Testimony

of

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before the
House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing and Trade

on
Protecting Children's Privacy in an Electronic World

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2123 Rayburn House Office Building

Chairman Bono Mack, Ranking Member Butterfield, and distinguished members of the Committee: My name is Morgan Reed, and I would like to thank you for holding this important hearing on children's online privacy and the proposed changes to COPPA.

I am the executive director of the Association for Competitive Technology (ACT). ACT is an international advocacy and education organization for people who write software programs--referred to as application developers--and providers of information technology (IT) services. We represent over 3,000 small and mid-size IT firms throughout the world and advocate for public policies that help our members leverage their intellectual assets to raise capital, create jobs, and innovate.

My goal today is to help explain how small businesses that are fueling explosive growth in the mobile apps marketplace have become aware of their responsibilities under COPPA, how the rule changes outlined in the FTC's Notice of Proposed Rulemaking (NPRM) may affect them, and how small businesses are attempting to meet the goals of COPPA through innovation and parental outreach.

Overall, app developers have three key messages for members of this committee:

1. **The mobile apps ecosystem is creating American jobs and innovative new products but heavy-handed new regulations could threaten that success.**
2. **The NPRM demonstrates the power and the flexibility of the original COPPA legislation, and proves that technology-specific privacy legislation is unwarranted at this time.**
3. **The NPRM does a good job of clarifying and modernizing the original COPPA regulations. However, there are still areas where we think the FTC needs to expand examples of what is permissible and pull back from changes that could limit innovation.**

The Smartphone Ecosystem is Creating Jobs and Opportunities in a Tough Economy

The evolution of mobile technology has led to a renaissance in the software industry; small software companies that once wrote exclusively for big software platforms at the enterprise level are now able to create innovative products and sell them directly to consumers. The emergence of the app market is a radical departure from the era of up-front marketing costs, publisher delays, and piracy. Its growth has eliminated the longstanding barriers to

entry that our industry battled for the past two decades.

In the face of this tough economic environment, there has been a bright spot in the: sales of smartphones and tablets, such as the iPhone, the HTC Thunderbolt (running Google Android) the Samsung Focus (running Microsoft WP7), the iPad, Xoom and Amazon's "Fire" continue to outpace all predictions and are providing a huge growth market in a slumping economy. Nearly one hundred million smartphones were shipped in the first quarter of 2011[1] marking a 79% increase in an already fast growing market.[2] In fact, 40% of adult mobile phone owners in the United States have smartphones. At the end of last year, smartphone sales were 20% of the U.S. market. Europe now sells more smartphones than feature phones[3].

In 2008 Apple launched its App Store to provide a place for developers to sell independently developed applications for the iPhone. Since then, over 500,000 new applications have gone on sale, with billions of applications sold or downloaded. The Android platform has recently exceeded the growth rate seen in the iPhone, totaling more than 300,000 applications. In 2010 we saw the release of Windows Phone 7 with its own applications store and an entirely unique user interface. Just last week, Microsoft released "Mango", and Amazon launched the "Fire" tablet. Total unique apps across all platforms are expected to hit one million by the end of 2011,[4] and the future looks bright.

The Mobile App World – A Job Growth Engine

The mobile app marketplace has grown to a five billion dollar industry from scratch in less than four years. In the next four, analysts expect that number to reach $38 billion -- exceeding $54 billion when including service expenditures[5].

A recent study by the University of Maryland found the Facebook platform for app developers has created more than 182,000 jobs generating over $12 billion in wages and benefits.[6] Facebook is just one platform that app

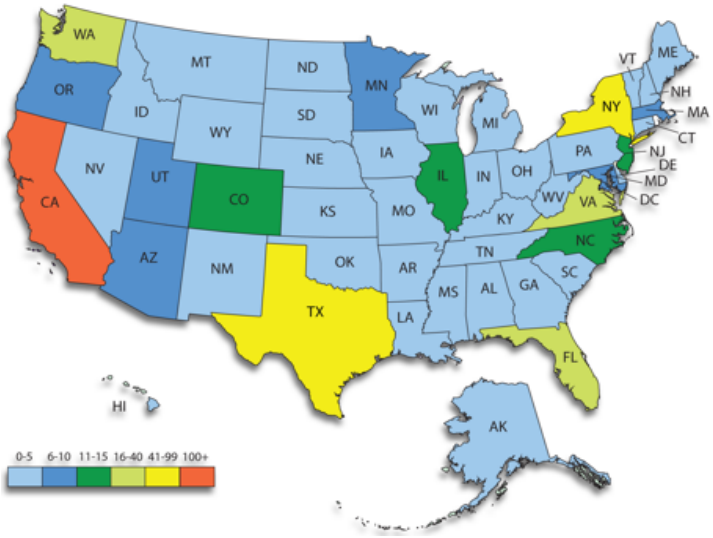
[1] Mark Kurlyandchik, *IDC: Nokia Remains Top Smartphone Vendor Worldwide*, DailyTech, May 6, 2011.
[2] *Id.*
[3] http://www.engadget.com/2011/09/12/smartphones-out-ship-feature-phones-in-europe-samsung-leads-the/
[4] http://d2omthbq56rzfx.cloudfront.net/wp-content/uploads/2011/04/Distimo-survey-201103-app-stores-count.png
[5] http://blogs.forrester.com/john_mccarthy/11-02-28-mobile_app_internet_making_sense_of_the_2011_mobile_hysteria
[6] http://www.rhsmith.umd.edu/digits/pdfs_docs/research/2011/AppEconomyImpact091911.pdf

developers write for, with iOS, Android, and Windows Phone 7 also attracting mobile app developers. ACT's own research estimates that the current mobile apps economy has created, saved or supplemented more than 600,000 jobs nationwide.

ACT regularly conducts workshops for app developer groups throughout the country and we hear about opportunity for jobs in the app development world. And these aren't just programmer jobs; app developers often need graphic artists, content writers and marketers to assist in app development.

The jobs created by app development are not just in Silicon Valley. During the dot-com years, the majority of growth occurred in the California while the rest of the country was not able to reap the direct benefits of the economic boom. However, today's mobile apps industry is experiencing job creation across the country.

App Developers Across the Country



While California continues to have a large representation of app developers, nearly 70% of the businesses are located outside of the state of California. The nature of this industry allows developers to live almost anywhere, including: *Animal's Pronunciations A to Z* by Rickety Apps in California, *Otto the Otter* by Baked Ham Games in North Carolina, and *Christ Church United Methodist* app by Speak in Tennessee.

Another feature of this new industry is that small businesses are the driving economic force. Of the 500 best-selling mobile apps, 88% are produced by small businesses.[7] In a majority of cases these are micro businesses with less than 10 employees.

[7] ACT analysis of top 500 selling apps, some discrepancies exist due to lack of verifiable employment data and apps created by a developer who has significant investment from a larger company. Some apps branded for a larger company are in fact developed by small firms subcontracted to build the application. Sample size of 408 applications, from "top apps" on March 25 2011.

The Power of the FTC to Protect Children

The FTC has been aggressive in utilizing the power of existing COPPA regulations. The app community has drawn particular attention as the Commission has recently focused on a few bad apples operating without regard for COPPA. Through actions both big (Playdom, $3 million fine) and small (W3, $50,000 fine) the Commission's enforcement actions have raised awareness in the apps community that COPPA applies to them. Despite evidence to the contrary, some critics believe the FTC does not have the tools necessary to protect children in today's online world. This is clearly not the situation.

Recent steps taken have shown the Commission is effectively identifying and addressing the problems of bad actors in the industry. Moreover, FTC's rulemaking authority provides flexibility so that COPPA may be updated when necessary as evidenced by the most recent proposed changes.

These concerns are reflected in the FTC's position on proposed legislation: it has consistently denied new laws are necessary. When FTC Chairman Leibowitz testified before the Senate Committee On Commerce, Science, and Transportation, he noted the Commission needs no new laws.[8] Again, in testimony before Senators Rockefeller and Kerry in the Senate Commerce Committee, the FTC made clear its position that it already possesses sufficient regulatory tools to address privacy online and in the mobile marketplace, including for children. Rather than new legislation, the FTC continues to point out the need for more resources to increase the number and effectiveness of their enforcement actions.

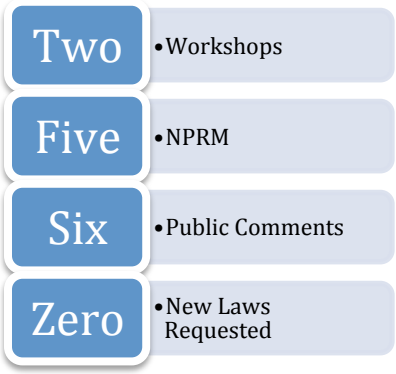
The FTC's NPRM Shows the Power to Adapt COPPA to Technology – Some lawmakers want to put new legislation's cart before the FTC's NPRM horse. Most recently in HR 1895, the "Do Not Track Kids Act", the Bill's authors propose amendments to COPPA that seek to address issues already covered by the FTC's latest NPRM.

[8] For now, FTC Chairman Jon Leibowitz is willing to give the industry a chance before calling for legislation. Even without a government mandate, he noted, it's in the industry's self-interest to make Do Not Track work. After all, Leibowitz says, "nobody wants to be on the wrong side of consumers." Jolee Tessler, *Internet privacy controls challenge tech industry*, Bloomberg Businessweek (July 26, 2011).

A cursory review of the NPRM shows multiple examples:

- Section 3 of HR 1895 requires clear and conspicuous notice to children; addressed by the NPRM
- Section 3 expands COPPA to cover "Apps"; again, this is in the NPRM
- Section 6 requires express authorization prior to collection of geo-location from minors. The NPRM already covers this for under 13. Moreover, this seems to be after-the-fact as all the smartphone platforms are providing notification and an opt-in requirement when the GPS is initially activated by an app.

In 11 Years the FTC Has Updated COPPA Via:



Therefore, Congress should let the FTC make the adjustment to the existing COPPA regulations before proposing new legislation.

How the NPRM Effectively Updates COPPA

The FTC has taken affirmative steps to update COPPA to changes in the technology marketplace. Clarifying and modifying existing law, this latest NPRM offer guidance to help app developers create quality content for children while protecting children's privacy.

Maintaining Consistency in the Age of Applicability - The FTC wisely maintained the existing age of COPPA applicability to those under 13. While the increasing of the COPPA age to 17 and under as some have requested, would likely be found unconstitutional,[9] it would also upset the framework on which much of the Internet is based.

For example, many general audience Internet sites that collect personal information do not allow users under 13. If forced to comply with COPPA retroactively due to an increase in age, many users might suddenly find their access revoked. This could include access to cloud-based storage of their personal documents, social networking sites, and even sites as innocent as MovieFone and WashingonPost.com.

[9] *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (upholding the injunction of enforcement of COPA due, in part, to its applicability to those under 18).

Increased Clarity on COPPA's Application to Apps – The NPRM removes any uncertainty for mobile app developers about the applicability of COPPA and clarifies some key terms. While undefined by the original COPPA language, the NPRM provides certainty to identify apps as an "online service." This helps us in our educational outreach efforts to increase awareness among our members of the need to comply with COPPA and to inform how they achieve compliance.

Increased Parental Notice is a Good Thing - We believe that transparency to the consumer is critical. Transparency informs consumers of how their information is being collected and used. This allows consumers to make educated decisions while eliminating the "scary factor." ACT has been very active communicating to our developers about the need to create and use privacy policies if their app collects personal information.

We do worry, however, that requiring too much disclosure produces unnecessary burdens on developers while not providing appreciable benefits to consumers. Still, we are pleased to see the FTC's emphasis on empowering consumers to make informed decision with greater transparency.

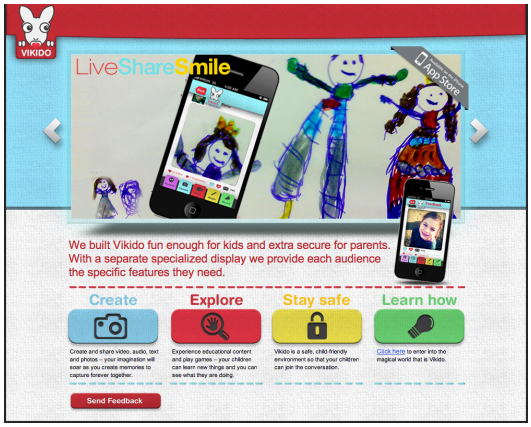
COPPA is aimed at protecting children's privacy online while increasing parental notice, consent, and involvement in how and when a child can share their information online. As app developers, this is also at the heart of the apps that we develop for children.

The FTC Should Encourage Innovation in Parental Consent – Parental engagement is necessary for truly effective COPPA compliance and appears to be the goal of the statute. We want parents to know what their child shares online and we want them to be involved. But when the FTC considers completely removing systems like email plus, it only discourages websites and developers from creating engaging, useful tools for children. This is especially the case when, as the FTC states, "few, if any, new methods for obtaining parental consent have emerged since the sliding scale was last extended in 2006."[11] Alternative email verification services will not arise because of stricter COPPA guidelines – instead, we need to find ways to make parental consent easier. That means not letting the perfect become the enemy of the good. We believe the FTC should re-examine elimination of email plus to

[11] COPPA Rule Review, 16 CFR Part 312, Project No. P104503 p. 64 (FTC Notice of Proposed Rulemaking 2011).

determine if there are other ways to encourage innovation, including investigating alternative systems that are part of social network sites, game systems, and global marketplaces.

App Developers are innovating to Obtain Parental Consent and Provide Notice - COPPA compliance is an incredible hurdle faced by small mobile app developers – who are challenged by screen size, business size, and



evolving business models. The good news is we are innovating. Take for example the app developer Vikido. Vikido's mantra is "Create, Explore, Stay Safe." Children's safety is at the core of the Vikido application, highlighted from the very first screen on. Vikido allows children to share pictures and statements online, but only after first obtaining parental consent through Facebook Connect. Vikido's privacy policy clearly states that no information from the child will be shared except through the parent account, and they've taken the time to explain COPPA to parents directly in their blog:

> ***So, What is Vikido doing about this?***
>
>
> *We started Vikido as "concerned parents" and that is why kids on Vikido don't have an "account" in the regular sense of the word – it's an extension of the parent's account. The parent logs in using FB connect, creates a "child" account – and the child is logged-in only via the parent's permissions – entering a child-mode interface.*
>
> *So – no one can connect with your child unless you approve it (you add a family member via YOUR parent side, but the child doesn't have this ability).*
>
> *In addition, no one can see the child's feed (other than his family) and the only person who can share the child's creations is the parent. You can see an example on my own facebook account: https://www.facebook.com/amit.knaani/posts/10150310197421443 - that's me as a parent, sharing my child's pic under my name.*
>
> *We also added an additional level of control by notifying the parent when a message is sent to the child.*
>
> ***"But it's kind of annoying to pay all that attention to my kids' activities!"***
>
> *Well, the process implemented by Vikido requires at least some initial parental intervention and consent. The parent needs to register the child, add and approve other family members, and the child can't login*

> *with its own password. We know… it ain't easy, but we did it anyway, because just like you, we rather spend a couple of minutes here and there, and make sure we don't put our kids in harm's way.*[12]

This is exactly the kind of innovation the FTC should be encouraging – with the full understanding that it may require modification down the road. Vikido's efforts here are working to achieve exactly the desired outcome from COPPA: Parental understanding, engagement and control. We ask that the FTC not only maintain the current models of parental consent, but also increase their availability. This way we can once again encourage and make economical the development of tools to help children.

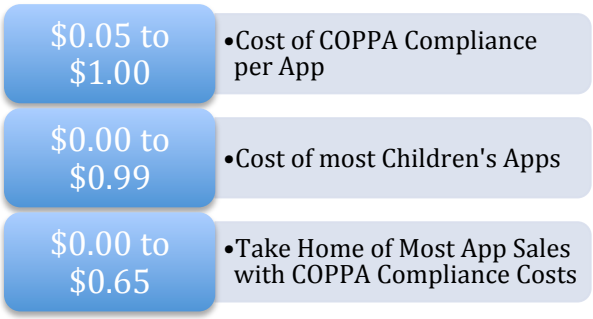
Challenges for App Developers

With every change, there are benefits and harms. We worry that in its effort to increase clarity, the FTC may have, inadvertently, created confusion for some app developers. This ranges from difficulties in app development and optimization to the inability to produce low cost, high quality apps for children.

Costs of Compliance with COPPA for App Developers - Too often it seems that websites and developers try to avoid catering to those under 13 in an attempt to avoid dealing with the difficulties in compliance with COPPA. The requirements for parental consent are difficult and costly. Joining a safe-harbor program accompanies financial outlays. In face, the Commission stated,

> [I]t is unclear whether the economic burden on small entities will be the same as or greater than the burden on other entities … in order to comply with the rule's requirements, *website operators will require the professional skills of legal … and technical … personnel* … and that approximately *80% of such operators would qualify as small entities* under the SBA's Small Business Size standards.[13]

As the number of children using computers, tablets and smart phones increases, so do the opportunities to use these devices as learning tools. But to do so, there must be an economically viable platform on which these tools can be built. Current costs of acquiring parental consent range



[12] *See* http://vikido.com

[14] http://www.cooley.com/files/84589_ALERT_COPPAcoversMobile.pdf

from $0.05 to $1.00 per app. Such a barrier is too high for many small businesses, like many members of Moms with Apps (an online community of family friendly developers), especially when most app developers net only $0.75 or less per app sold. Accordingly, we ask that the Commission simplify compliance with COPPA, and thus decrease the costs of compliance to these small entities.

Treatment of UDID as Personal Information – The addition of UDID to the list of personal information under COPPA creates unexpected consequences to app developers' ability to improve and develop their apps. For example, app developers often use a UDID for analytics purposes: seeing what parts of their apps kids like best or least, and using this information to improve the existing and future products. This information is used exclusively as a type of data-point. While we at ACT think this collection falls under the "internal operations" exception, enough uncertainty remains warranting further clarification.

We recognize that the FTC's proposed definition of "support for the internal operations of the website or online service" includes "user authentication, improving site navigation, maintaining user preferences, serving contextual advertisements, and protecting against fraud or theft." However, we are uncertain if the collection for purposes of analytics invokes notice and consent requirements. Often the third-party terms-of-use allow the third-party to collect and store the UDID. With so few options for third-party analytics, app developers are stuck between a non-negotiable terms of use and COPPA regulations, and as an NPRM analysis by Cooley, LLP points out:

> *The FTC mentions parenthetically one example of a mobile application and an advertising network that collects information from within the application. No mention is given as to whether both the mobile application and the advertisement need to be directed toward children or whether both might be operators simply because either the mobile application or the advertisement is directed toward children. If the latter, this raises questions regarding whether parties have an obligation to conduct due diligence on the activities of the other party and the effect, if any, of contractual prohibitions on targeting children*[14].

A possible solution to this dilemma would be to expand the definition of "support for the internal operations of the website or online service" to explicitly include the collection for purposes of analytics even if by third parties.

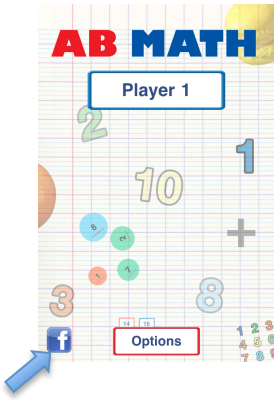
Treatment of User Name as Personal Information - A user name, like a UDID, without any other information is just a combination of letters. It does not necessarily identify any particular individual. Treating a user name as

[14] http://www.cooley.com/files/84589_ALERT_COPPAcoversMobile.pdf

personal information has unintended consequences for app developers. Because app developers also use user names to track popularity as opposed to UDIDs, the treatment of user name as personal information limits their ability to provide useful educational and fun services to children.

ACT spoke with educational developers who are members of Moms with Apps, an organization made up of more than 600 Moms (and now Dads) who create educational apps. Several developers we spoke with noted that educational apps need to enable parents and teachers to see if children did their reading, took the test, or completed the project made available through the app. As part of the process to enable this review, the app creates user names for the children. If user names are considered personal information it could chill such innovation.

Prompting the Sharing of PI is Collection - While it may seem obvious that the prompting or encouraging of a child to share personal information constitutes collection, the growth of social networking as a means to stay connected with kids and parents suggests a difference between "sharing" and "collecting." Our concern is that a developer adding a social networking button such as the Facebook "Like" button would automatically be in violation of COPPA, even though no direct information about the child is shared.



We do not believe that this is a scenario the FTC necessarily envisioned, but we ask that they review this outcome in the light of this limitation.

Prohibition on Advertising to Children - When COPPA was created, it was to protect children's privacy online, not to prevent marketing to children. In fact, legislators stated four different goals for COPPA[15] none of which included a probation of marketing to children. Moreover, advertising and interest-based advertising to children is not new. A child watching "Pokémon" will have likely seen an advertisement for Nintendo products since Nintendo knows that kids who like Pokémon may also like other Nintendo products. The company knows this since it is able to

[15] COPPA was created to "(1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online form such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent." 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan).

collect information through services such as Neilson ratings that tracks the viewing habits of families, including their children.

App developers require the option to earn the nominal income generated from nominal advertising to children since app developers, especially those making apps for kids, charge little or no money for their products. Yet children desire creative, fun, and well-made apps. This prohibition would "raise costs for smaller or new sites and services geared toward minors"[16] and force app developers to choose between making lackluster and cheap apps, or utilize alternative revenue streams, like those from passive tracking, to create types apps kids want.

We worry that if the FTC enacts this complete prohibition, it will encourage app developers to drive to the bottom. Since most apps cost one dollar or less this means a drive to decrease quality. This is not something anyone wants.

Conclusion

The apps ecosystem is creating innovating new products for teachers, parents, and children. Moreover, it is creating jobs. As the FTC considers changes to COPPA outlined in the NPRM, we urge incredible attention to the potential risks that misstep could cost small businesses and stifle innovation. Nonetheless, the FTC has made great strides at updating COPPA. Faced with an evolving marketplace that provides innovative ways to make learning fun, the Commission has taken a measured approach to improve child safety. While it requires additional changes, we are not suggesting the FTC throw the NPRM out with the proverbial bath water.

We concur with the FTC's frequent reminder to Congress that the Commission possesses sufficient existing regulatory authority to address online child safety. The strength of the COPPA statute and the flexibility of the regulatory process provide effective means to update the Act without the need for additional legislation.

We thank you again for the opportunity to present testimony and we look forward to working you and the FTC in protecting children's privacy online and the innovators who are growing our economy.

[16] Written Testimony of Berin Szoka Senior Fellow, The Progress & Freedom Foundation & Director of PFF's Center for Internet Freedom, Hearing on "An Examination of Children's Privacy: New Technologies & the Children's Online Privacy Protection Act" April 29, 2010.