TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Children's Online Privacy Protection Rule

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TABLE OF CONTENTS

Introduction 1

I. About TechFreedom 1

II. COPPA Has Succeeded Because It Is Limited, Understandable, and Seeks to Empower Parents, Not Punish Good-Faith Operators 3

III. Returning to a Textualist Definition of "Directed to" 4

A. A Textualist Analysis of "Directed to" 5

B. Learning from the FCC's Experience 7

C. Recommendation: Refocus the Definition on the Intended Audience, as Understood through Objective Factors 9

IV. The Additional Factors Proposed by the NPRM 9

A. Recommendation: Drop Reviews & Comparison to "Similar" Sites & Services 11

V. Conclusion 12

INTRODUCTION

TechFreedom files these comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the FTC and published in the Federal Register on January 11, 2024.[1] The NPRM seeks to implement changes to how the FTC implements the Children's Online Privacy Protection Act (COPPA).[2] The NPRM follows from the FTC's 2019 Rule Review Initiation,[3] and seeks further comment on several issues, including: (1) amending the COPPA Rule's definition of "website or online service directed to children,"[4] and (2) changing the COPPA Rule's "actual knowledge" standard.[5]

COPPA has served the agency, and more importantly, parents, well. Embarking on a rulemaking designed to establish vague, overbroad, and highly constitutionally questionable rules will neither solve the perceived problem nor be an effective use of taxpayer resources.

I. About TechFreedom

Founded in 2010, TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

We have weighed in on significant issues at the FTC over the past decade:

- We filed comments[6] in response to the 2019 NPRM, which were cited seven times in the current NPRM.[7]

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[1] Children's Online Privacy Protection Rule, NPRM, 89 Fed. Reg. 2034 (Jan. 11, 2024), https://www.govinfo.gov/content/pkg/FR-2024-01-11/pdf/2023-28569.pdf. The NPRM called for comments to be filed by March 11, 2024. These comments are timely filed.

[2] Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6506.

[3] Children's Online Privacy Protection Rule, Request for Public Comment, 84 Fed. Reg. 35842 (July 25, 2019), https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online.

[4] NPRM at 2035.

[5] *Id.* at 2037.

[6] Comments of TechFreedom in COPPA Rule Review, Docket No. FTC-2019-0054 (Dec. 11, 2019), https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf.

[7] NPRM at 2036, n. 20; 2040, n. 75; 2042, n. 110; 2046, n. 152; 2058, n. 289; 2058, n. 292; 2058, n. 293.

- We participated in the 2019 FTC Workshop on the Future of the COPPA Rule.[8]

- We hosted an event in the U.S. Capitol on January 13, 2020, bringing together the YouTube creator community with staffers to discuss the impact of the FCC's settlement with YouTube.[9]

- We've warned against requiring imposing new "design features" to limit how website and online service providers[10] create their offerings, showing how such limitations would effectively ban virtually all games and other entertainment to children.[11]

- We've recounted how past attempts to ban advertising to children have backfired badly on the Commission, and how current attempts to resurrect such bans would repeat these failures; as a 2004 FTC staff report put it, the FTC "has traveled down this road before" and this "is not a journey that anyone at the Commission cares to repeat."[12]

- We've championed a reasoned approach to COPPA enforcement that doesn't destroy the creative community or tech industry;[13]

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[8] *See* Press Release, Federal Trade Commission, The Future of the COPPA Rule: An FTC Workshop (Oct. 07, 2019) (General Counsel James E. Dunstan appeared on Panel 2: Scope of the COPPA Rule), https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop.

[9] *See Will Kids' Privacy Crackdown Break the Internet?*, TECHFREEDOM (Jan. 13, 2020), https://techfreedom.org/save-the-date-will-kids-privacy-crackdown-break-the-internet/

[10] For brevity, we sometimes below refer to operators of websites—without also specifying that this includes operators of services. COPPA covers both equally.

[11] Comments of TechFreedom in the Matter of Petition for Rulemaking to Prohibit the Use on Children of Design Features that Maximize for Engagement, Docket No. FTC-2022-0073 (Jan. 18, 2023), https://techfreedom.org/wp-content/uploads/2023/01/TechFreedom-Comment-on-CDD-Engagement-Petition.pdf.

[12] Comments of TechFreedom in the Matter of Protecting Kids from Stealth Advertising in Digital Media, Docket No. FTC-2022-0054 (Nov. 18, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-on-Stealth-Advertising-11-18-22.pdf (quoting FED. TRADE COMM'N STAFF REPORT, ADVERTISING TO KIDS AND THE FTC 23 (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf.).

[13] We hosted an event in the U.S. Capitol on January 13, 2020, bringing together the YouTube creator community with staffers to discuss the impact of the FCC's settlement with YouTube. *See Will Kids' Privacy Crackdown Break the Internet?*, TECHFREEDOM (Jan. 13, 2020), https://techfreedom.org/save-the-date-will-kids-privacy-crackdown-break-the-internet/. We also hosted a Capitol Hill panel discussion on COPPA in 2011, *see* https://techfreedom.org/reminder-techfreedomfosi-coppa-event-in-dc/, and appeared at the FTC's workshop on COPPA. *See* Press Release, Fed. Trade Comm'n, The Future of the COPPA Rule (Oct. 07, 2019) (General Counsel James E. Dunstan appeared on Panel 2: Scope of the COPPA Rule),

- We've warned about the pitfalls inherent in conducting Mag-Moss rulemakings in the context of the FTC's recent "commercial surveillance" ANPR;[14]

- We've cautioned against attempting to conduct general rulemakings over unfair methods of competition under Section 6(g) of the FTC Act;[15] and,

- We've encouraged the Supreme Court to limit the FTC's remedy powers to those that are explicitly granted by the FTC Act.[16]

II. COPPA Has Succeeded Because It Is Limited, Understandable, and Seeks to Empower Parents, Not Punish Good-Faith Operators

After more than 25 years, COPPA has been a great success. That success has been achieved precisely because the statute, and the FTC's implementation of it, has been limited via rules that have been (relatively) clear and easy to follow; accordingly, unlike other laws enacted to protect children, to date, COPPA's constitutionality has never been challenged.[17]

COPPA applies whenever an operator collects personal information from a child if the operator either (a) "has actual knowledge that it is collecting personal information from a child" or (b) operates a "website or online service directed to children."[18] These limitations have been crucial to avoiding a direct First Amendment challenge: unlike the Communications Decency Act of 1996 (CDA) or Children's Online Privacy Act of 1998 (COPA),[19] COPPA has not affected the ability of adults to communicate online. The "directed

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https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop. *See also* Comments of TechFreedom in COPPA Rule Review, Docket No. FTC-2019-0054 (Dec. 11, 2019), https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf.

[14] Comments of TechFreedom in the Matter of Trade Regulation Rule on Commercial Surveillance and Data Security, Docket No. FTC-2022-0053-0001, 10-11 (Nov. 21, 2022), https://techfreedom.org/wp-content/uploads/2022/11/TechFreedom-Comments-Trade-Regulation-Rule-on-Commercial-Surveillance-and-Data-Security.pdf.

[15] *See generally* Berin Szóka & Corbin Barthold, *The Constitutional Revolution that Wasn't: Why the FTC Isn't a Second National Legislature* (June 2022), https://techfreedom.org/wp-content/uploads/2022/06/FTC-UMC-Rulemaking-Authority-TF-Version.pdf.

[16] *SCOTUS Should Apply Congressional Limits Placed On FTC's Remedy Power*, TECHFREEDOM (Oct. 2, 2020), https://techfreedom.org/scotus-should-apply-congressional-limits-placed-on-ftcs-remedy-power/.

[17] NetChoice, LLC v. Yost, No. 2:24-cv-00047, slip op. at 27 (S.D. Ohio Feb. 12, 2024) ("But [AG Yost] points to no case where a court has concluded that COPPA's language is not vague, nor can this Court find one.").

[18] 15 U.S.C. § 6502(a)(1).

[19] Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 133 (1996), struck down in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997); Child Online Protection Act (COPA), Pub. L. No. 105-277, div. C, Tit. XIV, 112 Stat. 2681-736 (1998), enjoined in American Civil Liberties Union v. Ashcroft

to" limitation has ensured that COPPA will not require the overwhelming majority of websites and services to demand identifying information from users in order to age-verify them or obtain what COPPA calls "verifiable parental consent."

The Commission has, by rulemaking, identified multiple factors for assessing whether a site is directed to children. No court has yet reviewed this extrapolation upon the statute, as one federal district court judge recently noted:

> Defendant Yost also points to the Children Online Privacy Protection Act of 1998 ("COPPA"), a federal regulation that uses some of the same factors to explain which websites or online services are "directed to children," and therefore, covered by COPPA. But he points to no case where a court has concluded that [the] COPPA [rule]'s language is not vague, nor can this Court find one.[20]

III. Returning to a Textualist Definition of "Directed to"

The proposed COPPA Rule update would add considerable uncertainty to a regulatory framework that has already drifted significantly from the text of the statute. This drift began with the issuance of the COPPA Rule in 1999, when the Commission included two concepts in the definition of "directed to children": "The Commission will also consider competent and reliable empirical evidence regarding audience composition; [and] evidence regarding the intended audience."[21] Neither the rule proposed nor the rule adopted that year[22] really explained how these two concepts related to each other, or to the metes and bounds laid down by Congress.

This was long before Justice Elena Kagan declared that "we're all textualists now."[23] So perhaps it is not surprising that the Commission failed to perform the kind of textual analysis

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(*Ashcroft I*), 322 F.3d 240, 243, 247 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004). The Third Circuit reviewed and affirmed *Ashcroft I* in American Civil Liberties Union v. Ashcroft, 534 F.3d 181, 196 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

[20] NetChoice, LLC v. Yost, No. 2:24-cv-00047, slip op. at 27 (S.D. Ohio Feb. 12, 2024), (internal citations omitted).

[21] 64 Fed. Reg. 59913 (Nov. 3, 1999).

[22] Children's Online Privacy Protection Rule, 64 Fed. Reg. 22750 (proposed Apr. 27, 1999) (codified at 16 C.F.R. 312).

[23] Harvard Law School, *A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE (Nov. 17, 2015), https://youtu.be/dpEtszFT0Tg?si=5fllsqspRQUyohCc&t=478 (explaining that "the primary reason" Justice Scalia will "go down as one of the most important, most historic figures in the Court" is that he "taught everybody how to do statutory interpretation differently"); *id.* at 8:28 ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

of COPPA that would today be expected in any significant rulemaking. What *should* the Commission have done? "Congress has written something," Justice Kagan continued, "and your job truly is to read and interpret it, and that means staring at the words on the page."[24]

A. A Textualist Analysis of "Directed to"

A "website or online service" (or a portion thereof), says the statute, is "directed to children" if it is "targeted to children."[25] Congress did not further define these terms but their common meaning is clear: to "target" something means to "use, set up, or designate as a target or goal" or "to direct toward a target."[26] Courts have understood the use of "directed to" and "targeted at" in other federal statutes in just this way.[27] "Targeting" was thus a way for Congress to refer to the audience that an operator *intended* to reach.

This understanding is consistent with the version of COPPA originally introduced in the Senate, which further specified that one way a site or service could be "directed to" children was "by reason of the subject matter, visual content, age of models, language, characters, tone, message, or any other similar characteristic of the website."[28] This language was dropped from the final bill enacted by Congress, but was ultimately included in the 1999 COPPA Rule.[29] All of these characteristics are objective indications of the operator's targeting intentions—as are the other two included in the Rule's definition of "directed to": "whether a site uses animated characters and/or child-oriented activities and incentives."[30] By thus pointing to the text ("targeted to"), it would not have been hard to justify enumerating these factors in the rule in textualist terms.

The NPRM refers to this "'multi-factor test,' which applies a 'totality of the circumstances' standard."[31] Such objective characteristics of a site or service allow the Commission to question operators' specious claims about their intentions—just as objective evidence may

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[24] *Id.* at 9:26.

[25] 15 U.S.C. § 6501(10).

[26] *Target*, DICTIONARY.COM, https://www.dictionary.com/browse/target (last visited Mar. 11, 2024).

[27] *See, e.g.*, Doe v. Hopkinton Pub. Sch., 490 F. Supp. 3d 448, 461 (D. Mass. 2020) (holding that *directing at* someone requires some intent and action to aim or target that person); United States v. Trump, 88 F.4th 990, 1019-20 (D.C. Cir. 2023) (to "target" a person is to aim or direct a statement toward a person or entity).

[28] Children's Online Privacy Protection Act, S. 2326, 105th Cong. § 2(11)(A)(ii) (1998), https://www.congress.gov/bill/105th-congress/senate-bill/2326/text.

[29] 64 Fed. Reg. at 59913.

[30] *Id.*

[31] 89 Fed. Reg. at 2046.

always overcome any defendant's claims about its subjective state of mind.[32] This test remains sufficient to address the NPRM's concern about operators "circumventing the Rule by claiming an 'intended' adult audience despite the attributes and overall look and feel of the site or service appearing to be directed to children."[33]

So far, so good: the 1999 rulemaking's failure to explain what it did in textualist terms is not inconsistent with textualism. But after the sentence laying out these factors, the NPRM added the sentence quoted above: "The Commission will also consider competent and reliable empirical evidence regarding audience composition; [and] evidence regarding the intended audience. . . ."[34] Here, the Commission should have explained its reasoning in terms of the text's focus on targeting: while evidence of the *intended* audience would be of paramount relevance to the focus of the statute—targeting (intention)—the Commission might also consider evidence regarding composition of the *actual* audience as *indirect* evidence of whom the operator had targeted. If a site or service's audience consisted largely or overwhelmingly of children, the Commission might reasonably presume that the operator intended to reach ("target") that audience—just as it might presume so because of the heavy use of, say, animated characters.

The "targeted to" standard can be a powerful tool in protecting children if it is based on evidence of the operator's intent. The FTC recently reached a record $275 million settlement with Epic, the creator of the Fortnite computer game, for violating COPPA. The complaint alleged that Fortnite had intended to target children in multiple ways, including the way Epic promoted the game to advertisers and potential retail partners:

> Further evidencing the game's intended audience, Epic has made millions in royalties by partnering with companies to sell officially licensed Fortnite merchandise for children. Within a year of Fortnite's public release, Epic retained a licensing agent and launched a consumer products program to give players official Fortnite-branded merchandise.
>
> Acknowledging that "Youth and Kids are obsessed with Fortnite" and "want to show their allegiance to their favorite pastime," Epic's agent developed a licensing plan with a "core" component that targeted "Kids" and "Youth Universes," and worked closely with Epic to broker partnerships between Epic

[32] *See, e.g.*, Counterman v. Colorado, 143 S. Ct. 2106, 2113 (2023) ("True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content.").

[33] NPRM at 2047.

[34] 64 Fed. Reg. at 59913.

and other companies to create Fortnite-branded costumes, toys, books, youth-sized apparel, and "back to school" merchandise (e.g., backpacks, pencil cases, etc.).[35]

Epic, the complaint explains, both knew that minors were the actual audience for Fortnite[36] and intentionally targeted that audience.[37] With the right evidence, the Commission *can* connect these two concepts. Unfortunately, the 1999 rulemaking offered no explanation of how the two conceptions of audience relate, or how actual audience relates to the statute's text (*i.e.*, to "targeting"). This created a confusion which has led directly to the present NPRM's "propose[d] modifications to clarify the evidence the Commission will consider regarding audience composition and intended audience"[38]—as if both concepts were equally directly grounded in the statute.

B. Learning from the FCC's Experience

Consider the Federal Communications Commission's experience under the Children's Television Act (CTA). Congress left the term "children's television programming" undefined,[39] but the FCC concluded that it means that which is "originally produced and broadcast primarily for an audience of children 12 years old and under."[40] Thus, the FCC focused on the intended (*i.e.*, targeted) audience of the programming's original producer.

The CTA also required the FCC to consider, before renewing broadcast licenses, how much of the applicant's programming included "programming specifically designed to serve . . . the

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[35] United States v. Epic Games, Inc., Complaint for Permanent Injunction, Civil Penalties, and Other Relief, No. 5:22-cv-00518, ¶¶ 22-23 (E.D.N.C. Feb. 7, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesComplaint.pdf. *See also* Press Release, Fed. Trade Comm'n, Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges (Dec. 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations.

[36] Epic Complaint ¶ 14 ("While Epic avoided collecting Fortnite players' precise ages . . . , Epic has consistently asked about players' living situation and occupation through player surveys—and used the results as a proxy for players' age demographics. The results show that most Fortnite players (i.e., approximately 70%) live at home with their parents or guardians, and, of those who live with their parents or guardians, most (i.e., approximately 80%) identify as students.").

[37] *Id.* ¶¶ 23, 25, 26.

[38] NPRM at 2047.

[39] Children's Television Act of 1990, Pub. L. 101-437, 104 Stat. 996 (1990).

[40] In the Matter of Policies and Rules Concerning Children's Television Programming, Report and Order, 6 FCC Rcd 2111, 2112 (1991).

educational and informational needs of children."[41] Congress did not define this term either, but clearly focused on the programmer's intentions ("designs"). In its first rulemaking to implement the CTA, the FCC's initial definition was overly broad: "programming that furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs."[42] In 1996, the FCC found it necessary to narrow the definition to avoid situations where television stations were claiming general audience programs, or even reruns of programs originally aired in prime time, as educational children's programming.[43] "All of these steps are important to guarantee that we do not return to a time when *G.I. Joe, Mighty Morphin Power Rangers, America's Funniest Home Videos, the Jetsons*, and *the Flintstones* were held up as examples of programs that met the educational and informational needs of children."[44] In other words, the FCC found that the original intent of the program's producer was the best evidence of the target audience, not what some station claimed years, or even decades, later. [45]

For instance, someone today looking at reruns of *The Flintstones* or *The Jetsons* might conclude that they are children's programming because they are animated cartoons, comedic, and have characters that might be attractive to children. Yet both programs were originally produced for, and broadcast in, prime time,[46] where audiences must include adults to generate the ratings that attract advertising dollars to support the program.

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[41] Pub. L. 101-437, 104 Stat. 996 at 103(a)(2) (codified at 47 U.S.C. § 303(a)(2)).

[42] *Id.* at 2114; *see also* 47 C.F.R. § 73.671(c).

[43] *See* Louise Schiavone, *Broadcasters, Lawmakers Wrangle Over Educational Television*, CNN (June 3, 1996, 5:05 PM), http://www.cnn.com/US/9606/03/children.tv/index.html ("Some broadcasters say shows like 'Mighty Morphin Power Rangers' and 'The Jetsons' educate children about life in the future. Cartoons like 'The Flintstones' are informative shows about the past, they say.").

[44] Statement of Commissioner Michael J. Copps on Children's Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-221, 51 (Nov. 23, 2004), https://docs.fcc.gov/public/attachments/FCC-04-221A1.pdf.

[45] In the Matter of Policies and Rules Concerning Children's Television Programming, Report and Order, 6 FCC Rcd 2111, 2112 (1991) ("The *Notice* proposed to define "children's programming" as "programs originally produced and broadcast primarily for an audience of children 12 years old and under. The vast majority and a broad cross-section of the commenters support this proposal. Various parties note that this formulation is well established, thereby providing certainty, and is consistent with legislative intent, industry practice, and the statutory purpose of protecting children who can neither distinguish commercial from program material nor understand the persuasive intent of commercials." (internal citations omitted)).

[46] *The Flintstones* was "the first and longest running animated situation comedy seen on nighttime television." GEORGE W. WOOLERY, CHILDREN'S TELEVISION: THE FIRST THIRTY-FIVE YEARS, 1946–1981 106 (1983), https://archive.org/details/childrenstelevis0000wool/page/106/mode/2up.

Under a similar analysis of "directed to" under COPPA, the focus should be on what the website operator itself says about its website and whom it is targeted to, not what others say about the website,[47] or whether other "similar" websites might be targeted at children.

C. Recommendation: Refocus the Definition on the Intended Audience, as Understood through Objective Factors

The Commission should do now what it should have done in 1999: clarify that an operator's intended ("targeted") audience is paramount, and that evidence of audience composition is only relevant indirectly as evidence of that intention. Thus, the order of the two concepts should be reversed, and the connection between them clarified. Specifically, we propose the following amendment to the existing rule:

> In determining whether a Web site or online service, or a portion thereof, is directed to children, the Commission will consider***, as potentially indicative of the audience targeted by the operator,*** its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence ***regarding the intended audience*** ***as well as evidence*** regarding audience composition ***as potentially indicative of the audience targeted by the operator*** ~~**evidence regarding the intended audience**~~.

The first and last changes will help the Commission defend its longstanding understanding of the statute from any potential future legal challenge; they should not complicate the Commission's continued application of its "totality of the circumstances" test in any way. Flipping the order of intended audience and actual audience will likewise more clearly ground the Commission's approach in the text of the statute ("targeted to").

IV. The Additional Factors Proposed by the NPRM

Some of what the NPRM now proposes to add to the definition of "directed to" does relate clearly to the statute's focus on the intention of the operator—and can be justified in textualist terms: Certainly, "an operator's marketing materials and own representations about the nature of its site or service are relevant" because, as the NPRM says, these "provide

[47] NPRM at 2046.

insight into the operator's understanding of [both] its intended [and] . . . actual audience."[48] It makes sense to add these elements, whether the representations are made "to consumers or to third parties."[49]

But the Commission starts to drift away from the statute's focus—the targeting intentions of the operator—when it adds that "other factors can help elucidate the intended or actual audience of a site or service, including user or third-party reviews and the age of users on similar websites or services."[50] Perhaps these two factors might sometimes be competent indications of audience composition in the absence of direct, reliable measurements thereof, but even then, they would be only doubly indirect indications of what actually matters under the statute: the operator's targeting intentions. These factors might, in some circumstances, be more reliable as evidence of the operator's targeting intentions, but if the Commission believes so, the current rule already allows such factors to be pled like any other "competent and reliable empirical evidence regarding audience composition . . . [or] the intended audience." The 1999 rulemaking drew the term "competent and reliable empirical evidence" from the FTC's longstanding use of the term in its enforcement actions.[51] More recently, the FTC has defined the term "competent and reliable scientific evidence" to mean: "tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results."[52] What the Commission is really proposing to do is to bypass this case-by-case analysis by experts and declare that "user or third-party reviews and the age of users on similar websites or services" are *inherently* competent evidence of whether a site is "directed to" children. Nothing in the NPRM justifies this leap, nor would such a claim stand up in court.

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[48] *See supra* notes 35-38 and associated text.

[49] *Id.*

[50] *Id.*

[51] *See, e.g.*, Removatron Intern. Corp. v. Fed. Trade Comm'n, 884 F.2d 1489, 1498 (1st Cir. 1989) ("The Order defines 'competent and reliable scientific evidence' . . . as adequate and well-controlled, double-blind clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing.'"); Sterling Drug, Inc. v. Fed. Trade Comm'n, 741 F.2d 1146, 1156-57 (9th Cir. 1984).

[52] Basic Research, LLC v. Fed. Trade Comm'n, No. 2:09-cv-0779 CW at *2 (D. Utah Nov. 25, 2014).

A. Recommendation: Drop Reviews & Comparison to "Similar" Sites & Services

The Commission should drop altogether its proposal to add "including user or third-party reviews and the age of users on similar websites or services" to the definition of "sites and services directed to children." If either of these factors is actually competent and reliable in a particular circumstance, it is already covered by the existing rule as "competent and reliable empirical evidence regarding audience composition." The Commission has only to explain *why* either are "competent and reliable" in a particular circumstance. The Commission simply has not justified elevating these from potential factors to the list of specifically enumerated factors.

Two further problems creep into the analysis under the NPRM's approach. First, the NPRM neither defines what a "similar" website or service is, nor does it provide any analytical framework as to how the FTC will decide whether two websites or services are "similar."[53] As commenters have pointed out, virtually all computer games are built using computer generated graphics, in once sense making *LEGO 2k Drive*[54] similar to *Grand Theft Auto V*.[55] Cartoons also run the gamut, from clearly child-directed cartoons such as *Dora the Explorer*,[56] to adult-directed cartoons such as *Family Guy*, and *South Park*.[57] Without further clarification of how the FTC will analyze the similarity between website and services, this standard will become nothing more than "I'll know it when I see it," thus leaving websites and developers at the whim of future enforcers.

What is worse, allowing third-party reviews to color the intent of the website or service provider almost guarantees the weaponization of this new definition. In the same way that negative fake reviews of restaurants (sometimes by competitors) can destroy a business,[58] or fake positive reviews can unfairly bolster a business,[59] what is to stop a similar practice here of spreading false reviews of a website to make it look like it is targeted to children

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[53] NPRM at 2047 n. 153.

[54] LEGO 2K DRIVE, https://lego.2k.com/drive/ (last visited Mar. 11, 2024).

[55] GRAND THEFT AUTO FIVE, https://www.rockstargames.com/gta-v (last visited Mar. 11, 2024).

[56] DORA THE EXPLORER, https://www.nickjr.com/shows/dora-the-explorer (last visited Mar. 11, 2024).

[57] NPRM at 2046.

[58] One report suggests that upwards of 20% of all Yelp reviews are fake. Amanda Marie, *Are Yelp Reviews Reliable?*, REPUTATION X (Aug. 17, 2023), https://blog.reputationx.com/are-online-reviews-reliable#:~:text=One%20study%20suggests%20that%2091,really%20trust%20Yelp%20business%20reviews%3F.

[59] Ashley Belanger, *Yelp Names and Shames Businesses Paying for 5-star Reviews*, ARS TECHNICA (Sept. 21, 2023, 1:05 PM), https://arstechnica.com/tech-policy/2023/09/yelp-names-and-fmes-businesses-paying-for-5-star-reviews/.

under 13? How many third-party reviews saying that ESPN.com is a great place for 11-year-olds would lead the FTC to conclude that it is child-directed?

V. Conclusion

The Commission should use this rulemaking to better ground the COPPA rule in the COPPA statute. Doing so will help to ensure that the Commission continues to avoid legal challenges to its interpretation of COPPA. Because it is both inconsistent with the text of the COPPA statute and impracticable, the Commission should withdraw its proposal to expand the factors specifically enumerated in the Commission's definition of what makes a site or service "directed to children."

Respectfully submitted,

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