Before the
Federal Trade Commission
Washington, DC

Children's Online Privacy Protection Rule
Comment, P994504

Comments of

Time Warner Inc.

June 11, 1999

Arthur B. Sackler
Vice President
Law and Public Policy
Time Warner Inc.
800 Connecticut Avenue, N.W.
Washington, DC 20006
(202) 457-8582

Ronald L. Plesser
James J. Halpert
Emilio W. Cividanes
Alisa M. Bergman
Piper & Marbury L.L.P.
1200 Nineteenth Street, N.W.
Washington, DC 20036
(202) 861-3900

Counsel to Time Warner Inc.

Time Warner has been an industry pioneer in the area of children's privacy as well. We are committed to protecting children's online experience, empowering parents to exercise greater control over their children's online experience, and preserving the unique interactivity of the medium. Indeed, ours were some of the first Web sites to post language cautioning children against posting and furnishing personal information online without parental permission. We also participated in the Commission's 1997 workshop on these issues, at which time we discussed this cautionary language, the use of color and format to make these notices prominent to children, and other efforts we were undertaking to make our sites both family friendly and protective of children's privacy.

Time Warner's experience with consumer privacy issues is not limited to self-regulation or online activities. For example, we have more than a decade of experience in complying with the requirements of the subscriber privacy provisions of the Cable Communications Policy Act of 1984, 47 U.S.C. § 551. This privacy regime has protected privacy, but also has led to unintended negative consequences such as unnecessary and burdensome litigation. See, e.g., Scofield v. American Tele-Cable, 973 F.2d 874 (10th Cir. 1992) (dismissing action premised solely upon allegations of technical violations of Act's privacy notice requirements); Wilson v. American Cablevision of Kansas City, Inc., 133 F.R.D. 573 (W.D. Mo. 1990) (denial of class certification in suit under § 551 for essentially the same reasons).

In short, we have a wealth of experience with consumer privacy issues that can help the Commission implement COPPA in a manner that protects children while not altering the spontaneity and interactive nature of children's Internet experience more than fundamentally required by COPPA.

What Information We Collect from Children and Why

Time Warner has many sites that provide child-friendly, nurturing, and exciting environments in which to participate in cyberspace. These sites introduce children to the rich selection of Time Warner editorial content while fostering children's educational and social development. For example, TIME For Kids allows children to receive information tailored for younger audiences on current events such as guns in schools and an Indian tribe's centuries-old tradition of hunting whales, and provides a letter-to-the-editor forum entitled "Kids Talk Back" in which children voice their views on issues ranging from the impeachment of the President and the bombing of Yugoslavia to the death of author and illustrator Shel Silverstein.[2] It also provides material on issues that are of particular interest to children, ranging from a profile of a 29-year-old toy maker and coverage of an annual frog jumping contest to the casting of children's guinea pigs in movies.

Sports Illustrated For Kids enables children to engage in a wide range of interactive activities, including voicing their views on issues such as "should parents referee their children's games?"[3] The Cartoon Network enables children to view original model sheets, background sketches, and video clips of classic MGM and Hanna Barbera animations, and to experience original, interactive cartoons created exclusively for the Internet.[4] And, by posting colored-in

pictures of animated characters in its "Coloring Hall of Fame," DC Comics For Kids enables children to view the fruits of their creative talents.[5]

HBO next month kicks off "Camp HBO" at HBO4kids.com, which will offer children a healthy and dynamic interactive place online to make positive use of their summer vacation months. Campers at Camp HBO will take part in a summer full of games, competitions, activities and interaction. Camp HBO will run from July 1 through Labor Day, and children may choose to participate every day or on a less regular basis. The camp features counselors, a mess hall, arts and crafts, cabins, a lake, an athletic field, and a campfire pit.

With limited exceptions, Time Warner sites directed to children under 13 years of age do not collect personally identifiable information. We collect information from children primarily for improving children's experience with our sites—to better understand who uses what parts of our sites, to refine our sites, to personalize or speed up users' experience at the sites, and to complete transactions such as responding to children's requests for information or to send prizes to contest winners. In addition, we collect information to improve the quality of the editorial content we offer to children both online and offline. For example, children's submissions to TIME For Kids' "Kids Talk Back" feature may be posted not only at its Web site, but also in the print version of TIME For Kids magazine. We strip out individually identifiable information prior to publishing children's submissions—usually publishing only a child's first name, age, and city and state with his or her submission.

We do not use any of the personally identifiable information collected at these sites to sell or rent to third parties, to send unsolicited e-mails to children, or to sell our own products directly to children.

Specific Comments

The Commission has ample room under COPPA to ensure that children will continue to benefit from convenient access to appropriate, child-friendly interactive environments if it promulgates regulations that advance the laudable and carefully tailored goals of COPPA. It can, however, stifle and impair the development of interactive sites developed especially for children if it starts with the premise that all collection of data from children is to be discouraged and proceeds to promulgate regulations that exceed COPPA's requirements.

1. The Commission should not apply the rules retroactively to an operator's use or disclosure of information collected prior to the Act's effective date.

The sole basis for the Commission's rulemaking authority is COPPA's prohibition against operators *collecting* personal information: "It shall be unlawful for an operator . . . to *collect* personal information from a child in a manner that violates the regulations" promulgated by the Commission. 15 U.S.C. § 6502(a) (emphasis supplied).

The Commentary in the NPRM, however, justifies retroactive application on the ground that the proposed rule "applies to the use or disclosure . . . not just . . . collection" of personal information. 64 Fed. Reg. 22751. This is a strained reading of COPPA. Collection of data—not use or disclosure of data—triggers COPPA's obligations, just as collection is the sole topic of the only statutory prohibition in the Act. The Act thus limits the Commission's authority to data collected after the Act's effective date.

There is no evidence that Congress intended to reach back to cover conduct that occurred prior to the law's effective date. Nor is there evidence that, in enacting COPPA, Congress intended for it to overcome the well-established presumption against retroactive application of the law. See Landgraf v. USI Film Products, 114 S. Ct. 1483, 1505 (1994) (statutes are presumed not to apply retroactively absent a specific expression of congressional intent that they be so construed).

Moreover, requiring operators to contact the parents of all children whose information they have collected to seek consent that satisfies the rules would cause severe difficulties. For example, if Time Warner magazine sites are deemed not to have obtained the requisite consents at the time they collected personal information, then we would have to retrieve previously published copies of the print versions of TIME For Kids, Sports Illustrated For Kids, certain titles of DC Comics, and other offline publications to delete from them content that had been contributed by children whose personal information had been "collected" within the meaning of the rule. This proposed rule offends the First Amendment. See, e.g., Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) (government could not punish publication of highly sensitive information that had been lawfully obtained). Obliging operators to retrieve previously published magazines from libraries, archives and other repositories would also contradict the United States' position in safe harbor negotiations with the European Union where it is seeking to exempt news archives from the requirements of the E.U. Data Protection Directive.

Retroactive application of the rule would pose severe difficulties even if it does not apply to offline products and content. For example, unless Time Warner deleted all personal information already collected, the rule would require operators of Time Warner sites to determine: (1) what previously collected data falls within the Act's scope, (2) whether the consent obtained meets the Commission's new criteria, (3) whether they have the requisite data to notify the parents and seek a new consent, and (4) if not, the steps they need to undertake to secure such consent.

2. The Commission should set forth some bright line rules to assist in determining whether a Web site or online service is targeted to children.

COPPA applies only to operators of Web sites or online services directed to children. 15 U.S.C. § 6502(a)(1). Congress defined the term as a site or online service that is "targeted to" children. Id. § 6501. Both phrases imply a level of intentionality that is very different than if Congress had chosen a standard such as whether a site is "attractive to" children. The text of the proposed regulation and the commentary of the NPRM indicate that the Commission will consider a number of different objective factors in ascertaining an operator's intent—that is, in determining whether an operator has directed its Web site or online service, or a portion thereof, to children.

However, the NPRM's proposed definition ignores that the operator's *intended audience* is the central factor for purposes of the statute, and that other evidence listed in the definition is significant insofar as it bears on the operator's intent to target an audience of children.

As an operator of general interest sites that are visited by children even though directed at a general audience, Time Warner is well aware of the complex analysis that will sometimes underlie determining whether a Web site or online service, or a portion thereof, is targeted to children. For example, features that *are* attractive to children are not necessarily features "designed to be attractive" to children. 64 Fed. Reg. 22753. Music and sports sites may all be attractive to children, but often are not targeted to children. Sites with animated characters from comic books may be attractive to children, but children under 12 represent less than 15% of the guaranteed circulation for DC Comics, for example.

To provide as much advance guidance as possible for determining whether a Web site or online service is directed to children, the Commission should include some bright line rules in its final regulations. For example, the regulations should state that a site will not be deemed directed to children if:

(i) *The site has created a special area for children.* COPPA's legislative history indicates that if a site sets aside a special area for children, then that portion will be considered to be directed to children. See 144 Cong. Rec. S11657-58. But, when an operator sets aside a special area of its site for children, what does it reveal about the operator's intent in directing the remainder of the site to children? We submit that creating a special area for children should be more than a factor in the determination—efforts to draw children away from the general interest portions of the site should be considered conclusive evidence of the operator's intent to preserve the general interest nature of these portions of the site. Alternatively, the fact that a site has created a special area for children should weigh heavily against a determination that the remainder of the site, or other portions of the site that are not so designated, are directed to children.

(ii) *The site asks for age and does not allow children who report that they are under 13 into the site.* Where a site goes to the trouble of barring visitors who indicate that they are under 13, this should be conclusive evidence that the site is not directed to children under the Commission's rule.

(iii) *The way the site represents itself to advertisers.* Consistent with the key statutory phrase "targeted to children," this evidence should likewise be conclusive. If a site represents to advertisers that it is a children's site, then children are plainly the site's target market. Similarly, if a site holds itself out to advertisers as a general interest site or site for teenagers or adults, this evidence too should be conclusive of the site's target market.

(iv) *A majority of the site's visitors are not children.* As COPPA's legislative history indicates, a site that is regularly visited by children will not fall within the definition unless other factors indicating that the site is directed at children are present. A key factor in determining whether a site is child-oriented should be whether children are the primary

visitors to the site. The definition of a Web site or online service directed to children set forth in section 312.2 of the NPRM recognizes this as only one of a long list of factors. Time Warner submits that it is of considerably greater importance. If children do not constitute a majority of the visitors to the site, then it should be considered a general interest site not subject to COPPA.

3. The Commission should narrow the NPRM's proposed definition of "collects or collection."

Paragraph (a) of the definition of "collects or collection" at section 312.2 is another example of a proposed rule that exceeds COPPA's scope and requirements. The NPRM's proposed definition seeks to interpret the words "collects or collection" as encompassing information requested online "regardless of how that information is transmitted to the operator." 64 Fed. Reg. 22751. It is intended to apply to material submitted *offline* so long as it was requested *online*. Id.

The NPRM's position on this issue is clearly at odds with COPPA's plain language and legislative history. For example, COPPA explicitly limits its reach to information "collected online from a child." 15 U.S.C. §§ 6501(8), 6502(a). This is underscored by the legislative history, which states that COPPA's "reach is limited to information collected online from a child." 144 Cong. Rec. S11657. Indeed, it is at odds with the Commission's own recommendations to Congress. See FTC, Privacy Online: A Report to Congress at 42 (June 1998) ("[T]he Commission now recommends that Congress develop legislation placing parents in control of the *online collection* and use of personal information from their children. Such legislation would set out the basic standards of practice governing the *online collection* and use of information from children.") (emphasis supplied).

The "evil" at which COPPA seeks to strike is the ability of children to submit personal information online unbeknownst to their parents. The central assumption behind COPPA, and perhaps the Commentary to the proposed rules as well, is that children are uniquely at risk in cyberspace because they can submit personal information far more easily and with less likelihood of parental intervention than in the offline world where, for example, a child might need to ask a parent for a postage stamp. See, e.g., FTC, Privacy Online: A Report to Congress at 5 (June 1998) (noting online medium's ability to circumvent the parent's "traditional gatekeeping role" and public "concern about online collection practices that bypass parents").

However, under the proposed definition, the Commission would distinguish between the online and offline worlds not in their unique abilities to *collect* information but rather in some unspecified difference in their abilities to *advertise* and *elicit* the submission of information offline. The NPRM contends in effect that COPPA grants the Commission authority to reach personal information submitted *offline* if the information was elicited online, while acknowledging that the Commission has no such authority if the information was elicited, for example, in the print version of a Sports Illustrated For Kids magazine or a Superboy comic book passed along by a schoolmate. The NPRM has cited no authority for this position because neither the statute nor its legislative history supports this conclusion.

Similarly, because the legislative history indicates plainly that COPPA "is an online children's privacy bill," see 144 Cong. Rec. at S11657, it should not apply to use of e-mail by an entity that communicates offline with its audience, including individuals under 13, as one of many means to elicit responses or material from its audience. COPPA was not intended to reach every offline company that maintains an e-mail address, nor does it concern itself with a company's advertisement of an e-mail address in print materials, and use of it to receive information. Rather, COPPA focuses on the activities of operators of Web sites and online services—hosts of interactive places where children can browse and contemporaneously submit personal information. Applying the COPPA rules to information that is elicited offline but submitted online to an e-mail address that is distinct from a Web site would needlessly discourage use of e-mail as a means of communication to print publications, for example. Accordingly, the Commission should clarify that where an entity maintains a separate e-mail address, unaffiliated with its Web site, to process submissions in response to *offline* inquiries, this information collection process is not governed by COPPA.

Finally, the NPRM's attempt to cover "passive collection" is so sweeping that it makes all child-directed Web sites and online services liable under the Act if they receive an e-mail containing a child's e-mail address. Yet, the NPRM requires sites to include their e-mail address in the posted privacy notice—which elicits e-mail messages—and current technology automatically attaches a person's e-mail address to e-mail messages he or she sends. Involuntary receipt of information should not be considered "collection" within the meaning of COPPA. Otherwise, the rules would impose precisely the sort of broad, strict liability that Congress sought to avoid in its definition of sites and services directed to children. The Commission should clarify that the mere posting of an e-mail address to respond to viewer questions about a site's information practices does not trigger the notice and consent obligations under the statute.

4. The Commission should clarify that prior parental consent is not required for collection of information used in services such as letters to the editor, provided that the information in the letter is not disclosed in an individually identifiable form.

The Commission should clarify that children's sites may accept letters to the editor and similar submissions containing personal information from children without prior parental consent, notice, or opt out, provided that the information in the letters is used only for editorial-related purposes and not disclosed in individually identifiable form.

Various Time Warner sites encourage children to submit material, online or offline, that is considered for publication as editorial content in online, offline, or both versions of magazines. For example, as noted above, a child can submit his or her views about issues for posting and publication in the "Kids Talk Back" area of the TIME For Kids site or the "What Do You Think" area of the SI For Kids site. Time Warner uses these submissions only for these purposes, and does not use the information for non-editorial purposes.

In all cases, as discussed above, the information that is published is in nonidentifiable form. However, the information is *received* in identifiable form because, regardless of whether Time

Warner asks for an e-mail address, the child's e-mail address is automatically attached to his or her online submission. In most cases, we seek to obtain parental consent prior to publication. However, we do not seek parental consent prior to reviewing the submission for publication.

This activity arguably falls within the scope of COPPA only because the submitted material is received online with personal information without regard to the magazine's need or lack of need for such information. If operators strip the submissions of personal information and publish them in non-identifiable form, then this activity benefits children and families without posing any risks to them.

The Commission should clarify that a Web site's receipt of information that is stripped of personal information falls outside the definition of "collection." Excluding the process of collecting personal information attached to letters to the editor and similar submissions that will be rendered non-identifiable prior to publication would be analogous to the manner in which the subscriber privacy provisions of the Cable Act treat the process of converting personally identifiable information into aggregate information. See, e.g., S. Rep. No. 67, 98th Cong., 1st Sess. 28 (1983) (the application of 47 U.S.C. § 551 to the collection of personally identifiable information "is not intended to cover the electronic collection process used to produce aggregate records that are not individually identifiable").

Alternatively, the Commission should clarify that a child's request for publication directed to a children's site constitutes a "specific request from the child," and the site's use of the child's e-mail address to notify him or her that the submission has been accepted for publication, falls within the section 312.(c)(2) exception for one-time responses to specific requests, provided that the information in the letters is used only for editorial-related purposes and not disclosed in individually identifiable form.

Another alternative is for the Commission to use its authority under 15 U.S.C. § 6501(b)(2)(C)(ii) to recognize an exception to the prior parental consent requirement to allow children's sites to accept letters to the editor and similar submissions containing personal information from children, provided that the information in the letters is used only for editorial-related purposes and not disclosed in individually identifiable form.

5. The Commission should not prescribe detailed rules about the placement of privacy notices that are unduly burdensome and impractical.

The Commission's current proposal with respect to the placement of notice is impractical. Section 312.4(b)(ii) and (iii) would require Web site operators to display a link to the privacy policy "without having to scroll down" and, of course, would require this for both the home page and at every place where children provide personal information. The Commission should drop this requirement from the final rules and clarify that prominently placing the link to the privacy notice at the bottom of a Web page is sufficient to satisfy COPPA.[6]

Given its experience with the notice requirement of the subscriber privacy provisions of the Cable Act and its long-standing efforts to ensure that all of its sites post privacy notices, Time

Warner believes that detailed regulations concerning privacy notices are counterproductive and can give rise to frivolous disputes and litigation.

We agree that the key is for "such notices [to] be prominent and easy to find." 64 Fed. Reg. 22754. Cf. H.R. Rep. No. 934, 98th Cong., 2d Sess. 77 (1984) (the notice required by the Cable Act "must be in a form [that] clearly and conspicuously provides the subscriber the required information"). The practice that has emerged in the Internet industry, and that industry monitors such as CARU have endorsed, is to place the privacy notice prominently at the bottom of the screen, which is where copyright notices and links to other notices are posted. This is where consumers, including parents, have grown accustomed to look for the privacy notice. We believe, and have not seen any contrary evidence, that prominently placing the link to the privacy notice at the bottom of a Web page is sufficient to satisfy COPPA.

Moreover, particularly as to links to notices at places where children provide personal information, this requirement overlooks the fact that *users* have a great deal of control of what they view on their computer screen "without having to scroll down." The viewable area of a user's browser depends upon several factors. First, it depends upon a user's browser type and individual browser settings, two factors that are variable and are exclusively within the control of the user. For instance, a user's viewable area may appear different if he is using Netscape as opposed to Internet Explorer. Similarly, the size of the font the individual selects and the toolbar display options he selects also affect the amount of material that is viewable on the first screen. Second, the viewable area may depend upon the Web site's use of frames and the browser's ability to handle frames. Finally, a user may reach a Web site through the frame of another Web site via a link on the framed site, thus limiting the viewable area to the size of the frame. Consequently, a Web site operator cannot control whether the instructions for filling out a registration form or the entire form—let alone the link to the privacy notice—are viewed "without having to scroll down."

Because Web site operators have no control over a user's selection of a particular browser or setting choices, a Web site operator may have to undertake such extraordinary measures as significantly reducing the size of the print in the forms, breaking up the Web pages so that each portion of the form takes up only a small portion of the screen, or placing multiple links on every page where data is collected. Such measures would be cumbersome and overbearing for both the user and the Web site operator and would disrupt the "look and feel" of the site. In addition, these measures could require operators to reconfigure their Web pages on which they collect personal information. Even these measures could not guarantee that an operator has complied with the requirements: the operator cannot control for every possible combination of browser, browser settings, and framing techniques. To avoid legal uncertainty, operators might severely limit or stop collecting personal information, which would greatly diminish the end user's interactive opportunities online.

In short, regulating this area would impose serious legal uncertainty and substantial compliance costs that are out of proportion to the minimal benefits that it can achieve in advancing children's privacy.

6. The verifiable consent requirement should be interpreted flexibly to ensure that the interactivity of the medium is preserved and to foster the development of new and improved mechanisms by which to obtain parental consent.

Time Warner has filed joint comments with a number of other children's content providers in response to Question 13's inquiry regarding methods of consent. We address the need for flexible consent here because of the fundamental importance of e-mail-based consent to our Internet users and the services we provide to them.

The mechanisms for securing verifiable parental consent should accomplish COPPA's goals while not unnecessarily interfering with children's interactive experience. Time Warner welcomes the Commission's review of methods of obtaining parental consent that (1) are practical for Web site operators and children alike, and (2) "provide sufficient assurance that the person providing the consent is the child's parent." 64 Fed. Reg. 22756. However, Time Warner urges the Commission to go beyond the options listed and establish rules that allow greater flexibility for operators.

COPPA defines "verifiable parental consent" very flexibly. More specifically, it defines the term as encompassing "any *reasonable effort* (taking into consideration available technology)" to ensure parental authorization. 15 U.S.C. § 6501(9) (emphasis supplied). The legislative history underscores that "reasonable effort" suffices and that reasonableness must be interpreted in light of the constraints of "available technology." This is similar to the "available technology" limitation placed upon a court's authority under the Communications Assistance for Law Enforcement Act (CALEA) to order a telecommunications provider to furnish a law enforcement agency with a requested surveillance capability. 47 U.S.C. § 1007(a)(2) (an order may issue only if compliance with the requirements is "reasonably achievable through the application of available technology"). CALEA's legislative history makes clear that this limitation necessarily "will involve a consideration of economic factors" and is intended to excuse a failure to comply with a surveillance capability where the cost of compliance is "out of proportion" to the usefulness of achieving compliance. S. Rep. No. 402, 103d Cong., 2d Sess. 28 (1994). Consequently, the Commission has appropriately asked for information about the economic feasibility of various forms of parental consent mechanisms.

E-mail-based mechanisms are Time Warner's preferred method for obtaining parental consent to data collection at Web sites. Moreover, the statute's structure and legislative history reveal that Congress envisioned that e-mail would play an important role in the parental consent process. First, the Act defines "online contact information" specifically to include an e-mail address, and then creates a statutory exception for its collection in order to obtain parental consent. See 15 U.S.C. § 6502(b)(2)(B). Second, the legislative history states clearly that: "'Available technology' can encompass *other online* and electronic *methods* of obtaining parental consent." 144 Cong. Rec. S11657 (Oct. 7, 1998) (emphasis supplied).

Although e-mail-based consent mechanisms are a preferred method for Time Warner's and many other operators' sites, the only example of this mechanism discussed in the NPRM is e-mail "accompanied by a valid digital signature." 64 Fed. Reg. 22756. Digital signature technology,

however, is the subject of conflicting technical standards and is not widely available for consumer applications and can hardly be characterized as falling within "available technology." It is not reasonable to expect Web site operators to use digital signature technology to obtain verifiable parental consent at this time. Yet, as noted above, COPPA's structure and legislative history contemplate that "available technology" would encompass e-mail mechanisms.

E-mail-based mechanisms are a cost-effective means of obtaining parental consent that the Commission should maintain in its final rule. Parents also like it. For example, prior to allowing a child under 16 years of age to participate in its contests, the Cartoon Network requires children to provide their parent's e-mail address in addition to their own. The Cartoon Network then sends an e-mail to the parents to notify them of their child's entry into a contest. This e-mail gives parents the choice of either not responding within 72 hours, thus assenting to their child's participation, or withholding their consent and having their child's entry withdrawn. Even though this system only requires parental *opt-out* to withhold consent for their child's participation, many parents send e-mails expressly to voice their support and appreciation for the measures taken by the Cartoon Network to enable parents to exercise greater control over children's online experience. Indeed, the e-mail messages from parents thanking the Cartoon Network have outnumbered the e-mails it has received withdrawing parental consent.

The Commission should recognize e-mail consent under further, defined circumstances that provide additional indicia of authenticity. For example, e-mail-based mechanisms should satisfy the statute's "reasonable effort" standard if the verifying e-mail provides verifiable information that a child would be unlikely to know, e.g., information about a parent's work address. Given the continuing privacy concerns that consumers continue to express with regard to revealing sensitive information about themselves such as Social Security Numbers and credit card account numbers, see Louis Harris & Associates, 1999 Consumers League Study, at 16 (May 1999), the information that an operator elicits from a parent for authenticity purposes should be non-sensitive.

Although fax, toll-free telephone, and other consent mechanisms have a role to play under COPPA, they should not eclipse the use of e-mail-based consent mechanisms. Our experience with other methods has yielded mixed results. For example, even sweepstakes prizes sometimes go unclaimed when we require a child to download an authorization form and have a parent execute it and return it to us via fax or mail.

The Sports Illustrated For Kids magazine's experience with Web site subscriptions also is illustrative of the obstacles alternative methods pose to the interactive experience. Previously, a child could register online at the S.I. For Kids Web site for a subscription to the offline magazine under a money-back-guaranteed, cancel-at-any-time policy. No parents complained or sought cancellation of the subscriptions submitted online. We then switched from online registration to a download-and-mail-in approach, which resulted in a decline of approximately 80% in the Web site subscriptions to the magazine.

Consequently, we urge that the Commission's final rule endorse the use of e-mail consent for a defined, five-year sunset period, whereupon the Commission would review and update consent standards under the Act as part of its statutory review of implementation of the Act.

7. The Commission should modify its definition of "third party" to clarify that sharing of personal information with a corporate parent or affiliate that is governed by a common privacy policy does not constitute a "disclosure" under COPPA.

The NPRM's definition of "third party" would appear to cover corporate parents and affiliates of a Web site operator. Especially where corporate entities share a common privacy policy, this definition of "third party" will unnecessarily restrict the ability of operators to use personal information collected online.

As the Commission noted in its 1998 Report to Congress that led to the enactment of COPPA, disclosures of personal information are the Web site practice that pose the greatest danger to children. See FTC, Privacy Online: A Report to Congress at 5 (June 1998). In continued recognition of this, the NPRM suggests at Question 14 that the standard for parental consent should be more flexible for uses of personal information than for disclosures of such information. See 64 Fed. Reg. 22762.

However, by sweeping corporate parents and affiliates into the definition of "third parties," the NPRM places additional burdens on an internal use of personal information. In effect, the definition redefines certain "uses" as "disclosures." This is burdensome and unnecessary.

The Commission should exclude corporate parents and affiliates of an operator from the definition of third parties. Alternatively, the Commission should exclude corporate parents and affiliates of an operator who are subject to a common privacy policy from this definition. This is a common sense approach that, for example, BBBOnLine has adopted in its privacy program.

At the very least, the Commission should clarify that the term "third party" does not apply to an affiliated entity which a consumer would not reasonably expect to be a distinct corporate entity from the operator. For example, a consumer would not reasonably expect Sports Illustrated to be a distinct corporate entity from Sports Illustrated For Kids. This would be similar to the approach taken under the Telemarketing Rules. See 47 C.F.R. 64.1200(e)(2)(v) (limiting the scope of "do not call" requests to the specific entities making the calls "unless the consumer reasonably would expect [the affiliated entities] to be included given the identification of the caller and the product being advertised"). Cf. FTC, "Complying with the Telemarketing Sales Rule" (April 1996) (one of two factors in determining whether distinct corporate divisions of a single corporation are considered separate sellers for purposes of the Rule is "whether there is a substantial diversity between the operational structure of the divisions").

8. The Commission should make clear that under the parental right to review personal information collected from the child, operators are immune from liability where they are carrying out the disclosure obligation of the statute in good faith.

COPPA requires operators to offer parents a "reasonable" means to obtain the information collected online from their child—an obligation that stands in contrast to most U.S. commercial privacy laws. 15 U.S.C. § 6502(b)(1)(B)(iii).

Providing consumers with access to information about them is fraught with the potential that the person asking for the information is not the subject of the information. See, e.g., Robert O'Harrow Jr., "Privacy Lapses Force Shutdown of Online Credit Reporting Service," The Washington Post, August 16, 1997, at A1; John Schwartz, "Social Security Web Site Takes Hit Over Access," The Washington Post, April 8, 1997, at A1. This danger is magnified when, as here, the information is about children and the statute is designed to prevent unauthorized third parties from obtaining information submitted by children. Nevertheless, COPPA's obligation creates the risk that the person asking for the information is not the parent of the child about whom the information is being requested.

An essential part of the legislative compromise on this issue was the statute's grant of immunity for operators who carry out in good faith COPPA's disclosure obligation. 15 U.S.C. § 6502(a)(2) (immunity from liability for disclosures to parents "made in good faith and following reasonable procedures.").

To ensure the vitality of this provision, the Commission should make clear in its regulations that no liability will attach when an operator makes good faith disclosures of information to (1) someone who purports to be a parent and (2) a parent regardless of whether he or she has custody of the child.

In addition, the Commission should specify several examples of precautions that industry may take to protect itself from liability under other laws for a disclosure made under COPPA, as provided in section 312.6(b). For example, the particular methods of identifying parents listed in the Commentary—requiring a copy of a driver's license proving domicile at the same address as the child, providing a password chosen at the time parental consent is provided, 64 Fed. Reg. 22758—should be clearly classified as adequate to identify parents. Finally, the final regulations should continue to reflect the Commentary's observation that disclosure of "the specific types of information collected" under § 6502(b)(1)(B)(i) should not be subject to stringent identification requirements, id. n.12, as none of this information relates to an individual child.

9. The Commission's rules should be carefully tailored so as not to interfere with efforts to provide online content for school children or to connect classrooms to the Internet.

COPPA's legislative history provides that the Commission will consider in this rulemaking how schools and libraries will address the statute's consent requirement. The final rule should not interfere with efforts to connect America's classrooms to the Internet or to provide online content for school children. The flexibility of the statute's consent standard and the inclusion of guardians within the 15 U.S.C. § 6501(7)'s definition of a parent each give the Commission ample discretion to adopt such sensible rules.

To date Time Warner, at its own expense, has wired more than 12,000 schools for cable service, including 800 schools for Road Runner—our cable modem service. Under our Road Runner program, we offer services to classrooms including e-mail accounts and chat rooms. Wiring classrooms to the Internet serves a critical function, particularly for children from lower

income families that do not have a computer or Internet access at home. For these children, access to computers and the Internet at school is essential to ensuring that they are not at a distinct disadvantage in the Information Age.

The Commission should clarify, or make an exception to, the verifiable consent requirement for Internet access in schools where the schools have obtained parental consent for a child's participation in online activities. Online service providers that offer Internet access to schools should not be required to obtain a separate verifiable consent before a student receives Internet access. Such a requirement would be burdensome and would limit or deter efforts to connect classrooms to the Internet. Schools traditionally obtain consent from parents for any activities in which a child engages during the school hours. Where the school has already obtained parental consent, requiring a second consent under COPPA would be duplicative, imposing needless burden and expense on schools and/or service providers, raising the costs of providing such service.

Similarly, Web site operators should be able to rely upon consents supplied by school teachers and school administrators for students' school-based Internet accounts. Recognizing the school's ability to provide consent in this manner avoids the delay required to obtain parental consent from home and gives educators helpful pedagogical control over the sites that a child visits while at school.

In meeting the requirement of verifiable parental consent, both Web site operators and online services should be able to rely upon the representations of teachers or other duly authorized school representatives.

Conclusion

For the foregoing reasons, Time Warner requests that the Commission implement COPPA in a manner that protects children while not altering the spontaneity and interactive nature of children's Internet experience more than fundamentally required by the Act.

ENDNOTES

[1] The transitory nature of many online sites, particularly those for movies and music, make it difficult to specify with precision a total number of Time Warner sites.

[2] http://www.timeforkids.com

[3] http:// www.sikids.com

[4] http://cartoonnetwork.com

[5] http://www.dccomics.com

[6] We further urge the Commission to clarify that, for Web sites and online services that have separate areas reserved for children, the operator has the option of placing the link to the notice at either the homepage of the entire site or at the first page of the area that is reserved for children. This clarification would not affect the NPRM's proposal that an operator must also place a link to the privacy notice at every place within the children's area where personal information is collected.