

**Before the
Federal Trade Commission
Washington, D.C. 20580**

In the Matter of)	
)	Docket No. 339;
Implementation of the Children’s)	Project No. P104503
Online Privacy Protection Rule)	
)	

**COMMENTS OF
CENTER FOR DEMOCRACY & TECHNOLOGY (“CDT”),
THE PROGRESS & FREEDOM FOUNDATION (“PFF”)
& ELECTRONIC FRONTIER FOUNDATION (“EFF”)**

The Center for Democracy & Technology, The Progress & Freedom Foundation, and the Electronic Frontier Foundation respectfully submit these joint comments in the above captioned proceeding regarding the Federal Trade Commission’s implementation of the Children’s Online Privacy Protection Act (COPPA) through the Children’s Online Privacy Protection Rule.¹ Our organizations have been actively engaged on COPPA for some time,² and

¹ Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule, 75 Fed. Reg. 64 (Apr. 5, 2010), *available at* <http://www.ftc.gov/os/2010/03/100324coppa.pdf> [hereinafter *COPPA Review Request*].

² *See, e.g.*, John B. Morris, Jr., General Counsel, Ctr. for Democracy & Tech., Testimony at FTC COPPA Implementation Review Roundtable, Panel on Application of COPPA’s Definitions of “Internet,” “Website,” and “Online Service” to New Devices and Technologies (June 2, 2010), (unofficial transcript available at http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#June2_); Written testimony of Berin Szoka, The Progress & Freedom Found., at Hearing on “An Examination of Children’s Privacy: New Technologies & the Children’s Online Privacy Protection Act” before the Subcomm. on Consumer Prot., Comm. on Commerce, Sci. & Transp., U.S. Senate (April 29, 2010), http://www.pff.org/issues-pubs/testimony/2010/2010-04-29-Szoka_Written_COPPA_Testimony.pdf; Berin Szoka & Adam Thierer, *COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety & Free Speech*, Progress on Point 16.11 (The Progress & Freedom Found., Washington, D.C.), June 2009, <http://pff.org/issues-pubs/pops/2009/pop16.11-COPPA-and-age-verification.pdf> [hereinafter *COPPA 2.0*]; Written testimony of Deirdre Mulligan, Staff Counsel, Ctr. for Democracy & Tech., before the Subcomm. on Commerce, Comm. on Commerce, Sci. & Transp., U.S. Senate (Sep. 23, 1998), <http://www.cdt.org/testimony/testimony-deirdre-mulligan-senate-committee-commerce-science-and-transportation-subcommitt> [hereinafter *Mulligan Testimony*]; Written statement of John B. Morris, Jr., General Counsel, Ctr. for Democracy & Tech., before the Joint Comm. on Bus., Research, and Economic Dev., Maine State Legislature, on LD 1677: An Act To Protect Minors from Pharmaceutical Marketing Practices (March 4, 2010), <http://www.cdt.org/files/pdfs/LD1677-CDT-Testimony.pdf>; Written testimony of Berin Szoka, The Progress & Freedom Found., to Maine Legislature on Act to Protect Minors from

have written extensively on related issues of child online privacy and safety.³ Certain of the joint commenters are also submitting individual comments addressing detailed issues not covered here, but the undersigned wanted as a group to raise the following high level points: We counsel the Commission against expanding COPPA beyond its original, limited purposes and scope, or calling on Congress to enact an expansion. We call instead for the agency (i) to use the breadth and flexibility already given to it by Congress in the COPPA statute to enforce the statute in a manner consistent with the rapidly changing technical landscape and (ii) to supplement enforcement of that existing law with increased educational efforts and promotion of parental empowerment solutions.

I. INTRODUCTION

The purpose of the COPPA Rule is to help parents control what information is collected online from, and potentially shared by, their children under the age of thirteen. COPPA has been successful in limiting the amount of personal information collected from children online and in increasing parental involvement in children's online activities. This success is due in large part to the fact that both the Act and the Rule are narrowly drawn and clearly indicate which web sites and services are covered by the regulations. Expanding COPPA to cover older minors or altering the COPPA Rule's knowledge standard would greatly increase the number of websites that are bound by its requirements, and significantly increase the uncertainty of the Act's application and its burden on protected speech. This would result in the collection of *more* information about children, their parents, and potentially every other Internet user. Thus, COPPA expansion would, ironically, transform a rule intended to protect privacy into one that would create more privacy problems than it solves *without* further advancing the privacy or safety of children online.

II. COPPA'S EFFECTS ON CHILDREN'S ONLINE PRIVACY & SAFETY

COPPA, as currently implemented, has been reasonably successful in achieving its original goals.⁴ The purpose of COPPA is to protect the privacy and safety of children in the online environment, and it works to achieve this purpose by: (1) encouraging and enhancing parental involvement in children's online activities, and (2) limiting the collection of personal

Pharmaceutical Marketing Practices, LD 1677 (March 4, 2010), http://www.pff.org/issues-pubs/filings/2010/2010-03-04-Maine_Law_Testimony.pdf.

³ See, e.g., CDT, *Individual Comments in Implementation of the Child Safe Viewing Act*, MB Docket No. 09-26, http://www.cdt.org/speech/20090416_fcc_comments.pdf; EFF, *Reply Comments in Implementation of the Child Safe Viewing Act*, MB Docket No. 09-26, <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520216901>; PFF & EFF, *Comments in Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194, http://www.pff.org/issues-pubs/filings/2010/2010-02-24-PFF-EFF_Response.pdf; ADAM THIERER, PARENTAL CONTROLS & ONLINE CHILD PROTECTION: A SURVEY OF TOOLS & METHODS (2008), <http://www.pff.org/parentalcontrols/index.html> [hereinafter *Parental Controls & Online Child Protection*].

⁴ In 2007, the Commission found that no changes were necessary to COPPA because it had been "effective in helping to protect the privacy and safety of young children online." FTC, IMPLEMENTING THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT: A REPORT TO CONGRESS at 1, Feb. 2007, http://www.ftc.gov/reports/coppa/07COPPA_Report_to_Congress.pdf [hereinafter *2007 COPPA Implementation Report*].

information from children under the age of 13 without parental consent.⁵ COPPA's verifiable parental consent requirements have led sites to adopt policies that limit the collection of personal information and encourage more parental involvement. One of the approved methods for obtaining verifiable parental consent, for example, is to "requir[e] a parent to use a credit card in connection with a transaction" before collecting personally identifiable information.⁶ This requires that the credit card be verified by the issuer and ensure that "the parent is given additional notice [in the monthly billing statement] that the transaction occurred and has an opportunity to investigate any suspicious activity and revoke consent."⁷ Further, having to pay a fee prompts parents to think, and to talk with their children, about the sites and services their children are using.⁸ In 2007, the Commission declared that COPPA "has provided a workable system to help protect the online safety and privacy of the Internet's youngest visitors."⁹ COPPA thus supplements the parental control and filtering tools parents can use to restrict their children's access to websites and online services they consider inappropriate.¹⁰

COPPA was never intended to be a cure-all for child safety, and any law can be considered a failure if measured against unrealistic metrics for success. Thus, any realistic discussion of COPPA's effectiveness must recognize two things: First, COPPA is heavily focused on the question of a child's access to a particular site or service (although the statute also requires "reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children" as well as parental access to information collected and maintained by sites). But the most valid child safety concerns revolve primarily around what happens in online environments *after* access has been granted. That COPPA does not, and was never intended to, reach these problems need not be considered a failure of the COPPA regulatory model; rather, it is important to recognize the difficulties involved in attempting to devise regulatory solutions for policing such conduct. Ultimately, these issues are best dealt with through a combination of (i) government and private actors educating children and parents about how to stay safe online, (ii) policing by operators of child-focused sites through active, human filtering solutions (*e.g.*, responding to abuse complaints) as well as algorithmic filters (*e.g.*, detecting certain problematic keywords or activity patterns) and other innovative

⁵ The original goals of COPPA, as expressed by its Congressional sponsors, were to: "(1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent." 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan).

⁶ 16 C.F.R. § 312.5(b)(2).

⁷ Frequently Asked Questions about the Child Online Privacy Protection Rule, <http://www.ftc.gov/privacy/coppafaqs.shtml> (last visited June 30, 2010) [hereinafter COPPA FAQ] (Question 33: "I would like to get consent by collecting a credit card number from the parent, but I don't want to engage in a transaction. Is this ok?").

⁸ Denise Tayloe, *It's Time to Comply with COPPA*, THE PRIVACY ADVISOR, Vol. 6, No. 10, Oct. 2006, at 5.

⁹ 2007 COPPA Implementation Report, *supra* note 4, at 28.

¹⁰ See generally, *Parental Controls & Online Child Protection*, *supra* note 3.

systems;¹¹ and (iii) parents exercising choice through COPPA and parental control technologies to block access to sites and services that they (or trusted intermediaries) think are not doing enough to enhance child safety online.

Second, we must be honest about the ease with which children can, and do, circumvent COPPA's parental consent requirements. It is undeniable that some children lie about their age to circumvent COPPA restrictions. Indeed, data from a recent Pew Internet and American Life study seems to confirm that such deception happens: the report found that 46% of 12-year-olds used "an online social networking site like MySpace or Facebook," while 62% of 13-year-olds did so.¹² It is possible that some of these 12-year olds had in mind a site that permitted users under 13 to create a profile and that had in fact obtained parental consent prior to allowing the child to sign up, but certainly many of these children simply lied about their age to gain access to popular sites that do not allow access to children under 13 without their parents' knowledge or consent. This illustrates the fundamental technical difficulty facing site operators in an environment where they simply do not know users' true ages.¹³ Although COPPA is clearly not foolproof, it nevertheless does help to increase parental involvement in children's online activities by requiring parental consent for access to a site or service—just as its Congressional sponsors intended it to do.

Yet even these benefits have come at a price: increased costs for operators of child-oriented sites and services and higher barriers to entry for innovators in this market. COPPA compliance is a significant burden for website operators, who may have to employ chat-room supervisors, handle parental inquiries, and process COPPA permission forms at great expense.¹⁴ These expenses have forced some operators to stop providing services for children or risk going out of business.¹⁵ The increased costs of operating a COPPA-compliant website is also a significant barrier to entry for operators of new sites and services, and many sites have chosen to restrict

¹¹ See, e.g., Joshua Fairfield, *Virtual Parentalism*, 66 WASH. & LEE L. REV. 1215, 1234-40 (2009) (discussing in-game filtering systems that operate within virtual worlds).

¹² Amanda Lenhart et al., PEW INTERNET, SOCIAL MEDIA AND YOUNG ADULTS 12 (2010), <http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx?r=1> (button to download PDF on top right of page) (survey question text available at www.pewinternet.org/Static-Pages/Data-Tools/Explore-Survey-Questions/Roper-Center.aspx?item={CEB7A543-E41E-46C8-976F-C28804340329}).

¹³ Both Facebook and MySpace will take down profiles of underage users when notified that they might be underage. See, e.g., Facebook.com *Report an Underage Child*, www.facebook.com/help/contact.php?show_form=underage; MySpace.com, *How do you report underage MySpace users?*, http://faq.myspace.com/app/answers/detail/a_id/35.

¹⁴ Ben Charny, *The Cost of COPPA: Kids' Site Stops Talking*, ZDNET, Sept. 13, 2000, <http://www.zdnet.com/news/the-cost-of-coppa-kids-site-stops-talking/110410>

¹⁵ See, e.g., *An Examination of Existing Federal Statutes Addressing Information Privacy: Hearing Before the Subcomm. On Trade and Consumer Prot. of the H. Comm. On Energy and Commerce*, 107th Cong. 6 (April 3, 2001) (statement of Rep. Tauzin) (noting that the expense associated with COPPA compliance "has now forced companies to discontinue a number of products targeted toward children"), available at <http://republicans.energycommerce.house.gov/107/action/107-22.pdf>.

access to children under thirteen rather than incur the costs of complying with COPPA.¹⁶ Thus, COPPA has had the effect of reducing the sites available to younger minors.

Operators who have already implemented COPPA-compliant procedures dominate the existing marketplace of sites and services for children, resulting in a tendency toward industry “lock-in.” The combination of high barriers to entry and consolidation within the industry reduces competition and inhibits innovation. In the late 1990s, prior to the implementation of COPPA, the market for websites and services for children was populated by large entertainment companies, youth-oriented technology and education organizations, and small individual- and family-owned businesses.¹⁷ This latter category of operators—the small or family-owned businesses—is largely absent from the marketplace of 2010 due to a combination of factors, among which must be counted the burden of complying with COPPA.¹⁸

III. COPPA EXPANSION RAISES GRAVE PRIVACY & CONSTITUTIONAL CONCERNS

The old cliché about the Internet—“On the Internet, nobody knows you’re a dog”¹⁹—captures a fundamental truth: Internet communications do not inherently convey detailed information about the identity or characteristics of a user on the Internet. When someone orders a drink in bar or attempts to buy cigarettes at a drugstore, the person’s physical interaction with a waiter or cashier conveys certain basic information, allowing the other party to infer approximate age from the person’s physical appearance, voice, and other attributes. But when a user visits a website, the site does not know if the particular user is a certain age, is the parent or child of another user, or is the resident of a particular state or nation. To acquire such information, operators must affirmatively request it—but even when they do, they have no direct way to verify that any information submitted is accurate, or that the digital credentials submitted by the user that purport to indicate a certain age actually belong to that user, rather than, say, the parent, an older sibling, a friend, or anyone else. Because of this technological reality of Internet communications, any legal requirement for a site or service to differentiate among users by age and treat certain age brackets of users differently would force operators to collect significant amounts of information from *all* users, thereby aggravating (rather than addressing) privacy concerns.

COPPA prohibits operators of websites or online services “directed to” children, or where the operator has actual knowledge that the user is under the age of thirteen, from collecting

¹⁶ *Id.*; see Charny, *supra* note 14; *Children’s Online Privacy Protection Act (COPPA)*, Reference for Business, <http://www.referenceforbusiness.com/small/Bo-Co/Children-s-Online-Privacy-Protection-Act-COPPA.html> (last visited June 16, 2010).

¹⁷ Comments of Parry Aftab to FTC Request for Public Comment on the Implementation of COPPA and COPPA Rule’s Sliding Scale Mechanism for Obtaining Verifiable Parental Consent Before Collecting Personal Information from Children 3 (June 27, 2005), <http://www.ftc.gov/os/comments/COPPARulereview/516296-00021.pdf>.

¹⁸ *Id.*

¹⁹ Peter Steiner, *On the Internet, Nobody Knows You’re a Dog*, THE NEW YORKER, July 5, 1993, at 61, <http://www.unc.edu/depts/jomc/academics/dri/idog.html> (cartoon of a dog, sitting at a computer terminal, talking to another dog).

personal information without verifiable parental consent. The Rule defines “collect” to include “enabling children to make personal information publicly available,” with the result that any website or service that permits interactive communication is considered to “collect” information under COPPA.²⁰ If COPPA were expanded to cover older minors, or if the actual knowledge requirement were replaced with a constructive knowledge standard, many modern general-interest websites (which attract a general audience that could well include minors) would need to treat child users differently in order to comply with COPPA. This would require these sites—including every blog, video hosting platform, and any site that includes a commenting feature—to collect age and other personal information from every user (or to exclude all minors, even older minors, from the sites).

A. Several approaches to expanding COPPA would impose age verification mandates on general-interest websites

Under the current COPPA framework, operators of sites “directed to” children must obtain parental consent before “collecting” information from a child, but general audience sites only need do so if they have actual knowledge that they are dealing with a child.²¹ In determining whether a site or service is directed to children, the Commission considers the “subject matter, visual or audio content, age of models, language or other characteristics of the website or online service,” as well as “whether a site uses animated characters and/or child-oriented activities and incentives.”²² The calculus the Commission must make when deciding whether a site is geared toward a 12-and-under audience is relatively simple: Children’s interests are typically quite different from those of adults, and the language and images used will provide fairly clear indicators of the site’s intended audience. Expanding the definition of “child” to include minors above the age of 12 would make it much more difficult, if not impossible, to distinguish websites or online services that are “directed to children” from those that are aimed at—and actually used by—a general audience. Older minors are interested in many of the same topics and media as adults are, and they are (much more than the 12-and-under age group) attracted to sites that treat them in a more adult manner. Thus, while distinguishing between sites directed to those under 12 and sites directed to everyone else is relatively easy and involves few “false positives” (mistaking the latter for the former), the same simply cannot be said for trying to distinguish between sites directed to, say, 16-year olds rather than 18-year olds.²³ Moreover, many sites are indeed directed to both older minors *and* adults. These sites, or any general-interest site or service that could appeal to older minors, would thus potentially come under an expanded COPPA scope. As a result, a large number of sites would need to implement COPPA compliance procedures and collect increased amounts of personal information from all of their users (or seek to exclude older minors entirely).²⁴

²⁰ 16 C.F.R. § 312.2.

²¹ *Id.* § 312.3.

²² *Id.* § 312.2.

²³ Many websites catering to younger users label themselves as “for teens” or “for young adults,” categories that span the legal divide between minors and adults 18 and older. *See, e.g.*, Advocates for Youth, www.advocatesforyouth.org (promoting activist networks for both high school and college students).

²⁴ *See generally COPPA 2.0, supra* note 1.

Under current law and rule, operators must also obtain parental consent before collecting information from a user when they have *actual* knowledge that the user is a child.²⁵ Lowering this knowledge standard to include “constructive knowledge” that a user is a child—requiring the operator to consider some combination of data points that would lead the operator to the conclusion that a particular user is likely to be a child—would dramatically increase the uncertainty among operators as to whether their activities were covered by COPPA. When the standard is actual knowledge, it is clear to operators when their liability under COPPA attaches: the moment they acquire a direct indication, via a report from the child’s parent or information submitted by the child himself, that the user is a child.²⁶ But under a constructive knowledge standard, operators would not have a clear sense of when the information collected about an individual user would transform into “knowledge” that the user is a child. This uncertainty would likely lead operators of general-interest sites to collect more information about every user in order to ascertain their users’ ages (or, again, to seek to exclude older minors), rather than risk inadvertently violating COPPA.

Again, an expanded COPPA would apply to more than just those sites that request contact information from users because “collection” includes *any* function that permits a child to make personal information “publicly available.”²⁷ This includes any type of interactive communication, from posting a comment on a blog or video site to communicating on a social networking site or using forward-to-a-friend tools or online greeting cards.²⁸ Any expansion of COPPA to cover older minors or to assign operators liability under a constructive knowledge standard would capture these sites, in addition to the sites and services that actively solicit information from users—and thus require expanded age verification mandates that would affect adults in ways described below.

B. Expanding COPPA would increase data collection, reduce user privacy, & burden speech unconstitutionally

Efforts to expand COPPA would bring general-interest websites with primarily adult audiences within the Rule’s application and would require operators of websites and online services to collect information from *every* user in order to distinguish adult users from children. This

²⁵ 16 C.F.R. § 312.3.

²⁶ See COPPA FAQ’s, *supra* note 7 (Question 41(a)-(b): “What happens if a child registers on my site and posts personal information on his blog page or in a chat room, but nowhere does he reveal his age?” and “What happens if a child visits a chat room or creates a blog and announces his or her age?”).

²⁷ 16 C.F.R. § 312.3.

²⁸ In December 2007, the Commission added a question in its FAQ reflecting the agency’s view that COPPA would require parental consent before allowing a child to send electronic greeting cards or forward items of interest to their friends. *COPPA FAQ, supra* note 7, (Question 44: “My child-directed website wants to offer electronic post cards and the ability for children to forward items of interest on my site to their friends. Can I take advantage of one of the email exceptions to parental consent?”). The Commission requires parental consent if users can “freely type messages in either the subject line of the e-card or in any text fields”—presumably, because this might lead to the sharing of personal information with the card’s recipient. See Jim Dunstan, *E-cards and “Forward-to-a-Friend” Promotions: Not Kid Friendly Anymore*; see also, Jim Dunstan, *FTC Issues Final Rules in CAN-SPAM Proceeding: Forward-To-A-Friend Promotion Mystery Solved*.

expansion would bring COPPA into the same dangerous territory as the Child Online Protection Act (COPA),²⁹ which was held to be an unconstitutional restriction on free speech.³⁰

COPA prohibited commercial distributors from knowingly posting online (in a manner available to a minor) any communication that is “harmful to minors.”³¹ The credit card and age verification systems proposed in COPA “required an individual seeking to access material otherwise permissible to adults to reveal personal statistics.”³² COPA would have required that all website operators restrict access by minors to material deemed “harmful to minors” and, therefore, would have required age verification of all users who attempted to access such content.”³³ In striking down COPA, the Third Circuit found that “the statute [was] substantially overbroad in that it place[d] significant burdens on Web publishers’ communication of speech that is constitutionally protected as to adults and adults’ ability to access such speech.”³⁴ The Supreme Court agreed that a statute that “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”³⁵ The Third Circuit held that “requiring a user to pay a fee for use of an adult verification service or to enter personal information prior to accessing certain material constitutes a much more severe burden on speech than technical difficulties.”³⁶ In its third time reviewing the issue, the Third Circuit, in *ACLU v. Mukasey*, held that age verification mandates would require adults to relinquish their anonymity to access protected speech.³⁷

Expanding COPPA would subject sites that cater to both adults and children to COPPA’s parental consent requirements. The only way for these sites to differentiate between the adult users who need no parental consent to share information and the child users who do would be to collect age information from *every* user. All adult users of sites that could potentially be deemed “directed to” older minors would have to provide their age prior to requesting or sharing information. COPPA would thus have functionally the same effect as COPA, placing the same burdens both on Web publishers’ communication of speech that is constitutionally protected as to adults’ ability to access such speech.

An expanded COPPA regime would also violate the First Amendment rights of older minors to access information without seeking parental consent. The U.S. Supreme Court has made clear

²⁹ 47 U.S.C. § 231.

³⁰ *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff’d*, 542 U.S. 656 (2004) (affirmed but remanded to district court to be tried on the merits); *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 598.

³¹ 47 U.S.C. § 231.

³² *ACLU v. Reno*, 217 F.3d 162, 171 (3d Cir. 2000).

³³ *COPPA 2.0*, *supra* note 2, at 24.

³⁴ *Ashcroft*, 322 F.3d at 266.

³⁵ *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (citing *ACLU v. Reno*, 521 U.S. 844, 874 (1997)).

³⁶ *Ashcroft*, 322 F.3d at 259.

³⁷ *See Mukasey*, 534 F.3d at 197.

that “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to [minors].”³⁸ While it may be constitutionally permissible to restrict minors’ access to some sexual content that may be deemed “harmful to minors,” minors—especially older minors—have a right to receive information just as adults do.³⁹ As the Supreme Court has declared: “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁴⁰ And while parents do have rights to seek to restrict what material their children are exposed to, courts have determined that laws conditioning a minor’s access to information on the consent of a parent may impermissibly infringe the First Amendment rights of the minor,⁴¹ particularly in the case of older minors, who “need to be able to exercise their free speech rights to develop into responsible, educated adults.”⁴² Restricting minors’ access to material until they turn 18 “would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”⁴³

Congress’s original decision to limit COPPA’s application to minors under the age of 13 was not arbitrary.⁴⁴ Rather, it was an intentional move made in recognition of the need to respect the First Amendment rights of minors, and the difficulty of making bright-line rules regarding access

³⁸ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975).

³⁹ Even in the area of sexual content, the Supreme Court has recognized the rights of “mature minors” to receive information about subjects like abortion and contraception. For instance, mature minors have the right to obtain abortions without parental consent under certain circumstances. *Bellotti v. Baird*, 443 U.S. 622, 640-43 (1979) (plurality opinion); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992); *Lambert v. Wicklund*, 520 U.S. 292 (1997). Since a defining characteristic of a “mature minor” is the “ability to make critical decisions in an informed . . . manner,” *Bellotti*, 443 U.S. at 634, it follows that such minors have a right to information about abortion; otherwise, they cannot receive the information that would enable them to make informed decisions in the first place. If mature minors are entitled to information about abortion, they are also entitled to information about contraception, which may prevent the need for an abortion. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (upholding right of contraceptive manufacturer to mail to the public unsolicited “informational” pamphlets about availability of prophylactics generally and prevention of sexually transmitted diseases; importance of conveying “truthful information relevant to important social issues”; “the First Amendment interest served by such speech [is] paramount”). While *Bolger* focused on the right of parents to receive information that might help them in carrying out some of their most difficult responsibilities, the Court also noted that “the statute also quite clearly denies information to minors, who are entitled to “a significant measure of First Amendment protection.” *Id.* at 74-75, n.30 (quoting *Erznoznik*, 422 U.S. at 212). The Court also noted that “adolescent children apparently have a pressing need for information about contraception.” *Id.* at 74-75, n. 30.

⁴⁰ *In re Gault*, 387 U.S. 1, 13 (1967).

⁴¹ Charlene Simmons, *Protecting Children While Silencing Them: The Children’s Online Privacy Protection Act and Children’s Free Speech Rights*, 12 COMM. L. & POL’Y 119, 132 (2007). See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001) (“conditioning a minor’s First Amendment rights on parental consent of this nature is a curtailment of those rights”); *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 961 (8th Cir. 2003) (“the government cannot silence protected speech by wrapping itself in the cloak of parental authority”).

⁴² Simmons, *supra* note 41, at 132.

⁴³ *Am. Amusement*, 244 F.3d at 578.

⁴⁴ See, e.g., Mulligan Testimony, *supra* note 2 (recommending that the applicable age proposed in the COPPA statute as originally proposed be lowered from 16 to 13, to “ensure children’s First Amendment rights to access information are protected”).

to information where older minors are concerned. Any expansion of COPPA that would cover older minors, and thus prohibit teens from requesting information or using interactive communications platforms without first obtaining parental consent, would represent an unconstitutional abridgement of older minors' First Amendment rights.

An expanded COPPA regime would also impinge upon the First Amendment right of website and online service operators to reach the audience for their speech. The first court to review and strike down COPA noted that a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."⁴⁵ The burden that COPPA compliance places on website operators is significant: age verification systems are expensive, require the collection of a great deal of information from every user, and yet cannot guarantee accurate results,⁴⁶ while parental consent verification procedures also require significant expenditures of time and money. One result of COPPA has been that the vast majority of website operators simply bar minors under the age of 13 from accessing their sites and services, rather than incur these expenses.⁴⁷ If COPPA were expanded to include older minors, website operators and service providers would likely attempt to bar all minors from accessing their services. This would greatly limit the amount of speech available to teens and adults, while increasing the overall amount of information that websites collect about their users, thereby harming all users' privacy.

The current COPPA statute may go as far as is constitutionally permissible. The "directed to" and "actual knowledge" standards are essential to preventing COPPA from converging with COPA, and should therefore be maintained.

IV. THE COPPA STATUTE IS BROAD AND DOES NOT REQUIRE MODIFICATION TO PERMIT THE COMMISSION TO REGULATE EMERGING TECHNOLOGIES

The Commission requests comment on "the implications for COPPA enforcement raised by technologies such as mobile communications, interactive television, interactive gaming, or other similar interactive media, consistent with the Act's definition of 'Internet'."⁴⁸ The COPPA definition of "Internet" is device-neutral and broad enough to encompass children's access to the Internet through devices other than a traditional desktop or laptop computer. By defining "Internet" as "collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor

⁴⁶ Federal courts have found that there is "no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor." *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007); *see also* ONLINE SAFETY AND TECH. WORKING GROUP, YOUTH SAFETY ON A LIVING INTERNET (2010), www.ntia.doc.gov/reports/2010/OSTWG_Final_Report_060410.pdf).

⁴⁷ *See, e.g.*, MySpace, *Terms of Service*, § 1, www.myspace.com/Modules/Common/Pages/TermsConditions.aspx; Facebook, *Terms of Service*, § 4.5, www.facebook.com/terms.php; Second Life, *Terms of Service*, § 2.1 (barring minors below 18), <http://secondlife.com/corporate/tos.php>.

⁴⁸ *COPPA Review Request*, *supra* note 1, Question 11.

or successor protocols to such protocol,”⁴⁹ Congress ensured that the statutory definition would remain relevant even as applications, access devices, and transmission protocols evolve. This definition also gives the Commission the flexibility to include any emerging technologies and means of accessing the Internet in its regulations. There is no need to reopen the COPPA statute to expand the scope of devices and communications methods covered because the statute is *already* sufficiently broad.

V. THE FTC SHOULD PURSUE A STRATEGY OF ENHANCED ENFORCEMENT, INCREASED EDUCATIONAL EFFORTS & PROMOTION OF EMPOWERMENT SOLUTIONS

Though any expansion of the group of minors that COPPA covers would raise significant constitutional concerns, the Commission can pursue a number of activities to help increase minors’ safety and privacy online. The Commission excels in consumer education, with publications such as the Net Cetera guide⁵⁰ and the OnGuardOnline.gov website serving as important resources for parents, children, and educators. The Commission should continue its efforts to educate parents and children about safe and smart Internet usage, which will help to advance COPPA’s goal of increased parental involvement in children’s online activities.

Within the scope of COPPA as it is implemented today, the Commission could consider coordinating COPPA enforcement efforts among state Attorneys General, who may receive complaints about the misuse of children’s personal information that the Commission does not.

But COPPA was never intended to be the single answer to online child safety. As a privacy statute first and foremost, COPPA is focused on (and largely limited to addressing) the collection of data from children. The Act says nothing about the education and innovation in technological empowerment solutions that are essential to improving child safety online more broadly. Six blue ribbon task forces have agreed that education and empowerment are the primary solution to child safety concerns.⁵¹ The Commission may be able to help promote the

⁴⁹ 13 U.S.C. § 1302.6. The full definition concludes with “to communicate information of all kinds by wire or radio.” *Id.* The current definition in the Rule appends “or other methods of transmission” to the end of the statutory definition. 16 C.F.R. § 312.7.

⁵⁰ FTC, NET CETERA: CHATTING WITH KIDS ABOUT BEING ONLINE (2009), www.onguardonline.gov/pdf/tec04.pdf.

⁵¹ See generally Adam Thierer, *Five Online Safety Task Forces Agree: Education, Empowerment & Self-Regulation Are the Answer*, Progress on Point 16.13 (The Progress & Freedom Found., Washington, D.C.), July 2009, www.pff.org/issues-pubs/pops/2009/pop16.13-five-online-safety-task-forces-agree.pdf (summarizing COMM’N ON CHILD ONLINE PROTECTION, REPORT TO CONGRESS (2000), www.copacommission.org/report/COPAreport.pdf; COMPUTER SCI. & TELECOMM. BD., NAT’L RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET (Dick Thornburgh & Herbert S. Lin eds., 2002), available at http://books.nap.edu/openbook.php?record_id=10261&page=R1; TANYA BYRON, SAFER CHILDREN IN A DIGITAL WORLD: THE REPORT OF THE BYRON REVIEW (2008), <http://www.dcsf.gov.uk/byronreview>; INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES (2008), http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf; POINTSMART.CLICKSAFE., TASK FORCE RECOMMENDATIONS FOR BEST PRACTICES FOR CHILD ONLINE SAFETY (2009), www.pointsmartreport.org/PointSmartReport.pdf; ONLINE SAFETY AND TECH. WORKING GROUP, YOUTH SAFETY ON A LIVING INTERNET (2010), www.ntia.doc.gov/reports/2010/OSTWG_Final_Report_060410.pdf).

development and adoption of technological solutions that empower parents to more easily exercise granular choice over their children’s online activities or that improve the privacy and safety of children in online environments, especially after parental consent to the child’s participation has been obtained. Of course, the use of such technologies should not—and cannot, constitutionally—be mandated, but the Commission can play an important role in directing attention to the need for such innovation.

A layered approach of enforcement of existing laws, increased education, and technological empowerment, together, constitute an effective but less restrictive alternative to increased government regulation that is preferable on both constitutional and practical grounds. Ultimately, the best way to increase children’s safety and privacy online is not to erect a series of walls and barriers around them, but rather, to provide the education and tools necessary for children to become savvy, empowered Internet users. By encouraging parents to become involved with their younger children as they go online, COPPA—and the Commission’s enforcement of it—will help create the environment for this to happen.

Respectfully submitted by,

/s/

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