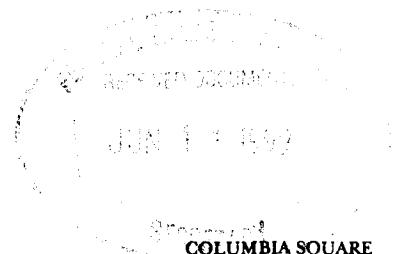


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June 11, 1999

Secretary Donald S. Clark
Federal Trade Commission
Room H-159
Sixth Street and Pennsylvania Avenue, NW
Washington D.C. 20580

**Re: Children's Online Privacy Protection Rule
Comment – PP994504**

Dear Mr. Secretary:

On behalf of 24/7 Media, Inc., AdForce, Inc., Doubleclick, Inc., Engage Technologies, Inc., Flycast Communications Corp. and Real Media, Inc. (collectively "Network Advertising Companies" or "NACs") I hereby submit comments to the Federal Trade Commission (the "Commission") on its proposed rulemaking to implement the Children's Online Privacy Protection Act of 1998 ("COPPA" or "Act"), 64 Fed. Reg. 22750 (1999) (to be codified at 16 C.F.R. pt. 312). 1/

Network Advertising Companies

Network Advertising Companies facilitate the delivery of advertisements to third party commercial web sites ("destination web sites"), as well as providing other products and services to Internet advertisers and destination web sites. NACs, for example, deliver banner ads that appear across

1/ All citations to the Commission's proposed rulemaking will be to the proposed C.F.R. sections, using the pagination on the Commission's public .pdf document, available at <http://www.ftc.gov/os/1999/9904/childrensonlineprivacy.pdf>.

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the top of a destination web site. In providing these ad delivery services some NACs may, in some instances, collect personal information (as that term is defined by the Commission) from children under the age of 13.

As the FTC is aware, online advertising has enjoyed exponential growth, and today represents more than \$2 billion worth of advertising expenditures. Advertising revenues often represent the single most important source of revenue for destination web sites, allowing them to develop and enhance content, products and services provided online. Perhaps most importantly from the Commission's perspective, advertising revenues permit the vast majority of destination web sites to offer consumers access to their web pages without charge. In this regard, Network Advertising Companies provide a valuable service that contributes substantially to the commercial development of the World Wide Web ("Web") and to unrestricted consumer access to the Web.

The FTC's Definition of "Operator" Under the Act

For purposes of these comments, I wish to focus on the NAC's role in delivering advertising to destination web sites and whether NACs could appropriately be defined as "operators" under COPPA. Under COPPA, "operator" is defined 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

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information is collected or maintained, where such website or online service is operated for commercial purposes.” 2/

Although operator is defined in COPPA, the Commission has attempted in its proposed rulemaking to clarify how that definition will be construed under the final regulations. For example, in the supplementary information on the proposed rule, the Commission listed the factors that it will consider in determining which entities meet the definition of “operator.” 3/ Those factors include: who owns the information, who controls the information, who pays for the collection or maintenance of the information, the pre-existing contractual relationships surrounding the collection and maintenance of the information and the role of the web site or online service. Also, the proposed rule suggests that there could be situations of joint responsibility where operators would be expected to make arrangements among themselves to “facilitate implementation of their responsibilities” under COPPA. 4/

As the Commission suggests in its section on “Questions on the Proposed Rule” the definition of “operator” is not sufficiently clear to “provide notice

2/ §1302(2)(A), Title XIII, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L.105-277, 122 Stat. 2681 (October 21, 1998) reprinted at 144 Cong. Rec. H11240-42 (Oct. 19, 1998). Since the Act has not yet been codified, citations to COPPA are to the section numbers designated in Title XIII of the Omnibus Act.

3/ 14 C.F.R. § 312.2 at 8.

4/ Id.

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of who is covered” 5/ and has impacts which are not fully appreciated by the Commission. This is particularly true for NACs.

NACs Should Not Be Defined as “Operators”

NACs should be excluded from the Commission’s definition of “operators” to the extent that their role is limited to delivering ads of third party advertisers to destination web sites.6/ Instead, the Commission should more appropriately include them under the definition of “third party.” “Third party” is defined as “any person who is neither an operator with respect to the collection of personal information . . . nor the person who provides support for the internal operations of the web site or online service.” 7/

It is more appropriate to define NACs as third parties. Destination web sites (which clearly meet the definition of operator) and not NACs determine whether and what information will be collected from children visiting their web sites. Therefore, destination web sites are in the best position to determine how the requirements of the Act can be met with regard to their arrangements with NACs and others with which they have business arrangements. To include NACs under the definition of “operator” for the purpose of complying with the COPPA simply because they appear to meet some of the factors the FTC regards as determinative

5/ 14 C.F.R. § 312, Section I.

6/ The Network Advertisement Companies concede that with respect to the operation of their own web sites, they could be “operators” under COPPA, assuming that the other requirements of the definition are satisfied.

7/ 16 C.F.R. § 312.2 at 10.

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would create confusion among NACs and the advertisers and destination web sites with which they do business as to their respective obligations under the Act. Moreover, it could be confusing to parents if they were to receive information, such as links to privacy notices, from multiple sources that they could not easily identify or relate to a particular destination web site. Finally, allowing NACs to be defined as “operators” would place substantial new regulatory burdens on them, impairing their ability to provide timely and cost-effective advertising services to destination web sites. Such a result would be inconsistent with the Congressional intent of adopting COPPA to avoid burdensome regulation.

- Defining NACs as “Operators” is Not Necessary to Ensure that Children’s Privacy Rights are Protected

The Commission can effectively protect the privacy of children online by requiring destination web sites as “operators” to determine how the firms with which they do business, such as NACs, can help them comply with the Act. That is because destination web sites are the primary interface with consumers and are the place that consumers will look to determine the information practices affecting their children. NACs, on the other hand, have a limited role with respect to destination web sites. NACs merely deliver advertising and provide other services under contract with the destination web site.

Moreover, subjecting NACs to the obligations attendant to an “operator” under the Act would be superfluous and burdensome. Highlighting just two of the provisions with which “operators” must comply under COPPA illustrates why it would be inappropriate and confusing for NACs to be included under that definition.

Under the COPPA proposed rule, operators are required to: (1) “post a link to a notice of its information practices with regard to children . . . at each place on the website or online service where personal information is collected, 8/ and (2) “obtain verifiable parental consent before any collection, use/or disclosure of personal information from children”: 9/

- ◆ Under the first requirement -- posting a link wherever personal information is collected -- it is clear that the destination web site alone should be obligated to meet this requirement. There is simply no practical way for a NAC delivering a banner ad, for example, to meet the requirement of posting a link on an ad seen by a child or their parent. Not only would such a link be difficult to design and maintain, it would also be confusing to parents about which “operator” was collecting information from their child. Such a result would seem to be at odds with one of the primary goals of the Act, which is to encourage parental involvement in their child’s online activities (since requirements that confuse or annoy parents will almost certainly decrease their participation in their children’s online activities).
- ◆ Under the second requirement -- obtaining verifiable parental consent -- again it is obvious from the face of the requirement that it would be impractical to expect NACs to undertake compliance

8/ 16 C.F.R. § 312.4(b).

9/ 16 C.F.R. § 312.5(a)(1).

with it and confusing for parents if they attempted to do so. A destination web site is much better positioned to assume and execute this obligation than an NAC.

Parents are most likely to look to a destination web site to find information regarding the collection and use of their child's personal information. Therefore, it makes sense for destination web sites to shoulder the primary obligation of determining how best to provide the necessary links, notice and consent required under COPPA.

- Defining NACs as "Third Parties" Will Ensure that Parents Are Informed About NAC's Information Practices

Under the proposed regulations, operators are required to disclose to parents the facts surrounding any disclosure of personal information to third parties. 10/ Specifically, "operators" must disclose whether personal information is disclosed to a third party and, if so, they must provide information about the type of business in which the third party is engaged; the general purposes for which such information is used; whether the third party has agreed to maintain the confidentiality, security and integrity of the information; and the fact that the parent has the option to consent to the collection and use of their child's personal information without consenting to the disclosure of that information to third parties. 11/ Including NACs under the definition of "third party" would ensure that parents were fully informed about their business and information practices

10/ 14 C.F.R. § 312.4(b)(2)(iv).

11/ Id.

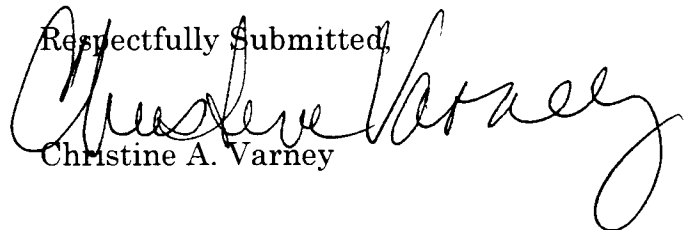
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respecting children, and maintained the right to opt-out of providing their child's personal information to them.

In summary, in its final rules, the Commission should clarify the status of NACs. Including NACs under the definition of "operator" would not be appropriate and would place significant and potentially prohibitive regulatory burdens on advertising on the Internet without providing additional and meaningful privacy protections for children. The Commission's definition of "third party" appears to be more appropriate considering NACs limited role in delivering ads to destination web sites.

I look forward to working work with the Commission on the important issue of protecting the online privacy of children by means of regulations that are appropriate and effective.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Christine A. Varney". The signature is fluid and cursive, with a large loop at the end.

Christine A. Varney