

**Before the
Federal Trade Commission
Washington, D.C.**

In the Matter of)
)
Children’s Online Privacy Protection Rule) **Comment, P994504**

Comments of Viacom Inc.

Viacom Inc. (“Viacom”) is pleased to respond to the Commission’s request for comment on its Notice of Proposed Rule Making (“Notice”) to implement the Children’s Online Privacy Protection Act (the “Act”).¹ Viacom Inc. is one of the world’s largest entertainment companies and is a leading force in nearly every segment of the international media marketplace. The operations of Viacom include Blockbuster, MTV Networks (which includes MTV: Music Television, Nickelodeon, VH1 and other program services), Paramount Pictures, Paramount Television, Paramount Parks, Showtime Networks, Simon & Schuster, 19 television stations, and movie screens in 12 countries. Viacom also owns approximately 80 percent of Spelling Entertainment Group, as well as half-interests in Comedy Central, UPN and UCI.

Introduction

With its focus on creating, producing and packaging content, Viacom has sought to disseminate its program services worldwide on every distribution platform possible, including cable television, wireless cable television, direct-to-home satellite, broadcast television and, now, the Internet. While Viacom views the Internet as another means of distributing program services, it also understands that the Internet is unlike any other

¹ 15 U.S.C. §6500 et seq.

medium because it is interactive in nature. It is this interactivity that facilitates learning, information-gathering and communication. Interactivity also permits Internet visitors to express their likes and dislikes and pursue them with immediacy. And interactivity enables websites to cater to their visitors' preferences. But while the "trail" of such preferences allows website operators to improve their services and better serve their visitors, it can also be exploited and abused to the detriment of an individual's privacy. Children, in particular, are especially vulnerable to the unfettered, unlimited and unrestricted online collection and use of their personal information. That is why Viacom supported the enactment of the Act, which will hold all children's websites to a threshold standard of prior parental consent.

As the owner of the leading program service for children —Nickelodeon— Viacom understands that the trust of kids and their parents is the hardest earned and most highly valued asset. Nickelodeon's philosophy is to inform and educate children while engaging and entertaining them. It has not wavered from that philosophy since its launch 20 years ago in 1979, as evidenced by its award-winning programs, including "Blue's Clues," "Gullah Gullah Island," "Nick News," and "Wild Side." So committed is Nickelodeon to the education of children that it has recently partnered with Children's Television Workshop to create Noggin, a new, commercial-free program service dedicated to teaching children.

Nickelodeon seeks to apply the same kids-first mission to its online ventures. To that end, Nickelodeon hosts two websites targeted to children: Nick.com, which is directed to kids ages 9 to 14, and Nickjr.com, which is targeted to kids ages 2 to 5. Nickelodeon also hosts Teachers.nick.com, a website targeted to educators, which contains elementary and preschool curriculum-based materials created for use in conjunction with Nickelodeon's educational programs and initiatives.² As a leader in children's websites, Nickelodeon is

² Nickelodeon hosts two other content sites that are not directed to children. They are Nick-at-Nite.com and TVLand.com.

committed to providing kids with a safe and entertaining online experience. Thus, Nickelodeon never collects personal information from kids online for marketing purposes. Nick.com was one of the first sites to use a bumper page to differentiate editorial content from advertising and to alert kids when they are leaving the Nickelodeon site. And Nickelodeon holds advertisers to very high standards; it has created a separate site, Info.nick.com, to help advertisers better understand Nickelodeon's online guidelines. Nickelodeon's standards department reviews all prospective advertiser links to ensure kid-appropriate content and safety. Thus, for example, Nick.com will not link with an advertiser who has a chat room unless it can guarantee that the room is monitored by an operator employed by the advertiser's company. Nickelodeon's own "auditorium" chat events with celebrity guests (accessed via America Online) are always real-time monitored by Nickelodeon operators. Earlier this year, Nick.com launched a series of online vignettes featuring Nickelodeon's animated characters who teach online etiquette and safety. Just this past March, Cyber Angels, the largest online safety and educational program on the Internet, voted Nick.com one of the safest sites for kids. For these and other reasons, Nick.com was the first web site directed to children to be awarded the BBBOnline privacy seal.

Viacom lauds the Commission's years of work in raising public and industry awareness on the important issue of privacy online, particularly with respect to children. We also commend the Commission's efforts in crafting a proposed Children's Online Privacy Protection Rule (the "Proposed Rule") that seeks to balance the privacy needs of children with the "unprecedented opportunities" offered by the unique interactivity of the Internet by providing parents with the tools for "controlling the flow of their children's personal

information on the Internet.”³ It is with that balance as the goal that Viacom urges the Commission to clarify and/or modify certain definitions contained in the Proposed Rule, as well as requirements regarding notice, and the means for obtaining parental consent. We shall address each of these issues in turn.

The Proposed Rule’s Definitions

“Collects or collection”

The Proposed Rule defines “collects or collection” as the gathering of any personal information from a child “*by any means*” including “any online request for personal information by the operator *regardless of how that personal information is transmitted to the operator*”⁴ This “by any means” language sweeps so broadly as to encompass information collected offline. Indeed, the Notice states that the term would include all online requests for personal information, regardless of whether the personal information is ultimately transmitted online or offline, and would include a situation where the website directs the child to print out a form, respond in writing and mail the form back to the operator. Viacom respectfully submits that such a result contravenes the plain language of the Act and the intent of Congress. Specifically, Section 1302(8) of the Act, which defines “personal information,” states that the term means such information about an individual “collected *online*”⁵ Further, the legislative history to the Act underscores—under the definition of “personal information”—that “[t]his is an online children’s privacy bill, *and its reach is limited to information collected online from a child*. . . .”⁶ In

³ Notice at 4.

⁴ Id. at 6. (Emphasis added.)

⁵ Emphasis added.

⁶ Statement of Sen. Bryan, 144 Cong. Rcd (“Bryan Statement”) at S.11657, Section 1302(8).

light of the Act's language and its legislative history, Viacom urges the Commission to modify its proposed definition of "collects or collection" to limit that term to only the online submission of personal information from children.

“Website or online service directed to children”

The Proposed Rule sets forth various factors in determining whether a website or online service is “directed to children.” Most of those factors —subject matter, visual or audio content, age of models, language or other characteristics of the website, as well as whether advertising which promotes or appears on the website is directed to children—largely track the definition contained in the Act and the guidance provided in the legislative history.⁷ However, the Proposed Rule provides that the Commission will also consider “competent and reliable empirical evidence” regarding additional factors in evaluating whether a website is covered. One such additional factor includes “audience composition.” Viacom respectfully submits that reliance on this additional factor could substantially widen the scope of the Act so as to cover websites that are not directed to children. General audience sites, for example, may create and produce content for persons ages 13 and over but which nevertheless attract a large under-13 following. To subject such websites to the prior consent and other requirements of the Act where there is no actual knowledge of the age of a visitor would chill online speech on, as well as the innate immediate interactivity of, those websites targeted to persons over age 12.

Indeed, the Federal Communications Commission (“FCC”) has adopted this approach in implementing the Children’s Television Act of 1990 (“CTA”), which limits the number of minutes that commercial broadcast television stations and cable operators may air during “children’s programming.”⁸ The FCC has defined children’s programming as “programs originally produced and broadcast for an audience of children 12 years old and

⁷ See 15 U.S.C. §6501(10); Bryan Statement at S.11657, Section 1302 (10).

⁸ 47 U.S.C. §303.

under” and *excludes programs* originally produced for a “general audience that might nevertheless be significantly viewed by children.”⁹ Moreover, the FCC ruled that the statutory limits on commercial matter should not apply to programs intended for a teenage audience.¹⁰

In sum, Viacom urges that the Commission not assign weight to this factor in evaluating the intended target of the website. Instead, any evaluation of whether a website is directed to children should focus on the factors prescribed in the Act, as well as the other additional factors included in the Proposed Rule.

Notice

Placement of Notice

Section 312.4(b)(1) of the Proposed Rule provides that the link to a notice of a website’s information practices with regard to children must be placed “in a prominent place” on the home page “such that a *typical* visitor to the home page can see the link without having to scroll down. . . .”¹¹ Viacom agrees that the proper placement of the information practices link is on the home page, but not necessarily above the fold.

Computers function differently from television sets. With television, viewers nationwide tuned to a particular program see the same image on their screens at a given moment regardless of the size of their television sets. With computers, however, there is no guarantee that users nationwide will be able to view the same amount of content on their

⁹ In the Matter of Policies and Rules Concerning Children’s Television Programming, 6 FCC Record 2111, ¶3 (1991).

¹⁰ See id. at fn. 16.

¹¹ See id. at 13.

monitor screens when they visit a particular website. This is because service providers control how much of a website's home page is displayed on the screen and users control their browsers.

As technology evolves, and it is doing so rapidly, what constitutes above the fold for a "typical" visitor will depend upon the visitor's browser. Older browsers, for example, display a 640-by-480-pixel page. Thus, a notice link placed at 400 pixels down is above the fold, and no scrolling is required. Today, however, browsers display an 800-by-600-pixel page such that placement of the notice link at 580 pixels down would be above the fold for browsers equipped with current technology, but would be below the fold, and thus require scrolling, for those with older browsers. The next generation of browsers is expected to display 1200-by-1500 pixels, thereby allowing a notice link placed at 1400 pixels to be above the fold for visitors using these updated browsers. Given the pace of technology, therefore, it is difficult to guarantee placement of the notice above the fold. What can be guaranteed, however, is placement of the notice somewhere on the home page. Moreover, Internet users are conditioned to scrolling to the bottom of a home page to find contact, legal and other information pertinent to a website. In sum, Viacom respectfully submits that so long as the notice link is located on the home page, it will comport with Congressional intent that notices be "prominent."¹²

Notice to a Parent

Under Section 312.5(c)(3) of the Proposed Rule,¹³ in the case of notice to parents where the operator collects online contact information from a child to be used to respond

¹² Bryan Statement at S.11657, Section 1303.

¹³ See *id.* at 21-22.

directly more than once to a specific request from the child, the operator must send notice by postal mail or e-mail to the parent's address. Under the Act, only the *online* contact information —and not the offline contact information— of a parent may be collected in connection with a one-time basis request,¹⁴ with a request that is used for the sole purpose of obtaining parental consent¹⁵ or with the more-than-once response.¹⁶ In light of these statutory restrictions, Viacom urges the Commission to eliminate postal mail as a means of sending notice in that it might serve as a justification for the unnecessary collection of offline contact information —the home address of the parent and, possibly, of the child.

New Notice/Consent

The Notice states that an operator must send a new notice and request for consent to parents where the operator wishes to use the information in a manner that was not included in the original notice, such as disclosing that information to parties not covered by the original consent, including parties created by a merger or other corporate combination involving existing operators or third parties.¹⁷ When parents give consent to a children's website operator for the collection, use and disclosure of their children's personal information, it is unlikely that parents know who actually owns the site or the ownership structure of that site. Indeed, in many cases, the owner of the website might be millions of public shareholders. In other words, when parents give their consent, they are giving it to the website, not to a particular owner or owners of that site. Therefore, a

¹⁴ Section 1303(b)(2)(A).

¹⁵ Section 1303(b)(2)(B).

¹⁶ Section 1303(b)(2)(C).

¹⁷ See Notice at 17.

change in ownership of a website, where that change is insubstantial, should not, in and of itself, be an event that triggers a new consent/notice requirement. Moreover, repeated notice/consent dispatches for changes in ownership or control of a website could be perceived by parents as harassment or spamming. Thus, Viacom suggests that a new notice/consent be required only where the majority ownership and/or the day-to-day management control of an operator changes.

Mechanisms for Verifiable Parental Consent

Background

The Act defines “verifiable parental consent” as “any reasonable effort (taking into consideration available technology)” to “ensure” that a parent of a child receives notice of the operator’s personal information collection, use and disclosure practices and authorizes such collection, use and disclosure before that information is collected from the child. The legislative history adds that “verifiable parental consent” should be interpreted “flexibly, encompassing ‘reasonable effort’ and ‘taking into consideration available technology.’”¹⁸

In response to the statutory call for flexibility, the Notice indicates that operators may develop “any number of ways” to implement verifiable parental consent, and

¹⁸ Bryan Statement at S.11657, Section 1302(9).

suggests that operators could do so by: (1) providing a consent form to be signed by the parent and returned to the operator by postal mail or facsimile; (2) requiring a parent to use a credit card in connection with a transaction; or (3) having a parent call a toll-free telephone number.¹⁹ Another possibility, according to the Notice, could be an e-mail accompanied by a valid digital signature.²⁰ And, the Notice states, the Commission is also “considering” other e-mail-based mechanisms that would satisfy the Act’s requirement of “sufficient assurance” that the person providing the consent is the child’s parent.

For reasons discussed further below, as well as those specified in Joint Comments filed this same day by Viacom and other operators of children’s websites,²¹ Viacom urges the Commission to adopt a rule —subject to a sunset date— that permits a myriad of options, including parental consent via e-mail, depending upon the type of activity in which the child seeks to participate. Under such an approach, e-mail consent alone would not be permissible for a child wishing to participate in certain activities, such as chat rooms, e-mail and instant messaging. Until the sunset date, however, Viacom is committed to working with the Commission in pursuing other cost-effective, feasible and available methods and technologies for obtaining verifiable parental consent, including third-party methods and emerging technologies.

Pros and Cons of E-Mail-Based Mechanisms and Other Forms of Parental Consent

As described above, Nick.com is designed to appeal to and entertain kids while ensuring that they are comfortable and safe. Viacom fears that if a final rule is adopted

¹⁹ Id.

²⁰ Id.

²¹ See Joint Comments of Disney, Headbone et al.

which erects obstacles, a child will be forced to bypass the safe communities at Nick.com and other children-friendly sites in favor of adult-oriented sites that are barrier-free. We acknowledge that the Commission is actively seeking to balance the privacy of children with the interactive nature of the Internet, and appreciate the difficulty of such a task. But Viacom cautions that excluding an e-mail-based form of parental consent from the range of permissible options might bring about the unintended consequence of channeling kids away from safe communities, such as Nick.com and others, to sites that host inappropriate content and may attract unsavory and unmonitored visitors.

Viacom believes that verifiable parental consent should take a multitude of forms in order to accommodate all children, ranging from those who live in homes with no fax machines or computers to those who live in homes with the latest technologies. Participating in activities on children's websites should not be a question of "haves and have nots." Thus, in addition to an e-mail form of parental consent, Viacom endorses the Notice's proposal to permit consent through downloadable forms returned by postal mail or fax, credit card verification, calls to a toll-free telephone number and e-mail with digital signature. Each of the Notice-supported methods and e-mail consent constitute an attempt at using "best efforts" in obtaining verifiable parental consent.

Yet no one of the various methods readily available today can be deemed unassailably verifiable in that each could be short-circuited by a cunning child: the signature on a downloadable form could be forged, the use of the credit card could be unauthorized, the voice on the phone could be that of an older sibling or friend, and the e-mail address could be that of the child and not of the parent. E-mail accompanied by

digital signature may be the most reliable of the methods for obtaining parental consent, but it is not foolproof, either.²²

In addition to reliability, there are other concerns with some of the methods of obtaining parental consent, including parents' level of comfort, the ease of use of the method, the cost to parents, and the cost to the children's website operator. Nick.com has recently conducted focus group studies in Los Angeles and New York with parents of children ages 9 to 14 on the topic of parent registration.²³ With respect to credit card verification, almost all of the parents told Nick.com that they were uncomfortable about giving out their credit numbers online, especially without a charge attached. In fact, only a handful of fathers indicated they were amenable to credit card verification. But even those few willing fathers indicated they are concerned that their children would have access to the credit card account in the future to make unauthorized purchases. "Once you have my credit card number," one parent said, "I would want a guarantee that my daughter couldn't order anything."

When alternatives to credit card verification were presented to the New York City focus groups, parents said they felt more comfortable with the e-mail option. Few parents said they saw a need for a mail-in or fax-back option, because most of them indicated that they have their own e-mail accounts. "My kids don't have my personal password for my e-mail," said one parent, "so I think it's a more verifiable way to gauge permission."

Moreover, Nick.com learned from its focus group studies that parents are supervising

²² See, Breden, John, "Logging on with Your John Hancock," The Washington Post, May 20, 1999. Copy attached as Appendix A.

²³ Four focus group studies were conducted between mid-March and mid-April 1999 in Los Angeles and New York City.

their kids when they go online. Many parents said they need to be present when their kids logon and many said they are in the room when their kids surf. “It’s not that I don’t trust her,” one parent said, “but if you put the letters in wrong in ‘Search,’ you come up with smut.”

As to ease of use and cost to parents, e-mail accompanied by a digital signature or certificate currently may be the most reliable form of consent, but we are concerned about the lack of widespread availability of such technology, the possible user-unfriendliness of the technology and the costs that might be incurred by both the parent and the operator in adopting such technology at this time.²⁴ Finally, as noted in the Joint Comments, the costs incurred by children’s website operators make some methods more attractive and others prohibitively expensive. An e-mail method provides the least expensive means of obtaining consent, an important factor for free websites. Equally importantly, an e-mail-based mechanism honors the unique interactive nature of the online medium

“Verifiable Parental Consent” Should Permit E-Mail Consent Until a Sunset Date

In light of Congress’ intent that the rules should be fluid enough to accommodate the roll-out of technology, Viacom urges the Commission to adopt a final rule that is pliable and evolutionary and that permits the use of e-mail-based consent, at least for certain activities and until a sunset date. A reasonable sunset date would parallel that of the Commission’s review of its rule, which, under Section 6506 of the Act, is scheduled to be undertaken no later than five years from the effective date of the adoption of the rule.

²⁴ For example, Cyber-Sign’s biometric verification system would cost parents \$850 for the software alone. See Breden, John, “Logging on with Your John Hancock,” The Washington Post, May 20, 1999. Copy attached as Appendix A.

In the meantime, as discussed in greater detail in the separate Joint Comments filed by numerous kids' sites,²⁵ the type of e-mail consent could be adjusted to suit various circumstances. Thus, where the parent and child have different e-mail addresses, e-mail consent alone would be sufficient for the child to participate in certain activities. If, on the other hand, the e-mail addresses of the parent and child are the same, the operator would be required to send e-mail messages requesting consent on a delayed basis (when children are likely to have forgotten about receiving such a request) or at a certain time every evening, for example, after 9:00 p.m. (when the child can reasonably be expected to be in bed). If the Commission believes that further assurance is needed for verification, then operators could require that when e-mailing their consent, parents include information that is not readily ascertained by a child under age 13, for example, the age and year of birth of the parent.

Overall, however, Viacom believes any e-mail-based consent be utilized in accord with the sliding scale approach offered by the Commission in Question 14. Under that approach, the type of parental consent required would depend upon the type of activity in which the child wishes to participate. Instant messaging, e-mail and chat rooms—even those that are real-time monitored—are activities that facilitate the posting by children of their personal information in a forum that is immediate and public. Viacom believes that before children may participate in these activities, their parents must provide consent only in the form of signed permission forms that are sent to the operator by fax or snail mail or credit card or similar method of verification (such as a driver's license or other similar unique identifier). In such cases, Viacom believes that any additional costs incurred by its

²⁵ See note 21, above.

children's sites under these types of verification are well worth the benefits, including a greater level of assurance that parents are aware of their children's engagement in activities that might disclose their identities to the public at large. For all other activities, including games and contests where personal information is not publicly disclosed to third parties, all other methods of consent, including e-mail alone, should suffice because no safety issues are implicated.

Until the sunset date, when the Commission has an opportunity to evaluate its rule and available and affordable technologies, Viacom stands ready and able to work with the Commission and other children's website operators in pursuing alternative cost-effective, feasible and available methods and technologies for obtaining verifiable parental consent.

Conclusion

For the foregoing reasons, Viacom urges the Commission to adopt a final rule which incorporates the modifications described above. Viacom also requests that the Commission host a workshop for further discussion of the Proposed Rule.

Respectfully submitted,

Anne Lucey
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