Children and Screens | Institute of Digital Media and Child Development

Comments of Children and Screens: Institute of Digital Media and Child Development
to the
Federal Trade Commission
COPPA Rule Review, Project No. P195404

Children and Screens: Institute of Digital Media and Child Development ("Children and Screens") appreciates the opportunity to submit comments to the Federal Trade Commission's ("Commission" or "FTC") on their proposed rulemaking to the Children's Online Privacy Protection Act ("COPPA"). Since 2013, Children and Screens has worked to help young people lead healthy lives in a digital world by synthesizing and disseminating the latest scientific research, while also supporting advancements in the field through funding and convenings.

Children and Screens supports the highest standard of security and privacy for children's data and personal information. In its notice of proposed rulemaking ("NPRM" or "notice"), the Commission takes important steps to modernize its COPPA rule ("Rule" or "COPPA Rule") towards this end. Children and Screens is largely supportive of the Commission's proposals, and its positions on existing statutes. In these comments, we address what we consider to be the most pressing proposals and positions raised in the notice, and offer recommendations where we feel there is room for improvement. Our positions are informed by empirical research, and are based on interpretations of COPPA that will maximize the privacy and security of all children. We arrived at these conclusions free of conflicts due to the support from technology industry funding, which allows Children and Screens to view research findings objectively.

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Maximizing for engagement

Features and practices intended to maximize engagement and maintain user intention pose a serious risk to consumers. There is no reason, commercial or otherwise, that a website or online service is justified in maximizing engagement of children. Research has identified features intended to increase engagement as possible contributors to mental health harms. Platforms such as TikTok can induce so-called "flow states"[1]. These flow states can be considered the height of engagement. They are a state in which someone is highly focused on the task at hand, losing track of time and their surroundings. Research in adults has not only connected flow states to poorer mental health, but also found that flow states are more common when using TikTok than when using Instagram[2]. Other platforms are still capable of inducing flow states, but TikTok's algorithm-curated feed of short form videos is especially detrimental. Flow states can also underlie problematic internet use[3], which is associated with more serious mental health issues (depressive symptoms, anxiety, loneliness, and other mental health outcomes), and with lower levels of subjective well-being[4]. Thus, any feature that maximizes user engagement should be viewed with caution, regardless of the intent.

Children and Screens strongly supports narrowing the definition of data uses that constitute support for the internal operations of a website or online service.

Children and Screens strongly supports The Commission's proposals to clarify and limit the "support for internal operations" exception. The Commission is correct that this exception should not be used to optimize user attention and maximize engagement. Such uses are an abuse of the exception, and put children at a heightened risk of mental health harms with no measurable benefits to users. Additionally, narrowing the scope of this exception is a vital component of protecting the privacy and rights of minors, and establishing the clearest guidelines possible makes compliance easier for websites and online services. We feel that the 2013 amendment's inclusion of stand-alone persistent identifiers in the definition of personal information was a necessary change, and we applaud the Commission for maintaining that change in section 14.A.2.c of the notice. In response to section IV.A.4, we agree that any entity using the support for the internal operations exception should be required to

[1] Yao Qin et al., *Flow experience is a key factor in the likelihood of adolescents' problematic TikTok use: The moderating role of active parental mediation, 20 International Journal of Environmental Research and Public Health*, 2089 (2023)

[2] James A. Roberts & Meredith E. David, *Instagram and Tiktok Flow States and their association with psychological well-being*, 26 Cyberpsychology, Behavior, and Social Networking, 80–89 (2023)

[3] *Supra* note 1

[4] Zhihui Cai et al., *Associations between problematic internet use and mental health outcomes of students: A Meta-Analytic Review, 8 Adolescent Research Review*, 45–62 (2023)

specify why the operator has collected a persistent identifier and the means the operator uses to comply with the exception's use restrictions.

Regarding the proposals in section IV.A.1 of this notice and in response to question 3, we support adding mobile phone numbers to the definition of online contact information for the limited purposes proposed by the Commission, such as in connection with obtaining parental consent through a text message.

Children and Screens urges the Commission to view operator-driven personalization with caution, and assume it is Intended to increase engagement and maintain attention

In response to questions 9 and 15: In question 9 the Commission asks under what circumstances personalization would be "user-driven" and in question 15, the Commission asks "should the Rule differentiate between techniques used solely to promote a child's engagement with the website or online service and those techniques that provide other functions, such as to personalize the child's experience on the website or online service? If so, how should the Rule differentiate between those techniques?" We feel these are closely related. Any design or feature that is not expressly controlled by the user would be considered operator-driven. This includes but is not limited to algorithmically informed social media feeds and suggested accounts. User-driven personalization is settings or features a user can turn off and/or customize. This means that a component of user-driven personalization is the ability to disable or modify operator-driven personalization, in addition to more granular changes a user can make to their experience. This does not mean that operator-driven personalization becomes user-driven when an operator permits a user to turn it off or modify it. It means users can and should have the ability to turn off and modify operator-driven customization.

Operator-driven personalization is frequently intended to increase engagement and maintain attention. Even when used to enhance the user experience, operator-driven customization will nearly always increase engagement, and should first and foremost be considered a method of increasing engagement and maintaining attention. We urge the Commission to view all operator-driven personalization with caution, and assume it is intended to increase engagement and maintain attention.

Third parties

Children and Screens urges the Commission to limit personal information sharing with third parties and to require operators to justify all third party sharing that does occur

Regarding sections IV.C.1 and IV.B.2, and question 12 of the notice, Children and Screens feels it is extremely important to limit data sharing to the maximum extent possible. When operators share personal information with third parties, they should be required to identify those third parties or specific categories of those third parties in the direct notice to the parent[5] and in the online notice[6]. In these notifications, at minimum the operator should be required to (1) identify the third parties; (2) state the purposes for sharing data with those third parties and whether or not it is integral to the use of the online service; (3) state the type of data being shared with each third party; and (4) state that the parent can consent to the platform's collection and use of a child's personal information without consent to disclosure of that information. Considering the majority of Americans lack reading proficiency[7], we urge the Commission to specify that all notifications must be clear, and suggest the Commission go as far as setting a recommended reading level for such notifications.

In response to the proposals in section IV.A.2.b, we support the Commission striking the word "directly" from the definition of "website or online service directed to children" under the COPPA Rule[8]. The Commission is correct in their justification that the word "directly" creates a loophole that is contrary to the intent of COPPA.

Viewers of child-direct content

Children and Screens urges the commission to adopt its proposal to not allow general audience platforms to rebut the presumption that all viewers of child-directed content are all children

In response to section III of this notice addressing the rebuttable presumption, we agree with the Commission's position that general audience platforms should not be permitted to rebut the presumption that viewers of child-directed content are all children. There is no path for rebuttal that does not put a significant portion of children viewing child-directed content at risk, if not all the children viewing this content.

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[5] 16 C.F.R § 312.4(c) (2023)
[6] 16 C.F.R § 312.4(d) (2023)
[7] Jonathan Rothwell, (Gallup, Inc.) (2020), https://www.barbarabush.org/wp-content/uploads/2020/09/BBFoundation_GainsFromEradicatingIlliteracy_9_8.pdf (last visited Feb 2024)
[8] 16 C.F.R § 312.2 (2023)

Conditional participation

Children and Screens urges the commission to continue prohibiting operators from conditioning a child's participation in an activity on collection of more personal data than is necessary

Regarding section IV.E of this notice, the Commission is correct in reaffirming the prohibition on conditioning children's participation in activities on the collection of personal data beyond what is necessary[9]. Furthermore, we support the Commission's proposal to expand the definition of "activity." This aligns with the spirit and the statute of COPPA, and will help companies comply with COPPA by reducing ambiguity, and help fill potential loopholes companies may try to exploit.

Personal information

Children and Screens urges the commission to add biometric identifiers to the final Rule's definition of personal information and adopt inferred data requirements

Regarding section IV.A.2.a, we strongly support adding biometric data to the definition of personal information, and encourage the Commission to define "personal information" in the broadest terms possible. Biometric data is particularly sensitive and merits significant protection. This proposed change would also better align the COPPA Rule's personal information definition with the Family Educational Rights and Privacy Act[10].

Regarding section IV.A.2.b, we acknowledge that the language of COPPA clearly states that only data collected *from a child* is covered[11]. However, we disagree that inferred data should be excluded entirely on these grounds. As the Commission states, inferred data could be considered a proxy for personal information "if it is combined with additional data" that is already considered personal information. It is our position that nearly all inferred data requires some amount of personal information, and can be extremely sensitive. Unless the Commission knows exactly how a website or online service has developed their inferred data, it is a reasonable and likely assumption that some amount of personal information was used to develop that inferred data. The example of "predictive behavior" used in the notice for instance, could be informed by the age of the user, geolocation, or a persistent identifier. Furthermore, inferred data can and is a strong proxy for personal information in some clear cases. A platform could infer that a user is in a particular city based on their search history for example. Such location information should be protected, and aligns with the intent of COPPA. For these reasons we

[9] 16 C.F.R. § 312.7 (2023)
[10] 20 U.S.C. § 1232g; 34 C.F.R. Part 99 (2023)
[11] 15 U.S.C. § 6501(8).

ask the Commission to reconsider excluding inferred data entirely, and feel very strongly that there should be clear requirements regarding inferred data.

Knowledge standards

Children and Screens urges the commission to apply a constructive knowledge standard to mixed audience platforms

Regarding section IV.A.5.c of this notice, we support the proposed clarifications to "mixed audience" platforms proposed by the Commission, and the rationale behind it. In section II.B of the notice, the Commission declines expanding the actual knowledge standard to a constructive standard. However, we do encourage the Commission to adopt a constructive knowledge standard for mixed audience platforms. There are two compelling reasons to do so. 1) The Commission already applies a limited version of a constructive knowledge standard. The current presumption that all users of child-directed websites or services, or viewers of child-directed content, are children is a constructive knowledge standard. The Commission rightfully determined that a user's age could be assumed based on the intended audience of a website or content, and that the risk to children viewing child-directed content outweighs the minimal burden this standard puts on operators. 2) Under the current COPA Rule, in most cases as long as a child has lied about their age, an operator is shielded from liability even if that operator has determined the user to be a child. In these circumstances an operator can advertise to that user as if they are a child, recommend child-directed content, and market that user's data as that of a child, all free of liability under COPPA.

The ability of operators to infer a user's age based on any number of factors is at least as accurate as presuming age based on the intended audience of a website or specific content. For instance, if a middle school student's account is connected to the accounts of other children, and the student's device is located at a middle school during typical school session hours, an operator may correctly determine that the user is a middle school student and more than likely is under 13. For these reasons we ask that, should an operator determine a user is a child for any purpose, the Commission require the operator to treat that user as a child. If an operator decides not to profile a user, then an operator would not be required to treat that user as a child unless that user meets other requirements under the current COPPA Rule.

There are numerous examples of a constructive knowledge standard in proposed state and federal legislation, including the Kids Online Safety Act (KOSA)[12]. In the February 2024 draft of KOSA, platforms

[12] Kids Online Safety Act of 2023, S.1409, 118th Cong. § 7 (2023)

would be covered under KOSA if they have "actual knowledge or knowledge fairly implied on the basis of objective circumstances." This kind of requirement still gives platforms flexibility in how they determine a user's age, but should they decide to profile a user, they must then treat users they have determined to be children as children. It is also possible to empirically determine if a platform has identified a user as a child. If operator-driven personalization results in a user being delivered child-directed content or advertising, then it can be assumed that the operator has determined the user is a child. This approach would dovetail with the Commission's position that viewers of child-directed content should be treated as children.

Viewing child-directed content is a reasonable proxy for age, and it can be assumed that a large proportion of viewers of child-directed content are children, and thus the safest approach is to assume all users are children. Likewise, treating a user as a child for marketing purposes, or to personalize content, are also proxies for a user's age, and it can also be assumed that a large proportion of users identified as children for these purposes are children. Assuming all these users are adults puts a substantial number of children at a privacy and security risk, just as assuming viewers of child-directed content are adults puts children at risk.

Data retention and security

Children and Screens urges the commission to adopt stringent data retention and security requirements

Regarding sections IV.F and IV.G of this NPRM, the Commission is right to propose changes to §312.8[13] and § 312.10[14] of the Rule. COPPA was enacted recognizing the security of children's personal information as an utmost priority. Yet children's personal information remains at risk. In 2022, there were 298 identified data breaches from a wide range of sectors, exposing the private information of over 1 million children[15]. Compromising a child's personal information translates to direct financial consequences for families. On average, child identity fraud costs a family more than $1,000, and annually costs U.S. households over $900,000,000[16]. Enhanced security requirements will not eliminate the threats to children's personal data, but are necessary to mitigate the damage done. The

[13] 16 C.F.R. § 312.8 (2023)

[14] 16 C.F.R. § 312.10 (2023)

[15] *Data breaches by third parties* Black Kite (2023), https://blackkite.com/data-breaches-caused-by-third-parties/ (last visited Nov 14, 2023).

[16] *Child Identity Fraud: A Web of Deception and Loss* Javelin Strategy & Research (2021), https://javelinstrategy.com/research/child-identity-fraud-web-deception-and-loss

Commission's proposals are reasonable, and we fully support any increase to security requirements given the sensitive nature of children's data.

Conclusions

As noted in these comments, we fully support many of the proposals, and the stances the Commission takes on its previous decisions. The proposed changes appropriately modernize the Rule, and we applaud the Commission for taking these steps. We encourage the Commission to reconsider its positions on inferred data and knowledge standards. There is a responsible approach to including inferred data in components of the Rule, and for moving away from a strict adherence to an actual knowledge standard. Doing so would better align the Rule with the intent of COPPA, and with the current practices of websites and online services.