



December 21, 2011

Online Publishers Association
249 West 17th Street
New York, NY 10011

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: COPPA Rule Review, 16 CFR Part 312, Project No. P-104503

Dear Mr. Secretary:

The Online Publishers Association (“OPA”) appreciates the opportunity to comment on the Federal Trade Commission’s proposed amendments to the Children’s Online Privacy Protection Rule (“COPPA Rule” or the “Rule”).¹ OPA is a trade association dedicated to representing trusted online content providers before the advertising community, the press, the government and the public. We are the only trade association focused exclusively on the digital content business and its unique role in the future of media. Our members include many of the Internet’s most respected online publishing brands and they collectively reach an unduplicated audience of 179.400 million unique visitors or 81% reach of the U.S. online population.²

Although several OPA members operate age-appropriate Websites that are specially designed for children, the majority operate sites directed to a general audience. Our members provide invaluable services to the public at a time in which the average American adult now relies on the Internet for their news, information and entertainment.

OPA has long understood that respect for consumer privacy interests – including the need to protect children’s privacy online – is paramount for its members to maintain confidence in their brands and attract the large audiences they need to be competitive. Accordingly, OPA respects and shares the Commission’s goal of enabling children to enjoy the Internet in a safe environment. At the same time, online publishers believe that privacy regulations must be

¹ Notice of Proposed Rulemaking, Federal Trade Commission, Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011), available at <http://www.ftc.gov/os/2011/09/110915coppa.pdf> (“NPRM”).

² comScore Media Metrix, October 2011.

carefully tailored to avoid unintended consequences that could disrupt the economics of advertising-supported business models that provide a rich, high-quality online experience to consumers of all ages. These concerns apply with no less force to sites directed to children than they do for general audience sites. It is important to note that this generation of children will remain online. If regulation or other factors reduce the number of kid-friendly sites, children would likely migrate to general audience sites or sites with adult content, thereby, resulting in fewer protections for children.

To help advance the Commission's goal of strengthening online privacy protections for children while preserving a vibrant market for online content, we offer the following comments in response to the proposed amendments to the COPPA Rule.

- **COPPA's Definition of "Child" Should Not Be Expanded to Include Teens.**

First, OPA supports the Commission's conclusion that the expansion of COPPA's definition of a "child" to include teenagers is unwarranted. We agree that such a change would be impractical and would raise significant First Amendment concerns by burdening the free speech rights of adults and older minors. Expanding COPPA to cover teens would also greatly increase the number of websites that would be required to adopt cumbersome age verification procedures and related access restrictions.³ Contrary to the Commission's data minimization goals, these measures would lead to a counterproductive increase in personal data collection and produce a corresponding loss of privacy for adults. They also would degrade the online experience for all users by slowing them down as they navigate online.

The expansion of the COPPA Rule to cover teens also would pose difficult practical challenges. As the Commission recognized, teens are far more likely than young children to falsify their parents' contact information. They may also be more likely to fib about their ages to gain access to online services and circumvent standard cookie-based access controls used to prevent young children from reentering a site after revealing their ages.⁴ For all these reasons, the Commission should continue to oppose calls for a change in COPPA's statutory definition of a "child."

- **The "Actual Knowledge" Standard Should be Retained.**

Second, and for similar reasons, OPA commends the Commission for resisting calls to convert COPPA's "actual knowledge" standard into an implied or constructive knowledge test. The latter standard would require operators of general-interest websites to age-screen every

³ See Comments of Interactive Advertising Bureau, *available at* <http://www.ftc.gov/os/comments/copparulerev2010/547597-00067-54980.pdf> ("As a practical matter, requiring teenagers to obtain verifiable parental consent would have the effect of imposing COPPA compliance costs on virtually all of the most popular online sites and services.").

⁴ See Comments of Interactive Advertising Bureau, *available at* <http://www.ftc.gov/os/comments/copparulerev2010/547597-00067-54980.pdf> ("As a practical matter, requiring teenagers to obtain verifiable parental consent would have the effect of imposing COPPA compliance costs on virtually all of the most popular online sites and services.").

visitor simply because statistical analysis suggests that some children are likely to be commingled with adults in their general audience of users. Because such measures would unduly burden the free rights of adult website users without clear offsetting benefits for children's privacy, the Commission correctly concluded that "[a]ctual knowledge is far more workable, and provides greater certainty, than other legal standards that might be applied to the universe of general audience websites and online services."⁵ Like the Commission's sensible conclusion that statutory protections expressly intended for children would be inappropriate for older minors, the Commission's decision to retain the actual knowledge standard will help ensure that adult visitors will continue to enjoy convenient access to valuable online content and services.

- **Revising the "Collection" Definition to Allow Use of Reasonable Measures to Delete Less Than 100% of Personal Information is Appropriate.**

Third, OPA supports the Commission's proposal to revise the Rule's current definition of "collects or collection," which some have interpreted to create a so-called 100% deletion standard. The proposed Rule would expressly adopt a "reasonable measures" standard. The process of using human review to screen every user-generated message before it is posted to remove content that might inadvertently reveal personal information of a child is highly burdensome. Moreover, automated software filters, like their human counterparts, will not function perfectly all of the time even if they are robust and generally very reliable. Given these realities, the specter of liability under the perceived "100% deletion standard" of the current Rule has discouraged responsible online publishers from offering services with interactive features to young users.⁶

Under the amended Rule, an operator that enables children to publicly post personal information would not be deemed to have "collected" that information if the operator uses automated software filters or other means that occasionally delete "less than all" of the personal information from a posting before it is made public. This approach reflects a healthy awareness that children deserve and will demand a meaningful voice online no matter what privacy schemes policy makers adopt. Measures that discourage the development of safe online forums specifically designed for children would be counterproductive because they would force children to rely on interactive services designed for adults with no children's privacy controls. OPA strongly believes that the proposed adoption of a "reasonable measures" standard could spur the development of more age-appropriate online communities and interactive features that would benefit children and urges the Commission to preserve this change in the final amended Rule.

Although the foregoing Commission decisions represent positive developments for OPA members and their website visitors, OPA views several other facets of the proposed Rule with concern:

⁵ NPRM at 59806.

⁶ See, e.g., Comments of Entertainment Software Association (June 30, 2010) at 13-15, *available at* <http://www.ftc.gov/os/comments/copparulerev2010/547597-00048-54857.pdf> (noting that the use of robust and desirable automated filtering technologies will nevertheless trigger the collection of children's personal information under the current regulatory framework).

- **The Definition of “Internal Operations” Should Be Broadened.**

As described in more detail below, OPA believes the proposed expansion of COPPA’s definition of personal information raises serious concerns. The proposed “internal operations” exception also is problematic. As currently proposed, the “internal operations” exception is defined to cover only those activities that are “*necessary*” to “maintain the *technical* functioning” or to “protect the security or integrity” of the website or online service. OPA is concerned that this construction is unduly restrictive.

Even when persistent identifiers are not used to offer behavioral advertising to children, the collection of such identifiers is integral to the architecture of the Internet and to core analytics, reporting, optimization, personalization, content and ad delivery functions that are employed by virtually every advertising-supported website, including sites directed to children. Online publishers routinely use persistent identifiers to operate and improve their sites, to create and personalize content over multiple browsing sessions, to store user preferences and login IDs, to report industry-standard metrics and to perform core functions necessary for the sale and delivery of advertising that do not involve third-party behavioral targeting.⁷

For example, an IP address, cookie or other unique identifier may be used not only for IP protection and fraud prevention but also to ensure the content served is in compliance with territorial licensing restrictions and in an appropriate language for the intended audience. Identifiers are also used to improve the user experience by sequencing content and making content that may be more relevant or interesting more accessible and easy to find. Publishers also use these identifiers to measure audience size for reporting and inventory. In addition, publishers collect this data to identify technical problems (e.g., when a site receives 100 calls to a home page, is it 100 individuals or 10 individuals having to request a page 10 times for a page to load?)

Publishers also use IP addresses for advertising purposes (not including third-party behavioral targeting), such as:

- serving contextual advertising;
- executing online campaigns in accordance with contractual requirements (such as geographical requirements and category or brand exclusivity commitments);
- capping the frequency with which an individual ad is displayed – a feature that benefits both advertisers and website visitors;
- preventing click fraud; and

⁷ See, e.g., Comments of Facebook (July 12, 2010) at 6-7, available at <http://www.ftc.gov/os/comments/copparulerev2010/547597-00079-54993.pdf>; Comments of National Cable & Telecommunications Association (June 30, 2010) at 6-8, available at <http://www.ftc.gov/os/comments/copparulerev2010/547597-00045-54854.pdf>; Comments of Direct Marketing Association (July 12, 2010) at 5-8, available at <http://www.ftc.gov/os/comments/copparulerev2010/547597-00072-54983.pdf>.

- synchronizing and sequencing creative advertising content, thereby enabling advertisers to “tell a story” through their campaigns using creative elements that must unfold in a logical order.

In light of the Commission’s statement that the proposed changes regarding persistent identifiers were designed so as “not to interfere with operators’ ability to deliver content to children within the ordinary operation of their Web sites or online services,”⁸ we respectfully request that the Commission revise Section 312.2 to expressly cover other important operational uses of unique identifiers that do not raise significant concerns for children’s privacy. These changes are designed to further clarify that the Rule is not intended to interfere with online publishers’ collection and use of cookies, IP addresses and other identifiers collected through their own websites or services for purposes that are integral to their ability to operate websites, improve their services and create digital content. Specifically, OPA proposes that the Commission adopt a definition of “support for the internal operations of the Web site or online service” that reads as follows:

Support for the internal operations of the Web site or online service means those activities undertaken to maintain the general operation 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 §§ 312.5(c)(3) and (4). Examples include, but are not limited to: (i) user authentication; (ii) controlling access; (iii) identifying users to each other; (iv) recalling user settings; (v) improving site or online service navigation; (vi) maintaining user preferences; (vii) delivering contextual advertisements or other content or advertising within the ordinary operation of the Web site or online service; (viii) site or online service registration; (ix) creating personalized content or features; (x) analytics and traffic analysis; (xi) responding to user requests; (xii) responding to law enforcement inquiries; (xiii) game play management; and (xiv) protecting against security breaches, fraud or theft.

- **The Proposal To Expand the Definition of “Personal Information” to Include Persistent Identifiers, Screen Names and Photograph, Video and Audio Files of Children Should Be Reconsidered.**

OPA believes that the Commission should reconsider its proposal to categorically treat all unique persistent identifiers as items of “personal information,” including Internet Protocol addresses and unique device IDs that necessarily are transmitted with every browser call to a Web server⁹ or communication from a mobile device. Under the proposed Rule, these identifiers, standing alone, would be covered as “personal information” that would trigger COPPA’s parental consent requirements, provided that they are used for “functions other than, or in addition to, support for the internal operations of the Web site or online service.” The

⁸ *Id.*

⁹ The Commission expressly recognized in the Notice accompanying the proposed amended Rule that “if IP addresses, without more, were treated as ‘personal information’ under COPPA, a site or service would be liable for collecting personal information as soon as a child landed on its home page or screen.” NPRM at 59812.

Commission proposes to define this latter phrase, in relevant part, as “activities *necessary* to maintain the technical functioning of the Web site or online service” or “to protect the security or integrity of the Web site or online service.”¹⁰

Specifically regarding screen names, OPA is concerned about the proposed inclusion of a screen name that does not reveal an *individual’s* e-mail address as currently required by the COPPA Rule.¹¹ The Commission proposes to change the applicable definition to include “a screen or user name where such screen or user name is used for functions other than or in addition to support for the internal operations of the Web site or online service.”¹² It is unclear how unique screen names that many online publishers with websites directed to children have used to provide safe, interactive online experiences for children contain any *individually* identifiable information or would raise any of the original legislative concerns addressed by COPPA.¹³

The fact that the Commission would allow operators to use screen names *within* a single site (so long as no other “personal information” is collected/used/disclosed) does not allay significant practical concerns that arise from the narrow “internal operations” definition currently proposed by the Commission and the ambiguous scope of the implicit limitation of use to a single website.¹⁴ Requiring parental consent to allow use of unique screen names that do not contain email addresses or other identifiable information would severely restrict innovative ways to provide interactive, educational and entertaining experiences for children. For example, publishers use screen names to allow access to personalized content and features across platforms and devices.

OPA is also concerned that much of the Commission’s proposal exceeds the Commission’s statutory authority under COPPA by seeking to expand the definition of “personal information” to include data that does not identify and permit contact with “a specific individual,” even when the data is not combined with any other individual identifier.¹⁵ One of Congress’ primary motivations in passing COPPA, as reflected in various headlines from the time, was to protect children online from pedophiles who might use the Internet to contact and

¹⁰ *Id.* at 59810 (emphasis added).

¹¹ 16 C.F.R. § 312.2 (emphasis added).

¹² NPRM at 59830.

¹³ The same concerns arise for the Commission’s proposed expansion of personal information to include “a photograph, video, or audio file where such file contains a child’s image or voice” as it is not clear that such photos/videos/audio files of a child would “permit physical or online contacting” of a specific individual. NPRM at 59813, 59830. OPA understands that the Commission is concerned with potential facial recognition technology that could identify persons in the photos or that embedded metadata in photos could provide latitude and longitude coordinates for the location at which the photo was taken. *Id.* at 59813. The Commission’s approach, however, is overbroad because it does not include limiting language that would restrict covered photos and videos to those that “permit physical or online contacting.” It is also underinclusive, in the sense that the same risks that drive the Commission’s proposal would be presented by photographs and videos of children posted by adults. The proposed change will adversely impact online publishers’ ability to offer fun, safe and age appropriate user-generated content (UGC) activities, contests and promotions on websites directed to children.

¹⁴ NPRM at 59810.

¹⁵ *Id.* at 59810-59814, 59830.

lure-in young children.¹⁶ The proposal to modify the definition of “personal information” to include persistent identifiers such as IP addresses and screen names loses sight of this purpose because these identifiers do not enable contact with a specific, identifiable person and do not place children in danger.

The Commission’s rationale for the proposed expansion of the Rule to cover persistent identifiers like IP addresses and device IDs relies heavily on the proposition that such identifiers are equivalent to residential street addresses and home phone numbers that can be used to identify and contact a child’s household. As noted, COPPA provides that “personal information” may mean “any other identifier that the Commission determines permits the physical or online contact of *a specific individual*.”¹⁷ Addresses and telephone numbers are qualitatively different from the data elements included in the proposed new definition, because a pedophile could attempt to contact a child by physically visiting a home or calling a residential telephone number. This concern is not present with identifiers like cookies, device IDs, IP addresses and screen names.

Congress chose to include in its original statutory definition of “personal information” identifiers such as a “home or other physical address including street name and name of a city or town” and a “telephone number.” Residential street address or phone number, standing alone, could be said to permit contact only with a household in the sense that they do not, in and of themselves, individually identify any particular member of the household that uses the address or phone number. However, these considerations do not support the Commission’s expansion of COPPA to include the new identifiers that it proposes to add to the definition of “personal information” in the amended Rule. Congress deliberately chose to include residential addresses and phone numbers in its original definition of personal information. At the same time, however, Congress expressly limited the Commission’s discretion to add new identifiers only if they permit the contacting of “a specific individual.”

The COPPA Rule should not restrict such uses of persistent identifiers by default. Doing so could turn COPPA compliance into a never ending guessing game in which online publishers and their service providers would be forced to speculate about which specific uses of unique identifiers will fit within the “internal operations” exception and which will not. Such a standard could sow considerable legal uncertainty and doubt in the field of online publishing for children and have serious chilling effects on innovation as technology advances and publishing models continue to evolve.¹⁸

¹⁶ See, e.g., Yvette C. Hammett, *Teen Girls Get Scare Surfing Internet*, Stuart News, Jan. 7, 1997, at A1; *FBI Chief Warns of Internet Pedophiles*, Buffalo News, Apr. 9, 1997, at A4; Stanley Ziemba, *Legislators Fall in Line to Protect Kids Online*, Chicago Tribune, Apr. 25, 1999, at 1; Amanda Garrett, *Undercover Deputy Foils Chat Room Sex Scheme*, Cleveland Plain Dealer, Nov. 2, 1999, at 1A; Dan George and Nicole Lorince, *Online Danger Signals Better Use Caution Cruising the Information Highway, Picking up New Friends*, Cleveland Plain Dealer, Nov. 10, 1999, at 4; *Mom Crusades Against Sickos on the Internet*, Cincinnati Enquirer, Dec. 12, 1999, at B01.

¹⁷ 15 U.S.C. § 6501(8) (emphasis added).

¹⁸ The Commission notes in its commentary that “[t]he new language in the definition would permit operators’ use of persistent identifiers for purposes such as user authentication, improving site navigation, maintaining user preferences, serving contextual advertisements, and protecting against fraud and theft.” NPRM at 59812. However, a comprehensive list of benign operational uses of persistent identifiers will necessarily change over time.

To avoid these risks, OPA urges the Commission to reconsider its expanded coverage of unique identifiers. While we believe the proposed expansion is unwarranted and problematic, the Commission could adopt a more tailored approach that proscribes only the specific use of persistent identifiers that the Commission wants to regulate – namely, third-party profiling for behavioral advertising. Specifically, the Commission could amend paragraph (g) in the definition of “personal information” to read as follows: *“A persistent identifier, including but not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier, where such persistent identifier is used by a third party for behaviorally targeting advertising to the child, but not where such persistent identifier is used for support for the internal operations of the Web site or online service.”*

- **The Treatment of Identifiers Used to Link Users Across Sites, Services or Platforms Should Be Reconsidered.**

OPA does not support the inclusion of the Commission’s proposed “catch-all” category in paragraph (h) that would treat as personal information any unique identifier that “links the activities of a child across different Websites or online services.”¹⁹ We are deeply concerned by the ambiguity created by this provision’s reliance on key undefined terms and phrases such as “different Websites or online services” and “links the activities.”

This provision could impact our members’ ability to deliver editorial content, services and features across a family of commonly-operated (and usually cobranded sites) that are designed to provide an interconnected experience for users. The proposed catch-all provision may also sweep in other benign practices that are beneficial to children, such as the use of identifiers to honor preferences, remember settings and otherwise maintain continuity in a child’s experience as the user switches between different device platforms (e.g., online and mobile) that are used to host a given service. For example, a publisher may use an identifier to recognize or “link the activities” of a given user who starts playing a game on a personal computer before pausing the game session and resuming it on a cobranded application running on a mobile device. We urge the Commission to allow publishers to continue to design safe, fun and educational services for children that are designed to be experienced across a family of affiliated and commonly-operated platforms or properties.

- **The Emphasis Placed On Child Celebrities, Celebrities Who Appeal to Children and Musical Content Should Be Reconsidered.**

OPA also asks the Commission to reconsider its blanket conclusion that “the presence of celebrities are strong indicators of a Web site or online service’s appeal to children”²⁰ for purposes of applying the “totality of the circumstances” test mandated by the Rule to identify sites that target children. Many of our members have raised concerns regarding the emphasis that the amended Rule would place on whether a website’s content features musical content or

¹⁹ NPRM at 59812.

²⁰ *Id.* at 59814.

celebrities popular with children. Our members point out that almost every major sport, entertainment or music celebrity who appeals to children is also an object of interest for the parents of those children and for millions of other adults and teens who take a keen interest following celebrity culture. Similarly, in many instances, music that appeals to children is also appealing to teens and adults.

Moreover, as any parent with a young child knows, children are fickle in their fan allegiances and are quick to drop former idols as new stars and starlets continuously take the stage. Like all of us, child celebrities age and their fan bases and media followers change with them as they mature, assume more “adult” public images and all too often become entangled in very grown-up problems. The romantic lives of young entertainers like Justin Bieber demonstrate all of these considerations. The ups and downs of his romance with another popular young entertainment celebrity, Selena Gomez, have been extensively chronicled by BopTigerBeat.com, a website directed to teens and tweens ages 10 to 16. However, a quick Google search reveals that his relationship with Gomez has been followed just as assiduously by TMZ.com and by countless other general audience sites. When threats of a paternity suit against Bieber surfaced earlier this year, the story appeared on the home pages of general audience news sites all over the world.²¹

OPA does not suggest that the use of celebrity images or other celebrity-focused or musical content could never be relevant, as one of many factors, to the question of whether a particular site is directed to children. However, such possibilities are already covered by the current description of the “totality of the circumstances” test, which expressly calls for an evaluation of a site’s “subject matter” and content. In light of our members’ strong negative reactions, we simply question whether the proposed focus on celebrity content would bring more confusion than clarity to the Commission’s standard. We also worry that the Commission’s approach may place undue emphasis on factors that are likely to be inconclusive in most cases.

- **A Sliding Scale of Consent Should Be Retained for Internal Uses.**

The Commission also should reconsider its proposal to eliminate the “email plus” option for obtaining verifiable parental consent or otherwise preserve a comparable intermediate sliding-scale means of obtaining parental consent for more limited internal uses of personally identifiable information. The record does not reflect any evidence of harm from maintaining a sliding scale approach in these limited circumstances. Moreover, it is important for online publishers to have access to an automated, cost-effective, scalable method of obtaining parental consent in situations where they are collecting only a very limited type of information and using it only for *internal* purposes. The simplicity of use of an email or a text-based mechanism for parental consent in this context is beneficial to both parents and businesses. The costs and complications of obtaining verifiable consent for such limited data usages that do not fall within the “one-time use” or newsletter exceptions otherwise may limit the range of innovative and rich online content available that publishers can provide to children outside of paid subscription services.

²¹ See also Reuters, *Move over Britney, ‘tweens’ want a new idol (kids trending away from the sex-tart role models)*, June 21, 2003 (“As teenage stars grow up, they may start to appeal more to an adult market.”).

- **The Proposal to Revise the Rule’s Online Notice Provision to Require Disclosure of the Contact Information and Information Practices of All Operators of a Website or Online Service Should Be Reconsidered.**

Finally, OPA urges the Commission to reconsider its proposal to revise the Rule’s online notice requirements so as to apply to all operators of a website or online service, rather than permitting the designation of a single operator as the contact point. (The revised paragraph (b) of Section 312.4 of the Rule would also require disclosure of each operator’s information practices.) OPA believes the approach in the current Rule has served children’s privacy interests well, and we are concerned that the proposal will create unnecessary confusion for parents and contravene the Commission’s stated desire for shorter privacy notices.

We are also concerned that the proposal could impose unreasonable burdens on publishers especially when paired with the proposal to expand the definition of personal information to include IP addresses and other persistent identifiers. As the Commission knows, the rendering of a webpage involves multiple parties. Advertisements that appear on websites frequently are delivered to visitors’ browsers by servers controlled by advertisers or advertiser agencies, as opposed to the website publisher. Each time an ad is served, the advertiser or agency (or a service provider acting on their behalf) that delivers the ad to the user’s browser necessarily receives a user’s IP address to serve the ad. It is unclear how the proposed revision to COPPA’s online notice provision would impact these data collection events. For example, the Commission’ discussion of this proposed amendment to date leaves unanswered central questions such as which advertising entities, if any, would be treated as “operators,” how the internal operations exception would apply in this context, how notices would be displayed and, whether one “operator” would be held responsible for another operator’s failure to honor some term of its notice.

Although it is difficult to meaningfully address the potential problems associated with the expanded notice requirement without a better understanding of its intended scope, OPA submits that any approach that the Commission ultimately adopts must account for the considerations that: (1) some third-party collection of unique identifier information is indispensable to publishers’ ability to monetize their investment in content and services; (2) the mix of advertisers on any given site changes constantly, and (3) online advertising is often sold in a real-time bidding environment only seconds before the ad is served.

Moreover, we urge the Commission to clarify that website publishers will not be responsible for the failure of another “operator” to comply with the terms of its own privacy notice. This principle is consistent with the allocation of duties and liabilities in analogous consumer protection law contexts, such as product liability and false advertising. For example, numerous courts have held that newspapers and other media publishers have no duty to investigate the accuracy of claims made in advertisements they print.²² These holdings stem

²² See, e.g., *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La. 1987) (“[A] newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisements placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised.”), *aff’d*, 834 F.2d 1171 (5th Cir. 1987) (per curiam); *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101, 103 (Cal. Ct. App.

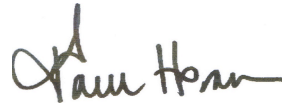
from the recognition that imposing obligations on publishers to police their advertisers would both unduly restrict the flow of commercial speech and indirectly threaten the core, noncommercial speech that is supported by the sale of advertising.²³

Many of the knotty issues raised by the Commission's proposed amended online notice requirement would be avoided if the Commission reconsidered its proposal to expand the definition of personal information to include unique identifiers such as IP addresses. However, if the Commission moves forward with this aspect of its proposal, OPA believes that the related implications of the expanded online notice provision deserve more thorough dialogue and evaluation than is possible in this comment cycle. Thus, OPA respectfully requests that the Commission provide additional opportunity for public comment prior to implementing the proposed changes to Section 3.12.4(b) of the Rule.

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OPA commends the Commission's commitment to protecting the privacy and safety of children online and looks forward to working with the Commission to answer any questions regarding the foregoing comments or the online publishing industry.

Sincerely,



Pam Horan
President
Online Publishers Association
212.204.1487

1987) (“[W]e are loathe to create a new tort of negligently failing to investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue.”); *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974) (“[N]o such legal duty to investigate [advertisements] rests upon respondent [, the publisher of *Popular Mechanics Magazine*,] unless it undertakes to guarantee, warrant or endorse the product. To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system.”); *Goldstein v. Garlick*, 318 N.Y.S.2d 370, 374 (N.Y. Sup. Ct. 1971) (“Nor should the onerous burden be placed upon newspapers under ordinary circumstances to conduct investigations in order to determine the effect of a questioned advertisement.”).

²³ See, e.g., *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F. 2d 830, 837 (5th Cir. 1989) (“[T]he publication’s editorial content would surely feel the economic crunch from the loss of revenue that would result if publishers were required to reject all ambiguous advertisements.”).