

>> Female Speaker: We are delighted to have you here to discuss the review of COPPA. We have five panels today that touch some of the issues that we think are exciting and challenging. There are many, many more issues in our Federal Register Notice, and we invite everybody to please think carefully about them and do submit comments on them. The format we would like to have today, if possible, is a very informal one. We would like the audience to feel free to participate in the discussion. So if there are comments or questions that are pertinent to the point being raised up here on the -- at the tables, feel free to raise your hand and ask for a mic. We're gonna try that and hope that it creates a free flow of dialogue. If it gets too complicated or too disruptive, then we'll go back to just questions and comments at the end of each panel, but let's give that a try. In a moment, I'll introduce our Bureau Director, but I have to make this required statement before we do. This is our security briefing. So, you should know that anybody who goes outside the building without an FTC badge will be required to go back through security and the x-ray machine prior to reentry into the conference center. If there is a fire or another reason for evacuation, we will all leave the building, and we will go outside across the street and stand in front of Georgetown University. One of us will put up a hand and let you know where the conference attendees' section is. So if that happens, just pay attention. In the event that there is any sort of emergency, and it's deemed to be safer to stay inside, then we will tell you where to go. And, finally, if you suspect any suspicious activity, please report it to one of the conference planners, and we will have it looked into. I believe that's it. Um... Oh. Yes, and for those of you who haven't been to this building before, when you exit the conference center, to your right right behind the elevators are the bathrooms -- men and women's bathrooms. We will also have several breaks, brief breaks during the day between sessions, and we're gonna try to keep to those as best as we can. The, uh -- we'll have a few slides with the language of the rule, the pertinent parts being discussed, and also let you know when the breaks are coming. So, uh, finally, I would like to introduce our Director of the Bureau of Consumer Protection, David Vladeck. I think most of you know him, so I'm not gonna say anything more, and we really, really look forward to a productive, open day. Thank you. [Applause]

>> David Vladeck: Good morning, everyone. We are a federal agency on the move. We're actually starting a panel before 9:00 A.M. I'm delighted to welcome you here to day for our 2010 COPPA Round Table. This is a -- we picked an auspicious month to do this. 12 years ago this month, in what now seems to be the dark ages of technology, the Federal Trade Commission issued a report to Congress on privacy online. Our June 1998 report, which I know many of you in this room had a hand in drafting, recommended that Congress "develop legislation placing parents in control of the online collection and personal use of information from their children. The notion was supported by industry and the advocacy community, and just four short months later, the Children Online Privacy Protection Act, or COPPA, was born. At the time, approximately 14% of American children were online. I know this well because at the time, my sons were 10 and 12 years old. Using the Internet for homework -- not much -- informal learning, browsing, games, and, according to our report "corresponding with electronic pen e-mails." Listen to that -- "electronic pen by e-mails, placing messages on electronic bulletin boards and participating in chat rooms." Their growing presence online was seen as creating enormous opportunities for marketers. It also presented safety concerns as children were able to come into contact with strangers without any parental involvement and awareness. And let me just, as an aside, say that the problem that parents face today is a problem they still face, which is by the time your kids are 10 or 12, they are so much more technologically proficient than the parent is that the idea of direct parental control is a difficult one to understand. Now, let's fast-forward 12 years to where we stand today. According to a 2010 Kaiser Family Foundation Study, 84% of youth ages 8 to 18 have Internet access at their homes, and in a typical day, 70% of 8 to 18-year-olds, in fact, go online. The Kaiser study showed that the average young American today spends practically every waking moment, except for the time in school, using a Smartphone, a computer, a television, or another electronic device. So, what do they do when they're online? Activities only computer scientists or science-fiction writers among us could have conceived of in 1998. They visit social-networking sites, they download music, they post and watch online videos, they watch TV online, they create their own avatars and move through online virtual worlds. And the concept of the computer, boy, that has changed, too. Forget the clunky PC with the freestanding tower. Now a computer's something you hold in the palm of your hand and tuck into your pocket. It gives you instant access to the Internet and a host of online services barely imaginable just five years ago. Really, had we ever heard the term "app" before the iPhone? Did we really know that the word "friend" could be a verb? In just a few years

birds have gone from the only things that tweeted to some sort of anachronism. Today two-thirds of all 8 to 18-year-olds own their own cellphones -- just stunning. The statistics are even more astounding when you consider that 31% of 8 to 10-year-olds have a cellphone, and that 69% of 11 to 14-year-olds also own cellphones. So these devices are now ubiquitous. Our rule review, including today's round table, is all about how well this statute, this 12-year-old statute has stood the test of time in light of all these head-spinning technological changes. We're taking a look at this statute even though we did just five years ago because things have changed that much. Today we're gonna ask some fundamental questions about COPPA. Is the basic requirement of prior parental consent still sound? Does COPPA statute's coverage of websites located on the Internet and online services reach the kinds of electronic media children engage in today? How do we deal with the statute's requirement that general-audience websites have "actual knowledge that they are collecting personal information from a child" when we have no real means of verifying age-identifying children? Should the item of individually identifiable information currently set in the CPPA rule be expanded to take account of things such as mobile Geolocation data or information collected in connection with online behavioral advertising. Are the methods for verifying parental consent, such as using a print-and-send form obsolete? And are the limited exceptions sent out by Congress for the collection of children's online contact information without parental consent being adhered to properly? We've got a lot to cover today and in the months to come as we consider possible changes to the Commission's rule. So without further ado, I look forward to a great discussion and to your assistance as we move forward. I'd like to thank our unbelievably talented staff for putting this together -- Mamie Kresses, Phyllis Marcus have taken the lead. I know we're gonna have a productive day. Thank you very much. [Applause]

>> Phyllis Marcus: I'd like to call up the speakers for Panel 1.

>> Mary Engle: Good morning, everybody. My name is Mary Engle. I'm the Associate Director for Advertising Practices here at the FTC, and I'll be moderating the first panel this morning, along with Phyllis Marcus, who is a Senior Attorney in the Division of Advertising Practices, and I'm sure is well-known to everyone in this room as the head of our COPPA Program. The first panel this morning is going to hopefully set the stage for some of the later discussions because it's gonna look at some very basic issues, which are the definitions and scope of coverage of terms like

websites located on the Internet and online services, which, as you know, COPPA applies to the collection of personal information from children through those. So, what are the definitions of those terms, what is their scope and extent of coverage? How have they held up over the 12 years, and do they need to be modified, or how do they cover current activities and things that are going on? So, with us this morning, I'm very pleased. We have a terrific panel to help us explore these issues. Starting to...your left, my right, we have Mike Altschul, who's Senior Vice President and General Counsel of CTIA, The Wireless Association. Angela Campbell, who's a professor at the Institute of Public Representation at Georgetown University Law Center right across the street where we convene in event of emergency. [Chuckling]

>> Male Speaker: Do you come here in an emergency?

>> Angela Campbell: Not that I know of. No, we go to the Tower Green. [Chuckles]

>> Mary Engle: Ed Felten, who is the Director and Professor of Computer Science in Public Affairs at the Center for Information Technology Policy at Princeton. Of course, here's Phyllis. [Chuckles] Jeff McIntyre, who's Director of National Policy at ChildrenNow. John Morris, who's General Counselor and Director at the Center for Democracy & Technology, and Mike Warnecke, who is Counsel at the Entertainment Software Association. So, starting off, um...

>> Phyllis Marcus: I'm gonna put the slide on.

>> Mary Engle: As Mamie, I think, had mentioned, we're gonna have slides just of some of the terms and the definitions that we'll have under discussion today. So, um, you know COPPA covers operators of websites located on the Internet and online services, but only defines the Internet. It doesn't define website, it doesn't define online services. So, starting with the statute's definition of Internet, we're wondering whether this remains a valid description of what we consider the Internet today, and I'd like to start off asking Ed to address that issue.

>> Edward Felten: Sure. Well, so the definition of Internet here is technology-based, right? It's based on the TCP/IP Suite of protocols, which are the basic communication protocols used on the

Internet. That was true in 1998, and it's true today, as well. And so -- and so I think this is, was, and still is a spot-on definition of what Internet means -- worldwide interconnection and the use of TCP or IP or any of that Suite of protocols.

>> Mary Engle: So, uh, how -- how extensive would you say the definition of Internet is, or what does it encompass? I mean, what about, uh, you know, mobile browsers and things like that that we didn't really have back in 1998?

>> Edward Felten: Sure, well, if you're using your -- if you're using your laptop or desktop computer to access anything that you think of as the Internet, that would be covered. If you're using your mobile phone to browse a website, send e-mail or something -- most of the things you would do on a mobile phone, including, say, watching a YouTube video would be within the scope of the Internet as defined here. So it's not focused so much on which device you're using to access the website or online service as it is focusing on the basic network technology. And because the Internet is worldwide and is used by such a wide range of services, this is actually quite broad coverage independent of the access device.

>> Mary Engle: Do any of our other panelists have any comments or different views on this scope of the definition and its currency?

>> Phyllis Marcus: [Chuckles]

>> Mary Engle: Okay, good. [Chuckles] So, we got that much right, I guess. [Chuckles] Um, pretty good back in 1998. Um, well, what about, you know, it's kind of -- to me, it sort of seems like a curious language, "website located on the Internet," that the COPPA statute uses. Does that definition limit the scope of application in any way -- "website located on the Internet"? How does that -- what does that mean?

>> Edward Felten: Well, I think "website located on the Internet," roughly speaking, would cover anything that you can access through your browser on your ordinary computer or mobile phone. So

if you can access it in Internet Explorer or Mozilla FireFox or the browser that's on your mobile phone, for example, then it is a website located on the Internet.

>> Mary Engle: Are there websites that are not located on the Internet?

>> Edward Felten: I think that the distinction here would with something like a corporate intranet, where a company has a website that's set up just for internal use by their employees, and that's not located on the Internet. But if it's generally available, accessible to the public, then it -- then a website would be on the Internet.

>> Mary Engle: Okay. What about the definition of online service? Now, we didn't -- that was -- that term was not defined in the statute or the rule, and it seems -- somehow we seem like we have an intuitive understanding of it, but the way it was used back in 1998 may have been different from the way we think about it today. Does Ed or anyone else want to comment on -- on...?

>> Phyllis Marcus: John is.

>> Edward Felten: John has his hand up.

>> Mary Engle: John.

>> John Morris, Jr.: Sure, I mean, I'll jump in on that. My guess is that, you know, if we really put all the members of Congress up on a lie detector, back in '98, you know, they thought that online service meant AOL or Prodigy because those were big online services. But, you know, there's I don't think a reason to try to, you know, narrow that term. I think the term is fairly broad, and I think there is a fairly, you know, kind of broad understanding of -- of, you know, websites and non-web-based services that are available over the Internet. So, I mean, you know, I think the term "online service" can fairly be read to be -- to be quite broad.

>> Mary Engle: So "online" is sort of a synonym for over the Internet, a service that is available over the Internet or connected to the Internet?

>> John Morris, Jr.: I think that's fair enough. Yeah.

>> Mary Engle: Uh, Angela.

>> Angela Campbell: Thank you. I was Counsel to the Center for Media Education when we negotiated the bill, and I think -- I agree absolutely with Ed that the Internet was intended to be a very broad definition, and online services was intended to be even broader, sort of a catch-all term that would -- would cover any service that was made available through a computer or a similar device connected to a network, and I actually went and looked at some dictionaries from that time period just to confirm my understanding, and the Webster's New World Pocket Internet Dictionary from 1997 defines "online" as "connected to a network or available from a network," and defines "online service -- online information service" as "a for-profit firm that makes current news, stocks, quotes, or other information available to subscribers over a standard telephone line." And Newton's Telecom Dictionary from 1999 defines "online" as "available through the computer. Online may be information on the hard disk, such as online documentation or online help, or a connection through a modem to another computer," and then it defines "online services" as "a commercial service that gives computer users, i.e. its customers, access to a variety of online offerings, such as shopping, games, and chat rooms, as well as access to the Internet. America Online, Microsoft Network are examples of online services." So it was intended to be very broad, obviously included anything on the Internet, but wasn't necessarily limited to the Internet.

>> Mary Engle: Jeff or -- I'm sorry. Mike, did you want to...?

>> Michael Altschul: Well, I mean, I think that the online services today should be viewed in conjunction with the Internet. If we were to take the view that online service applies to any computer network that's not covered by the definition of Internet, it would greatly expand, I think, the reach of COPPA in a way that I don't think was intended.

>> Jeff McIntyre: Okay, here we go. [Sighs]

>> Phyllis Marcus: [Chuckles]

>> Jeff McIntyre: [Laughs] Um, yeah, absolutely. It's got to be broad. Even in the definition of the Internet that we have here, it doesn't just refer to the technological base, but it refers to the possible technological base, which it says, "or any predecessor or successor protocols to such protocols such as a TCP/IP." For us, there's a great concern, as well, when we see the growth of wireless devices, for instance, that the Internet isn't just something that we -- or the concerns about COPPA aren't just simply about web-based access but about communication, and that's the heart of this is communication, and with communication in that, is information being exchanged? Is it going back and forth? Where does that information end up at? You don't need a website for that. You can use that through text-messaging. And now there's some tricky issues once we get into texting, for instance, but -- but, absolutely, that sort of communication, that sort of communication over an Internet where information can be gathered and collected through this purpose absolutely should be opened to interpretation here.

>> Edward Felten: Could I?

>> Mary Engle: Yeah.

>> Edward Felten: Um, so, I generally agree that -- um, that a broad reading of online service is -- makes sense, and that it's not necessarily limited to just the Internet, although I do think it would be limited to some kind of wide area network. Congress wrote the statute with the two sort of branches. One branch is website located on the Internet, and the other is online service, which I read as being -- being broader. So it's not necessarily any network, but at least a service that's provided across some kind of wide area network.

>> Mary Engle: Mike.

>> Michael Altschul: In the parallel universe of the FCC just across the Mall in Southwest, let's slice this baloney a little thinner so that, depending on the network address as opposed to the content, some messages are categorized as communications if they use a phone number, for

example, as frequently happens in SMS Messaging. But if the same content is transmitted by the same user of the same wireless device that uses an Internet address or domain-named system address -- so and so at domain.com -- then it's recognized really to be an information or Internet-access service. While that may strain, you know, some of the applications, in fact, federal courts now have relied on the FCC's distinction, and in the context of enforcing the TCPA, which applies to telephone calls against certain kinds of commercial marketing activities. So, we just need to be conscious of that distinction. They both use IP formats, but one uses something called SMTP, Simple Mail Transfer Protocol, and the other is SMPP, for -- which is the Short Message Peer-to-Peer -- typically what kids and teenagers are using to send messages within a wireless network.

>> Mary Engle: So, Mike, how would that map onto the COPPA statute?

>> Michael Altschul: Well, clearly if the address used to by the user to reach the user is identifiable as an Internet address in the common domain-name system, it's going to easily fall within COPPA. If it uses the -- if a phone number, as is often used in a text message is used as the address, there's certainly, as I said, this parallel universe of law that suggests it's a telephone call and not an Internet service.

>> Jeff McIntyre: I think there are debates that are beginning to blossom, though, that are questioning that. I mean, even in the recent court decisions --

>> Michael Altschul: There were debates and questions at the beginning. [Laughter]

>> Jeff McIntyre: Um, good. Um, [Chuckles] let's continue those because I think that there's a real concern here that if you have, for instance, the example of two teenagers that are using texting back and forth as going over a telephone service, which may not be a problem or open to COPPA interpretation, but if those two teenagers then walk into a GameStop, for instance, where they're texting, and that information is being gathered by that GameStop of, you know, the technology that they're using or how they're using it or even the content of what they're using, then at that point, you've established a commercial purpose, and I think is and can be open to COPPA interpretations.

>> John Morris, Jr.: Again, so far, at least the Federal Court decisions I've seen have gone after conduct like that under TCPA.

>> Michael Altschul: Yeah.

>> John Morris, Jr.: And, I mean, you know, to the extent that -- that some of Mike's wireless carrier members are providing text-messaging services, you know, i think it's actually very unlikely that -- that that would got through anything that the GameStop store could see. If the GameStop store is offering a Wi-Fi-based service, that could well be connected to the Internet. There could well be COPPA implications in that context. But if -- so, you know, it's a little unclear what the GameStop example -- you know, how that actually gets implemented.

>> Phyllis Marcus: Oh.

>> Mary Engle: Anybody? Oh, Angela.

>> Angela Campbell: Well, I just wanted to make sure that everybody understood that whether or not something is an online service or a website on the Internet is not the only determination of whether it's gonna be covered by COPPA. So many things you might be concerned about, you know, wouldn't be, but just to give a real-world example of what Jeff was talking about, um, there's a service called Foursquare, which is currently offering a promotion with Starbucks where a user can go into a Starbucks, and then it's sort of like a game where you check in using your cellphone that you're there, and if you check in a certain number of times, and you get a barrister badge, and you can compete with your friends to become mayor of the Starbucks, and if you're mayor of the Starbucks, which I think you've been there the most number of times, then you can actually get a dollar off a Frappuccino. So there are commercial applications. Foursquare is actually making the data they have -- they get through this service to Starbucks or to other retailers that sign up for this service so that they can get very detailed information about who's checked in, what their gender is, what time of day, what they like, what they don't like -- a whole lot of different information for commercial purposes.

>> Mary Engle: Well, I think that might be a good segue to the next topic we wanted to talk about, which is mobile communications.

>> Phyllis Marcus: Should we open it up for questions and answers?

>> Mary Engle: Oh, okay, all right. Does anybody in the audience have questions about that before we get to mobile? Yes.

>> Female Speaker: Here's a microphone.

>> Male Speaker: What about noncommercial? Though I know that COPPA specifically says "commercial," there's the problem of noncommercial services, such as BitTorrent. How do we deal with those?

>> Mary Engle: Well, um, you know, I think -- I mean, the question in terms of -- I mean, there's a -- whether BitTorrent is online services -- we had a little bit of a discussion about that, but, you know, the FTC, the scope of our -- our jurisdiction authority extends to commercial services. I think BitTorrent is - I mean, obviously companies that use BitTorrent are in commerce, so if they're otherwise covered in some way, then we're there. But I don't think that -- you know, that protocol raises a particular issue. Does anyone feel any differently?

>> Jeff McIntyre: I'll say one small thing just kind of in support of what Mary is saying that when you look at BitTorrent or when you look at other sort of technological -- I hate to call it platforms, but when you look at these sort of processes, one of the things that's really easy to do for regulators and consumers and politicians is very quickly, you get kind of glassy-eyed when we start talking about the platforms that are available, and suddenly we can shift the conversation away from where it's supposed to be in this, which is about children, and suddenly get much more caught up in kind of the TCPs versus the IPs versus the iPads, iPhones, iPods, et cetera, et cetera. It becomes very technologically based. The heart of COPPA is about protecting children, and so each time that we have these sort of discussions and the questions about a different sort of platform or a different sort of technological basis, for the advocates in this arena, what we're -- each time what we're gonna try

to do is bring it back to the simple question of, is it good for kids? Does it protect kids? Does it put kids at risk? If it does, based on where the current research shows it to, or where the public-health community believes that it does, then, at that point, we're gonna start asking much more basic questions other than about kind of the technological platform and however that may empower, disempower that risk.

>> John Morris, Jr.: Let me just -- I'm all for a broad reading of applicability of COPPA. You know, I think we all, you know, do want to protect kids. You know, on the other hand, if it's good to protect kids, but it's outside the statute, then it's outside the statute, and, you know, it may be a good idea to protect kids, but -- and, you know -- no, I mean, in a particular way, but -- but if it's outside the statute, it's outside the statute. So, I mean, you know...

>> Mary Engle: So, for example, if children now had a children's area on its website, you know, you're not in commerce. You're not a commercial firm that would be accepted to the FTC's jurisdiction, so, technically, [Chuckles] you know, it's that sort of thing. There are limits on our jurisdiction in terms of who we could actually pursue. Yeah.

>> Jeff McIntyre: And I think that's a valuable question, as well, then, because it also opens up other nonprofit companies, if you will, or nonprofit organizations, on whether they should have more oversight. Does National Geographic, does Discovery/Hasbro, does, you know, these other sort of -- does Common Sense Media? Do these other groups that have that, um, should there be some sort of privacy consideration as they move forward?

>> Phyllis Marcus: Do we have another question?

>> Mary Engle: Question down here.

>> Michael Altschul: I just wanted to --

>> Mary Engle: Oh.

>> Phyllis Marcus: Hold on, Mike. One second. Oh, okay. Go ahead, Mike.

>> Michael Altschul: I wanted to endorse John's statement that we can't read commercial out of the statute, and it's very easy to imagine elementary school setting up some kind of site that allows its students to communicate and share information with one another over the Internet, and certainly personal-identifying information and other information otherwise included under COPPA would be potentially available and be available for use by third parties, who, uh -- if the site wasn't properly accessed-controlled. But, again, that would not meet the commercial definition that's part of the statute.

>> Mary Engle: And it's not just that commercial definition, but also elsewhere in the statute, it refers to the extent of the FTC's jurisdiction is the extent of the jurisdiction we have under the Federal Trade Commission Act, which is limited to practices in commerce.

>> Phyllis Marcus: I think we had a question --

>> Mary Engle: One question down here, and then...

>> Female Speaker: Yes.

>> Denise Tayloe: Good morning. Denise Tayloe with Privo. My question to the panel is specific. "American Idol" says text in a vote. I send it in with my cellphone, they collect my cellphone number. It's now in their database. Is that under COPPA?

>> Mary Engle: Mike, you want to handle that?

>> Michael Altschul: Well, I -- [Chuckles] I think that there's a larger body of law that I admit I'm not an expert in as to what kind of information the promoters of "American Idol" have as to their audience and what are the purposes that they're doing their outreach, and perhaps some later panel will be better suited than at least I am to answer that question.

>> Mary Engle: Anyone else on the panel? Ed?

>> Edward Felten: Well, uh... Uh, I think texting in votes is certainly something that occurs online. I think you could make a good argument that depending on the details of how this works, that it could be an online service within the scope of COPPA. As to whether there is information gathered that is personal information within the scope of the statute, that I don't know.

>> Angela Campbell: Um, I would also add I think it is an online service, but not only do you have to also then show that it's personal information as it meets the definition of that, but also that they know it's from a child, and, you know, that's a factual question they may or may not know, so it could be, and it may not -- maybe covered by COPPA, it may not be.

>> Mary Engle: And later panels will explore those issues.

>> Phyllis Marcus: Right.

>> Mary Engle: Susan, you had a question.

>> Female Speaker: Yes, I'd like to go back to the question of what is commercial and what is not commercial and your example of a school website. What if there's advertising on the website -- on the school's website? Or what if the website is funded by a commercial company? Then what?

>> Michael Altschul: I think those are two different questions. Certainly there's a model in the area of both schools and not-for-profit organizations where some kind of sponsorship does not change the legal status of the activity, but certainly when something is actually sponsored by a commercial firm for -- for a school, let's say, that is part of that commercial agreement, the commercial entity is entitled to information, I think that -- under that circumstance, it would fall under the commercial purpose. But, um, the kind of ads that, you know, are in the back of high-school yearbooks and so on that may enable it I don't think would change the purpose of the bulletin board or website.

>> Phyllis Marcus: Want to go back to the...? Yeah, yeah.

>> Mary Engle: Okay, going back to -- we've touched on quite a bit, actually -- is mobile communications. And, you know, we have been very clear that when a child can access the web or a WAP site through a mobile device and can provide or disclose personal information through that, that that is covered by COPPA, that COPPA applies. Um, and I just wondered whether there's any disagreement among the panel about that?

>> Michael Altschul: Well, you know that we had a FreeCall, and I think that all of us agree that any -- any kind of Internet site that you can access over a desktop can also be accessed today over a mobile device. And I should say that's true using a commercially licensed spectrum, as well as the kind of Wi-Fi access that's available in this room and, you know, increasingly in all other rooms. But the devices are increasingly agnostic as to what kind of spectrum they interconnect with to access content on the Internet.

>> Mary Engle: So, um, let's talk a little bit more about the types of online services that can be accessed via mobile devices. We heard about Foursquare, for example, that Geolocation Angela mentioned, and others. I probably should have -- if my 12-year-old were here, she could probably tell more about what she does on her Smartphone and the types of apps and services than I personally use. So, anybody want to volunteer to talk about what kinds of online services or services that, you know, we would agree are covered, can be accessed through mobile devices? Angela.

>> Angela Campbell: Um, well, I went on my iPhone and looked at the apps, and there's actually quite a large number of apps that are specifically designed or appear to be specifically designed for children to teach letters and numbers and things like that. So I think, again, you can't just say all apps are online services or all apps are not online services. Some of them will be, some of them won't be. If the apps do allow children to receive targeted advertisements or to purchase goods and services, to play games that are connected to a network, to obtain information, to get access to the Internet, those would be examples of online services that could be subject to COPPA. If you're

just, you know, downloading a game, and you're just playing a game on your phone, and there's no network connection, then that would not be an online application and service.

>> Edward Felten: So, um, the way that this part of the statute is structured, it matters not so much what is happening on the end device, whether you're in a browser or in, say, a mobile-phone app. What really matters is the nature of the service and how it's provided across the network. If it is either a website provided across the Internet, or if it is an online service under the broad understanding that -- that we generally seem to share here, then, regardless of whether it's access on a mobile device or a stationary machine, regardless of whether it's accessed via website or via an app, it would still be within the scope of COPPA. Again, it's the nature of the service.

>> John Morris, Jr.: I mean, I would suggest that -- you know, that we be precise to figure out who might be covered. I absolutely agree that if there is an app on my Android phone -- I don't have an iPhone. But if there's an app on my Android phone that accesses an online service, that goes out and retrieves information, or, you know, allows me to post information, there's clearly an online service involved. There's clearly COPPA applicability, but I would suggest that -- that the -- the software designer of the app may not be an operator of an online service. He or she may just have written a piece of software and made it available and then had no further connection to the communication, no -- you know, no later involvement, and so for that kind of individual, I would say that the designer of the actual software is probably not an operator of an online service, but to the extent that software connects to an online service, then -- then absolutely. The operator of the online service is COPPA covered, and so, I mean, you know, I think that one just needs to be precise when we're talking about apps as to who might be COPPA covered.

>> Edward Felten: Just if I could expand a little on what John said, and I agree with that. If you look at an example like Foursquare, which is a service for recording your location over time and publishing that information. Foursquare is an online service, and you might access it via the web. You might access it via, say, an iPhone app that came from the Foursquare company, or, in principle, you might access a service like that via an app that was written by some third party, and, as John points out, in a case like that where you're using an app that was provided by a third party, which does nothing more than connect to Foursquare servers and provide information to

Foursquare servers, it seems to me that Foursquare is -- the company is providing the online service, and the app developer is not necessarily an operator of an online service as the -- as the -- as the statute would have it. Also, by the way, the operator of, say, the wireless network that is used to transmit those bits up to Foursquare, in that scenario, also, is not the operator of the online service.

>> Michael Altschul: Ed's part of this panel I like the best. [Laughter]

>> Jeff McIntyre: I would indicate a great amount of comfort with this because it definitely begins to draw some lines into some areas that can be gray and can be an area where some kind of a tricky definitions could come up on this. I think what's important with this is that as it's been -- it's -- well, it is. It's cliché to talk about the technology moving so fast right now, and so I think the trick for the regulators in this instance is being able to write language for a proposed regulation in this area that is broad enough to be able to still apply to the dynamic of collecting information on technologies that we may only really kind of grasp that are out there to be able to kind of get an idea of protecting that dynamic of information collection around children. And the trick to that is being able to be specific, like you're saying, to be able to protect the software developer, and, instead, go to Foursquare or the online operator that may actually be collecting that information. But, you know, we look back now at 1997 and 1998, you know, technologically, as kind of the quaint good old days with, "oh, God, how did I survive with dial-up?" Um, you know, we want to be able to make sure that we allow the language here to not just pull out the specific instances and then give hard regulations about what we know that exist, but also to be broad enough to be able to apply itself so we don't find ourselves and the Federal Trade Commission isn't outdated within 18 months.

>> Michael Warnecke: If I could add something on that. I mean, I think it's important when we're looking at these scope issues to also consider the fact that not all instantaneous communications are necessarily going to fall within the scope of COPPA. I mean, you could have a situation where the communication is not utilizing the Internet, where it's not utilizing a worldwide network of networks, but that personal information is being communicated. So, for example, let's say that six people in the audience here had generic tablet computers, and those tablets had a dual-connection

mode that would allow the users to connect to each other either through the Internet or in a limited geographic region through another technology that doesn't involve a wireless access point or any cables. Now, in the first instance, yes, the Internet -- the definition of Internet would apply. But in the second instance, that instantaneous communication through a local, very defined geographic area, that I would argue would not. And so we need to be careful when we're looking at how broadly it applies to new communications to keep that in mind. And I think that would even be consistent with what Ed was saying earlier about even online service would have some limits in terms of how broadly it would be defined.

>> Mary Engle: So in your case, the tablet communications would be neither website located on the Internet nor an online service.

>> Michael Warnecke: That's my position, yes.

>> Michael Altschul: And there are some -- I think the software writers have locked down the vulnerabilities, but there are certain kinds of access ports to wireless devices, Infrared and Bluetooth, that there were commercial applications being designed to sort of capture the information about that device -- the phone number and other aspects of the device -- for people who are just walking by an airport concourse or whatever that was enabled to read and capture that kind of information that's not going over the Internet, but it certainly would qualify as PII under, you know, many contexts.

>> Mary Engle: We have a question from the audience.

>> Matt Galligan: Matt Galligan from SimpleGeo. I'm on one of the panels a bit later, but they've talked about -- you've talked about computers, mobile devices, but there are many other connected devices that can access the Internet or wireless protocols. Great examples would be video-game devices, so Xbox, and specifically speaking to your point, the Nintendo DS comes prepackaged with a bit of software called PictoChat, and PictoChat can create a local network where anybody that is on that local network can communicate with other people. That completely circumvents the Internet, but anybody that is actually connecting to that local network can communicate with each

other, and so it could be, you know, the 10 DS users around, or it could be the 10 DS users around, and the 11th that's sitting outside of the building that could be communicating with those 10 people, and so that software itself is providing communication, but it is -- there are potential dangers there with the communication that is going on because it is circumventing the Internet completely, but it's meaning that there are other people that are being connected locally through a similar service that you would find on the Internet.

>> Mary Engle: Matt, that's an excellent question, and I'm gonna ask the panelists to hold the answer because we're about to get to interactive gaming, but thank you for raising that.

>> Phyllis Marcus: Um, okay, so we've been --

>> Mary Engle: Oh.

>> Phyllis Marcus: One more?

>> Mary Engle: One more question from the audience.

>> Shai Samet: Is it on? Shai Samet with kidSAFE Seal. You know, I just want to go back to a comment that was made earlier about the question that was asked by Denise regarding the "American Idol" text submission. I'd like to understand. It seemed like there were some contradictory remarks as to whether that would be covered or would not be covered. I'd like to understand what is it about this definition that would cover the submission of a text message back to "American Idol" in that example.

>> Mary Engle: John, do you want to start with it? [Chuckling]

>> John Morris, Jr.: I'm not sure I do, but, um... [Laughter] You know, if -- you know, I think Mike was suggesting that, you know, if it's a pure telephone call not using an Internet-based address, that possibly it is not covered by COPPA. You know, my impression is that the wireless companies are pretty sensitive, you know, on COPPA issues in general, and so I'm not sure it

actually makes a difference in terms of their behavior as to whether it's online or offline, but I think one could argue that if it is just a -- something that happens on the telephone network, that it's not covered by COPPA.

>> Edward Felten: I would disagree with that to the extent that I don't think that something being provided across, let's say, text-messaging as a medium would necessarily put it outside the scope of what is covered. Something -- a service provided via text-messaging, for example, might be an online service. It would not be a website provided on the Internet, but the Internet limitation applies only to the website side of the fork, if you will. Now, in the case of "American Idol," it does seem to me that there's a reasonable argument that collecting votes could be seen as an online service. But whether this meets the other requirements of the statute collection of personal information and knowledge that there's a child and so on, that I don't know.

>> Michael Altschul: We had discussed that factor, the knowledge of the child, which is really a fact-based inquiry. Television producers spend a lot of time targeting and knowing the demographics of their viewers and targeting advertisements -- to selling advertisements based on the demographics of their viewership. So you'd have to determine -- I don't -- I'm weak in popular culture, so I can't tell you who advertises on "American Idol," but whether it's a -- products that are designed to be purchased by people who are older than 13 or under 13 would be part of the fact-based inquiry.

>> Mary Engle: Well, that is the separate issue, and I think -- so -- I gather we really don't have agreement at the table about whether text messages like that, those kind of voting that we see in "American Idol" are covered right now.

>> John Morris, Jr.: You know, I was not kind of trying to urge disagreement. I was -- you know, I think one could make an argument that -- that if it is wholly on the telephone system, it might not be reached here. I'm actually personally quite comfortable with Ed's pushback to say that -- that this could easily be an online service. You know, again, Mike is correct to say it's not clear in most texting context whether there's any direct knowledge, and I have no more cultural knowledge than

Mike does, but I don't think that "American Idol" is aimed at the 12-and-under set. I think it's more aimed -- but I may be wrong.

>> Phyllis Marcus: We have, I'm sure, some disagreement on that in the room. [Laughter]

>> Mary Engle: It's really a separate issue, I think.

>> Phyllis Marcus: Right, right.

>> Mary Engle: But I think this is an area where we'll definitely want written comments. So it's something to keep in mind as you're preparing written comments that particular issue. Is that something that is clear or something where we would need clarification, and that's gonna apply throughout a number of other issues.

>> Phyllis Marcus: Right.

>> Mary Engle: You know, as you know, we have more flexibility in how change we make to the rule. If there needs to be a change in the statute, that's something that Congress will need to do. So any views on this issue would be very helpful to us.

>> Edward Felten: Mm-hmm.

>> Jeff McIntyre: I might offer in this -- I don't think that this reflects a disagreement as much as it reflects kind of a threshold or a burden by which then other panels may explore today that, um, if this is a text-based service, if -- if they determine that information is being collected, if it is determined that a child is submitting that information, then, at that point, I think the burden shifts, and we can kind of reframe the conversation then about whether this -- this particular instance of the "American Idol" issues becomes then an online service. If those other things are held up as -- as verified, if they are children and they are submitting information, and it is collected, then that, I think, reframes this conversation.

>> Michael Altschul: It's a -- may not be the best example, 'cause, as I recall, 800-number voting is the alternate mechanism for voting on "American Idol," which [Chuckles] is just a traditional telephone-network activity, and the particular architecture used for this kind of short-message service is a virtual private network architecture. Nothing is being translated or flowing over the traditional networking networks.

>> Denise Tayloe: So, um...

>> Mary Engle: Well, hold on, Denise. Let's -- let's keep moving through our questions.

>> Phyllis Marcus: Um, so, kind of related to the question of what information -- you know, in the case of "American Idol," they're texting in votes or just voting for somebody, but in other situations, information may be being collected, personal information, from the person or the child, and I'd like to have a little bit of a discussion about that. What types of personal information are collected through apps, and how does that vary, and is there more active versus passive collection of information?

>> Michael Altschul: Well, one piece of information that typically will be collected will be the telephone number associated with the wireless device, and, um, the COPPA statute does identify telephone numbers as -- as personal information. Interestingly, the Telecommunications Act, and Section 222, which deals with similar kinds of issues, thanks to the lobbying activities of directory publishers, does not include telephone numbers and name and addresses for identifying information, so we end up back on the horn of the dilemma -- is a message sent using a phone number going to fall under the rules, the Communications Acts rules for telephone-call messages, or will a message sent using an IP protocol fall within COPPA and have the telephone number be treated as personal information. Another increasingly frequent source of information is location information. Location information is not provided without notice and consent to the customer and subscriber. Oftentimes the user child may not be the subscriber to the service. It would be the parents on a family plan, and, you know, depending on the application, when it's downloaded, for example, if you download Google Maps to your wireless device, there will be a long, you know, terms-of-use license agreement which provides notice, and presumably customers give consent to

then provide that location information in using any location-based services enabled by their software. So those are the two fundamental pieces -- the telephone numbers provided by the network and location-based information today, and it's changed just in the last two years or so, increasingly is provided by the wireless device without the involvement of the wireless carrier.

>> Mary Engle: John.

>> John Morris, Jr.: I'm just gonna, you know, toss out that -- that you should be aware that there is a huge diversity of information that -- that technology designers are designing the platforms to allow to be transmitted from the device. I'm very involved in an ongoing standards discussion at the Worldwide Web Consortium that where we're discussing the privacy implications of -- of this kind of device's ability to be able transmit to a website the ambient temperature in the room, the ambient noise level, the light level -- you know, a whole range of environmental facts, some of which could have, you know, privacy implications. I mean, you know, one could actually determine, you know, where someone is not. You know, you could rule out locations by knowing, as they're, you know, thinking about doing, you know, the barometric pressure. I mean, there are devices that are being designed that will, you know, be able to convey the barometric pressure, and you can say, "well, I know that that person cannot be in this location if the baro--" you know, so there's a huge diversity of information. So you shouldn't focus on just what's available now. You should, you know, recognize that there's -- there are things coming down the pike, applications and devices that we really haven't kind of seen in the market yet.

>> Mary Engle: And that's gonna -- you know, later one we'll have a discussion of what constitutes personal information, and, as you know, one of the elements is, is it allows you to contact a child online or offline. So perhaps that type of information will be relevant to that you know if they're standing outside or they're inside the building, for example. Okay, um... [Speaks indistinctly]

>> Phyllis Marcus: Yeah, sure. Um, in helping us think through the information that's collected through mobile apps, does it help for us to divide them between information that's actively provided by users and information that's passively collected from a user on the device, or perhaps between

applications that a user must pay for versus those that are free? I'll throw this out for the panel. Anyone?

>> Edward Felten: Sure.

>> Phyllis Marcus: Ed. [Chuckles]

>> Jeff McIntyre: Perhaps someone could define active and passive for those of us?

>> Phyllis Marcus: Maybe Ed can do that for us.

>> Edward Felten: Well, I think what's intended here is to draw distinction between information that is actively entered by the user versus information that's just gathered.

>> Phyllis Marcus: Right.

>> Edward Felten: So something like the barometric pressure, if the device can measure that, leaving aside whether it's personal information, that's information that is collected by the device of its own accord. A physical location also might be collected by the device as opposed to information like the user's name, which is going to be -- inherently going to be entered by the person. So it might be useful just in thinking these things through to think about those cases -- to divide those cases, although the language of the statute would cover them both. It just talks about information being collected.

>> John Morris, Jr.: But I'm -- and I'm gonna completely agree, but you also -- you might even need to have a third category, or at least recognize that in the passive category, you know, when you install an app on this device, at the time of installation, it will tell you the seven different data points that this app uses and transmits to the network, and you have to agree to it. So, um, you know, I suppose you might view, then, that as passive after you've done the agreement, but so there is passive data collection that there's been no consent, no notice for at all. There is somewhat

passive data collection where you agreed when you installed the app that this could be transmitted, and then there's what you're actually typing in.

>> Edward Felten: So the consent issues are likely to be different in these cases, or at least the way you think about consent, it's likely to be different in a case where a user actually actively types something in versus one where it's gathered maybe with some kind of consent in advance, maybe not.

>> Michael Altschul: To complicate it even further, there's the concept of implied consent, which is neither active nor passive, but somewhere in the middle. The granddaddy of this kind of consent is for 911 calls or, more recently, for concierge-type services where you want driving directions. So in dialing 911, the justice department has opined that the caller wishes to disclose their location so they can be rescued or assisted by the dispatcher without ever expressly consenting to provide their location information. In using a location-based app to find the nearest gas station, you can extend that to say, "well, if I'm looking -- if I've asked the app to provide the nearest gas station, I'm consenting to provide my location so the app can figure out where I am to find the nearest gas station.

>> Jeff McIntyre: I'd like to make just a quick shot at getting some unanimity on this just to make sure. No one on the panel is talking about getting informed consent from a child. That is, we talk about loading these applications and loading these apps that the idea of getting informed consent from a child underneath the age of 13, much less any younger ages, is something that does not exist. Children developmentally cannot make that decision for themselves, should not make that decision for themselves, and don't have the developmental capacity to be able to do that, and any commercial application that relies on that in any capacity then absolutely falls under this. When we're talking about consent then, at that point, what you're talking about is parental consent for that application used by a child, and that's a very different thing. If we're talking about location devices, that's a little different. That begins to get into a gray area, at which point, then we begin to argue about the definition of commercial intent. You know, GPS Locaters, no problem, OnStar, no problem. That sort of stuff -- no issues in the public health community for that sort of stuff. In fact, you'll probably find a great amount of advocacy for that sort of stuff, but once that turns into a

locator device to let you know, as Angela's example was earlier on, that when you're pinging that you're in Starbucks, you're able to get points for that based on your location, then the question changes a little bit.

>> Mary Engle: Right. And what you've pointed out is COPPA's regime. It was not consent from the user itself, but consent from a parent that was anticipated.

>> Jeff McIntyre: Yes.

>> Edward Felten: There's one more piece of your initial question which we haven't addressed yet, and that is whether an app is free or cost money, and I don't think that matters in itself. The statute requires that the website or online service be operated for commercial purposes, but often a website or service that's operated for commercial services provides an app for free to a user, which is their interaction with, and if that's the case, it would still be covered.

>> Mary Engle: Sure. Okay. So, turning now to interactive gaming, which somebody earlier asked a question about, and we wanted to address more specifically. So, would a company that offers interactivity on a gaming device, whether a handheld or a console, be an operator under COPPA?

>> Phyllis Marcus: Mike.

>> Mary Engle: Mike would you like to take that?

>> Michael Warnecke: Sure. Uh, perhaps, but I think you need a little bit more information to answer that question. I don't think mere interactivity alone is determinative of the answer. You would have to figure out what the device maker is doing with the information that it's receiving, and if it's merely passing it through as a conduit, then, no, I don't think that interactivity would make them an operator. If, however, it's collecting and maintaining that information, and if it's doing so in a way that it's aware that it's directed to children or that it has actual knowledge that kids under 13 are involved, then -- then you would maybe be an operator. You'd have to look at the

FTC factors for being an operator, but I think the main point here is that mere interactivity alone is not determinative.

>> Mary Engle: Can you refine that distinction? What would be a type of interactive gaming activity that would be a conduit only?

>> Michael Warnecke: You could have a situation, for instance, where there is a web-browser capability in the device, but that the operator isn't collecting any -- the game-device operator -- or, I'm sorry. The game-device maker isn't collecting any information, but just enabling the user to access the Internet.

>> Mary Engle: Does anyone have refinements on that? Angela.

>> Angela Campbell: Well, it's clear that COPPA covers chat rooms, and it seems to me that you could have a situation where kids are communicating with each other on their DS, for example, and it really is the equivalent of a chat room even if the information is not being necessarily collected and used, so I think in that situation, again, parental consent would be required.

>> Mary Engle: Well, yeah. I mean, we had some earlier, I think, opinions that if it's just of a local network -- so a few kids in a room chatting with each other, I think we heard an opinion earlier that that would not be covered. It was not going over the Internet. Is that -- or is there a difference of opinion on that?

>> Angela Campbell: I don't think it has to do with geographic location, necessarily. I mean, I think it has to do with whether it's really a chat room or kids are disclosing information where parents don't have any control over who is actually getting that information, and parents have to consent to that if they want their kids to be able to do that under COPPA.

>> Michael Warnecke: I mean, a couple responses to that. First off, I think that goes to the basic question that we were addressing earlier, though, that there are limits on the scope of COPPA. It does apply only to certain networks, not to every, you know, local communication that may occur.

But secondly, I think a larger point to make is this -- that the consoles have built within them parental control functions that will allow parents to limit this information at the get-go. And so I think when we're considering these issues, we need to be aware of that backdrop of parental controls that specifically allow parents to address those issues.

>> John Morris, Jr.: And, I mean, I would push back a little bit, you know, for -- you know, for a DS that allows, you know, essentially peer-to-peer communication within the room, within, you know, the distance of a Wi-Fi signal. You know, every single computer laptop available can do that, and so my question is -- and since my child could take this laptop, could create an ad-hoc wireless network, and could communicate with another child in the same room on an ad-hoc wireless network, there is nobody else involved in doing that. Does Apple in this case have a COPPA obligation to get the parents' consent for that communication? I would say that's not really workable. I'm a little, you know, kind of anxious about the idea that the maker of a device that has Wi-Fi capability has a COPPA obligation without more, without being somehow involved in providing an online service that allows communication. So I'm a little -- I'm worried that we're going too far here.

>> Mary Engle: So, who is the operator? Like, Angela, who would you consider then who would have the obligation to get parental consent in that situation? Nintendo, who makes the DSi, or who?

>> Angela Campbell: Well, I mean, there's a lot of questions, and I think there's probably some gray areas here, but I think you have to go back to what the purpose of COPPA is to protect children and to provide a way for -- for parents to know when they're interacting with complete strangers or where other people may be collecting information about them, and so, you know, I don't -- you know, I think you have to talk about a specific situation, so...

>> Jeff McIntyre: If I may offer this. I mean, if we can get guarantees that these sort of communications are happening in a closed network, you know, I got no problem with that. We're essentially talking, to use a 1970's reference, to nothing more than just kind of like CB radios. If kids are talking, you know, to each other through whatever technological platform, and it's staying

refrained within that space, I don't think there's gonna be an issue. The problem here is that the way that technology is formed is that it allows for loopholes in that, and that's where we're concerned. We don't want to overburden the technology or kind of point fingers where they don't need to be pointed, but if I'm convinced that it's six 12-year-olds that are talking, not an issue, but if it's six 12-year-olds and a marketer from McDonald's is suddenly thrown in the mix, they can collect information, which will come up in later panels, then at that point, um, it's an issue. It's the collection of information, and it's distributed. It's just a matter of kind of how we pinpoint where operator and which is the most appropriate definition for being able to apply the regulations.

>> Michael Altschul: Doesn't that read back into the statute the commercial purpose, which, you know, we can't read out, and there are different models for chat rooms. Some may be sponsored for free to attract, you know, for a commercial purpose. You find out who -- who's interested in your products. Other kind of commercial chat rooms may be offered on a subscription basis. That would also be a commercial purpose.

>> Jeff McIntyre: Yeah, absolutely. I mean, we see that the trend in gaming, especially these days, is towards a much more individualized sort of experience. I don't think there's anybody among us that wants to be able to inhibit that sort of technological growth or that sort of individualized experience for the gamer these days, as well. The trick comes in, then, making sure that this isn't a interpretation based on exception, but is based on rule instead and still be -- is able to take care of the spirit of COPPA while still adhering to the original regulations.

>> Phyllis Marcus: Well, I would like a follow-up question, then, to ask a follow-up question of Michael. Um, most gaming systems, I would say all three of the big three offer parental controls as options. But in your opinion, is that done as a best practice or because the manufacturers have determined that COPPA applies to those interactive gaming capabilities?

>> Michael Warnecke: Well, I can't opine on the specific motivations of any one company, but what I can say is this, is that there are interests here that go beyond merely protecting children for purposes of COPPA compliant. There are brand-protection issues, there's issues of enabling parents and developing a good rapport with parents to make sure that they have a comfort level

with the technology, that they feel comfortable with kids using them, and that they have some level of control over what they're engaging. So I think the desire to help families provide a safe entertainment experience for their children is the key motivating factor there, and, you know, this is something that was, you know, in place, and was done apart from the COPPA compliance, but it's an example of how the marketplace already has some features in place to address these issues, not necessarily just for legal-compliance reasons, but because of a desire to enable families to enjoy games in a safe manner.

>> Phyllis Marcus: Fair enough.

>> Edward Felten: So, well, in thinking about this issue of when a game console company might be an operator, it seems to me there are three cases that are worth -- three sort of basic cases that are worth thinking about. One of them is the one that Michael pointed to at first, where the game console provides, say, a web browser, or a way to access something that occurs elsewhere. Let's say you can use your game console to access Facebook. In that case, there probably is an online service or a website on the Internet involved, but the game console maker is presumably not the operator of it, and so it would be Facebook or whoever else who would have any obligations under COPPA. A second case which we've talked about is the case of communication within a room, let's say, between devices of three kids who have Nintendo DS devices, and they're chattering with each other while they play, and -- but they're not connecting to a wide-area network for this purpose, and, to me, that's not an online service because it's not online, or it's not using the Internet. And the third case is, let's say, a chat room which is accessible via the device and which is really available to everyone in the world on which to chat, and, there, again, you have an online service, or you have a website, and you have to ask who's the operator of it. If it's the game console company, also, then, yes, they might have some obligation.

>> John Morris, Jr.: Just to kind of add on to that. I think this discussion highlights a critical need for -- for the Commission to, you know, not only ask about and imagine what is possible, but look at what is actually plausible and likely. Because, I mean, certainly I could envision a world where McDonald's sends people out into the neighborhood with their DS light, and they create a network, and they hope that people, kids in the neighborhood get online, and then they can market to them

without having touching an online service, and so maybe they're not COPPA compliant, but that seems pretty unlikely to me at least today. I mean, it seems to me that -- that, you know, the great, you know -- most of the motion toward -- you know, in technology development is toward greater interactivity, greater connectivity to online resources. I think that it is very likely that most services that we're gonna see are gonna have an online component, an online-service component, and even if we can imagine marketing to kids technologically being done in a way that circumvents COPPA, you know, I would suggest that until we actually see that kind of behavior happening, it's not something we need to expand the reach of COPPA to envision a technical possibility when it's, in fact, not a practical market or likely possibility.

>> Jeff McIntyre: The exceptions always make for bad rules on this, just as we've seen in terms of --

>> Mary Engle: But good conversation.

>> Jeff McIntyre: ...of text-messaging and of closed chat room within gaming sites and whatnot, as well, and I would argue that -- I think Google does this already a little bit. I'm able to pull up a photo of my front yard, my front door, my truck, and the gear that I have on Google right now, and I can zone in -- I was looking for a friend that had bought a house recently in a nearby neighborhood, and I was able to pull up almost every information, including I could zone in and see something that he had placed in his front window based on the Google website, and this is from Google driving around, you know, with their camera on the top, and so I don't think, in this particular example, which may not be the greatest example. I don't think it's as much of a reach to be able to say that we may be able to begin to see location-based networks grow up, that marketers and advertisers are able to use for their own purposes of gathering information.

>> Mary Engle: Okay, we just have a few minutes left, and there's a couple more topics that we'd like to cover, so we'll move on now to interactive TV. Actually, we have more than a few minutes, right?

>> Phyllis Marcus: Yeah. No, we're good -- until 10:30. Yeah.

>> Mary Engle: We're good. Okay. I was thinking 10:15, but... Um, so, interactive TV is a broad term that can cover anything from using a wireless remote to purchase products advertised in a commercial or changing the actual close of a show that you're watching, and so we're wondering when would a provider of an interactive TV service be considered an operator under COPPA, and, you know, I'm sure, as everybody knows, we're getting closer and closer to interactive TV being something that people are actually doing and using way more now than just a few years ago with some recent announcements. So, um, um, John or Jeff, do you want to take a stab at that?

>> Jeff McIntyre: [Chuckles] No, really, after you. [Laughter]

>> John Morris, Jr.: Well, being a cultural Luddite, and, as far as I know, I've probably never used interactive TV. I'm not sure I'm the best source, but, I mean, you know, again, I actually would come back to what I just said a moment ago. You know, I think that, um, you know, whatever interactive TV was 5 or 8 years ago, you know, may have been being done, you know, using proprietary signals between the cable network and the home box, and thus conceivably might skirt the, you know, the TCP/IPness of -- that COPPA suggest for the Internet definition, but my impression is that, again, you know, more and more things that are interactive are, in fact, tied into things on the web, things, you know -- I mean, we're not moving to a world, you know, where interactive TV is gonna be siloed off by itself. It's all gonna be a -- you know, I think, a single, rich experience, and my guess is that that experience is most often going to involved something that is pretty clearly an online service, and so, you know, I'm not sure that all interactive TV, whatever that was 5 years ago, would necessarily be an online service, but my guess is -- is that the interactive TV of today and the interactive TV of tomorrow will likely involved an online service and thus likely would be covered by COPPA.

>> Phyllis Marcus: Angela?

>> Angela Campbell: Yeah, I would agree. Again, I think the statute covers it. I think that we knew back in '98 that digital television was already being talked about. We envisioned it as being able to connect to websites or in website-like services, and, in fact, the way it is developing is a

way that you can get more information about products. You can purchase things online. So it's clearly covered as an online service. I just wanted to also mention that the FCC has a tentative conclusion since 2004 that any interactive advertising targeted to children would not be in the public interest and is not allowed. The Chairman of the FCC said last summer that they were planning to finalize that decision soon, so I do think that it would be covered by COPPA.

>> Phyllis Marcus: Ed, what do you think?

>> Edward Felten: Um, I tend to agree. I agree especially, I think, with John's point that it's not clear that interactive TV will pose difficult questions that -- beyond the difficult questions we already have in this area. That is that it's likely to look like perhaps an online service that involves some video as opposed to some entirely different kind of thing. And so whether it qualifies as an online service or meets the other requirements to be an operator under COPPA I think will be a similar question to what we would face with other kinds of services.

>> Jeff McIntyre: I just want to make a quick brief mention that I think this is really cool because as recent as 2008, we were being told in the Child Advocacy Community and the Public Health Community that this was really a nascent technology, and that it was something that was probably not gonna be, you know, 10, 15 years off or so, that we just really didn't see that these issues were gonna arise, and so to be able to have esteemed Federal representatives talking about the issues that this is gonna represent, especially on the heels of the introduction of Google TV, and what we see is the growth, you know, or the interaction of DVRs and those sort of technologies that this is something that's very real. I don't know that it necessarily poses any new issues that are any more tough than what we already have to mimic what Edward has said, as well, but I think when we also look at the arena, kind of what's been happening in terms of online in terms of the gaming world when you look at multiuser gaming instances where they go online. If there are commercial instances, and there's awareness of children that are playing that, we already have the sort of larger, onscreen that can be interactive. I think that's just kind of gonna serve as a good, if perhaps metaphorical model for how we're able to view interactive television down the road. It's not gonna necessarily be, "hey, it's cool. I can order a pizza on my TV," but, in fact, it's gonna be something

much more about the collection of information that I think we're comfortable with where we're at now.

>> Phyllis Marcus: Michael, what do you think?

>> Michael Warnecke: Well, I mean, I-I-I-I think that the issues that we're saying play out in gaming devices and interactive TV just illustrate the point that when we're looking at operator, we have to be really careful to look at the specific facts and what's going on with the technology and how it's -- how the information is being used. It's -- It's a little bit hard to address these issues in -- in the abstract.

>> Mary Engle: We have a question from the audience.

>> Kathryn Montgomery: I guess I need a mike. Yeah. Hi. I'm Kathryn Montgomery at American University. [Clears throat] Excuse me. And along with Angela, I was involved in actually leading the campaign that -- that resulted in COPPA. So it's heartening for me to hear that the statute we all negotiated was written broadly enough and inclusive enough and hopefully with some foresight, even though we didn't know how it would all evolve, that these new forms of marketing to children are covered. And I just want to sort of make a comment that we could talk more about how these various platforms are being used for marketing purposes. We've discussed gaming a little bit, but the fact that in-game marketing, in-game advertising is a growth area. All of these platforms, mobile -- huge growth areas for marketing and marketing directed at children, as well as teens and adults. And I think there are gonna be a lot of other questions that we'll be addressing this afternoon that will touch on what this is about. But I hope we get to some of these issues. So, for example, with mobile, I think we have to look at how mobile works, how parents are involved in mobile, how one does agree. I think the -- the questions that Jeff raised are very important. What constitutes opting in, and is it really meaningful? Because the purpose of this law was really to protect children from manipulative marketing in the digital media. And so I want to just keep the focus on that and just underscore that I'm glad to see all these platforms are included when we talk more about it.

>> Phyllis Marcus: Sure. And just, you know, by virtue of design, we've had to kind of break up topics so that we can really delve deeply into each one. And as you know, you're going to be participating on a panel a little bit later. And I -- [Laughs] And I hope you delve into that, and then we will be talking about parental verification mechanisms in the panel following yours. Um... You know, just to -- just to kind of close the loop on interactive television, I think it was John who said that we're -- you know, we're going to move toward more television and video -- to kind of reiterate what was said down here, too -- looking like online services than others. So just to -- to note our -- our carve-out, or to ask a general question, if it's a broadcast network company that's soliciting interactive participation from a child during the course of programming, for the lawyers among us, would the FTC have jurisdiction under that situation? Mike?

>> Michael Altschul: I don't know. [Laughter] Well --

>> Phyllis Marcus: And it may -- that, you know --

>> Angela Campbell: Is there a reason you wouldn't?

>> Phyllis Marcus: [Laughs]

>> Angela Campbell: Why wouldn't they? I mean, you have jurisdiction over broadcast advertisers. I mean, networks that do advertising. If they're -- If they're do-- they're collecting information from kids and using it for commercial purposes, absolutely.

>> John Morris: Although, I mean, let -- let me push back and -- and, again, you know -- If we're talking about COPPA, you know, obviously there are other -- other statutes that -- and -- and -- and -- and -- and things that -- that the FTC appropriately can -- can -- can regulate. You know, if -- if - if I go onto the street and -- and -- and -- and every tourist, every young -- you know, every 12-year-old who walks by, I say to them, "Go on disney.com and have fun." I-I-I-I -- I'm a little skeptical that COPPA would apply to me, to -- to me as just someone who, in a completely offline way, is promoting an online service. And so -- so if a broadcast -- Come back to the hypothetical. If a broadcast network simply airs a -- a plain old commercial that says, "Go online to disney.com,"

well clearly disney.com is an online service that's covered by COPPA, and -- and -- and -- but -- but I'm -- I'm a little unclear how you get COPPA applying to the -- to the -- to the broadcaster of that commercial.

>> Jeff McIntyre: What is this broadcast TV you speak of? Is it -- It re-- It reminds me of the VCRs and the long-playing records we used to use. I'm not sure that there's much -- In terms of a regulatory definition, this is an important conversation to be able to have because it's gonna draw a distinction between where the FTC powers are and where the Federal Communications Commission powers are. And the FCC is still kind of playing that out a little bit, although we have seen indications from their tentative conclusion on interactive advertising that they are gonna come out with some protective language there, as well, or they'll at least reaffirm the protective language there, as well. But to kind of play off something that Michael mentioned earlier on is that, you know, all this stuff is gonna be integrated, and so the idea that a broadcaster's gonna exist as kind of solely in its own little individual little bubble out there, I think, is a broadcaster that's pretty doomed to begin with. And -- And I can't think of many instances -- I mean, you know, there may be legal definitions for how the name is used, but, you know, I think of ABC-Disney, I think of NBC-Comcast, if I can say that, I think of, you know, Viacom-CBS, I think of -- I think of all of these services already beginning to merge together, and then if a broadcaster is collecting information, then we're gonna see it. And we -- we -- we're able to, at the Federal Communications, begin to get some foundations laid out to be able to protect kids in that way, that, yeah, if they just have, you know, say, nick.com shows up on the screen, then they can't -- You know, that may not fall under COPPA regulations, but at the same point, if that nick.com flashes on the screen, then there are certain things that cannot happen on the Website at the same time, such as host-selling requirements that point to the importance of protecting kids in the online environment in this instance. And so I -- Yeah, I just don't see, you know, the -- the broadcaster -- God bless his little airwave-based heart -- just may be, you know, as we imagine it with a long-player record album, a endangered species in this regard and -- and not something I would like to see the Federal Trade Commission really spend a lot of regulatory effort around.

>> Phyllis Marcus: Fair enough.

>> Mary Engle: Okay.

>> Phyllis Marcus: Okay. Now to turn to another controversial topic. We have a question about ad networks and whether an ad network that is serving -- serving targeted ads to kids or tweens should be considered an online service. Angela?

>> Angela Campbell: Uh, yes. [Laughs] Actually, the -- in -- in adopting the COPPA rule, the FTC said that if -- if -- if companies collect personal information directly from children who click on ads placed on Websites or online services directed at children or if companies collect personal information from visitors who click on their ads at a general-audience site and information reveals that the visitor is a child, then they will be subject to the act. So I think the -- the commission already has answered this question. But I guess I would add that, you know, an ad network is targeting -- If they're targeting kids, you know, that it's really the functional equivalent to targeting computer users on Internet Websites, and -- and so, you know, it -- it -- I think there's just no question that it would be covered. You know, that doesn't necessarily mean the -- the Website itself is. I mean, you could have a part of a Website that is subject to COPPA and another part that's not. But the part that is being used to target ads to kids and -- and to collect information from kids would be covered by COPPA.

>> John Morris: So -- So -- So we might have our first concrete disagreement here. I -- You know, absolutely if there is a Website that has ads that utilizes an ad network and either the ads or the Website is targeted at kids, the Website is clearly covered by COPPA, has full COPPA obligations. To -- To -- To suggest that -- that a piece of the Website has -- has COPPA -- independent COPPA obligations, what that would lead to, I would think, would be a -- a requirement that -- that two companies gather the full information about the parent when, in fact, the one company that is the operator of the Website -- I mean, to me, you know, an ad placed on a Website is not an independent Website. It is -- It is one graphic on a larger Website. Clearly the Website operator has to get full verifiable parental consent. But to suggest that -- that the -- the display of a particular ad -- I mean, that would, I think, suggest, then, that -- that any -- any piece of the Website that, you know, gets displayed to kids might then have to go collect, you know, the information about the parent and all. I mean, it seems to me that -- that when -- when there is clear COPPA

applicability for the Website, it -- it is unclear to me either whether the statute covers a -- a -- an element on the page, but it's also unclear to me as a policy matter whether we want to -- whether we want to force and create two COPPA interactions as opposed to one. Now, having said that, I mean, if -- if the ad network, you know, crosses different -- different sites, then -- then -- then the Website -- any Website that uses the ad network has to get full COPPA, you know, consent from the parent to -- to -- to do that -- to do that Website, you know, to do the cross-site connection. And, I mean, there has to be full disclosure to the parent about exactly what is happening. So, you know, there shouldn't be an end run around COPPA, but the Website ought to be -- ought to be the responsible party.

>> Angela Campbell: Going back to the legislative history, there's a section-by-section analysis that was put in the congressional record by the sponsor of COPPA, Senator Bryan, and he says that the term "operator" is defined as "a person or entity who both operates a Website or online service and collects information on the site either directly or through a subcontractor." The definition is intended to hold responsible the entity that collects the information, as well as the entity on whose behalf the information is collected. It doesn't apply to the extent that it's just used to -- that it doesn't collect information. So, clearly, we understand from the beginning that you could have more than one entity covered by COPPA, and then there's also FTC cases that have been brought against, for example, BigMailBox, which operated a -- a chat room on -- that was -- resided on children's Websites. And they said that because they collected personal information, that embedded component itself was subjected to COPPA. So, I mean, they may be able to work out some sort of agreement that they can share the parental consent, but there clearly is the opportunity for both to be covered.

>> Phyllis Marcus: Thank you. I'd like to at this point open the mikes up for questions from the audience either about things that we've just been talking about or things that we mentioned earlier in the session. And for the next five minutes, let's hear from people in the audience. Anyone? Sure. We have a question over there.

>> Female Speaker: Based off of that example that you just gave, where you've got two business entities serving up information, if there's parental consent on the Website with the operator, how is,

then, that ad then covered by that parental consent? Or are they now not covered? When a -- When a parent gives parental consent to a Website and collecting a P.I.I. and then you've got another ad operator on the site, how's the parental consent then given for that? Or how is that covered?

>> Angela Campbell: Well, I think that's really the topic of another panel, but I would say -- I mean, I think it kind of goes to the adequacy of consent. I mean, parents may be consenting for one thing and then the information is being used for something entirely different than what they thought they had consented for their child to use. That would not be adequate consent.

>> John Morris: I would completely agree that that -- that -- I mean, that -- that any parental consent needs to provide full notice and consent from the parent for any use and any, you know, information. So, I mean, the -- a Website would need to make clear, you know, "Your child will both be able to play a game where he or she can tell their name to, you know -- to -- to another game player, and they will be served targeted ads based on, you know, information collected." And the parent needs to be able to understand both elements and -- and consent or not to -- to both elements.

>> Michael Warnecke: I'd like to address this multiple-operator question in a slightly different context apart from the online advertising, and that's -- it's a context that we genuinely see occurring quite frequently in the game industry, and that is where you have consent at the platform level the parent gives for certain communications to take place. And then a couple of months later, the child acquires a game that they play, and then the -- the publisher's software comes up and says, "Hey, we need parental consent for in-game chat." And this causes a bit of confusion with the parent who doesn't understand why, "I previously gave consent before. Why am I being asked again for this same consent?" And so I-I think what would be very helpful on that situation -- I appreciate it's a little bit different from the -- the online advertising circumstance, but it raises a similar issue -- is that if there was some streamlined way where you could have one operator obtain consent from multiple parties, subject, of course, to appropriate disclosures and -- and making sure that the parent is fully informed. But if there was some flexibility to do that, I think that would be very useful.

>> Jeff McIntyre: I would add one last kind of issue that is important in this, I think, to consider. We've talked a lot about -- as we were talking about "American Idol" and talking about determining whether the user is a child -- when you're dealing with consent, I think it's also important to make sure that you can consider whether the person giving consent is indeed, in fact, the parent or the guardian. I think there are a lot of instances that are where the child is marking off on consent without ever reading the consent notice. And -- And I'm not sure how that's resolved, but I think it's definitely an issue that exists that -- that who we think are the parents only may indeed not be.

>> Mary Engle: Well, that's definitely a topic for later in the day. That's an oldie but a goody.

>> Phyllis Marcus: Right.

>> Mary Engle: Good question for us.

>> Phyllis Marcus: I think at this point, we need to wrap up. I thank all of our panelists and everyone in the audience for being so interactive, and we hope that this continues throughout the day. [Applause]

>> Female Speaker: We're gonna have a -- We're gonna have a 15-minute break. Before we do that, every time the word "wireless" came up, I felt guilty, guilty, guilty because I was supposed to say early this morning that if you wanted to hook into the Wi-Fi system, today's code is CABE010808. And there are cards outside if you can't keep that in the mind.

>> Female Speaker: And actually, you should pick FTC Event 1 or 2, not the guest access.