Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of	)	
	)	
Children's Online Privacy Protection Rule:	)	Project No. P-104503
	)	
Request for Public Comment on	)	
Supplemental Notice of Proposed	)	
Rulemaking	)	

COMMENTS OF

The Center for Digital Democracy,
American Academy of Child and Adolescent Psychiatry,
Berkeley Media Studies Group,
Campaign for a Commercial-Free Childhood,
Center for Media Justice,
Center for Science in the Public Interest,
ChangeLab Solutions,
Children Now,
Consumer Action,
Consumer Federation of America,
Consumers Union, the advocacy and policy division of Consumer Reports,
Consumer Watchdog,
National Consumers League,
Public Health Advocacy Institute at Northeastern University School of Law,
Privacy Rights Clearinghouse,
Public Citizen,
Public Health Institute, and
Praxis Project

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Dated: September 24, 2012

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SUMMARY

Children's Privacy Advocates generally support the Commission's revised proposals, including the Commission's proposed definition of "personal information" to include persistent identifiers used for functions other than or in addition to support for the internal operations of the website or online service. However, we oppose the proposed change in the definition of "directed to children," because it would undercut the other beneficial proposals and lessen privacy protections for children. We also do not support the newly revised proposal to redefine "support for internal operations," because the newly proposed definition would create a large loophole that could allow operators to engage in behavioral advertising to children.

Children's Privacy Advocates agree that it is necessary to clarify the COPPA responsibilities of both 1) child-directed websites or online services and 2) third parties such as ad networks and plug-ins that collect information from or use information to target children. We support the Commission's proposal to revise the definition of "operator" to make child-directed services responsible for personal information collected or maintained for their benefit. This proposal is fair to operators, helpful to parents, and consistent with the language and legislative intent of COPPA.

We have concerns, however, about the Commission's proposal to limit the liability of third-party operators to situations in which they have actual knowledge or reason to know that they are collecting personal information through a host website or online service directed to children. While we recognize the logistical and enforcement problems with holding multiple parties responsible for COPPA compliance, we are concerned that the proposed standard, coupled with the statement that third-parties have no duty to ascertain whether a website or online services on which they operate are child-directed, creates the wrong incentives.

Finally, Children's Privacy Advocates strongly oppose the proposed redefinition of websites and online services directed to children. While we understand that at times it may be difficult to apply the "totality of circumstances test," the proposed solution to this problem would create a gigantic loophole that would result in much less privacy protection for children.

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The Center for Digital Democracy, American Academy of Child and Adolescent Psychiatry, Berkeley Media Studies Group, Campaign for a Commercial-Free Childhood, Center for Media Justice, Center for Science in the Public Interest, ChangeLab Solutions, Children Now, Consumer Action, Consumer Federation of America, Consumers Union (the advocacy and policy division of Consumer Reports), Consumer Watchdog, National Consumers League, Public Health Advocacy Institute at Northeastern University School of Law, Privacy Rights Clearinghouse, Public Citizen, Public Health Institute, and the Praxis Project (collectively "Children's Privacy Advocates") appreciate the opportunity to comment on the FTC's Supplemental Notice of Proposed Rulemaking regarding the revision of its Rule implementing the Children's Online Privacy Protection Rule ("COPPA Rule").

I. The Commission Should Revise the Definition of Personal Information to Ensure that Marketers Cannot Engage in Behavioral Advertising to Children Without Parental Notice and Consent

Children's Privacy Advocates support the Commission's proposed definition of "personal information" to include persistent identifiers used for functions other than or in addition to support for the internal operations of the website or online service. This update is necessary to respond to the sophisticated data-driven techniques currently being used to market to children. Moreover, the FTC has clear legal authority to update the definition of personal information. However, the Commission should clarify the newly revised proposal to define "support for internal operations" to ensure that the exception does not swallow the rule.

A. To Protect Children's Privacy in the Modern Information Ecosystem, the Commission Must Recognize Persistent Identifiers as Personal Information

Children's Privacy Advocates reiterate their strong support for the FTC's proposal to update the definition of personal information to include persistent identifiers.[1] This change is

[1] Children's Online Privacy Protection Rule, Proposed Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011) [hereinafter 2011 NPRM] (to be codified at 16 C.F.R. pt. 312); *see* "Comments of the Center for Digital Democracy et al, In the Matter of Children's Online Privacy Protection Rule: Request for Public Comment on Proposal to Amend Rule to Respond to Changes in Online Technology," 23 Dec. 2011, at 26, http://ftc.gov/os/comments/copparulereview2011/00373-8239 9.pdf.

necessary to protect children's privacy in light of contemporary online marketing practices. As the Commission succinctly summarized in its recent new framework on consumer privacy, "the traditional distinction between personally identifiable information and 'anonymous' data has blurred."[2]

In the same report, the Commission repeatedly made clear that a child's information is to be classified as "sensitive data," along with "a Social Security number or financial, health or geo-location information."[3] Similarly, the White House's new "Privacy Bill of Rights" makes clear that "children may be particularly susceptible to privacy harms" and that "greater protections for personal data obtained from children and teens" may be warranted.[4]

COPPA must be updated to include persistent identifiers as personal information to remain true to COPPA's intended purpose: "to regulate an operator's ability to obtain information from, and market back to, children."[5] Today's modern information ecosystem uses data syndication that links websites and mobile platforms with ad networks, real-time bidding platforms, and a complex of off- and online data broker providers. Social media widgets and "apps" operating their data practices independently are also integrated into webpages and platforms. Each part of the online marketing chain can contribute to a targeting profile.

By using persistent identifiers, third parties are now able to track each individual throughout his online experience, whether that experience takes place on a single website, exploring the Web across sites, or using mobile devices and other platforms. As the Commission has acknowledged,[6] offline databases contribute information to a user's online targeting profile.

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[2] U.S. Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 11 (2012), *available at* http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.

[3] *See generally id.* at 2, 15, 22, 47, and 59.

[4] White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* 15, 17-18 (2012), *available at* www.whitehouse.gov/sites/default/files/privacy-final.pdf.

[5] 2011 NPRM, 76 Fed. Reg. at 59811.

[6] As the FTC noted in its Complaint about data broker Spokeo this year, Spokeo "assembles consumer information from 'hundreds of online and offline sources,' such as social networking sites, data brokers, and other sources to create consumer profiles, which Defendant promotes

Through powerful Data Management Platforms, including those used by many leading services that target children online, a vast host of individual user actions and behaviors are instantly analyzed and actualized for marketing purposes. First- and third-party data are routinely combined and continually updated.[7] Insights gathered from personalized data collection are "optimized" for the most effective user targeting, while each action and reaction—known as a "digital exposure"—is closely measured for marketing purposes. "Integrated" platforms seamlessly combine user data captured through display advertising, mobile sites, and on social media, and can merge "non-anonymous digital" information with transaction and other data.

Each user is linked to a "user key"—*i.e.*, a persistent identifier such as that identified in a cookie—and these keys are bought and sold in real-time.[8] Online marketers targeting children and others consider these powerful and ever-growing new tools to be, in the words of one Viacom executive, a "Holy Grail of interactive ads for online and on-air, and convergent advertising serving."[9]

This complex of real-time ad exchanges and demand-side platforms enables Internet users to be targeted and sold to the highest bidder in milliseconds with interactive marketing

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as 'coherent people profiles' and 'powerful intelligence.' These consumer profiles identify specific individuals and display such information as the individual's physical address, phone number, marital status, age range, or email address." *U.S. v. Spokeo, Inc.*, http://www.ftc.gov/opa/2012/06/spokeo.shtm
(June 6, 2012). The Commission has also called for legislation on data brokers in its recent Privacy report. Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers* (2012), *available at* http://www.ftc.gov/opa/2012/03/privacyframework.shtm.

[7] *See generally* NPario, "Solutions," http://www.npario.com/solutions; Darryl K. Taft, *Viacom Launches 'Surround Sound' Ad System Based on Adobe Technology*, eWeek (Mar. 22, 2012), http://www.eweek.com/c/a/Application-Development/; Michael Green & Joanna O'Connell, *The DMP is the Audience Intelligence Engine for Interactive Marketers*, Forrester (July 25, 2011), *available at* http://www.bcama.com/documents/segment-based-advertisiing-Forrester.pdf; Turner, "Director, Digital Analytics," http://www.turner.com/careers/job-details/131182BR.

[8] *See, e.g.*, Presentation by Scott Nuernberger Vice President, Merkle, at Disney's Analytics and Optimization Summit, 2012, http://www.disneynow.com/profile/web/index.cfm?PKwebID=0x31047566f&varPage=activity.

[9] John Ebbert, *Viacom Wants Convergent, Audience Offering for On-Air and Online Says SVP Cogswell*, Ad Exchanger (Mar. 22, 2012), http://www.adexchanger.com/publishers/viacom/.

highly honed to their unique characteristics, whether on a website, using a mobile device, or watching a video.[10] So-called "optimization" engines adapt to a user's most recent data, enabling more precise targeting. Thus, these techniques allow marketers to serve specific people with content tailored for them on an individual level, even if they lack the types of information traditionally considered to be personally identifiable.

B. Operators of Child-Directed Websites Are Employing Sophisticated Tracking and Data Mining Techniques to Personalize Marketing Messages to Children

The techniques described above are currently used to personalize marketing to children as well as adults. A study by the well-known privacy expert Richard Smith found that many of the leading companies that specifically serve children deploy tools that enable granular targeting and actionable analysis.[11] Since then, more evidence has come to light documenting how the major children's websites have expanded the role of "Big-Data" driven analytics and services in their online marketing practices, including using well-known data-mining tools such as Hadoop, Netezza, and Omniture.[12]

Viacom—owner of Nickelodeon—openly boasts the ability to merge "highly proprietary . . . first-party data" with "data from trusted industry partners and providers around demographics, behavior, geography and purchase propensities." Such data, Viacom claims, is

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[10] Jeffrey Chester, *Cookie Wars: How New Data Profiling and Targeting Technologies Threaten Citizens and Consumers in the "Big Data" Era*, *in* Serge Gutwirth, Ronald Leenes, Paul De Hert and Yves Poullet, eds. *European Data Protection: In Good Health?* 2012; Monica Savut, *Real-Time Bidding Meets Multichannel in a Data-Driven World: New Report*, Econsultancy (Aug. 9, 2012), http://econsultancy.com/us/blog/10500-real-time-bidding-meets-multichannel-in-a-data-driven-world-new-report.

[11] This study was included as attached to our December 2011 COPPA filing. Mr. Smith reviewed the data collection practices of six leading children's sites during the week of 17 September 2012. They were Nick.com, Cartoon Network, Webkinz, Club Penguin, Poptropica and Barbie.com. Mr. Smith reported he found the same data collection, including behavioral tracking cookies, he discovered in his December 2011 research.

[12] Time Warner, "Job Details," https://careers.timewarner.com/1033/ASP/TG/cim_jobdetail.asp?jobId=617676&partnerid=391&siteid=36.

"anonymous," yet it enables Viacom's "Surround Sound" marketing system to "connect clients with specific audiences wherever they are across our digital portfolio."[13]

The online ad industry has disingenuously claimed before the Commission and the public that much of their data targeting practices are anonymous. However, in many industry presentations to advertisers, they make it clear that specific individuals are targeted using such information. Recent industry practices, as we have described, have also taken data targeting to a more precise level. An industry report on "audience buying" released last January reveals that the industry's claims that so much of their data is not really identifiable does not hold up:

> Despite the challenges inherent in the PII/non-PII divide, some data executives downplay the importance of knowing a prospect's name and address, arguing that pixel-driven data—insight into what an individual browser does on a website or a platform like Facebook—often brings the sought-after targeting capabilities, even without a consumer name. "A cookie is just as good as an individual ID," argued an executive at one large media-buying platform. . . . Ultimately, many said, the consumer's name and address isn't as important in raw behavioral data to determine propensity to respond."[14]

Child-directed sites are using a range of strategies to drive their users to their other multi-media platform branded sites, where they can collect additional data—such as "fan" information.[15] For example, Viacom markets *The Legend of Korra* through "social

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[13] *See generally* Taft, *supra* note 7; Ebbert, *supra* note 9; Tim Peterson, *Viacom Bundling TV, Digital Buys Brands Can Target Audience Segments Across Platforms*, Ad Week (Mar. 21, 2012) http://www.adweek.com/news/television/viacom-bundling-tv-digital-buys-139096; David Kaplan, *Viacom Creates "Digital Inventory" Job, Plans Private Exchange*, Ad Exchanger (July 10, 2012), http://www.adexchanger.com/online-advertising/viacom-creates-digital-inventory-strategy-post-plans-to-roll-out-private-exchange/.

[14] Winterberry Group, "From Information to Audiences: The Emerging Marketing Data Use Cases," Jan. 2012, http://www.slideshare.net/NikolayBulanov/iab-winterberry-auidiencedatause, emphasis added. At Disney's August 2012 "Analytics and Optimization Summit," presenter Acxiom illustrated how data targeting enabled the conversion of "30% of previously anonymous online behavior to specific customers." "Why Big Data is So Big," Acxiom 2012, http://www.disneynow.com/profile/web/index.cfm?PKWebId=0x31047566f.

[15] A recent study found that fans were more likely to perform desirable actions such as installing an app or making a purchase than non-fans, and that it was also significantly cheaper to prompt them to do so through advertising than to prompt non-fans. Cotton Delo, *Why Brands Still Need*

media/gamification" strategies designed to "build a fan base" through Facebook. *The Legend of Korra* is part of Nickelodeon's Saturday morning children's TV block ("the number-one destination for Kids 2-11 for 12 consecutive years").[16] According to Viacom, "Nick's marketing team built a plan to engage existing fans early and encourage them to share *Korra* in social . . . . Fans were rewarded with points for sharing and for driving their friends within social . . . . The more shares and clicks, the more points they got." Nick's KorraNation.com scored "100,000 social actions," a 5X growth of Facebook Fans totaling 185,000, and generated "2.2 million mentions" in a day.[17]

Just last month, the Walt Disney Company organized an "Analytics and Optimization Summit," which illustrates how Disney itself is engaged in and exploring a wide range of analytical-based online targeting techniques, using "Big Data" methods to "to micro target, customize and personalize media and [the] channel experience." The presentations made at the meeting, featuring well-known data analytics and online marketing companies Acxiom and Merkle, illustrated the landscape in which the Commission must ensure children receive the protections mandated by COPPA.[18] For example, databroker Merkle discussed how the "Digital Marketing Value Chain" incorporates "First, Second, and Third Party Data," "offline/online databases," and "individual level targeting." Merkle illustrated how behavioral targeting "cookies" could be used to target sites, mobile devices and with online video."

Facebook 'Fans,' AdAge (Nov. 22, 2011), http://adage.com/article/digital/study-facebook-fan-worth-10-average-brands/231128/.

[16] Carl Marcucci, *Nickelodeon Presents 2012 Upfront*, Radio Business Report, (Mar. 15, 2012) http://rbr.com/nickelodeon-presents-2012-upfront/.

[17] Daina Amorosano, *Leveraging Social Media/Gameification to Build Fan Base for "The Legend of Korra" Launch*, Viacom, (Apr. 13, 2012) http://blog.viacom.com/2012/04/leveraging-social-mediagameification-to-build-fan-base-for-the-legend-of-korra-launch/. While we recognize that children under 13 are not supposed to be on Facebook, it is a well-known fact that many are. *See, e.g., Why Are 5 Million Kids on Facebook if it Doesn't Want Them?*, Reuters (Sept. 19, 2012), http://www.reuters.com/article/2012/09/19/us-facebook-children-idUSBRE88I1G620120919.

[18] *See* Why Big Data is So Big, *supra* note 14; "Adobe AudienceManager — Optimized Ad Audiences," Adobe, http://www.omniture.com/en/products/advertising/audience-manager.

At the same meeting, the manager of social media analytics for Disney described Disney's mission to "own the mining and storage of social media data."[19] Among the content the company considers to be social media are many Disney and Marvel properties.[20] Disney's data summit also featured the ability to target individual members of a household, including children, on a "buying decision journey." Illustrating how Disney could use data collected from both a parent and child, the Acxiom presentation shows multi-platform targeting of children and a parent designed to reinforce an advertiser's data-driven campaign to foster a "digital nag factor" in children.[21]

A growing number of companies not only conduct their own digital marketing operations, but also supply data to third parties for targeting online consumers. Acxiom, for example, now provides digital ad targeting services, such as its Relevance X product ("to help marketers target and deliver personalized marketing messages across multiple media channels."). Acxiom offers both "retargeting" as well as what it calls "collaborative targeting." It also offers consumers a way to "opt-out of its behavioral ad campaigns, illustrating its role as both a service and direct provider."[22]

Third parties are central players in the collection of information about children on leading children's sites. For example, Omniture's Audience Manager—used by Disney, Cartoon Network, and Viacom/Nick—provides companies with a Data Management Platform that

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[19] Presentation of David Horn, Disney Interactive Labs, *available at* david.d8a.me/daos12/DAOS%202012.pptx.

[20] *Id.*; *see* "Building Brand Advocates by Personalizing Every Interaction," Tom Boyles, SVP of CRM, Disney http://webcache.googleusercontent.com/search?q=cache:nfU4ZEoE-J8J:www.targusinfo.com/summit/agenda/+&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a.

[21] Acxiom presentation, Disney, http://www.disneynow.com/profile/web/index.cfm?PKwebID=0x31047566f&varPage=activity

[22] "Multichannel, Mulit-Targeted Engagement," Acxiom. http://www.acxiomdigital.com/services/targeted-advertising.asp; "Acxiom Digital Agency." Acxiom. http://promo.acxiom.com/relevance-X/Agency/relevance-x_agency.html. "Acxiom Relevance Managed Media and Acxiom Retargeting Opt-Out," Axiom, http://www.acxiom.com/about-acxiom/privacy/managed-media- and-retargeting-optout/. ("Engage your customers and prospects with customized messaging across multiple channels, leveraging the universe of known visitors or viewers across a 3rd party publisher (i.e. Website, Cable Operator, Mobile Network, etc.).").

incorporates "actionable offline data" for "extended targeting." Third-party data partners include Acxiom, bizo, Datalogix, eXelate, and TargusInfo.[23] Acxiom offers a number of databases that can help target children, including children at various ages, "Children's Interests," and various products of interest to children.[24] eXelate's data partners include companies that help target children. Both Datalogix and TargusInfo can help online marketers target by identifying children in households and other kid-related variables.[25]

Below are several specific examples of how leading children's websites and their parent companies describe their own targeting abilities, often facilitated in part by third-party partners:

- The Walt Disney Company's Interactive division, which "creates immersive, connected, interactive experiences across console, online, mobile and social network platforms," analyzes "large, complex data sets representing the behavior of millions of online game players." The Disney Internet Group uses Omniture's SiteCatalyst data platform to "optimize the customer experience across *all* of its online properties."[26] Disney admits that it and "certain service providers operating on our behalf collect information about your activity on our sites and applications using tracking technologies such as cookies, Flash cookies and Web beacons."[27]

- Viacom launched its "Surround Sound" advanced data targeting system. Viacom Media Network's ad targeting services are used by a number of Viacom-owned brands, including child-targeted Nick.com, Nickjr.com, and Neopets.com.[28] Surround Sound provides a "new sales capability through which it can connect advertisers with highly specific audience segments – connecting the dots between first and third-party data to get at user attributes including interests, behaviors, demo, geolocation and more – wherever they are across Viacom's digital portfolio . . . online video, online display, mobile and email." Surround Sound, which uses Adobe Audience Manager,

[23] "Adobe AudienceManager — Optimized Ad Audiences," Adobe, http://www.omniture.com/en/products/advertising/audience-manager.
[24] InfoBase Consumer List, Axiom, http://www.acxiom.com/site-assets/factsheet /factsheet-infobase-consumer-list/.
[25] "Data Segments from the World's Most Trusted Data Providers," eXelate, http://exelate.com/data-sets/syndicated-data/; "Now Get Online Access to TVs Must-Reach Audiences," Datalogix, http://www.datalogix.com/dlx-tv/.
[26] "Game Designer," Linkedin, http://www.linkedin.com/jobs/jobs-Game-Designer-3413217; "Newsroom," Adobe http://www.omniture.com/press/390 (emphasis added).
[27] "Online Tracking and Advertising," Disney, http://corporate.disney.go.com/corporate/pp_online-tracking-advertising.html.
[28] "MTV Networks Digital: Kids & Family Group," MTV, http://adspecs.mtvn.com/site/kf_group.html; "Manager Digital Ad Sales Research," Simply Hired http://www.simplyhired.com/job-id/bknh37qmuq/manager-digital-jobs/.

is "used across *every screen*" Viacom targets, including online, display, mobile, etc. It enables "pinpoint accuracy" to reach "specific audiences on every digital platform" the company operates.[29]

- Turner Broadcasting, which operates Cartoon Network, has established a "Data Platforms and Solutions" division for its "Big Data Initiatives." Through the division's "Audience Insight System" the company uses "third-party vendors and tools" for its "audience analytics platforms."[30] Turner has also established a "Measurement Science, Advanced Analytics & Audience Insights Team" that "oversees measurement science, metrics and accountability for the online sector."[31]

- Mattel, which operates Barbie.com, another leading child-targeted site, "utilize[s] web data and analysis to create concise conclusions and recommendations for improving the user experience, increasing brand exposure and shop conversions, optimizing marketing and merchandising."[32] Data analytics firm Stratigent, which has worked with Mattel and also provides behavioral targeting services, explains the power of data collection today:

> With every click of the mouse, every touch of the screen, and every add to cart, we are like Hansel and Gretel, leaving crumbs of information everywhere. With or without willingly knowing, we drop our places of residence, our relationship status, our circle of friends and even financial information. Ever wonder how sites like Amazon can suggest a new book you might like, or iTunes can match you up with an artist and even how Facebook can suggest a friend?

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[29] Mark Jafar, "Serving Advertisers in 'Surround Sound,'" Viacom (Mar. 26, 2012) http://blog.viacom.com/2012/03/serving-advertisers-in-surround-sound-2/; New Initiative Utilizes Adobe Audience Manager to Enable Advertisers to ReachViacom's Audiences with Pinpoint Accuracy at Scale, Viacom (Mar. 21, 2012), http://ir.viacom.com/releasedetail.cfm?ReleaseID=658524. Viacom made its presentation at the 2012 Adobe Marketing Summit. As we discuss, Adobe's Omniture is used by Cartoon Network, Disney and others. The sessions at the Summit, which reflect the realities of today's online targeting system, included: Behavior-based marketing: Driving conversion through personalized, multichannel marketing; Moneyball Marketing: How predictive Marketing changes the game; Advanced audience segmentation: Combining multiple data sources to create meaningful user profiles; Getting to know you: Going from Anonymous visitor to loyal customer; and Converting mobile, social and location analytics." http://summit.adobe.com/tracksandsessions/session-recordings.html?rt_id=undefined.

[30] Time Warner, "Job Details," https://careers.timewarner.com/1033/ASP/TG/cim_jobdetail.asp?jobId=617676&partnerid=391&siteid=36.

[31] "Director, Digital Analytics," LinkedIn, http://www.linkedin.com/jobs/jobs-Director-Digital-Analytics-3246717.

[32] "Manager Digital Analytics," America's Job Exchange, http://www.americasjobexchange.com/job-detail/job-opening-AJE-557153987?source=sh.

> Most tools use first-party cookies to identify visitors to the site on their initial and future visits based upon the settings for that particular solution. The information generated by the cookie is transmitted across the web and used to segment visitors' use of the website and to compile statistical reports on website activity. This leaves analytics vendors – companies like Adobe, Google, and IBM – the ability to combine online with offline data, creating detailed profiles and serving targeted ads based on users' behavior.[33]

The leading commercial children's websites are all engaged in cross-platform marketing, in which persistent identifiers play a critical role. For example, Cartoon Network ("television's #1 network with boys 6-11") is now "streaming its on-air content live across multiple platforms, including online at CartoonNetwork.com and for mobile viewers on the iPod, iPod Touch, iPhone and iPad."[34] This summer it released a "mobile app for kids" called CN 2.0, described as "a first-of-its-kind app for iOS that will allow kids to watch television and play games simultaneously."[35] Disney XD's content also spans television, online, mobile and VOD platforms.[36]

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[33] Tiffany Zimmerman, "Data Crumbs," Stratigent (June 19, 2012), http://www.stratigent.com/community/analytics-insights-blog/data-crumbs; "Behavioral Targeting," Stratigent, http://www.stratigent.com/consulting-services/optimization/behavioral-targeting.

[34] *Cartoon Network Announces Live Streaming Across Digital and Online Platforms,* Apr. 18, 2012, http://www.nickandmore.com/2012/04/18/cartoon-network-announces-live-streaming-across-digital-and-online-platforms/.

[35] *Cartoon Network Mobile App for Kids*, Aug. 10, 2012, http://www.rmndigital.com/cartoon-network-mobile-app-for-kids/. In announcing the apps, Cartoon Network's vice president of digital, Chris Waldron, explained that "The viewing habits of kids are changing everyday and they are using mobile devices and tablets more than ever . . . We know they love our shows and games and have observed them participating in both simultaneously, yet on different platforms. It just made sense to bring all that together into an experience they can't find anywhere else but at Cartoon Network." Dan Sarto, *Cartoon Network Launches CN 2.0*, Animation World Network (Aug. 9, 2012), http://www.awn.com/news/mobile-and-wireless/cartoon-network-launches-ios-app-cn-20.

[36] Amanda Kondology, Crash and 'Bernstein' Premiers Monday October 8 on Disney XD, Aug. 30, 2012, http://tvbythenumbers.zap2it.com/2012/08/30/crash-bernstein-premieres-monday-october-8-on-disney-xd/146817/. Disney XD describes itself as "a basic cable channel and multi-platform brand showcasing a compelling mix of live-action and animated programming for Kids age 6-14, hyper-targeting boys and their quest for discovery, accomplishment, sports, adventure and humor."

These developments illustrate why the Commission must ensure that COPPA covers today's complex data-driven landscape confronting children and their parents. The growing practice of targeting on and across various digital media platforms for advertising purposes underscores how urgently the Commission must include persistent identifiers in the definition of personal information.

C. The FTC Has the Legal Authority to Include Persistent Identifiers Within the Definition of Personal Information

In passing COPPA, Congress gave the FTC broad authority to ensure that children would be protected even as technologies change, indicating that the Commission has clear authority to include persistent identifiers within the definition of personal information. As then-FTC Chairman Robert Pitofsky testified in supporting the passage of COPPA, the bill "provides the FTC with rulemaking authority necessary to implement [provisions to protect child privacy and safety] in a flexible manner. It takes into account rapid changes occurring in the industry."[37] Senator Bryan, who co-sponsored the Senate Bill along with Senator John McCain, also emphasized that COPPA "authorizes the FTC to determine through rulemaking whether [the definition of personal information] should include any other identifier that permits the physical or online contacting of a specific individual." He further explained that "contact" of an individual online was not limited to email, but included "any other attempts to communicate directly with a specific, identifiable individual." The only category of information not covered was "anonymous, aggregate information . . . that cannot be linked by the operator to a specific individual."[38]

As previously discussed, the ability of commercial websites and online service operators to collect and utilize information by use of cookies and other technologies has vastly expanded and become increasingly sophisticated over the thirteen years since the FTC promulgated the

[37] Hearings on S. 2326, Children's Online Protection Act of 1988, before the Subcomm. on Communications of the Senate Commerce Committee, 105th Cong. 7 (Sept. 23, 1998).
[38] Statement of Sen. Bryan, 144 Cong. Rec. at S11657 (Oct. 7, 1998).

first COPPA Rule. When marketers use information collected about an individual to display an advertisement chosen to appeal to that person at that time, they are contacting a specific individual online, even if they do not know the person's full name.

Moreover, scholars have pointed out repeatedly that sophisticated analysis can link so-called "anonymous" data about Internet users back to specific individuals. As Princeton University computer science professor Arvind Naranayan, formerly of the Stanford Center for Internet and Society, explained in a July 2011 blog post,

> In the language of computer science, clickstreams — browsing histories that companies collect — are not anonymous at all; rather, they are *pseudonymous*. The latter term is not only more technically appropriate, it is much more reflective of the fact that at any point after the data has been collected, the tracking company might try to attach an identity to the pseudonym (unique ID) that your data is labeled with. Thus, identification of a user affects not only future tracking, but also *retroactively* affects the data that's already been collected. Identification needs to happen only once, ever, per user.
>
> Will tracking companies actually take steps to identify or deanonymize users? It's hard to tell, but there are hints that this is already happening: for example, many companies claim to be able to link online and offline activity, which is impossible without identity.
>
> Regardless, what I will show you is that if they're not doing it, it's not because there are any technical barriers. Essentially, then, the privacy assurance reduces to: "Trust us. We won't misuse your browsing history."[39]

As the Commission acknowledged in its 2011 Notice of Proposed Rulemaking, persistent identifiers can now permit the contacting of specific individuals. The Commission noted, for example, that consumers increasingly use their own computer, smartphone or other device to access the Internet. In those cases, an IP address is likely to correspond with a specific individual.[40] Moreover, even if a computer or device is shared among more than one person, it still may be used to contact a specific individual. COPPA included home addresses and

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[39] Arvind Narayanan, *There is No Such Thing as Anonymous Online Tracking*, The Center for Internet and Society, (July 28, 2011, 12:38 PM), https://cyberlaw.stanford.edu/node/6701 (last visited Sept. 24, 2012).

[40] 2011 NPRM, 76 Fed. Reg. at 59812-13.

telephone numbers as examples of personal information even though more than one person often resides at the same address or uses the same telephone number. These examples of personal information—along with the broad authority granted to the FTC to define additional types of personal information—clearly show that the Commission has authority to adopt its proposal.

D. The FTC's Revised Definition of "Support for Internal Operations" Should Be Clarified to Ensure that Operators Cannot Use Personal Information to Target Children Without Parental Notice and Consent

Children's Privacy Advocates recognize that a persistent identifier may be used solely to support the internal operations of a website and then deleted without being passed on to any additional parties. We have thus been supportive of the Commission's effort to carve out an exception to data collected for "activities necessary to maintain the technical functioning of the Web site or online service."[41] However, we believe that the Commission's newly proposed definition of "support for internal operations" is so broad that it could exempt the collection of many persistent identifiers used to facilitate targeted marketing—the very types of personal information that

The Commission previously proposed to define "support for internal operations," as:

> those activities necessary to maintain the technical functioning of the Web site or online service, to protect the security or integrity of the Web site or online service, or to fulfill a request of a child as permitted by [exceptions], and the information collected for such purposes is not used or disclosed for any other purpose.[42]

The FTC has now proposed to expand that definition to include:

> those activities necessary to (a) Maintain or analyze the functioning of the Web site or online service; (b) perform network communications; (c) authenticate users of, or *personalize the content* on, the Web site or online service; (d) *serve contextual advertising* on the Web site or online service; (e) protect the security or integrity of the user, Web site, or online service; or (f) fulfill a request of a child as permitted by [exceptions] . . . ; so long as the information collected for the activities listed in (a)–(f) is not

[41] 2011 NPRM, 76 Fed. Reg. at 59809.
[42] 2011 NPRM, 76 Fed. Reg. at 59810.

> used or disclosed to contact a specific individual or for any other purpose.[43]

The Supplemental Notice explains that its revised proposal is intended to address concerns of some commenters that the previously proposed definition of "support for internal operations" was "too narrow to cover the very types of activities the Commission intended to permit, *e.g.*, user authentication, improving site navigation, maintaining user preferences, serving contextual advertisements, and protecting against fraud or theft. Others raised concerns that it was unclear whether the collection of data within persistent identifiers for the purpose of performing site performance or functioning analyses, or analytics, would be included within the definition of *support for internal operations*."[44]

We disagree that the previously proposed definition was too narrow to cover the types of activities the Commission intended to permit. For example, the Commission notes in the Supplemental Notice that some commenters maintained that the proposed definition would not cover "protecting against fraud or theft," but protection against fraud or theft would likely constitute information collected "to protect the security or integrity of the Web site or online service" and thus fall under the previously proposed definition.[45] Some other activities that commenters seek to exempt should not be exempted. For example, DMA wants to exempt the use of persistent identifiers for "geo-targeting."[46] Other commenters seek to include within "support for internal operations" persistent identifiers used for the purpose of "ensuring that advertising content is delivered in an appropriate language for the intended audience,"[47] "ad-

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[43] Children's Online Privacy Protection Rule, Supplemental Notice of Proposed Rulemaking, 77 Fed. Reg. 46643, 46648 (Aug. 6, 2012) [hereinafter 2012 Supplemental Notice] (to be codified at 16 C.F.R. pt. 312) (emphasis added).
[44] 2012 Supplemental Notice, 77 Fed. Reg. 46647.
[45] 2012 Supplemental Notice, 77 Fed. Reg. at 46647.
[46] "Comments of the Digital Marketing Association, Inc. on the Children's Online Privacy Protection rule," 23 Dec. 2011, at 10, http://ftc.gov/os/comments/copparulereview2011/00361-82387.pdf.
[47] "Comments of the National Cable & Telecommunications Association in the Matter of COPPA Rule Review 16 C.F.R. Part 312," 23 Dec. 2011, at 19, http://ftc.gov/os/comments/copparulereview2011/00338-82268.pdf.

sequencing,"[48] or "measur[ing] and analyz[ing] consumer habits and characteristics."[49] Such uses would clearly contravene the stated intent of COPPA "to regulate an operator's ability to obtain information from, and market back to, children."[50]

In particular, we are concerned about certain language in subparts (c) and (d). In subpart (c), the phrase "personalize the content" is so vague that it could be construed to include personalized marketing—the very problem that the FTC is trying to address in modifying the definition of personal information. As the Commission pointed out in its 2011 Notice, "it is clear that COPPA always was intended to regulate an operator's ability to obtain information from, and market back to, children."[51] Thus, to allow operators to collect and use persistent identifiers to enable personalized marketing would also defeat the intent of COPPA.

We also question the proposed exception in subpart (d) for persistent identifiers used to serve contextual advertising.[52] Contextual advertising is not an "internal operation." While we do not object to contextual advertising *per se*, we are concerned that the distinction between personalized and contextual advertising has become increasingly blurred. Today's so-called contextual advertising comprises many data collection and targeting elements that enable sophisticated targeting. "Data activation" techniques enable contextual advertising to engage in the "integration of data [that] . . . can tailor not only the message, but how that message is delivered and in what location . . . . Marketers can validate audiences, build profiles based on differing levels of engagement, and port those profiles to all of their marketing partners in order

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[48] "Comments of Berin Szoka, President TechFreedom on Children's Online Privacy Protection Act (COPPA) Rule Review," 23 Dec. 2011, at 10, http://ftc.gov/os/comments/copparulereview2011/00375-82401.pdf.

[49] "Comments of the Toy Industry Association in the Matter of Request for Public Comment on the Federal Trade Commission's Proposed Revisions to the Children's Online Privacy Protection Rule, Project No. P204502," 21 Dec. 2011, at 10, http://ftc.gov/os/comments/copparulereview2011/00304-82204.pdf.

[50] 2011 NPRM, 76 Fed. Reg. at 59811.

[51] *Id.*

[52] 2012 Supplemental Notice, 77 Fed. Reg. at 46653.

to maximize ROI."[53] "Semantic advertising" enables marketers to target contextual ads utilizing "Natural Language Processing" and algorithms that scan "each page for relevant sections and paragraphs based on text, style (fonts, size, color), and location on page," etc.[54] "Advanced semantic contextual targeting" can also incorporate a range of datasets and be driven through real-time ad exchange bidding.[55] Leading contextual online marketing firms have been acquired by major digital data-brokers that enable for greater precision in targeting.[56]

To prevent the exception for contextual advertising from becoming a loophole for behavioral advertising, the FTC should create a separate exception for the use of persistent identifiers for contextual advertising. It should specify that persistent identifiers may only be used for contextual ads based on the general content of the page, and that any other form involving further data analysis and collection requires parental permission under COPPA.

II. The FTC Should Clarify First and Third Party Liability Under COPPA

The Supplemental Notice proposes to modify the definition of operator to clarify the responsibilities under COPPA when third parties such as advertising networks or providers of downloadable software ("plug-ins") collect information from users through child-directed sites and services.[57] It notes that in adopting the initial rules implementing COPPA, the FTC did not

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[53] *See* BlueKai Announces Launch of First Complete Data Activation System for Data-Driven Marketing (July 18, 2012), http://www.bluekai.com/newsandmedia_pressreleases_20120718.php (last viewed Sept. 24, 2012).

[54] Peer39 Advertising Technology, http://www.peer39.com/technology/advertising-technology/ (last visited Sept. 24, 2012).

[55] Epic Media Group and LucidMedia Form Strategic Partnership (Jan. 5, 2011), http://www.businesswire.com/news/home/20110105005469/en/Epic-Media-Group-LucidMedia-Form-Strategic-Partnership (last visited Sept. 24, 2012).

[56] *See, e.g.*, Datran Media and CONTEXTWEB Merge to Create PulsePoint (Sept. 22, 2011), http://www.adexchanger.com/press-release/datran-media-and-contextweb-merge-to-create-pulsepoint/ (last viewed Sept. 24, 2012).

[57] 2012 Supplemental Notice, 77 Fed. Reg. at 46644. To achieve this purpose, the FTC also proposed to modify the definition of websites or online services directed to children. *See* discussion *infra* Part III.

foresee how commonplace it would become for child-directed sites and services to integrate social networking and other personal information collection features into their content.

Children's Privacy Advocates agree that it is necessary to clarify the responsibilities of different parties under COPPA. Today's modern information ecosystem uses data syndication that links websites and mobile platforms with ad networks, real-time bidding platforms, and a complex of off and online data broker providers. Social media widgets and "apps" operating their data practices independently are also integrated into webpages and platforms. Each part of the online marketing chain can contribute to a targeting profile.

Moreover, a recent survey found that a large number of websites have more than 50 or even 100 third party cookies that collect data, including flash cookies and beacons that can save vast quantities of information and that may even "respawn" after being deleted by the consumer.[58] While this study was not focused on child-directed websites, another survey found that more cookies were placed on children's websites than on adult sites.[59] Because of these developments, it is essential that the COPPA Rule be clarified so that data cannot be used for targeting a child without complying with COPPA.

The Supplemental Notice proposes to hold *both* the child-directed sites or services (first party) and the independent data collectors (third parties) responsible for COPPA compliance, at

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[58] Chris Jay Hoofnagle et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 Harv. L. & Pol'y Rev 273, 286 (2012) (finding twenty websites that placed 100 or more cookies, including seven with more than 150).

[59] To determine the prevalence of Internet tracking technologies on children's sites, the *Wall Street Journal* analyzed fifty of the most-visited U.S. websites for children and teens, as ranked by the comScore Media Metrix report from April 2010. The *Journal* excluded sites it had analyzed in its earlier database of major websites, and sites where fewer than 25% of visitors are under 18, according to comScore. Researchers for the *Journal* found that Nick's NeoPets had 88 trackers, Nick Jr. had 83, Nick.com had 9, Disney Go had 72, and Cartoon Network had 32. Steve Stecklow, *On the Web, Children Face Intensive Tracking*, Wall St. J. (Sept. 17, 2010), *available at* http://online.wsj.com/article/SB10001424052748703904304575497903523187146.html; *see* Appendix A, "Comments of the Center for Digital Democracy et al, In the Matter of Children's Online Privacy Protection Rule: Request for Public Comment on Proposal to Amend Rule to Respond to Changes in Online Technology," 23 Dec. 2011, http://ftc.gov/os/comments/copparulereview2011/00373-82399.pdf.

least in certain circumstances. Children's Privacy Advocates believe this is a sound approach that is consistent with the language and purpose of COPPA. However, its success will depend on adopting appropriate definitions.

A. Child-Directed Websites or Online Services Should Be Responsible Under COPPA Whenever Children's Personal Information Is Collected or Used

COPPA defines "operator" as "any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or *on whose behalf* such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service, involving commerce."[60] The FTC's current rule tracks this definition.[61]

On its face, this broad definition of "operator" clearly covers both first and third party operators. To clarify the responsibility of the first party, the Commission proposes to add a provision that "Personal information is collected or maintained an operator *on behalf of* an operator where it is collected in the interest of, as a representative of, or *for the benefit of, the operator*."[62] Children's Privacy Advocates support this clarification that amplifies the meaning of "on whose behalf." We agree that the operator of a child-directed website can control which plug-ins, software downloads, and advertising networks it integrates into its site, and that it would not allow such information collection if it did not benefit the website.

The FTC's broad interpretation of "on whose behalf" is consistent with the plain language and purpose of COPPA to ensure that personal information is not collected from children unless their parents are given notice and provide verifiable consent. Moreover, it is consistent with parents' expectations that a child-directed site or service will protect children's

[60] 15 U.S.C. § 6501 (2012) (emphasis added).
[61] 16 C.F.R. § 312.2 (2012).
[62] 2012 Supplemental Notice, 77 Fed. Reg. at 46644 (emphasis added).

privacy. It is not feasible or reasonable to expect parents to read privacy statements from all of the third parties that may be collecting information on a child-directed site or service.

Finally, child-directed websites and services generally have tools available to help them control the advertising content and applications available on their websites or service. For example, leading children's entertainment sites, including Nickelodeon, Disney.com, and Cartoon Network have specific term and condition requirements.

B. Third Parties Should Also Be Responsible for COPPA Compliance

Children's Privacy Advocates believe that the FTC should also hold third parties that collect or utilize children's personal information on child-directed websites or services responsible for complying with COPPA. Doing so will advance COPPA's purpose of limiting data collection and ensuring that parents have the opportunity to approve or reject marketers' desire to collect personal information about their children. We also think it is reasonable and fair to expect third parties to know when they are collecting or using children's information. Marketers increasingly have access to tools that help identify whether a website and its content can be considered "brand safe." For example, Rubicon offers a range of brand protection services for advertisers and publishers and reaches "96.2% of the entire U.S. Internet audience."[63] Many ad exchanges and major providers, such as the Google Content Network, also offer such services.[64]

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[63] Rubicon, Real-time Selling Requires Real Protection, http://www.rubiconproject.com/protection/; Rubicon, Rubicon Project Passes Google in U.S. Audience Reach, Ranks #1 on comScore's Ad Focus Ranking Report (July 2012) http://www.rubiconproject.com/press-releases/rubicon-project-passes-google-in-u-s-audience-reach-ranks-1-on-comscore%E2%80%99s-ad-focus-ranking-report/

[64] *See, e.g.*, AdSafe Media, http://adsafemedia.com/ (last visited Sept. 24, 2012); What is Verification?, DoubleVerify, http://www.doubleverify.com/what-is-verification/ (last visited Sept. 24, 2012); Google Opens Up Google Display Network Inventory Purchased through DoubleClick Ad Exchange for Verification with DoubleVerify, DoubleVerify (Mar. 15, 2011), http://www.doubleverify.com/resources/press-releases/google-opens-up-google-display-network-inventory-purchased-through-doubleclick-ad-exchange-for-verification-with-doubleverify/ (last visited Sept. 24, 2012). There are also various cost-benefit tools that help identify savings for using brand safety features. A number of services include brand safety in the cost of delivering

We agree that COPPA gives the FTC the authority to hold third-party collectors of personal information on child-directed websites and services strictly liable for such collection.[65] Moreover, it would not be unfair to impose strict liability on third-party collectors of personal information, because widely available tools enable third parties to prevent the display of their content on inappropriate websites. The dramatic growth of online brand safety services, used by major advertisers and incorporated into many ad network and online exchange services, provides levels of granular control that ensure targeting is not directed at children's sites unknowingly.[66]

However, we are concerned that the Commission's proposal to limit such liability by modifying the definition of "website or online service directed to children" only to an operators that "knows or has reason to know that it is collecting personal information through any Web site or online service" directed at children creates the wrong incentives. If third-party information collectors could be relieved from COPPA liability by claiming they did not know how their plug-ins were being utilized or where advertisements were placed, they would have an incentive not to know or find out this information. In effect, third party collectors would be given a pass whenever the FTC could not show actual knowledge "reason to know" that they were collecting personal information from websites or services directed to children.[67] Even though the sophisticated methods of collecting and analyzing data allow third parties to know, lack of transparency makes it difficult for the FTC or the public to show "actual knowledge." For this

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targeted ads. DoubleVerify for Higher ROI, http://www.doubleverify.com/resources/roi-networks/ (last visited Sept. 24, 2012); Contextual Targeting, Google Display Network, http://www.google.com/ads/displaynetwork/find-your-audience/contextual-targeting.html (last visited Sept. 24, 2012) ("Connect with your audience precisely when they show interest").

[65] 2012 Supplemental Notice, 77 Fed. Reg. at 46645.

[66] *See, e.g.*, AdSafe Campaign Monitor, http://adsafemedia.com/our-services/products-for-buyers/campaign-monitor (last visited Sept. 24, 2012); AdSafe Brand Protection, http://adsafemedia.com/brand-protection (last visited Sept. 24, 2012); AdExchanger, Google's Spencer And Miller Announce DoubleClick Ad Exchange Enhancements; Discuss Verification Space, Display Strategy (August 20, 2010, 2:08 PM), http://www.adexchanger.com/ad-exchange-news/googles-spencer-and-miller-announce-enhancements-for-doubleclick-ad-exchange-discuss-verification-space-and-display-strategy/ (last visited Sept. 24, 2012).

[67] *Id.* at 46653.

reason, it would also be useful to clarify the meaning of "actual knowledge" in the context of contemporary digital marketing.

In theory, it might be easier to show that an operator has "reason to know" it is collecting personal information from a child-directed website or service, as the Supplemental Notice proposes. Under common law, "reason to know" exists when a person has "information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer" the fact, or act on the assumption that the fact is true.[68] The Supplemental Notice explains that

> In choosing to use the phrase "reason to know" as part of the definition, the Commission is not imposing a duty on entities such as ad-networks or plug-ins to monitor or investigate whether their services are incorporated into child-directed properties; however, such sites and services will not be free to ignore credible information brought to their attention indicating that such is the case.[69]

But the FTC gives no examples of what would be considered "credible information."

The FTC staff's letter to OpenFeint illustrates some of the problems that may arise under the actual knowledge or reason to know standard.[70] According to that letter, OpenFeint is an online gaming network that offers a downloadable software kit to mobile applications. Several thousand apps have incorporated the OpenFeint software, including some categorized by the app developers as directed to children. The FTC letter indicates that to the extent that OpenFeint collects data from children through child-directed apps, it is an operator of an online service directed to children. OpenFeint disagrees, claiming it has little or no control over the apps that use its software. The FTC staff suggests that the current rule's definition of "website or online service directed to children" is ambiguous for operators like OpenFeint. It is not clear whether the proposed rule change resolves any ambiguity. It seems that the fact that some apps using the OpenFeint software identified as children's apps would be sufficient to infer that OpenFeint had

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[68] Restatement (Second) of Torts § 12(1) (1965).
[69] 2012 Supplemental Notice, 77 Fed. Reg. at 46653 (footnote omitted).
[70] Letter from Mary Koelbel Engle, Assoc. Director, FTC Division of Advertising Practices, to Susan Lyon, Counsel to OpenFeint, Inc. (July 31, 2012), *available at* http://www.ftc.gov/os/closings/120831openfeintclosingletter.pdf.

"reason to know." It would be helpful to Children's Privacy Advocates and industry alike for the FTC to clarify its understanding of how the "reason to know" standard would apply in the digital world.

The cases cited by the FTC do not provide such clarification. They involve whether an individual had knowledge that should have triggered a responsibility to investigate.[71] They do not address such responsibilities in situations where much of the information is collected and analyzed by computers using highly sophisticated software. Rather, they involved the liability of individuals in corporate management positions.[72]

Unless the FTC can develop meaningful criteria for the proposed "actual knowledge" or "reason to know" standard that will protect children's privacy, it should continue to utilize strict liability as permitted under COPPA.

[71] For example, in *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991), the D.C. Circuit overturned the Defense Logistics Agency's decision to debar an executive from government contracting because he did not have "reason to know" of his company's misconduct. Although the executive was "generally aware" of customer complaints and that few government searches of the company had occurred, there was no evidence he knew about the volume, consistency, or continuing nature of the complaints against his company before or after the alleged misconduct. *Id.* at 943. The court found that it was incorrect to determine the executive had "reason to know" of his company's misconduct based solely on his status putting him "in a position to discover the misconduct, report it to the Government, and take corrective action." *Id.* at 941. Similarly, in *Alf v. Donley*, another case about debarment from public contracting, the court found that CEO did not have reason to know of his company's criminal and fraudulent conduct simply by virtue of his position; the plaintiff did not have reason to know of the misconduct because there was no evidence that he "personally participated in the misconduct, had actual knowledge of the misconduct or had information from which a reasonable person could infer that misconduct occurred." *Alf v. Donley*, 666 F. Supp. 2d 60, 68 (D.C. Cir. 2009) (vacated pursuant to minute order entered Dec. 13, 2010).

[72] 2012 Supplemental Notice, 77 Fed. Reg. at 46645 n.18.

III. The Commission Should Not Revise the Definition of "Website or Online Service Directed to Children"

The Supplemental Notice proposes to revise the definition of website or online service directed to children based on comments filed by the Walt Disney Company. The current rule defines "directed to children" as

> a commercial website or online service, or portion thereof, that is targeted to children. *Provided, however*, that a commercial website or online service, or a portion thereof, shall not be deemed directed to children solely because it refers or links to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link.
>
> In determining whether a commercial website or online service, or a portion thereof, is targeted to children, the Commission will consider its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising, promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities and incentives.[73]

Disney argues that this definition is "at bottom, a totality of the circumstances test," and that because it is difficult to determine whether a website or online service is child-directed under this test, it must "treat all visitors as children."[74]

We disagree with Disney's characterization of COPPA compliance as "treating adults as young children." It suggests that adults are deprived of something important, when in fact, it merely means that when an adult visits a child-targeted site, he or she will not be subject to data collection that could be used for behavioral advertising. Many adults do not wish to be tracked.

[73] 16 C.F.R. § 312.2 (2012).
[74] 2012 Supplemental Notice, 77 Fed. Reg. at 46645-6; Disney Comments at 6.

Those that do want to be tracked have plenty of other websites where they can be tracked and receive targeted ads.[75]

In any event, we do not support the Supplemental Notice's proposal to replace the phrase "targeted to children" with a three part test:

> a commercial Web site or online service, or portion thereof, that:
>
> (a) Knowingly targets children under age 13 as its primary audience; or,
>
> (b) Based on the overall content of the Web site or online service, is likely to attract children under age 13 as its primary audience; or,
>
> (c) Based on the overall content of the Web site or online service, is likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population; provided however that such Web site or online service shall not be deemed to be directed to children if it: (i) Does not collect personal information from any visitor prior to collecting age information; and (ii) prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first obtaining verifiable parental consent.[76]

The revised definition would not solve the problems identified by Disney. Most importantly, the revised test could be interpreted to exclude a large number of websites and services that are generally understood to be child-directed. This would substantially reduce the protections afforded to children under COPPA because COPPA's protections apply only to websites or services that are child-directed or where the operator has actual knowledge that the visitor or user is a child. If fewer websites or services are considered child-directed under the revised definition, children will be subject to a lot more data collection and behavioral targeting.

[75] To the extent that Disney is suggesting that adults do not like to be asked to provide their parent's email in order to enter a contest or request information, it would seem that the solution is to offer a non-child portion of the website or conduct age gating at that point.
[76] 2012 Supplemental Notice, 77 Fed. Reg. at 46645.

A. The Proposed Revision Does Not Solve the Problems Associated with a "Totality of the Circumstances" Test

The three part test to clarify the meaning of targeted to children does not eliminate the uncertainty inherent in a totality of the circumstances approach. Instead, it simply introduces other definitions whose applicability is equally uncertain.

Part (a), "*Knowingly* targets children under age 13 as its *primary audience*," is problematic for several reasons. Under the COPPA Rule, the FTC considers "competent and reliable empirical evidence regarding audience composition." But as the FTC notes in the NPRM, online audience demographic information is "neither available for all Web sites and online services, nor is it sufficiently reliable."[77] While comScore, Nielsen and others collect demographic data for children's websites, that data is proprietary and not publicly available at all or only at great cost. As a result, it is difficult for the public and the FTC to show that the website or service *knowingly* targets children. Even if one has access to the data, the term "primary" is not defined. Does it mean that more than10%, 30% or 50% of visitors are children? Or somewhere in between? If the FTC were to examine demographic data for the major children's websites, we believe that it would find that the percentage of unique child visitors aged 2-11 for most children's websites, including some of the leading child-directed destinations, would be below 50%.[78] If the rule does not define "primary audience," website and online service operators could argue that primary means more than 50%. And if the Commission were to accept this claim, all but the youngest skewing children's websites would no longer be considered child-directed.

A recently-published study by the Rudd Center illustrates why a "primary" audience test could fail to reach a significant number of child-directed websites.[79] The study examined

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[77] 2011 NPRM, 76 Fed. Reg. at 59814.

[78] COPPA defines children as under age 13, while comScore defines children as 2-11. Inclusion of 12 year olds would increase the percentage of unique child visitors, but we do not have sufficiently granular data to determine the exact percentage.

[79] Jennifer L. Harris, Sarah E. Speers, Marlene B. Schwartz & Kelly D. Brownell, *US Food Company Branded Advergames on the Internet: Children's Exposure and Effects on Snack Consumption*, 6 J. Children & Media 51 (2012).

"branded computer games on US food company websites known as advergames, a relatively recent form of marketing that targets children."[80]

The study analyzed the numbers and ages of visitors to food company websites with and without advergames. To identify the sites commonly visited by young people, the researchers used the comScore Media Metrix Key Measures Report to obtain the number of unique visitors per month (ages 2+ years and 2–17 years) for each quarter in 2009 for food company URLs. Because in 2009, "2- to 17-year-olds represented 20.3% of all unique visitors to the Internet," the study excluded websites with less than half that proportion of youth visitors (i.e. 10.2% or fewer).[81] Of this group, researchers identified which sites have advergames, "defined as fun, interactive games and other user-directed activities featuring individual products or brands. Examples include puzzles and classic games, arcade-style games, and other highly engaging features such as building avatars or using pieces of candy to 'paint' pictures."[82]

Using this methodology, the Rudd researchers identified 102 food company URLs, of which 39 featured advergames. They found that children ages 2-11 made up 15.7% of the unique visitors to the websites with advergames, but only 8.4% of the websites without advergames.[83] The significance of the Rudd Study for the COPPA rule review is that it shows that even on websites clearly directed at children, children 2-11 make up only about 16% of unique visitors.

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[80] *Id.* at 1. For examples of advergames that target children, *see* "Comments of the Center for Digital Democracy et al, In the Matter of Children's Online Privacy Protection Rule: Requests to Investigate McDonald's Corp. General Mills, Inc., Doctor's Associates, Inc., Viacom, Inc., and Turner Broadcasting Systems, Inc. for COPPA Violations in Connection with Viral Marketing to Children" (22 Aug. 2012), http://www.democraticmedia.org/sites/default/files/FTC-letter.pdf, http://www.democraticmedia.org/sites/default/files/HappyMeal.pdf, http://www.democraticmedia.org/sites/default/files/General-Mills.pdf, http://www.democraticmedia.org/sites/default/files/Subway.pdf, http://www.democraticmedia.org/sites/default/files/Nick.pdf, http://www.democraticmedia.org/sites/default/files/CartoonNetwork.pdf.

[81] Harris, et al., *supra* note 79, at 54.

[82] *Id.*

[83] *Id.* at 6-7. The study concludes based on this and other analysis that "young people were significantly more engaged in sites with advergames compared to other food company-sponsored websites."

Without a clear definition of "primary audience," operators of child-directed sites could argue that they do not knowingly target their site to a primary audience of under 13.

The same problem, that is, the lack of a definition for "primary audience," applies to Part (b) of the proposed test, "based on the overall content of the Web site or online service, is likely to attract children under age 13 as its primary audience." In addition, the language "overall content" is a "totality of the circumstances" test.

Part (c) has the same problems as Part (b). It reads: "Based on the *overall content* of the Web site or online service, is likely to attract an *audience that includes a disproportionately large percentage of children under age 13* as compared to the percentage of such children in the general population."[84] Thus, Part (c) retains the "overall content" criterion, while substituting "disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population" for "primary audience." Yet, this language does not provide any greater certainty because it does not define what it means by meant by a "disproportionately large percentage."

In addition, Part (c) contains a proviso that exempts a website or service that serves disproportionately large percentages of children if it:

> (i) does not collect personal information from any visitor prior to collecting age information; and
>
> (ii) prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first obtaining verifiable parental consent.

We are concerned that many operators that currently provide child-directed websites or services could claim their online properties are covered by part (c) of the definition and become exempt from COPPA by "age gating." But "age gating" is fraught with problems. For example, if sites provide differentiated experiences for children and adults that are not sufficiently comparable, it could create incentives for children to lie about their age to access the "adult"

[84] Nielsen Online, "The Most Popular Websites For Kids, Teenagers and Young Adults" (Aug. 15, 2008), http://www.nielsen-online.com/pr/pr_080815_UK.pdf.

version of the site. In addition, as many commenters observed, existing parental consent mechanisms are often unreliable because it is difficult to know who is responding to the consent request. Some noted that neutral age gating mechanisms are "vulnerable to manipulation or circumvention"[85] and parental consent mechanisms are "easily gamed"[86] when "kids who do not want to get a parent involved know how easy it is to provide an email that they control."[87] Other commenters advocated for new, innovative methods of obtaining parental consent less susceptible to manipulation.[88]

In response to these comments, the NPRM proposes to eliminate email plus.[89] The NPRM notes that:

> The Commission limited the use of e-mail plus to instances where operators only collect children's personal information for internal uses. Although internal uses may pose a lower risk of misuse of children's personal information than the sharing or public disclosure of such information, all collections of children's information merit strong verifiable parental consent. Indeed, children's personal information is one of the most sensitive types of data collected by operators online. In light of this, therefore, the Commission believes that e-mail plus has outlived its usefulness and should no longer be a recognized approach to parental consent under the Rule. [90]

While the Commission hopes by this action to spur the development of new methods of parental consent, until such methods have been developed and proven successful, the Commission should

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[85] *See, e.g.*, "Comments of the Promotion Marketing Association, Inc. in the Matter of COPPA Rule Review," 23 Dec. 2011, at 4, http://ftc.gov/os/comments/copparulereview2011/00335-82259.pdf.
[86] "Re: TRUSTe Comments to COPPA Rule Review, 16CFR Part 312, Project No. P104503," 15 Dec. 2011, at 11, http://ftc.gov/os/comments/copparulereview2011/00231-82092.pdf.
[87] "Comments of Privo Re: COPPA Rule Review, 16 CFR Part 312 (Project No. P-104503)," 23 Dec. 2011, at 2, http://ftc.gov/os/comments/copparulereview2011/00380-82521.pdf.
[88] *See, e.g.*, "Comments of TRUSTe" at 11 (encouraging innovation around alternative methods of obtaining parental consent); "Comments of Privo," *supra* note 87, at 2; "Comments of the Digital Marketing Association, Inc. on the Children's Online Privacy Protection rule," 23 Dec. 2011, at 22-23, http://ftc.gov/os/comments/copparulereview2011/00361-82387.pdf (supporting new methods of obtaining parental consent such as video conferencing, text messages, online payment services, and digital signatures).
[89] 2011 NPRM, 76 Fed Reg. at 59819.
[90] *Id.*

not adopt a test that relies so heavily on age-verification. The problem of unreliable age verification would become greatly magnified if a large number of websites and services generally considered to be child-directed could avoid all of the responsibilities imposed on "child-directed" sites and services simply by calling themselves "family friendly" and utilizing age gating. In addition, age gating would create additional incentives for children to lie about their age.

B. The Exception for Family-Friendly Sites and Services Could Include Many Websites and Online Services Currently Understood to Be Child-Directed

As recently reported in Broadcasting & Cable,

> Marketers trying reach kids and their parents will continue to send the bulk of their ad spending to the Big Three kids cable networks-Cartoon Network, Disney and Nickelodeon—although some of the money previous allocated to TV is moving to those networks' digital platforms. Media buyers say as much as 90%-95% of their clients' kids budgets currently go to the kids cable networks, with the remainder going to the broadcast networks' Saturday-morning children's blocks.[91]

Not surprisingly, the websites associated with the "Big Three Kids Cable Networks" are consistently ranked among the most popular children's websites. For example, one recent report ranked Nick first, Nick Jr. third, Disney's Club Penguin fourth, and Cartoon Network sixth.[92]

Yet, Disney is now claiming that most of its websites should be considered "family friendly" instead of "child-directed." Disney points to its website Disney.com as an example of what it considers "family friendly." According to Disney, "much of the company's programming spans age groups. For example, children stay with Hannah Montana from a young age through

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[91] John Consoli, *Big Three Kids Cable Networks Monopolizing Ad Dollars,* Broadcasting & Cable (Sept. 20, 2012), http://www.broadcastingcable.com/article/489484-Big_Three_Kids_Cable_Networks_Monopolizing_Ad_Dollars.php?rssid=20065.

[92] Top 15 Most Popular Kids Websites, eBizMBA, September 2012, www.ebizmba.com/articles/kids-websites.

tween-dom."[93] Disney represents that "excepting web sites such as Club Penguin, which skews very young, most of what Disney does is directed at families." [94]

Indeed, it appears that Disney may already be attempting to position some of its child-directed websites to avoid COPPA compliance. For example, Disney's own fact sheet describes Disney XD as:

> a basic cable channel and multi-platform brand showcasing a compelling mix of live-action and animated programming for kids aged 6-14, hyper-targeting boys (while still including girls) and their quest for discovery, accomplishment, sports, adventure and humor. Disney XD branded content spans television, online, mobile and VOD platforms. The programming includes series, movies and short-form, as well as sports-themed programming developed with ESPN.[95]

In 2011, Disney told prospective advertisers that the audience composition was 59% kids 2-11, 15% teens 12-17, 27% adults 18 plus.[96]

The Disney XD website (http://disney.go.com/disneyxd/) offers videos of the Disney XD programs, games associated with the programs, and other child-oriented activities. For example, on September 24, 2012, the homepage of the website featured a promo for the new program "Crash and Bernstein."[97] The video titled "What's that smell" shows a boy who appears to be under 13 playing a video game and talking with a muppet-like puppet ("Crash') about stinky cheese and bologna. There is no question that this promo, like the rest of the website, is directed at children under 13.

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[93] Summary of *ex parte* meeting with FTC Chairman Leibowitz (February 9, 2012 Meeting Attended by Chairman Leibowitz, His Attorney Advisor, FTC Staff Members, and representatives of The Walt Disney Company), *available at* http://ftc.gov/os/comments/copparulereview2011/120222ftcchairdisneymtg.pdf.
[94] *Id.*
[95] Disney/ABC Television Group: Corporate & Press Information, http://www.disneyabctv.com/division/index_xd.shtml.
[96] Disney XD Network Profile, Cable Television Advertising Bureau, http://thecab.tv/php/networkprofiles/12profileData/2012pdf/12DisneyXD.pdf.
[97] *See* Attachment A, Figure 1.

However, the link at the bottom of the page for the privacy policy takes the visitor to a general privacy policy rather than a children's privacy policy.[98] This page also displays the TRUSTe "click to verify" logo for websites generally, rather than for children's websites. To see the children's privacy policy, one has to scroll down to section 6 and click on the Children's Privacy Policy link.[99] Thus, it seems that Disney does not consider the Disney XD website to be child-directed even though the primary audience of the Disney XD channel is kids 6 to 14.

We believe that under the current definition, the FTC would find the Disney XD website "child-directed." However, if the FTC adopts the proposal in the Supplement, Disney can avoid having Disney XD and most of its other child-directed websites classified as child-directed simply by employing age gating. If Disney were to do this, the other major children's websites would no doubt follow. As a result, only a handful of websites would be considered "child-directed" under COPPA.

We do not believe that this is the result intended by the FTC. The Supplemental Notice states that its proposal

> reflects the prosecutorial discretion the Commission has applied in enforcing the Rule. The Commission has charged sites or services with being directed to children only where the Commission believed that children under age 13 were the primary audience. If the Commission believed the site merely was likely to attract significant numbers of under 13 users, or had popular appeal with children (among others), the Commission has instead alleged that the operator had "actual knowledge" of collecting personal information from users who identified themselves as under 13.[100]

Yet, the cases cited by the FTC do not support its claim. It is true that the FTC has utilized the actual knowledge standard in taking action against websites that were clearly directed to a general audience but happened to feature products of interest to children and teens. For example, in *United States* v. *Sony BMG Music Entertainment,* Sony operated over 1,100 music-related websites for a general audience. These websites promoted various recording artists

[98] *See* Attachment A, Figure 2.
[99] *See* Attachment A, Figure 3.
[100] 2012 Supplemental Notice, 77 Fed. Reg. at 46645-46 (footnotes omitted).

and recording labels, "including artist that are popular with children and teenagers."[101] The FTC found that Sony Music had actual knowledge that it collected personal information from children under 13 because it collected the information after children entered a date of birth indicating they were under 13.[102] As shown above, the Disney XD website is not a general audience site that is merely popular with children; rather, it is directed to children.

Thus, Children's Privacy Advocates urge the FTC to retain its current definition of child-directed. The proposed language would permit child-directed websites or services to avoid COPPA by "age gating," and children's privacy would receive much less protections as a result.

CONCLUSION

Children's Privacy Advocates urge the FTC to promptly complete its COPPA Rule Review by revising its rules to ensure that the privacy protections afforded by COPPA remain effective in the increasingly complex digital data marketplace. With regard to these supplemental proposals, we urge the FTC to revise the definition of personal information to ensure that

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[101] Complaint at ¶ 11, *United States* v. *Sony BMG Music Entertainment*, No. 08 Civ. 10730 (S.D.N.Y., Dec. 15, 2008), *available at* http://www.ftc.gov/os/caselist/0823071/081211cmp0823071.pdf.

[102] Similarly, the website at issue in *United States* v. *Iconix Brand Group, Inc.*, was intended for a broad-based audience and the website collected personal information from users, including those under 13, who registered to receive brand-related communications. *United States* v. *Iconix Brand Group, Inc.*, No. 09 Civ. 8864 (S.D.N.Y, Nov. 5, 2009), *available at* http://www.ftc.gov/os/caselist/0823071/081211cmp0823071.pdf, In cases where the FTC alleged that a site was primarily directed to children, it is more difficult to tell exactly which factors influenced the FTC to file the complaint. However, it is clear that they were not limited only websites directed to very young children. For example, the FTC found that UMG Record Company's www.lilromeo.com was directed to children because it featured a model and celebrity who appealed to children, language, audio content, animation, and games targeted to children. The website was for twelve-year-old recording artist Lil' Romeo, who "enjoys 'just being a regular kid.'" The website included music by Lil' Romeo, which is "about having fun, and also about, you know, kids[']] things." Users could play an animated game to answer simple math and history questions to help Lil' Romeo save an elementary school from aliens. *See* Exhibit C, *United States v. UMG Recordings, Inc.*, No. CV-04-1050 JFW (Ex) (C.D. Cal. Feb. 18, 2003), *available at* http://www.ftc.gov/os/caselist/umgrecordings/040217exhiba-humgreordings.pdf.

marketers cannot engage in behavioral advertising to children without parental notice and consent. We also urge the FTC to hold those that collect or use children's personal information responsible for COPPA compliance, whether they are a child-directed website or service or a third party that is collecting or using personal data on a child-directed website or service. Finally, the FTC should not adopt the newly proposed definition of "directed to children" because this definition could lead to significantly less protection for children's privacy on the vast majority of what are commonly understood to be children's websites.

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Dated: September 24, 2012

Respectfully submitted,

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ATTACHMENT A

Figure 1

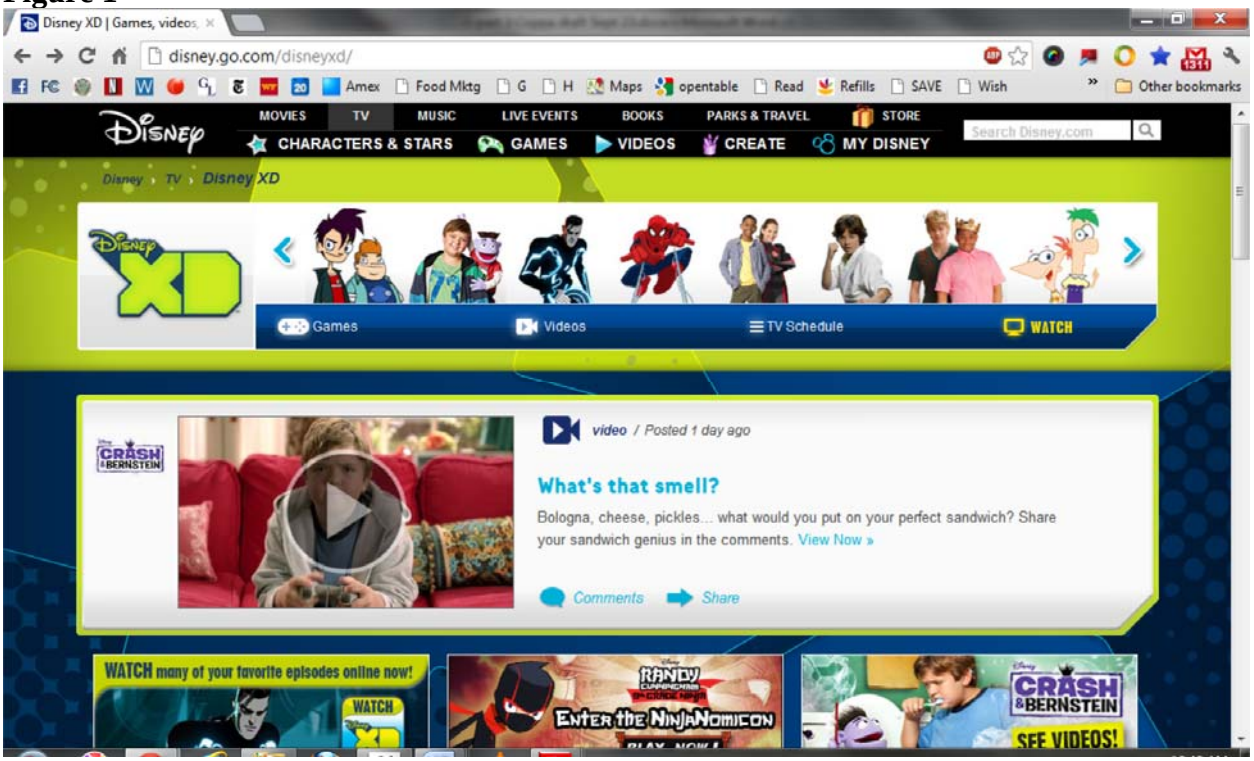


Figure 2

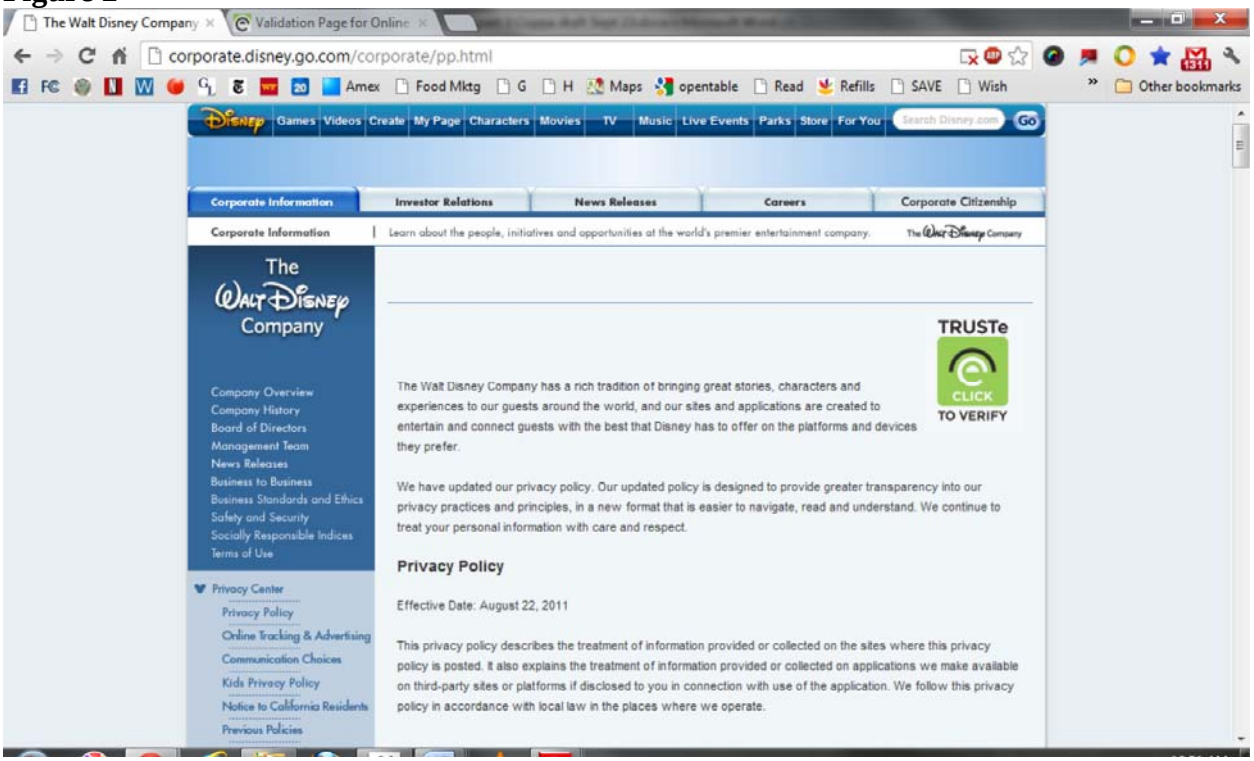
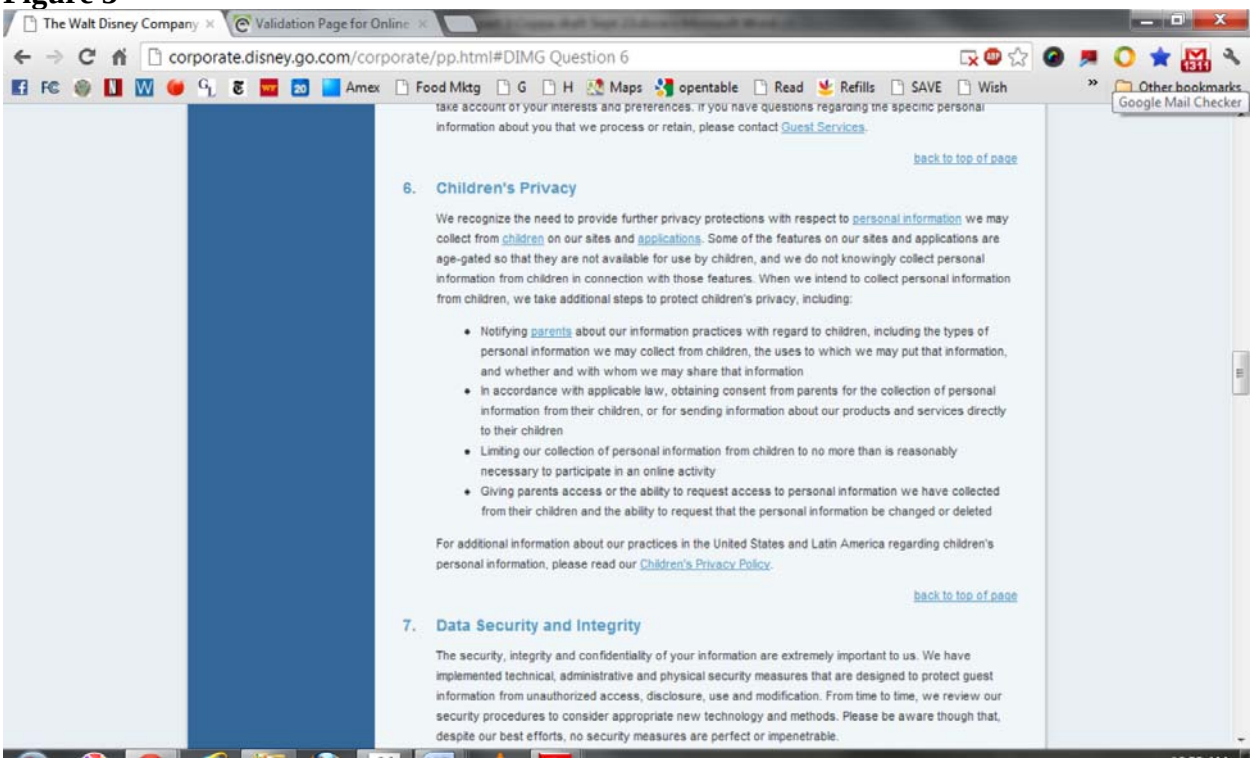


Figure 3


The Walt Disney Company
Validation Page for Online
corporate.disney.go.com/corporate/pp.html#DIMG Question 6
Amex
Food Mktg
G
H
Maps
opentable
Read
Refills
SAVE
Wish
Other bookmarks
Google Mail Checker
take account of your interests and preferences. If you have questions regarding the specific personal information about you that we process or retain, please contact Guest Services.
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6. Children's Privacy
We recognize the need to provide further privacy protections with respect to personal information we may collect from children on our sites and applications. Some of the features on our sites and applications are age-gated so that they are not available for use by children, and we do not knowingly collect personal information from children in connection with those features. When we intend to collect personal information from children, we take additional steps to protect children's privacy, including:
Notifying parents about our information practices with regard to children, including the types of personal information we may collect from children, the uses to which we may put that information, and whether and with whom we may share that information
In accordance with applicable law, obtaining consent from parents for the collection of personal information from their children, or for sending information about our products and services directly to their children
Limiting our collection of personal information from children to no more than is reasonably necessary to participate in an online activity
Giving parents access or the ability to request access to personal information we have collected from their children and the ability to request that the personal information be changed or deleted
For additional information about our practices in the United States and Latin America regarding children's personal information, please read our Children's Privacy Policy.
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7. Data Security and Integrity
The security, integrity and confidentiality of your information are extremely important to us. We have implemented technical, administrative and physical security measures that are designed to protect guest information from unauthorized access, disclosure, use and modification. From time to time, we review our security procedures to consider appropriate new technology and methods. Please be aware though that, despite our best efforts, no security measures are perfect or impenetrable.