

June 11, 1999

Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

*RE: Children's Online Privacy Protection Rule -- Comment, P994504*

To the Secretary:

Pursuant to the Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on April 27, 1999 (64 Fed.Reg. 22,749) (to be codified at 16 CFR Part 312), I am submitting these comments on behalf of the Association of American Publishers ("AAP") regarding the Federal Trade Commission's proposed rule to implement the Children's Online Privacy Protection Act of 1998 ("COPPA").

As the principal national trade association of the U.S. book publishing industry, AAP represents more than 250 member companies and organizations that include most of the major commercial book publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, including general fiction and non-fiction, poetry, religion, children's books, and general and specialized reference works. In addition, AAP members publish scientific, medical, technical, professional and scholarly books and journals, as well as textbooks and other instructional and testing materials covering the entire range of elementary, secondary, postsecondary and professional educational needs. Apart from print publications, many AAP members publish computer programs, databases, and other electronic software for use in online, CD-ROM and other digital formats.

AAP's interest in the above-referenced rulemaking is based on the fact that many of its members are operators of websites or online services which may be considered "operated for commercial purposes" and "directed to children," as these phrases are used in the definitional provisions of both COPPA and the NPRM. These members -- including several of our nation's leading publishers of children's books and educational materials produced primarily for the elementary school level -- may consequently come within the coverage of COPPA and the Commission's proposed implementing rule.

## **General Concerns**

AAP recognizes and supports the basic purpose of COPPA in preventing the exploitation of children through the online collection of their personal information. However, AAP is generally concerned that, in a number of respects, many of the provisions of the NPRM embody a level of complexity and inflexibility that is neither necessary nor appropriate for the implementation of COPPA in light of the explicit language and legislative history of the statute. Indeed, AAP believes that some of the excessively restrictive requirements in the NPRM are at odds with both the plain language of COPPA and Congressional intent to craft a careful balance between government mandate and industry self-regulation.

Insofar as a wide range of website and online service operators appear to be similarly-situated in general terms of their coverage by COPPA and the NPRM, AAP urges the Commission to carefully consider the thoughtful and detailed analysis of the NPRM that has been submitted to the Commission by the Direct Marketing Association (“DMA”). Given the breadth of online activities embraced by DMA’s membership (which includes AAP and several AAP members), DMA’s comments raise a number of specific concerns that cut across many different types of businesses that have little in common other than their operation of websites or online services that may be deemed “operated for commercial purposes” and “directed to children” under COPPA.

Rather than restating DMA’s explication of each of these concerns at length, it makes more sense for AAP to simply inform the Commission that AAP has thoroughly reviewed DMA’s comments and commends them to the Commission as a source of well-founded and constructive suggestions for revising the NPRM to implement COPPA’s parental rights provisions and other requirements with greater clarity, flexibility and practical expectations for compliance. In particular, AAP urges the Commission to direct its attention to DMA’s comments on the NPRM’s provisions regarding “verifiable parental consent” requirements (and the exceptions thereto), notice requirements, definitions, retroactive application, and liability.

## **Online Educational Programs**

Beyond the general concerns which AAP members share with a wide variety of other operators of websites and online services, AAP urges the Commission to focus specifically on the serious adverse impact that the NPRM would have on the implementation of online educational programs.

As we have previously noted, COPPA’s basic purpose is to protect children against commercial exploitation on the Internet in connection with their disclosure of personal information. The NPRM, however, would limit the collection, use, and disclosure of

personal information for both commercial and non-commercial activities,<sup>1</sup> including non-exploitive online educational programs. We fear that the rules would unduly restrict children's access to, and schools' use of, valuable online educational resources, even in circumstances where none of the hazards targeted by COPPA are present. This would be both tragic and ironic, given the growing importance of the Internet as an educational medium and the huge investments to promote technology in education that are currently being made both by government and by a variety of non-profit and commercial enterprises. Application of the NPRM to a wide range of "distance education" programs could needlessly impose restrictions that would stifle the growth of these and other online educational opportunities to the detriment of individual students and society as a whole.

Computers and the Internet already play a significant role in education, and their influence is growing exponentially. Educational websites and online services, operated by nonprofit or commercial entities, as well as through collaborations between such entities, offer a wealth of quality resources and activities that support or enhance classroom instruction. With use of the Internet as an educational medium continuing to grow, AAP envisions extensive expansion of online educational program offerings that will not only allow children to read or download information but will also allow them to engage in a range of interactive tasks, such as review exercises, learning games, homework activities and tests. These programs may relate directly to a child's work in school, or they may be supplemental, for independent study and enrichment.

The inherent interactivity of these online educational programs will often require that participants identify themselves and give responses, such as providing solutions to problems or answers to questions. Some online educational programs may involve recording and reporting grades and test results to teachers and school officials, as in instances where assessments and evaluations that in the past were administered using paper and pencil in a classroom are now or in the future administered online. All of these responses and data would seem to fall within the NPRM's proposed definition of "personal information" and thus to be governed by the rules, even if that personal information is not used for advertising, selling or otherwise marketing to children.

COPPA and the NPRM contain an exemption for certain nonprofit organizations, but that exemption does not solve the problem of restricting access to online educational programs. The leading providers of instructional content to schools in the United States, however, are

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<sup>1</sup> If COPPA's explicit application to websites and online services that are "operated for commercial purposes" means that its provisions apply to the *non-commercial* activities conducted through such sites and services, it is unclear why the NPRM does not similarly apply COPPA's provisions to the *commercial* activities conducted through sites and services that are operated by non-profit entities. Perhaps the Commission could explain the meaning of "operated for commercial purposes" in a manner similar to the way it purports to explain the meaning of "directed to children."

not nonprofit organizations -- rather, they are the commercial enterprises that create and publish textbooks, educational software, and other instructional materials. These commercial operators of websites and online services are making enormous investments in developing online learning resources, and they will undoubtedly remain among the leading providers of instructional content as the Internet's role in education continues to grow.

Requiring verifiable parental consent as a prerequisite to participation in online educational activities will discourage children's spontaneous participation in such programs, whether at school (during or after normal classroom hours) or in a library or at home. Clearly, such a requirement will greatly complicate even the planned use of online educational programs in schools, where the failure of even a single child to obtain parental consent could compromise or even preclude the use of an online program as a classroom or school-wide activity.

The verifiable parental consent requirement will, as a practical matter, entirely prevent many children from accessing online educational programs. This would be especially unfortunate because the financial and technological resources that are needed to access such online programs are not universally available; indeed, for large portions of our nation's population, a child's only feasible access and introduction to computers and the Internet is in a classroom, library or other institutional environment. Unless these proliferating online educational resources are otherwise made available to children who do not have a computer and Internet access at home and/or whose parents (for whatever reason) cannot or will not respond to a verifiable consent request, a large portion of our nation's children will be cut off from developing essential computer skills and accessing the same educational resources and opportunities that are available to their more advantaged peers. (For example, not all parents have a driver's license, credit card or bank account, much less a home computer and e-mail capability.)

In addition to the NPRM's provisions regarding verifiable parental consent, AAP is concerned that section 312.6 of the NPRM, which gives parents the right not only to review but to change and delete personal information concerning their child, raises another serious barrier to the use of online educational programs at school. Parents, in effect, could be allowed to change or delete grades, test scores and similar kinds of information under standards and procedures in conflict with the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, and various State and local policies.

In order to meet COPPA's basic objective, while avoiding the unintended consequence of denying children access to valuable educational resources that are available via the Internet, AAP believes the NPRM should expressly exempt online educational programs from its verifiable parental consent and other regulatory requirements, provided that the exemption facilitates implementation of COPPA's basic goal of protecting children from exploitation in connection with their personal information that is collected online.

Accordingly, AAP respectfully proposes the following amendments to the NPRM:

**Add the following paragraph under Section 312.2 “Definitions”:**

*“Online educational programs means activities or materials which (1) are designed to provide, support or build upon classroom or other systematic curricular instruction or assessment, and (2) are made available to participants through a website or online service. Such activities or materials may include core or supplemental curriculum materials; classroom, homework and home schooling activities; tests and other assessment materials; and learning games, review exercises, practice materials, student tutorials and other reading and enrichment activities.”*

**Add the following new section as Section 312.9 “Online Educational Programs”:**

**“Section 312.9 Online educational programs**

The provisions of this rule shall not apply to personal information collected from a child in connection with participation in an online educational program, provided that such personal information is used only for educational purposes and is not used for the purpose of advertising or selling products or services, and provided further that the operator of the website or online service providing such online educational program establishes and maintains reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.”

**Renumber existing Section 312.9 and all subsequent sections accordingly.**

Because we believe that various interests within the education and library communities (among others) are likely to share our concerns regarding the potential adverse impact of the NPRM on children’s participation in online educational programs, AAP will be interested to review other comments submitted to the Commission that address this issue.

In order to fully explore the ramifications of the NPRM for online educational programs, AAP respectfully urges the Commission to announce a “Reply Comments” round in this proceeding and, following the receipt of such Reply Comments, to conduct a workshop on the proposed rule for implementing COPPA. The issues raised by the NPRM deserve the fullest measure of public discussion that can be provided under the Commission’s procedures.

AAP looks forward to participating in these further proceedings, and to assisting the Commission in whatever way it can to achieve satisfactory implementation of COPPA

without jeopardizing the opportunities for children to fully benefit from participation in online educational programs.

Respectfully Submitted,

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