working to create online content to enrich the lives of children and families. Small businesses and solo online

¹³ Endorsement on Facebook from Commissioner Neelie Kroes, Commissioner for the Digital Agenda available at <https://www.facebook.com/NeelieKroes/posts/339007732821576>

¹⁴ EU Hackathon ‘Hack4Kids’ available at <http://2012.euhackathon.eu>

¹⁵ Amanda Lenhart et al., “Teens, Kindness and Cruelty on Social Network Sites,” The Pew Research Center’s Internet & American Life Project in partnership with FOSI and Cable in the Classroom, Nov. 9, 2011, available at <http://www.fosi.org/images/stories/research/PIP-Teens-Kindness-Cruelty-SNS-Report-Nov-2011.pdf>.

¹⁶ For example ‘Moms with Apps’ see <http://momswithapps.com/about/>

content producers will surely redirect their creative energies to produce content for other audiences and concerning other subjects if the burdens of complying with COPPA are substantially increased. Increasing compliance requirements for content producers and app developers may have the unintended consequences of reducing the material, not just for the under-13s but for young people in general.

The Commission should continue to assess the true hourly and financial burdens of compliance with the proposed Rule, as well as the total number of people affected.¹⁷ The NPRM makes reference to 500 additional operators being subject to the Rule, with an extra 125 being added each year¹⁸ and estimates 60 hours as the time needed to comply.¹⁹ The total financial approximation from the Commission is \$2,747,454.²⁰ While ensuring the safety and privacy of children is of paramount importance, serious consideration must be given to the impact of the revisions on content creators. In order for this assessment to be carried out accurately it is essential that the FTC works with precise numbers. Requiring complicated COPPA compliance procedures will diminish the content available and directed to all children with very little return.

If the Commission adopts the proposals included in the NPRM, FOSI recommends that the Commission increase its outreach to developers, small businesses and new entrants to the market. With increasing numbers of individuals including parents and even children creating great educational and informative content and apps for children, it is vital that the FTC continues with outreach to these groups as well as offering explanations and assistance with compliance with COPPA. This should cover information on the purpose of the Rule, issues around compliance and liability, and importantly how to protect data collected. Increasing confidence and awareness of the COPPA framework will stimulate content creation. Throughout this work the FTC should highlight the many advantages and opportunities offered in creating content for kids.

The Commission should continue its efforts to educate all, including members of the public about COPPA so that parents can make educated choices, give informed consent and engage

¹⁷ NPRM at 46649.

¹⁸ *Id.*

¹⁹ NPRM at 46651.

²⁰ *Id.*

with their children on issues around Internet safety as well as knowing about the processing of their and their children's information online.

In conclusion, FOSI commends the FTC for continuing to analyze the Rule and the impact of the proposed changes. Keeping children safe on the Internet is a shared responsibility; each distinct stakeholder must play their part. The FTC should endeavour to provide clear, concise and comprehensible guidelines that protect children's privacy without inhibiting innovation. Parents must remain engaged with their children's online experiences throughout their childhood and the existing and proposed COPPA Rule provides an opportunity for interaction and discussion between parents and children on their online sharing and behavior.

We would strongly caution the FTC against some of the proposed expansions referenced in the NPRM. A move towards what is effectively a constructive knowledge regime may raise serious constitutional concerns and a broadening of the definition of 'operator' increases liability concerns for developers exponentially.

In an effort to improve clarity we fear that the FTC may have further confused the issues and decreased, not increased, the likelihood that large and small businesses alike will be able to easily comply with COPPA. We would encourage the Commission to take careful note of the comments filed by content creators and app developers to ensure that the COPPA Rule framework is as intuitive and easy to comply with as possible and is not unduly burdensome. The FTC must hold true to the original aim of COPPA to promote and not stifle content production for children. All revisions must recall this and retain it as a central objective.

We look forward to continuing a productive dialogue with the Federal Trade Commission in our shared aim of protecting children's safety and privacy online.

Respectfully submitted,

Jennifer A. Hanley

Emma C. Morris

Family Online Safety Institute

September 24, 2012