

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

**COMMENTS OF
TIME WARNER INC.
ON THE
CHILDREN'S ONLINE PRIVACY PROTECTION RULE
COPPA RULE REVIEW 2005
PROJECT NO. P054505**

Time Warner Inc.
Jennifer Jacobsen
Vice President, Global Public Policy
800 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20006
202/530-7888

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Counsel

Alisa M. Bergman
James J. Halpert
Stuart P. Ingis
DLA Piper Rudnick Gray Cary US LLP
1200 19th Street, N.W.
Washington, D.C. 20036
202/861-3900

I. Introduction

Time Warner appreciates the opportunity to respond to the Federal Trade Commission's ("FTC" or "Commission") request for comments in connection with its review and evaluation of the Rule implementing the Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501 *et seq.*, ("COPPA" or "the Act"). 70 Fed. Reg. 21107, April 22, 2005.

Time Warner's divisions, including America Online (AOL), Home Box Office Inc. (HBO), Time Inc., Time Warner Cable, Turner Broadcasting System, and Warner Bros. Entertainment, are committed to protecting the privacy of children online. To that end, Time Warner actively has been involved in the Commission's implementation of COPPA over the past five years, including submitting comments in all of the various proceedings (either individually or through participation in our trade associations and coalitions), as well as having participated in the Commission's workshop on this topic in 1999. Many of our divisions offer Web sites and content directed at children. Among our leading Web sites that contain content directed to children are: Time for Kids Online, Sports Illustrated for Kids, Cartoon Network, Looney Kids, Kids WB, HBO Family, and DCKids.com. In addition, we offer a children's area on the AOL service, "KOL," which has content that is tailored to children under 13.

In connection with its five-year review of the implementation of the COPPA Rule as required by the statute, the Commission requests comment on the costs and benefits of the Rule, and whether the Rule should be retained, eliminated, or modified. The Commission also requests comment on the Rule's effect on: practices relating to the collection and disclosure of information relating to children; children's ability to obtain access to information of their choice online; and the availability of Web sites directed to children.

Consistent with congressional intent in adopting COPPA, the COPPA Rule has proven effective in protecting children without interfering with children's interactive experiences on the Internet. It strikes the balance that Congress intended between parental involvement, children's safety, and children's privacy on the one hand, and protecting interactivity and access to information on the other. The Rule also has been successful in preserving meaningful children's content to ensure that families and children are able to find safe, child-friendly online environments. During the five years in which COPPA has been in effect, Time Warner has received virtually no complaints from parents about our practices in connection with collecting information from children online, and we believe that the entire Rule should be retained in its current form. In fact, many of Time Warner's Web sites have received laudatory comments from parents who commend us on our measures to protect children's privacy.

We highlight below our experiences with the Rule and, more generally, our practices relating to information collection relating to children, as well as responding to some of the specific questions that the Commission raises in its proposal.

Specifically, our comments focus on:

- An overview of our experiences with COPPA;

- Support for making permanent the sliding scale mechanism for obtaining parental consent;
- The factors used to determine whether Web sites or online services are directed at children;
- The interpretation of the term “actual knowledge” and the related issue of “back-buttoning”; and
- The use of credit cards in connection with a transaction as a means of obtaining verifiable parental consent.

II. Overview of Time Warner divisions’ online information collection practices from children.

The majority of our child-directed Web sites either have structured their content and interactive functions around the collection of non-personally identifiable information or have limited their collection to e-mail addresses only, staying within COPPA’s exceptions to parental consent.¹ For example, many Time Warner children’s Web sites enable child interactivity through polls, trivia, and surveys, submitted via Web-based forms that do not collect personal information. In addition, some of our sites enable child visitors to create non-personally identifiable user names that enable personalization. Several of these sites collect children’s e-mail addresses for contests and sweepstakes, “letters to the editor” type features, newsletter subscriptions, and electronic postcards or messages.

Several of our Web sites collect personal information from children for which verifiable parental consent under the sliding scale is necessary. These practices range from collecting information for internal use only to allowing children to participate in online fora.

A limited number of these sites use the sliding scale mechanism for obtaining verifiable parental consent. For example, one of our divisions allows children to participate in online communities that include posting information on message boards and, thus, obtains consent through one of the more reliable methods of consent—the use of a print-and-fax-back form—because children make information publicly available in these communities. This division’s experience with the fax-back consent mechanism has been very positive, and the division has not seen any evidence of attempts by children to use the fax-back method to circumvent COPPA’s parental consent requirements. The division, therefore, believes that the fax-back method provides Web site operators with a high degree of certainty that they are dealing with the parent of a child.

¹ Specifically, our divisions use the single and multiple-contact e-mail exceptions, pursuant to which prior parental consent is not required when:

- (1) an operator collects an e-mail address to respond to a *one-time* request from a child and then deletes it; or
- (2) an operator collects an e-mail address to respond *more than once to a specific* request. In this case, the operator notifies the parent that it is communicating regularly with the child and gives the parent the opportunity to stop the communication before sending or delivering a second communication to the child.

One of our divisions currently obtains consent through the use of a credit card in connection with a transaction as part of its subscription-based service. Similarly, at least one other division believes that this method is effective for subscription-based models, and is actively considering the potential use of this mechanism in connection with the upcoming launch of a subscription service.

We believe that the combined use of the e-mail exceptions to parental consent and the sliding scale mechanism, which allows Web sites and online services to vary their method of consent based on the intended use of information, has offered our divisions flexibility in addressing children's privacy issues, thus ensuring the continued existence of meaningful children's content while protecting children's privacy.

III. The Commission should make permanent the sliding scale approach for obtaining verifiable parental consent.

The Commission has requested further comment, in addition to comments submitted during the initial review of this issue in January 2005, on whether its "sliding scale" approach to parental consent should sunset as scheduled on April 21, 2005, or be made permanent.² We incorporate by reference the comments filed in February 2005 by both the Direct Marketing Association ("DMA") and Motion Picture Association of America ("MPAA"), of which we are members, on the effectiveness of the sliding scale. *See* DMA and MPAA Comments in Project No. P054503 (re: COPPA) (Feb. 14, 2005).

Like both trade associations, Time Warner strongly supports the Commission's proposal to make permanent the sliding scale approach for obtaining parental consent. A flexible range of consent mechanisms, depending on the operator's use of the information, has proven fully consistent with the statutory purpose of protecting child safety for features that present the most concern about child safety. New technologies have not yet developed to facilitate verifiable parental consent at a reasonable cost, and no widely and economically feasible verification technology appears even to be on the near horizon. Consistent with the statutory mandate, which provides that parental consent must be reasonably calculated *in light of available technology* to ensure that the person providing the consent is the child's parent, *see* 15 U.S.C. § 6501(9), the

² Under the sliding scale approach, the requirements to obtain consent vary based on the way the operator uses the child's personal information. For instance, if the operator discloses the information to others—or enables the child to disclose information to others via an e-mail account, chat room, message board, or other means—then a very reliable method of consent is required because the situation potentially presents danger to children. Methods of obtaining parental consent that satisfy this "very reliable" standard include getting a signed form from the parent via postal mail or fax; accepting and verifying a credit card number; taking calls from parents through a toll-free number staffed by trained personnel; and receiving an e-mail that is accompanied by a digital signature. If, on the other hand, the personal information "collected" from the child will be used only by the operator for internal purposes, then a less rigorous method of consent is required (*e.g.* through a delayed confirmatory e-mail, referred to as "e-mail plus").

sliding scale approach affords a readily available and viable means of obtaining consent. Digital signature technology, although promising, has not yet become widely accepted; it still cannot be characterized as the type of “available technology” contemplated in the COPPA statutory framework.

The sliding scale approach has proven an effective means for allowing interactivity at children’s Web sites without unduly burdening Web sites or parents with costly parental consent mechanisms that could have the effect of reducing the availability children’s Internet content. Use of information for internal purposes through an e-mail-based consent mechanism does not present any harm to children. Thus, this approach strikes the appropriate balance between affording parental involvement in certain children’s activities without being cost-prohibitive for commercial Web site operators.

The parameters of the sliding scale approach are clear, providing Web sites with meaningful guidance on how to structure their activities around a preferred consent mechanism. The temporary nature of the sliding scale has inhibited many of our children’s Web sites from making investments in costly infrastructure, fearing that a once-appropriate means of obtaining consent would no longer be acceptable. If the Commission were to adopt the sliding scale on a permanent basis, many of these sites might make the types of investments in children’s content that they have been hesitant to make to date.

IV. The factors for determining whether a Web site or online service is directed at children are clear, and the Commission has provided meaningful guidance with respect to how these factors are to be applied in practice.

The Commission also has requested comment on the standard for determining whether a site or online service is directed at children. The definition of this term is important, as it determines whether a Web site’s or online service’s personally identifiable information collection activities are subject to COPPA.

Time Warner believes that the commentary in the Rule and the guidance the Commission has offered in the form of FAQs and compliance tools, taken together, offer companies meaningful guidance to determine whether their online activities are directed to children and, thus, covered by COPPA.

Specifically, the Commission has indicated that whether a Web site is directed to children is a flexible inquiry that involves assessment of “the overall character of the site,” including whether:

- there is child-oriented content on the site, which includes an assessment of the age of models on the site, presence of animated characters, children’s music, and/or child-oriented activities and incentives (such as puzzles, games, or trivia);
- the ads appear to be targeted at children under 13;

- the language is targeted toward an audience under 13;
- there is reliable empirical evidence regarding the age of the site's visitors; and
- there is evidence regarding the intended audience.

In addition, consistent with the factor analysis set forth in the commentary to the Rule, Time Warner supports the Commission's interpretation of this standard, which looks at the overall character of the site, rather than just the presence or absence of one or more factors (*e.g.*, the presence of animation). *See* 64 Fed. Reg. 59888, 59893 (November 3, 1999). Among the popular content at many of our divisions' Web sites are animated characters, for example, the Looney Tunes cartoons that attract an audience of all ages and are marketed by the Warner Bros. Studio as such. Indeed, the Studio's advertising confirms that the Looney Tunes brand and Web sites have a mature audience. Similarly, Road Runner, a broadband service provider owned and operated by Time Warner Cable, which markets itself to adults, has taken its name from an animated character and features this character on virtually every page of its Web site. By way of yet another example, Turner has begun producing Adult Swim, a block of popular late-night animated programming, which is intended for an adult audience. The promotional Web site and advertisements for Adult Swim also are targeted to adults.

Our experience and study of our own market confirms the Commission's conclusion that the overall character of the site should drive this analysis. Time Warner is familiar with these established standards from our long-standing experience in television, radio, and print advertising, and believes that the experiences of the past five years demonstrate that these standards work well in the online environment as well.

The Commission's statements regarding areas of sites directed to children, as well as the issue of how to address hyper-linking, also are instructive. Specifically, the Rule does not look only to whether a site or service is targeted to children *in its entirety*. The Commission has clarified that if a portion of a site or service (such as a child-oriented pen pal service) is targeted to children, then the requirements of the Rule will apply to that portion only.

Further, the Commission has clarified that merely referring or linking users to a site that is targeted to children does not subject an operator to the Rule, and that linking to a site that violates the Rule creates no liability. However, if other elements of a site indicate that the site is a child-oriented directory, then it would be considered targeted to children under the Rule.

Time Warner believes that these standards and the Commission's guidance are working well, and companies have successfully been applying them for the past five years. Thus, we believe that no further clarification is necessary.

V. The Commission’s guidance with respect to how sites and online services can obtain actual knowledge provides a clear framework for compliance, and the additional guidance regarding age-screening practices helps prevent falsification.

The Commission also requests comments on whether the term “actual knowledge” is sufficiently clear, and whether Web site operators are encouraging children to back-button and change their age. Time Warner believes that the Commission’s guidance with respect to how Web sites and online services can obtain the requisite actual knowledge provides a clear compliance framework, enabling sites to assess their compliance obligations and protecting children’s privacy.

Although this term is not specifically defined in the statute or the Rule, the FTC has provided guidance on the meaning of this term in both the commentary to the rule and in its FAQ. Specifically, the FTC states in the commentary that a Web site is considered to have actual knowledge “where the operator learns of a child’s age or grade from the child’s registration at the site or from a concerned parent who has learned that his child is participating at the site.” 64 Fed Reg. at 59892 (commentary on the definition of “Operator”).

The Commission also states that although Web sites are not required to investigate the ages of visitors, if the site asks for and receives information from users from which age can be determined—for example, by asking for age or date of birth or posing indirect questions that may elicit age information (*e.g.*, “what type of school do you attend?”)—the operator may acquire actual knowledge that it is dealing with children under 13. *Id.*

Offering additional guidance on this issue, in a FAQ regarding general audience Web sites, the Commission states that where a child posts personally identifiable information on a general audience Web site, but does not reveal his or her age and the site has no other information that would lead it to know that the visitor is a child, then it would not possess actual knowledge under the Rule and would not be subject to the rule’s requirements. The Commission goes on to note that collecting a child’s age, however, does provide actual knowledge. *See* FAQ #38 at <<<http://www.ftc.gov/privacy/coppafaqs.htm#teen>>>.

On the related issue of “back-buttoning,” Time Warner believes that the Commission’s guidance in the form of best practices in connection with age screening is helpful in addressing perceived concerns regarding children falsifying their age or date of birth information in an attempt to circumvent the protections of COPPA. Specifically, the FTC has advised that Web sites can identify which visitors are children under 13 years of age by asking for age or year of birth information when inviting visitors to provide personally identifiable information. The Commission’s guidance then encourages Web sites to ask age in such a way as not to invite falsification; for example, through a pull-down menu that enables children to enter their correct age or date of birth rather than permitting visitors only to enter birth years starting with age 13. *See* FAQ #39 at <<<http://www.ftc.gov/privacy/coppafaqs.htm#teen>>>. The FTC also encourages Web sites to use a session cookie to prevent children from “back-buttoning” to change their age once they realize that parental consent is required to collect their personally identifiable information.

Time Warner's Web sites are familiar with, and have been using, these best practices at Web sites where we ask for age or date of birth information when collecting personally identifiable information. We believe that these practices work well in addressing any perceived concerns about back-buttoning or age falsification. Importantly, as the Commission clarifies in its FAQ #39, "if the site does not invite falsification, however, it will not be responsible if a child misstates his or her age." *See id.* Time Warner believes that this statement recognizes that there are limitations and challenges to verifying the age of any user of a Web site, and that Web site operators need a clear understanding of their obligations.

For these reasons, we believe that the current interpretation of the term "actual knowledge" provides sufficient guidance to Web sites with respect to their compliance obligations, coupled with the Commission's guidance with respect to best age-screening practices to address any perceived concerns regarding back-buttoning.

VI. The use of a credit card should continue to be endorsed by the Commission as a method for obtaining verifiable parental consent.

The Commission requests comment on whether the use of a credit card in connection with a transaction should continue to be endorsed by the Commission as an acceptable method of obtaining verifiable parental consent. Currently, the Rule allows Web sites or online services to use credit cards *in connection with a transaction* among the more reliable methods of consent for disclosures of information to third parties (*e.g.*, children's e-mail accounts, chat rooms, message boards). The Commission also notes that some companies are now marketing debit cards to children, who may be able to use these cards to circumvent the parental consent requirement. 70 Fed. Reg. at 21109. The FTC, thus, is requesting comment on how this requirement is working and whether the availability of credit or debit cards to children under 13 affects the analysis.

Time Warner believes that the use of credit cards in connection with a transaction is a reasonable means of verifying that the person providing consent is the child's parent. AOL has been using this mechanism of verifiable parental consent in connection with its subscription model since the inception of the Rule. In our extensive experience with it, there is no evidence to suggest that this mechanism is not effective at addressing the requirements under the statute to obtain verifiable parental consent. Therefore, this method should continue to be among the available options for obtaining verifiable parental consent.

Several of Time Warner's divisions' Web sites use credit cards in connection with online purchases, and rely on them as a means of confirming that they are collecting personally identifiable information from an adult, rather than a child. We are unaware of the penetration of credit or debit cards among children under the age of 13, and therefore cannot comment on this point. In Time Warner's experience, most credit and debit cards are issued to individuals over 18 years of age. In the limited instances where such cards may be issued to someone under 18, an adult is responsible for the financial charges that are incurred or the cards are related to a parent account. Indeed, a fundamental premise of e-commerce is that a person who uses a credit

card has the authority to do so and is of legal age to enter a contract. Undermining this assumption would significantly increase the costs of doing business online.

VII. Conclusion

Time Warner appreciates the opportunity to provide comments in response to the Commission's request for public comment on the effectiveness of the COPPA Rule. As evidenced by the positive experience of the last five years, the Rule is working well and should be continued in its current form. We look forward to continuing to work with the Commission on protecting the privacy of children online.