CENTER FOR DIGITAL DEMOCRACY

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Supplemental Comment submitted for the "Children's Online Privacy Protection Rule Proposed Parental Consent Method; Application of the ESRB Group for Approval of Parental Consent Method"
Matter Number: P235402

August 21, 2023

The Center for Digital Democracy (CDD) respectfully urges the Federal Trade Commission (FTC) to reject the parent-consent method proposed by the applicants Entertainment Software Rating Board (ESRB) and EPIC Games' SuperAwesome division. Prior to any decision, the FTC must first engage in due diligence and investigate the contemporary issues involving the role and use of facial coding technology and its potential impact on children's privacy. The commission must have a robust understanding of the data flows and insight generation produced by facial coding technologies, including the debate over their role as a key source of "attention" metrics, which are a core advertising measurement modality. Since this proposal is designed to deliver a significant expansion of children's data collection—given the constellation of brands, advertisers and publishers involved with the applicants and their child-directed market focus—a digital "cautionary" principle on this consent method is especially required here. Moreover, one of the applicants, as well as several key affiliates of the ESRB—EPIC Games, Amazon, and Microsoft—have recently been sanctioned for violating COPPA, and any approval in the absence of a thorough fact-finding here would be premature.

The proposed use of facial coding technologies requires a more in-depth examination in the light of current industry debates involving the uses of this technology and its role as a rapidly evolving

targeting and measurement system for advertisers. CDD believes that the commission must have a firm grasp of the attention-measurement debate and the technology's uses, so it can make more meaningful policy decisions regarding children's privacy, consumer data protection generally, and this application in particular. For example, the Advertising Research Foundation (ARF) recently launched a major review of attention measurement—the ARF Attention Validation Initiative. In June 2023, ARF organized a series of research presentations on this issue, including sessions addressing facial coding developments. ARF released a literature review in July 2023 citing facial coding and related technologies. The FTC should review the work done related to facial coding by ARF, IAB and others. Of special interest is the use of "computer vision and machine learning"—as well as facial coding—to drive "attention AI," "emotion" measurement and other neuromarketing techniques, and marketing insights. The Nielsen company raises a number of questions regarding the use of facial coding practices (in the context of advertising effectiveness and emotion), citing its own research in the matter, which the FTC should review ("Let's Face it: Facial coding isn't up to the task"). The FTC should also review how facial coding, as a key modality used in the growth of the neuromarketing field, has been developed to help market products that can impact young people. One example is candy company Mars' Agile Creative Expertise (ACE) tool, which has won major ad industry awards for its use of AI. There are also other examples involving facial coding, ad testing, commercial surveillance marketing and market research that require scrutiny here.

The commission needs a better understanding of how facial coding in general, and this proposed use in particular, creates insights, data flows and opportunities for additional data collection and analysis. Since the applicants want to further monetize gaming applications for young children, we urge the FTC to conduct an in-depth review of their current and proposed operations. For example, SuperAwesome and parent EPIC Games are expanding their child- and other youth-directed gaming operations, which raise important consumer protection and privacy concerns regarding their interest in offering parents a streamlined method to process consent to further a child's monetization. A recent report from SuperAwesome—"How the kids gaming ecosystem has changed: It's not about the games, it's about their ecosystems"—highlighted that "kids have become the most important influencers in the world's biggest games." The report illustrates the extensive youth-directed "gaming ecosystem" focused on targeting them—including "playing

games, creating content about games, watching games and talking about games." SuperAwesome is currently involved building out what it calls its "ParentGraph," which appears to be an identity-management system linked to a number of the company's business operations. According to the company, the ParentGraph is a "a proprietary network of millions of parents that have been pre-verified by an application or service using Kids Web Services (KWS) technology. Once a parent is verified using KWS, they never need to re-verify for any other service that uses KWS technology, which is typically a common friction point." SuperAwesome boasts that clients who use its KWS applications can "boost parental consent conversion rates [and] maximize user conversion with the power of our ParentGraph, the world's largest and fastest growing network of pre-verified parents." The commission should note that SuperAwesome's explanation of its ParentGraph and related KWS services is said to be "certified under the FTC's COPPA Safe Harbor program by the kidSAFE Seal Program and the ESRB's Privacy Certified Kids Seal." The role and use of such a "graph," given the current explosion of identity based graphs for omnichannel commercial surveillance tracking, also requires further commission review before approving this application.

In its urging of brands to use its gaming services, SuperAwesome explains that "youth audiences are playing, discovering and connecting with brands in a whole new way…. [W]e amplify your brand's gaming activations across digital channels." Among the gaming techniques SuperAwesome offers its brand clients are in-game billboards, branded games, and integration into popular games. SuperAwesome's work targeting children ages 6-12 included a campaign for "Froot Loopes" from Kellogg's that used the Roblox platform that recently generated "8+ weeks of consistent sales velocity growth and earned the coveted title of No. 1 branded game on Roblox." Other SuperAwesome clients targeting young people include Mondelez, Post cereals, Paramount's Nickelodeon, and its parent EPIC for their Fortnite game. EPIC Games has other potential conflicts related to this application, given its expanding use of facial technologies for its gaming operations. For example, it recently acquired a number of specialist companies in that field to bolster its work on "video games, film, broadcast and immersive experience such as virtual reality."

Deciding on a system for parental consent for commercial data collection from children—given what we know about the expansive and manipulative affordances of digital marketing, let alone the mental health and other public health risks—requires the FTC to conduct sufficient fact-finding and analysis into both the specific technological method proposed as well as its relationship to contemporary digital marketing and data gathering from children. Parents and other caregivers depend on the commission to meaningfully protect children's privacy. CDD stands ready to provide the FTC with additional resources for its facial coding review in light of current developments. We urge you to delay any approval until there is sufficient vetting of this proposal and its implications for privacy, data security, and youth protection.