

Before the Federal Trade Commission  
Washington, D.C. 20850

**Children's Online Privacy Protection Rule**  
Comment, FTC File No. P994504

Comments of  
Yahoo! Inc., theglobe.com, inc., and DoubleClick Inc.

June 11, 1999

As leading Internet companies, we have a demonstrated commitment to providing consumers with the information and tools they need to protect their privacy. With respect to children's privacy, we are dedicated to empowering parents with tools to safeguard their children's personal information, and to ensuring safe online experiences. The Children's Online Privacy Protection Act of 1998<sup>1</sup> established specific procedures designed to advance goals which we firmly share.

We file these comments jointly to address an issue raised by the proposed rules.<sup>2</sup> The Act requires website operators "to provide notice on the website of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure practices for such information."<sup>3</sup> We are committed to providing this notice in a prominent place. Our concern is that the government should not prescribe our website design. To do so would interfere with core First Amendment protections which Internet services enjoy fully as much as individuals, newspapers, and other classic First Amendment speakers. By

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<sup>1</sup> Title XIII, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. 105-277 (Oct. 21, 1998) (not yet codified) ("COPPA").

<sup>2</sup> 16 CFR Part 312, FTC File No. 994504. <<http://www.ftc.gov/os/1999/9904/childrensonlineprivacy.pdf>>

<sup>3</sup> COPPA, § 1303(b)(1)(A)(i).

specifying the location of website notices, proposed rule 312.4(b)(1)(ii-iii) impermissibly places the federal government in the website design business.<sup>4</sup> The degree of specificity proposed by this provision is an extraordinary intrusion into the editorial judgment and First Amendment protections of website operators, and substitutes a design standard for the more appropriate performance standard, thus misconstruing the Act's requirements. It also seems to overlook the strong incentive created by the Act for Internet sites to obtain the required parental consent.

First, as a matter of constitutional law, it has been established that websites enjoy full First Amendment protection.<sup>5</sup> The Commission has not, in our view, satisfied its burden under the First Amendment to justify its proposed intrusion into the editorial judgment of website operators; indeed, it does not appear that the FTC has made such an attempt. Nor is there any explicit delegation of authority by Congress to the agency to impose such detailed specifications by regulation. Therefore, the proposal should not be adopted as a matter of law.

Second, the Commission's proposal fundamentally conflicts with the Act's approach by establishing a design standard in lieu of the performance requirement set by Congress. By requiring that the website provide notice of its childrens' privacy practices, but stopping short of more detailed specifications, Congress established a performance standard. Nothing in the Act goes the further step of establishing a design. Certainly, the Act does not dictate where on a webpage the notice must appear or authorize the Commission to do so on its own initiative.

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<sup>4</sup> The proposed rule provides in part: "The link to the notice must be placed in a prominent place on the home page of the website or online service such that a typical visitor to the home page can see the link with out having to scroll down."

<sup>5</sup> See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *American Civil Liberties Union v. Reno*, 1998 Westlaw 893423 (E.D. Pa. 1999).

Furthermore, proposed Subsections 312.4(b)(1)(ii-iii) are inconsistent both with trends in technology and with statements by FTC staff at the recent May 14 workshop on “Interpretation of Rules and Guides for Electronic Media.” At that workshop, which in part discussed various technological methods for providing disclosures, several industry and consumer representatives recognized that evolving technology creates ever-smaller screens and offers increasing user choice about how screens appear.<sup>6</sup> For example, specifying that a “typical” visitor – which is difficult, if not impossible, to define – must be able to see a notice without scrolling down would stifle online creativity and could effectively stall the development of new, convenient technologies.

In summarizing the May 14 workshop, the Director of the Commission’s Bureau of Consumer Protection remarked, “To the extent that we can continue what we have committed to in the past, and that is, performance standards and not design standards. I heard that all day long. And I think the Commission has a history of doing that, both in guidance and in rules and in case law as well. I am confident that we will continue that process.”<sup>7</sup>

Finally, such specificity is entirely unnecessary. COPPA requires a high performance standard for policies protecting children’s online privacy. Under the Act, we are obligated to obtain parental consent for the collection, use or disclosure of children’s information. We are committed to placing the mandatory notice where parents will find it.

As industry leaders committed to the protection of children’s interests and the integrity of our users’ information, we have been in the forefront of establishing policies to protect consumer

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<sup>6</sup> Federal Trade Commission, In the Matter of: Internet Legal Issues Task Force, File No. P974102, 26-28 (May 14, 1999). <<http://www.ftc.gov/bcp/rulemaking/elecmedia/wkshptranscript.pdf>>

<sup>7</sup> *Id.* at 313.

privacy online, while continuing to offer users unique interactivity when they choose to share personal information. These goals would not be served by the adoption of burdensome regulations which would both threaten First Amendment freedoms and exceed the letter and the spirit of the Act.

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<sup>8</sup> Admitted in Kentucky, D.C. application pending (practicing under supervision).