

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of)
)
Complaint and Request for Investigation of)
Ganz's Deceptive Practices in Connection)
with Webkinz World, a Children's Website)
)

COMPLAINT AND REQUEST FOR INVESTIGATION

Submitted by

Campaign for a Commercial-Free Childhood

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The Campaign for a Commercial-Free Childhood (CCFC), by its attorneys, the Institute for Public Representation (IPR), asks the Federal Trade Commission (FTC) to investigate and bring an action against Ganz for engaging in deceptive and unfair trade practices in violation of Section 5 of the Federal Trade Commission Act in its operation of Webkinz World (Webkinz.com), a website targeted to children under age 13.

Ganz is the ninth most popular child-targeted internet media company among United States children. In 2005, Ganz began marketing Webkinz pets. Webkinz are toy stuffed animals with a special property: each animal comes with a secret code that enables its owner to join the members-only Webkinz World website. In Webkinz World, Webkinz owners play games, interact with other members, and care for and play with virtual versions of their Webkinz pets.

When Ganz introduced third-party advertisements to the website in 2007, many parents complained. As a result, Ganz adopted an Ad Policy expressly stating that parents could opt out of having their children view third-party advertisements. CCFC has learned, however, that in direct contradiction to its Ad Policy, Ganz continues to expose children to third-party advertising even *after* their parents have opted out. Ganz's express misrepresentation in its Ad Policy is thus a deceptive trade practice violation of Section 5.

CCFC's investigation has further shown that Ganz is violating the FTC's rules implementing the Children's Online Privacy Protection Act in at least two ways. First, there is no link to Ganz's Children's Privacy Policy on the Webkinz.com homepage. Second, the Children's Privacy Policy is written in a vague, confusing and contradictory manner. In addition, the

Children's Privacy Policy is deceptive because it falsely tells parents that the information Ganz collects cannot be used to contact or identify a child.

Finally, Ganz's practice of using cookies on Webkinz.com to track children's activities and serve them targeted ads without affirmative parental consent is contrary to the FTC's guidance on behavioral advertising and constitutes an unfair trade practice in violation of Section 5.

I. BACKGROUND

Ganz is a privately held Canadian corporation specializing in the manufacture and distribution of gifts and toys. It was founded in 1950 and is based in Woodbridge, Ontario, Canada.¹ Ganz has additional offices in Atlanta, Los Angeles, Hong Kong and Shanghai.²

A. The Introduction and Phenomenal Popularity of Webkinz

Ganz began selling Webkinz stuffed animals in 2005. Each Webkinz toy, which costs between \$10 and \$15, comes with a unique "secret code" that grants access to the Webkinz World website, which is also owned and operated by Ganz. The Webkinz World website is an online virtual playground and social network for children. When a child receives a Webkinz toy, she uses the unique code to register or "adopt" her pet on the Webkinz World site. Once logged in, a child can interact with virtual versions of her pets, create pet communities, play games, earn and make purchases with virtual money, and chat with other children.

Both the Webkinz toys and the website have proven to be immensely popular. As reported by *Wired* magazine in 2007, the "latest toy craze in North America are stuffed animals called Webkinz that blend the comfort of teddy bears with the addictive challenges of online role-playing games."³ Within the first year alone, Ganz sold approximately one million Webkinz

¹ *Ganz Corporate Profile*, http://www.ganz.com/ganz_corporate.php (last visited Dec. 7, 2011).

² *The Ganz Story*, http://www.ganz.com/ganz_story.php (last visited Dec. 7, 2011).

³ Jacob Ogles, *How to Take Money From Kids: Sell Toys Both Physical and Virtual*, *Wired*

toys. Two years after Ganz introduced Webkinz, girls aged six to eleven rated Webkinz as the “coolest” toy brand while boys of the same age rated Webkinz as the third coolest toy.⁴ In 2007, the Toy Industry Association named Webkinz the “Specialty Toy of the Year.”⁵ In that same year, *Toy Directory Monthly* reported that over 21% of retailers surveyed said that Webkinz was their best-selling item.⁶

Traffic on Webkinz World has increased dramatically. For example, the number of unique monthly visitors increased from 325,000 in April 2005 to 2.8 million in March 2007.⁷ Although it is somewhat less popular now, the website still drew about 2.6 million unique visitors in November 2011, making Ganz the ninth most popular children’s internet media company among children in the United States.⁸

With such large numbers of toys sold and visitors to the website, it is reasonable to assume that Ganz has reaped tremendous profits. Because Ganz is privately owned, however, financial data is not publicly available. Industry expert Jim Silver, editor-in-chief of *Toy Wishes* magazine, estimated that Ganz made \$100 million in 2006.⁹

When it first launched, the Webkinz website did not contain advertising. However, advertising is now a prominent component of the site. Third parties interested in advertising may request a Webkinz media kit via Ganz’s media contact.¹⁰ A complete copy of the Webkinz media kit is provided in Appendix G.¹¹ The Webkinz media kit promotes third-party advertising

(Aug. 13, 2007), <http://www.wired.com/gadgets/miscellaneous/news/2007/07/webkinz>.

⁴ Nancy Zwiers, *Toys Still Tops With Kids—Barely*, *Playthings*, Jan. 1, 2008 at 21.

⁵ Ogles, *supra* note 3.

⁶ Sheila M. Coyle, *Top-10 Best Selling Holiday Toys for Girls: Critters Take Over Christmas*, *Toy Directory Monthly* (Jan. 2008), <http://www.toydirectory.com/monthly/article.asp?id=2935>.

⁷ Bob Tedeschi, *Fuzzy Critters with High Prices Offer Lesson in New Concepts*, *N.Y. Times*, Mar. 26, 2007, <http://www.nytimes.com/2007/03/26/technology/26ecom.html>.

⁸ *Top 15 Most Popular Kids Websites*, eBizMBA (Dec. 2011), <http://www.ebizmba.com/articles/kids-websites>.

⁹ Ogles, *supra* note 3.

¹⁰ *Ganz Media Center—Press Kits*, http://www.ganz.com/ganz_press_kits.php.

¹¹ Appendix G: Webkinz Media Kit, *infra* p. A-21.

opportunities on Webkinz.com. The first advertising method the media kit describes is a “homepage takeover.” To sell advertisers the homepage takeover, Ganz points out that “[e]very Webkinz user must log in through the Webkinz Homepage to get inside Webkinz World.” If a third party purchases a takeover, the Webkinz homepage may feature a custom skin, wallpaper, banner, or a video in standard or flash format, all promoting the third party’s product.

Ganz also sells advertisers the opportunity to customize a popular Webkinz World game with their own content. The media kit shows how Ganz integrates third-party advertisements into the Wheel of Wow, a game that gets 4 million plays per month. Again, custom wallpaper may be inserted into the background of the game and banner advertisements may be displayed alongside it. As an example, the media kit includes screen shots of a custom Wheel of Wow sponsored by *The Smurfs* movie,¹² discussed in detail in Section II. Third-party advertisers may also sponsor a specific Webkinz toy affiliated with their brand, “floating icons” or the Webkinz Clubhouse. Floating icons fly across Webkinz World, awarding virtual food items to children who “catch” them by clicking on them mid-flight.¹³ Ganz boasts to potential advertisers that over 8 million children clicked to catch the floating “enchanted berry” associated with *The Smurfs*, and that “[k]eeping Webkinz virtual pets well fed is essential to their happiness and well-being.”¹⁴ The Clubhouse is a social area of the site that garners 1 million visits per month.¹⁵ There, children can play games, chat, design their own rooms, and trade items with other users.

Webkinz.com’s first third-party advertisements, which promoted the children’s films *Bee Movie* and *Alvin and the Chipmunks*, were introduced in October 2007.¹⁶ Many parents were not

¹² *Id.* at A-26.

¹³ *Id.* at A-27.

¹⁴ *Id.*

¹⁵ *Id.* at A-30.

¹⁶ Louise Story, *Shift Away from Ad-Free Has a Price*, N.Y. Times, Dec. 13, 2007, <http://www.nytimes.com/2007/12/13/business/media/13adco.html>. This article also reports that when Webkinz ran ads for *Bee Movie*, the site also ran tie-ins, with offers for things like bee costumes that users could put on their virtual pets.

happy with this development. CCFC partnered with parents to demand that the site remove the ads. A popular blog for parents of Webkinz users, WebkinzMom.com, featured a post criticizing the ads and dozens of parents commented in agreement.¹⁷ Trade press publication *Paid Content* called the move to add advertisements to Webkinz.com a “PR nightmare.”¹⁸

A story in the *New York Times* quoted Jacqueline Rupp, a mother of two children, explaining why parents were so upset by the introduction of advertising: “I bought into the Webkinz phenomenon because there wasn’t mass marketing on the site.”¹⁹ She added that as a parent who had spent more than \$300 on Webkinz pets, “If you’re putting out \$15 for the Webkinz doll, you are paying for the ability to have something ad-free.” In response to public pressure, Ganz began offering parents the option to block third-party advertisements from appearing on the Webkinz site.

B. The Webkinz.com Experience

Webkinz.com explains that it is “designed for users aged 6–13+ and . . . intended to include content for all ages and levels of computer skill within that range.”²⁰ While targeted to children, the website also has portions designed for parents. As shown in Figure 1, the homepage has yellow tabs at the bottom labeled: Customer Service, Take a Tour, Webkinz Catalog, Parent’s Area, Store Locator and Game Cards. Beneath the yellow tabs in small font are links to the Privacy Policy, User Agreement, and Ad Policy.

¹⁷ *Id.*

¹⁸ WebProNews Staff, *Webkinz Ad Addition Angers Parents*, (Dec. 14, 2007, 11: 41 AM), <http://www.webpronews.com/webkinz-ad-addition-angers-parents-2007-12>.

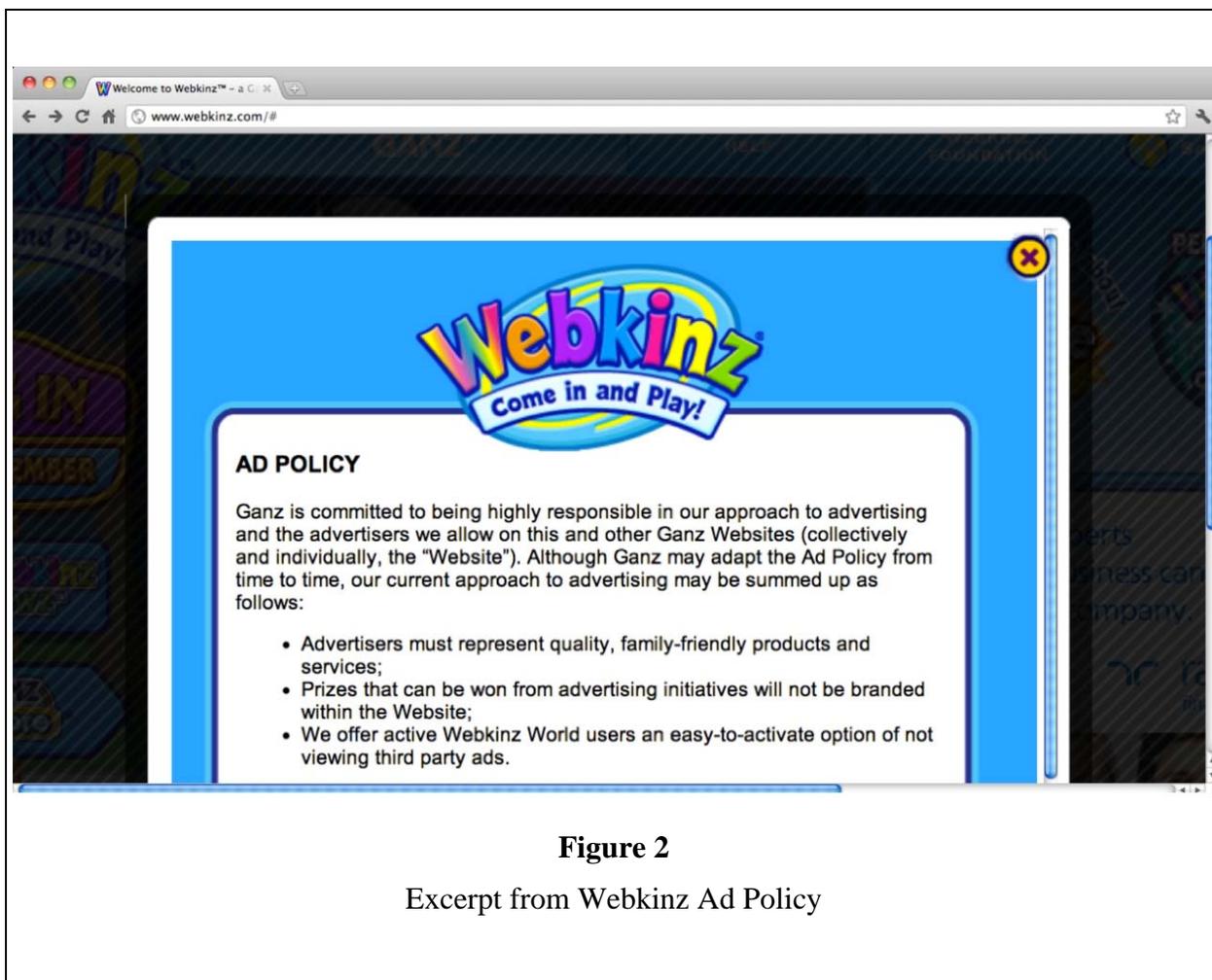
¹⁹ Story, *supra* note 16.

²⁰ *Webkinz Parent’s Area*, “How Does This Site Appeal to Small Children,” http://www.webkinz.com/us_en/faq_parents.html (last visited Dec. 12, 2011).



Figure 1
Webkinz.com Homepage

Clicking on the “Ad Policy” link on the homepage brings up the Ad Policy in a small window, as shown in Figure 2.



The complete Ad Policy is reproduced in Appendix A.²¹ The Ad Policy states that Ganz is committed to being “highly responsible” in its approach to advertising. The policy also describes an “easy to activate” option to not view third-party ads on the website. Third-party ads are those for products or services offered by an entity other than Ganz. First-party ads are those that promote Ganz products, and visitors are unable to opt out of seeing them.

Clicking on the “Privacy Policy” link on the homepage takes one to the General Privacy Policy. A complete copy of the six-page General Privacy Policy is provided in Appendix C.²² More than halfway through the General Privacy Policy, there is a section titled “Online Policy

²¹ Appendix A: Ad Policy, *infra* p. A-1.

²² Appendix C: General Privacy Policy, *infra* p. A-4.

Regarding Privacy of Children.” This section contains a link to a different Children’s Privacy Policy. A complete copy of the Children’s Privacy Policy is provided in Appendix D.²³ The Children’s Privacy Policy states that Webkinz complies with COPPA and that it only collects information that is reasonably necessary for a child’s participation in an online activity. It claims that none of the information it collects during registration is “personally identifiable information” because it cannot be used to contact a child. The policy also describes the website’s practices regarding obtaining parental consent, sharing information with third parties, and so on.

Clicking on the “Parent’s Area” tab on the homepage takes one to another page with links to various topics including “Frequently Asked Questions,” how to manage a child’s KinzChat PLUS access, and how to turn off third-party ads. Parents who click on the “Turning off Third Party Ads” link within the Parent’s Area are provided with a link to another, shorter ad policy. A complete copy of the second ad policy is provided in Appendix B.²⁴ This ad policy reiterates Ganz’s “responsible approach” to advertising. Here, Ganz also states, “We will limit the amount of third-party advertising that appears in Webkinz World. The majority of advertising space will remain dedicated to Webkinz products and features and positive lifestyle messaging.” The Parent’s Area also includes links to the General Privacy Policy described above and a lengthy User Agreement.

The colorful homepage (Figure 1) welcomes children to “Come in and Play!” A guidepost has links for children to either log-in or become a “New Member.” When a child clicks on “New Member,” he or she is introduced to a cartoon duck named Ms. Birdy. Ms. Birdy helps the child through the multi-screen registration process.

²³ Appendix D: Children’s Privacy Policy, *infra* p. A-10.

²⁴ Appendix B: Short Version of Ad Policy, *infra* p. A-3.

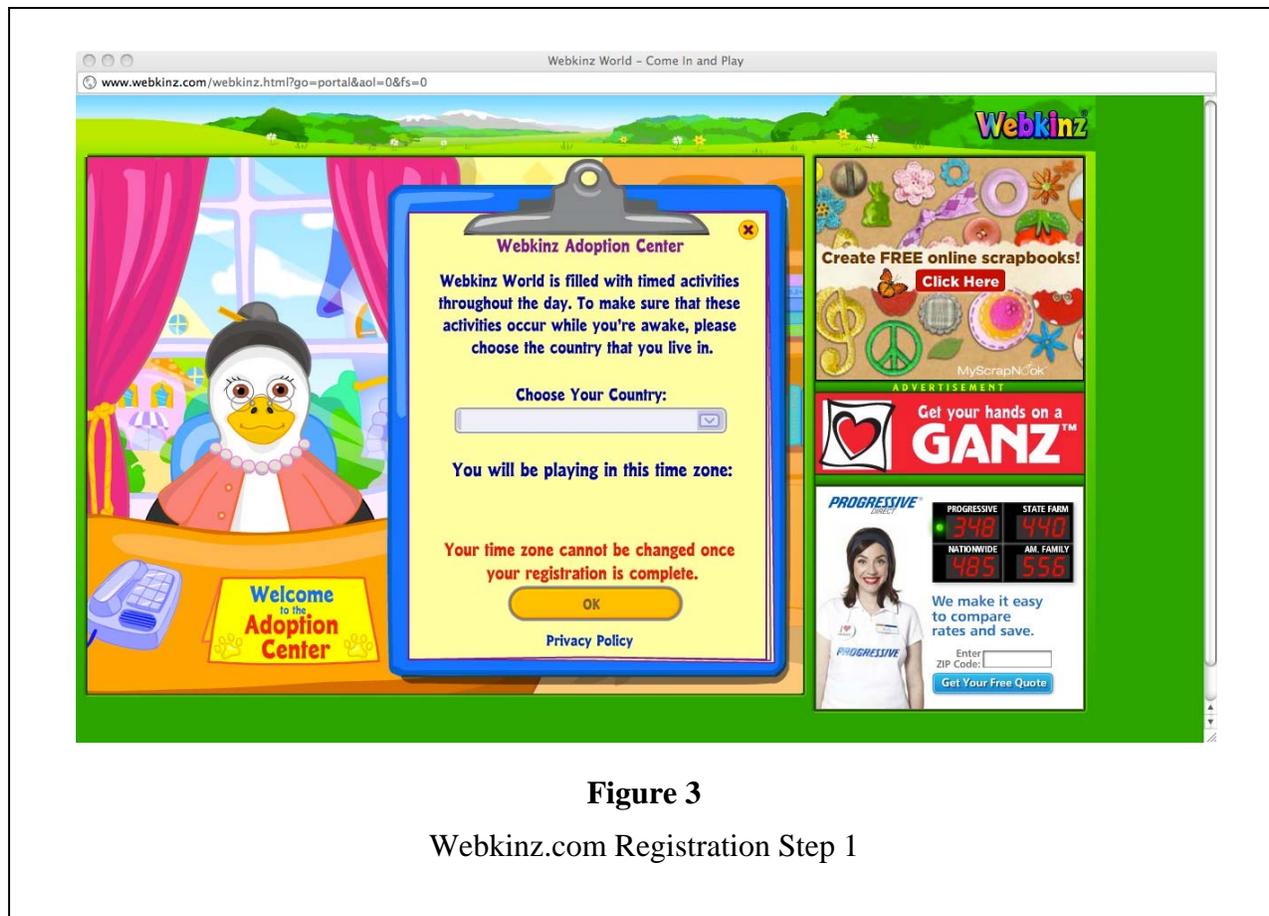


Figure 3

Webkinz.com Registration Step 1

The first step is to select a country of residence. Next, children are told to read the User Agreement and check the box to indicate “I accept these terms and conditions.” The User Agreement itself is presented in a small box and appears to be the same User Agreement that can be found in the Parent’s Area. Printed out, the User Agreement is twelve pages long.

Children are unlikely to read the User Agreement. Only a small portion can be seen on the screen at one time, and the agreement is written like a contract. Indeed, the User Agreement even states that it is “a contract between you and Ganz.” It defines “you” as “any person or entity using this Website, and your parent or legal guardian in the case of minors.” In the unlikely event that a child tried to read the User Agreement before clicking the box, it would be incomprehensible to him or her.

Next, children are asked to enter other information about themselves. Text bubbles appear above Ms. Birdy and she says, “I will need to learn a little bit about you. Please answer the following questions.” As shown in Figure 4, the registration form asks for first name, date of birth, gender and state of residence. A notice on the registration screen warns children that “it is important to use real information.” The next step is to create a user name and password. Finally, children enter the unique secret code associated with the plush toy.



Figure 4

Webkinz.com Registration Form

After registering for an account, and after every subsequent log-in, children are taken to “Kinzville”—the animated hub of Webkinz.com. The first screen (Figure 5) appears automatically and features “Daily KinzCare.” In the Daily KinzCare activity, children may win

prizes in the form of food for their pets or KinzCash.²⁵ It typically features an advertisement. For example, as shown in Figure 5, Daily KinzCare featured an advertisement for a Nintendo game during November 2011.

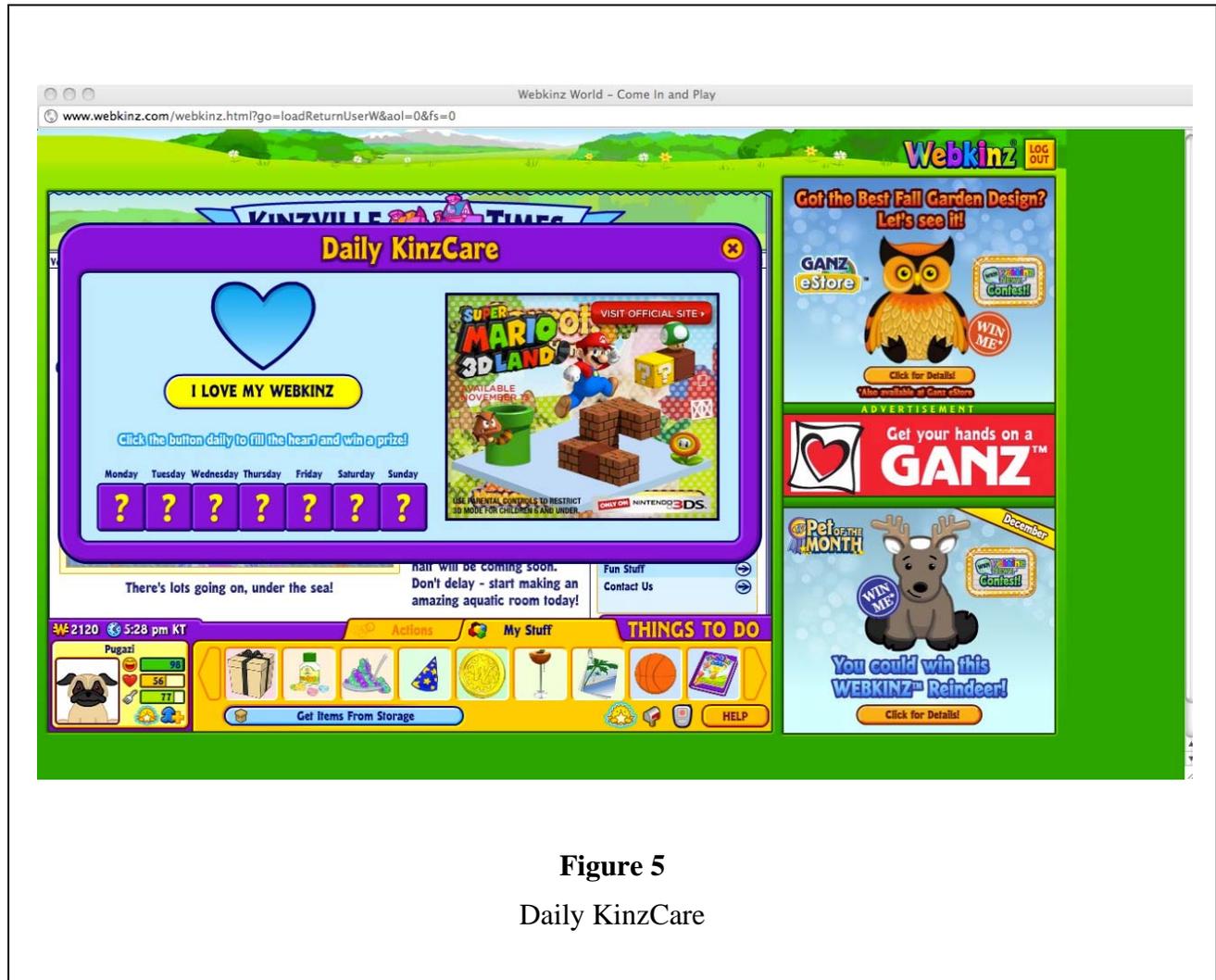


Figure 5
Daily KinzCare

After closing KinzCare, children may explore the rest of Webkinz World through the “Map of Kinzville” shown in Figure 6. The map provides links to different areas such as a virtual

²⁵ KinzCash is a virtual currency with which children may buy food, clothing and furniture for their Webkinz.

park, arcade, school, and shopping center where children can earn KinzCash by playing arcade games and winning prizes. Children use KinzCash to buy food, clothing, furniture and toys for their pets. A tool bar (which can be seen at the bottom of the screen shot in Figure 6, as well as on other screens) displays the pet's health, happiness and hunger levels. The child can change these levels by feeding and interacting with the pet. The bar labeled "My Stuff" displays items the child has acquired for the pet.



Figure 6
Map of Kinzville

While children play in Webkinz World, Ganz allows third parties to track their activities for behavioral advertising purposes. It does so by allowing third-party advertisers to install

cookies and tracking devices onto users' computers. Even children whose parents have opted out of Ganz showing third-party advertisements are tracked in this way.

CCFC's counsel discovered the behavioral tracking by conducting an informal experiment. IPR used a computer with a clear hard drive and no internet history to access Webkinz.com via Internet Explorer and created an account. The account was set to opt out of viewing third-party ads. The preferences on Internet Explorer were set to alert the user whenever a cookie was installed.²⁶ Nearly thirty cookies were installed on the computer while visiting Webkinz World. Several seemed to be installed for behavioral advertising purposes. For example, Figure 7 is a screen shot of Internet Explorer asking to install a cookie from website "mookie1.com."



Figure 7

Mookie1.com Cookie Alert

²⁶ Internet Explorer's default setting does not alert a user when a cookie is installed. Therefore, an average parent of a Webkinz.com user would not be made aware that a cookie such as the mookie1.com cookie was installed unless she set her browser to create an alert. Moreover, many users would find this setting to intolerably impair the Webkinz.com experience because cookies are so prevalent that one would have to constantly click to accept or reject cookies before a webpage fully loaded.

Media Innovation Group (MIG), a subsidiary of the world’s number one advertising agency, WPP, operates mookie1.com.²⁷ According to its website, MIG “provides clients with advanced media targeting, optimization and analytics. Leveraging the power of ZAP technology, the MIG enables advertisers to engage the right audience, at the right time, across media sources.”²⁸ The “ZAP” technology used by MIG includes “ZAP DMP” and “ZAP Social.” ZAP DMP allows companies like MIG to build profiles about website users by connecting online and offline data. ZAP Social allows companies to manage social sites to “[l]everage unified data . . . for more precise targeting and optimization.”²⁹ In other words, MIG engages in online behavioral advertising.³⁰

II. GANZ’S AD POLICY IS DECEPTIVE BECAUSE GANZ FALSELY STATES THAT PARENTS CAN OPT OUT OF VIEWING THIRD-PARTY ADS

When evaluated from the perspective of parents—the target audience for Webkinz.com’s advertising and privacy policies—Ganz’s Ad Policy is deceptive. Section 5 of the Federal Trade Commission Act (“FTC Act”) prohibits unfair and deceptive trade practices.³¹ In assessing whether a practice is deceptive, the FTC considers whether (1) there has been a representation, omission or practice that would be likely to mislead a consumer, (2) a consumer acting reasonably under the circumstances would find the representation misleading, and (3) the

²⁷ Domain Tools Search for mookie1.com, Domain Tools, <http://www.domaintools.com/> (search “mookie1.com” in “Whois” field).

²⁸ *The Media Innovation Group Products and Services*, <http://www.themig.com/services.php> (last visited Dec. 7, 2011).

²⁹ *The Media Innovation Group ZAP Products and Services*, <http://www.themig.com/ZAP.php> (last visited Dec. 7, 2011).

³⁰ Behavioral advertising is defined as “the practice of tracking an individual’s online activities in order to deliver advertising tailored to the individual’s interests.” Fed. Trade Comm’n, *FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising* i (2009) [hereinafter FTC Staff Report].

³¹ 15 U.S.C. § 45.

representation is “material.”³² Applying this standard, Ganz’s Ad Policy meets all three prongs of this test.

First, Ganz makes the express representation that parents can easily opt out of having their children view third-party advertisements. As seen in Figure 2, Ganz claims it is “committed to being highly responsible in our approach to advertising and the advertisers we allow on this and other Ganz Websites.” Specifically, Ganz’s Ad Policy states that “We offer active Webkinz World users an easy-to-activate option of not viewing third-party ads.” The Ad Policy also instructs parents how to opt out:

To opt out, members must simply go to “My Options” and turn off the ads. This blocks third-party ads within the Website for 30 days. Parents who wish to extend the blocking option simply create a question and answer that only they know, to ensure that their children do not reactivate the viewing option. Once the 30-day block is in effect, it cannot be lifted.³³

Third-party ads continue to appear on the site, however, even after parents have opted out. Figure 8, for example, shows a screen shot of the Webkinz.com log-in page from a computer that had opted out of receiving third-party ads. It shows third-party ads for a Hilton Hotels Hawaiian vacation and Google Chrome.

³² FTC Policy Statement on Deception appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 170–71 (1984) [hereinafter Deception Policy Statement].

³³ Appendix A: Ad Policy, *infra* p. A-1.

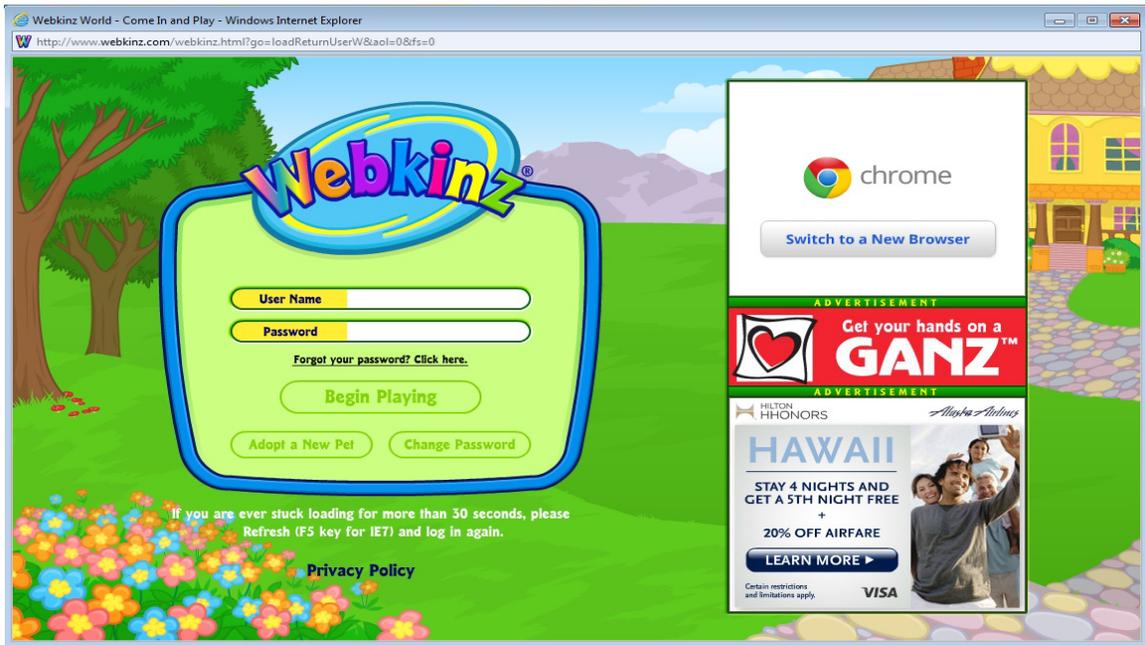


Figure 8
Post-Opt-Out Login Page

Third-party advertisements also continue to periodically appear on the Wheel of Wow page. The Wheel of Wow is an arcade game. A spin of the wheel guarantees a prize of KinzCash, food, clothing or furniture for children’s Webkinz pets. Ganz characterizes the Wheel of Wow as its version of a door prize that thanks kids just for showing up. The company tells parents, “as kids love getting free prizes, naturally these features are highly popular on our site.”³⁴ The Wheel of Wow’s popularity likely makes it a prime spot for third-party advertisements.³⁵

³⁴ *Parents’ Frequently Asked Questions*, “Is the Wishing Well and Wheel of Wow gambling?” http://www.webkinz.com/us_en/faq_parents.html, (last visited Dec. 12, 2011).

³⁵ As discussed above in Section I.A, Ganz boasts that Wheel of Wow gets 4 million plays per month. See Appendix G: Webkinz Media Kit, *infra* p. A-21, at A-26.

On June 14, 2011, CCFC’s Associate Director Josh Golin forwarded a parent’s complaint about advertisements on Webkinz.com to Ganz.³⁶ In response, Ganz Communications Manager Susan McVeigh acknowledged that the site contained third-party ads, but added, “We would like to stress that all third-party ads are constantly monitored for appropriate content before they are released on our sites. If an ad appears that a viewer may feel is questionable we can be contacted and will immediately investigate.” Golin then repeated his request that Ganz consider removing third-party advertisements because they “seem[] to defeat the ability of parents to opt-out of 3rd party ads since you have to log-in in order to be recognized as having opted out.” Golin also inquired whether it was true that Ganz had integrated advertisements into Webkinz World, for instance, in the Wheel of Wow. McVeigh responded that:

For limited-time promotions with partners (such as announcing an upcoming kid’s movie), we permit special activities. We adopted this different approach because

- The events are time-limited and infrequent
- The virtual ‘rewards’ themselves are not branded and are suitable for all ages

The landing page of Webkinz World is open to the general public, so yes we do offer advertising there.

With our focus on ‘kid-friendly’, we pay close attention to our advertising choices, and actively monitor third-party ads served up on our site. We consider each partnership proposal to ensure that, from our cautious perspective, members are offered maximum fun and non-branded rewards although the event is certainly ‘marketing’.

Thus, the Ganz spokesperson confirms that Webkinz.com permits third-party marketing to children even after parents have affirmatively opted out.

At the time of this email exchange, the Wheel of Wow featured ads for the kids’ movie *The Smurfs*, as shown in Figure 9.

³⁶ Copies of the email exchanges are appended to this complaint. Appendix E: CCFC Email Exchange with Concerned Parent, *infra* p. A-15; Appendix F: CCFC Email Exchange with Susan McVeigh, *infra* p. A-17.



Figure 9

Screen Shot of Wheel of Wow from June 2011 before opting out of third party ads

When CCFC visited the page a second time after opting out of third-party ads, the movie ad in the top right quadrant had been replaced by a Webkinz ad. However, as shown in Figure 10, the *Smurfs* ad surrounding the Wheel of Wow remained.



Figure 10

Screen Shot of Wheel of Wow from June 2011 after opting out of third party ads

Ganz continues to place third-party ads on the Wheel of Wow page in blatant contradiction of its assurances in its Ad Policy. Figure 11 below features a screen shot, taken on November 7, 2011 using an account that had opted out of third-party ads. It shows an advertisement for Mattel's Fijit Friends, a new toy robot for girls.

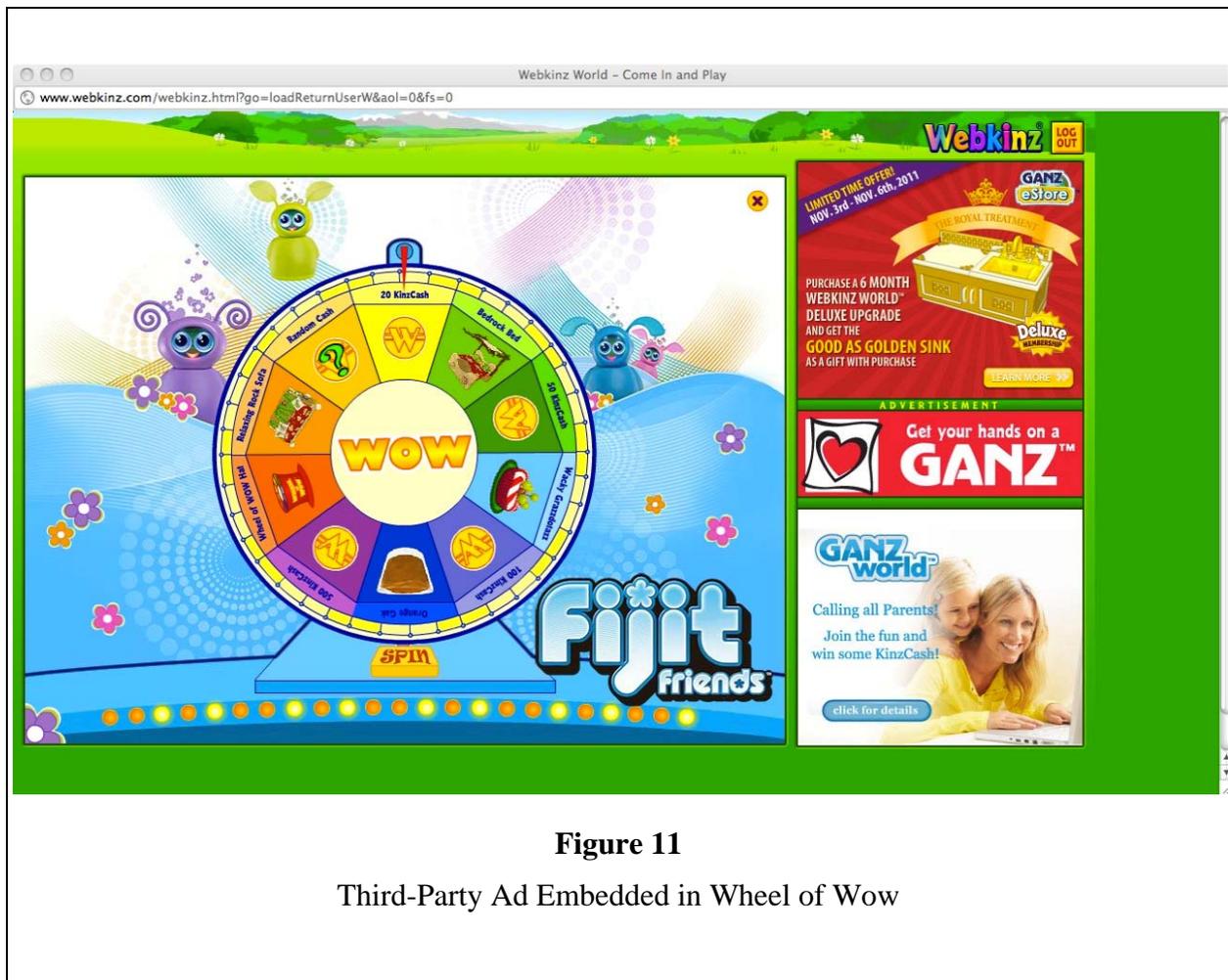


Figure 11
Third-Party Ad Embedded in Wheel of Wow

Ganz’s Ad Policy also omits the fact that cookies and web beacons may be installed on a user’s computer even after that user has opted out of viewing third-party ads. This omission may be misleading to parents who have indicated that they do not want their children exposed to advertising. These parents reasonably expect that by expressing their preference not to see ads on Webkinz.com, they have indicated that they do not want advertisers to track their children’s activities on the site either.

These misrepresentations and omissions are clearly material. Express misrepresentations are inherently material.³⁷ Moreover, if parents knew their children would still be shown ads after opting out and/or their children would be tracked for purposes of behavioral advertising, many

³⁷ Deception Policy Statement *supra* note 32, at 189.

would not allow their children to use the site and would not spend the \$10–\$15 to buy a Webkinz pet in the first place. For example, *USA Today* reports on one parent’s surprise to learn that her nine-year-old daughter, Isabella, was seeing ads on the Webkinz site.

While on the Webkinz site, [Isabella] clicked once a day for seven days on an ad for a film trailer that was posted for *Judy Moody and the NOT Bummer Summer*. She says that she wasn’t really interested in the movie. But each day that she clicked it and answered three questions, she earned a virtual lime-green dresser and bulletin board for the rooms she created online for her Webkinz.

“I’ve got five dressers and seven bulletin boards,” says the girl. “I don’t have enough rooms to fit them all in.”

This kind of marketing to kids drives Isabella’s mother crazy. “They’re doing this right under the noses of parents,” says Elizabeth Sweet, a doctoral student at University of California-Davis doing her dissertation on the marketing of kids’ toys. Even so, she says, she had no idea about the video ads on Webkinz until her daughter told her.

“This whole planting of movie videos in the online game experience is new to me,” Sweet says. “What bothers me most is that when she first signed up for the site, I thought it was OK.”

Sweet has an ad-blocker app on her browser. These movie ads are woven into the site content in such a way that her daughter sees—and responds to them—anyway, she says.³⁸

In summary, Ganz deceives parents in violation of Section 5 of the FTC Act by claiming to offer the opportunity to opt out of having their children view third-party ads when in reality, it is not possible to opt out of third-party ads.

³⁸ Bruce Horovitz, *Marketing to Kids Gets More Savvy with New Technologies*, USA Today (Aug. 15, 2011, 2:39 PM), http://www.usatoday.com/money/industries/retail/2011-07-27-new-technologies-for-marketing-to-kids_n.htm.

III. GANZ’S PRIVACY PRACTICES VIOLATE SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Ganz’s privacy practices also violate the FTC Act in at least three distinct ways. First, Ganz violates the notice requirements established under COPPA. Second, Ganz’s Children’s Privacy Policy falsely states that the information Ganz collects from children cannot be used to identify them. Third, Ganz unfairly uses cookies and web beacons to track children’s behavior and serve them targeted ads.

A. Ganz Violates the Children’s Online Privacy Protection Rule

Ganz is in violation of the Children’s Online Privacy Protection Rule (COPPA Rule) in at least two ways. First, it violates Rule 312.4(b), which requires an operator of a website directed to children to “post a link to a notice of its information practices with regard to children *on the homepage* of its website . . . and at each area on the website . . . where personal information is collected from children.”³⁹ This rule also requires that, “[t]he link to the notice must be placed in a *clear and prominent place and manner* on the home page of the website or online service.”⁴⁰ Second, Ganz violates Rule 312.4(a), which requires that all notices of information collection, usage and disclosure practices “must be clearly and understandably written, be complete, and must contain no unrelated, confusing, or contradictory materials.”

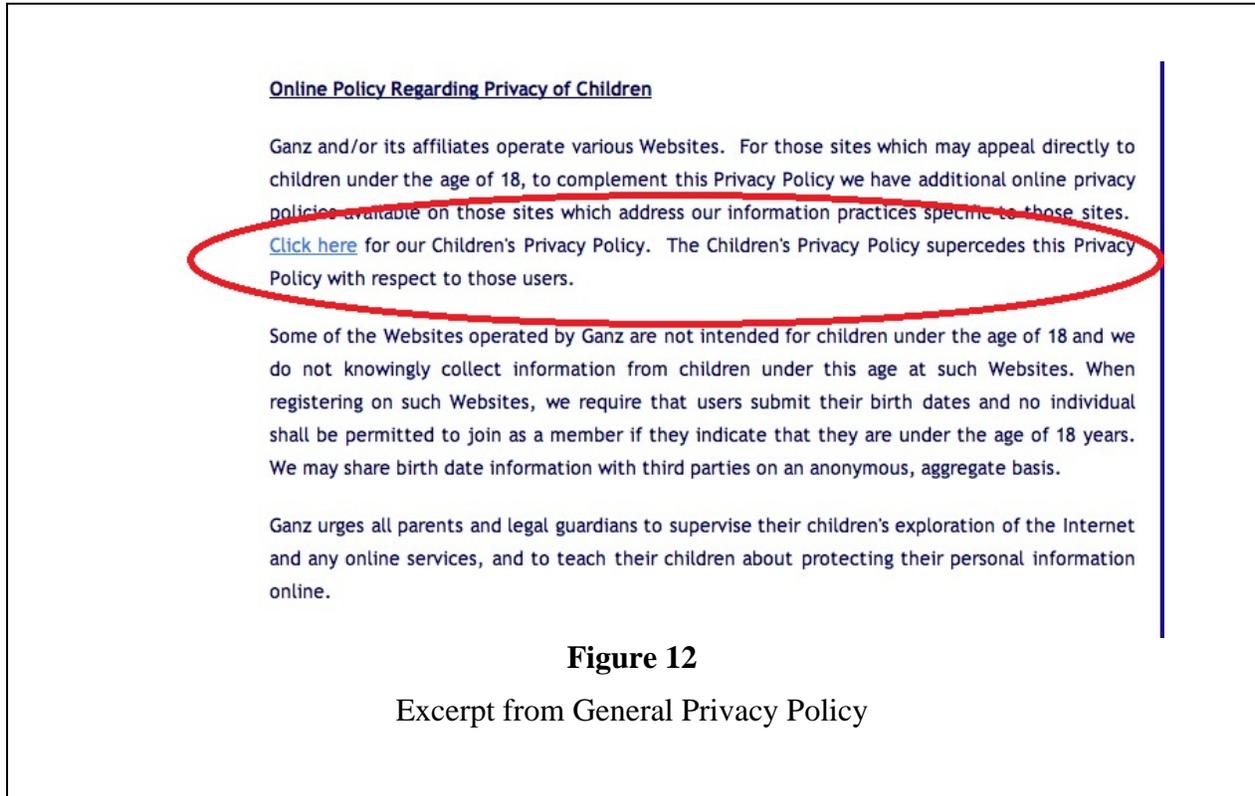
Ganz’s placement of its Children’s Privacy Policy does not meet the requirements of Rule 312.4(b) because, as discussed above on page 8, there is no direct link to it on the homepage. Instead, clicking on the “Privacy Policy” link on the homepage leads parents to Ganz’s “General Privacy Policy.” The section of the General Privacy Policy addressing the scope of the policy states,

Ganz has a Children’s Privacy Policy applicable to children who use Webkinz.com (and certain information provided by their

³⁹ 16 C.F.R. § 312.4(b) (2011) (emphasis added).

⁴⁰ 16 C.F.R. § 312.4(b)(1)(ii) (2011) (emphasis added).

parents and/or legal guardians) and incorporated into this document by reference below; if there is a conflict between the two documents, the Children's Privacy Policy supercedes this Privacy Policy with respect to those users.



Parents must scroll through several more pages of the General Privacy Policy to reach the section titled “Online Policy Regarding Privacy of Children.”⁴¹ As seen in Figure 12, the link to the Children’s Privacy Policy is not prominent. It appears in the middle of a paragraph in the same size and font as the surrounding text. Thus, not only is the link to the applicable Children’s Privacy Policy not on the home page, but when it does appear, it is not placed in a clear and prominent manner.

⁴¹ Appendix C: General Privacy Policy, *infra* p. A-4, at A-7.

Ganz’s Children’s Privacy Policy also violates COPPA Rule 312.4(a), which requires that all notices of information collection, usage and disclosure practices “must be clearly and understandably written, be complete, and must contain no unrelated, confusing, or contradictory materials.”⁴² The fact that Ganz publishes two privacy policies on Webkinz.com is inherently confusing. A parent who follows the “Privacy Policy” link on the homepage but fails to see the second link and read the child-specific policy may come to the reasonable—but inaccurate—conclusion that the General Privacy Policy applies to Webkinz.com. Even if the parent reads both privacy policies, Ganz’s explanation for having multiple policies only adds to the confusion. For example, in the excerpt shown in Figure 12, the second sentence states that Ganz’s privacy policies relating to children “complement” the General Privacy Policy, suggesting that interested parents must read both and try to figure out how to harmonize them. But the last sentence of the same paragraph states that “[t]he Children’s Privacy Policy *supersedes* this Privacy Policy with respect to” users under the age of 18 (emphasis added). This sentence suggests the Children’s Privacy Policy replaces the General Privacy Policy on the Webkinz.com site.

Other aspects of the Children’s Privacy Policy are also written in a vague, confusing and contradictory manner. For example, the definition of personal information is extremely confusing. Under the heading “What is Personal Information?” the policy explains:

When this Children’s Privacy Policy uses the term “personally identifiable information” (“PII”), we mean information that identifies a particular individual, such as the individual’s full name (first name and surname together), postal address, and email address. When certain other information such as your favorite Webkinz pet, or other non-identifiable information is directly associated with PII, this information also becomes PII for purposes of this Children’s Privacy Policy. Some jurisdictions may call personally identifiable information “personal data” or “personally identifying information,” and may include opinions about or

⁴² 16 C.F.R. § 312.4(a) (2011).

related to a user in the definition of PII. We sometimes refer to PII in this Children’s Privacy Policy as “personal information.”⁴³

Does this mean that the term “personal information” sometimes refers to PII and sometimes does not? How is a parent to know how it is being used? Also, how is the average parent to know when non-identifiable information becomes PII? Are user names and unique “secret codes” associated with Webkinz toys “personal information” because they pertain to particular individuals? What about the first name of a child with a highly unusual first name? The Children’s Privacy Policy does not provide an answer.

The explanations under the heading “What Personal Information Does Ganz Collect, and Why?” are also confusing. Under “Surveys and Feedback” the policy states that Ganz “may collect aggregate information in connection with surveys and other online activities that allow your child to give us feedback,” but does not explain what is meant by the term “aggregate information.” Further, under the “Site Management” heading the policy states that Ganz “may collect information through technology” for a variety of site management purposes. The ambiguous phrase “collect information through technology” is never defined. Nor do the examples provided under this section provide a clear definition: Ganz may collect IP addresses, track traffic patterns, use cookies, track a child’s activities and deliver geographically specific content. This explanation is not only confusing, but does not provide information that parents would reasonably want to know—such as whether the site allows behavioral advertising—before deciding whether to allow their children to participate.

Moreover, parts of the Children’s Privacy Policy seem broadly worded enough to allow virtually unlimited use of data by third parties. For example, the explanations offered under the heading “What Kind of Personal Information Does Ganz Disclose, to Whom and Why?” is confusing and unclear. There, the policy states, “Ganz may use outside organizations to perform

⁴³ Appendix D: Children’s Privacy Policy, *infra* p. A-10.

specialized services such as, *but not limited to*, payment processing” and that the service providers are “only given the information needed to perform those services” (emphasis added). Ganz’s failure to limit the types of services provided by third parties could be read to nullify its assurance that the service providers are only given information necessary to perform the service.

B. Ganz’s Privacy Policy Is Deceptive Because It Falsely States that the Information it Collects Cannot Be Used to Contact a Child

Ganz’s Webkinz.com Children’s Privacy Policy also makes a false representation when it claims the information Ganz collects cannot be used to contact children offline. Ganz makes this claim in the “Registration” section under the heading “What Personal Information Does Ganz Collect and Why.” The policy states:

When your child registers for his or her online Webkinz account, we ask for only his or her first name, birthday, gender, country of residence, and, if you live in Canada and the USA, we also collect the state or province of residence where the child lives. None of this is personally identifiable information, because it cannot be used to contact or identify the child offline.

Ganz’s claim that this information cannot be used to contact or identify a child offline is misleading. In recent years, research has demonstrated the ease with which several pieces of information that do not independently qualify as “personally identifiable information” may be pieced together to identify an individual person. By stating that the information it collects cannot be used to contact a child, Ganz perpetuates the “anonymity myth”—that is, the false assumption that someone is not traceable so long as he or she never gives a full name. The “anonymity myth” is a term used by privacy experts Paul M. Schwartz and Daniel J. Solove in a forthcoming article.⁴⁴ Their research shows that the anonymity myth is caused by mistaking the momentary anonymity the Internet can provide for actual untraceability.

⁴⁴ Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 NYU L. Rev. (forthcoming 2011).

Ganz's Children's Privacy Policy also fails to take into account the fact that even data that, used alone, may not be used to identify or contact an individual, can be combined with other data for this purpose.⁴⁵ One well-known example involved AOL's release of 20 million "fully anonymized" search queries for research use. *New York Times* reporters showed that some of the "anonymized" information could be used to re-identify individual users.⁴⁶

Given that Ganz has the information it collects at registration (first name, birthday, gender, country and state of residence), plus the unique numbers from one or more Webkinz toys, the child's username,⁴⁷ and the information from the cookies and beacons, and because it

⁴⁵ See Daniel J. Solove, Understanding Privacy 117–128 (2008). Paul Ohm of the University of Colorado Law School also discusses aggregation in his article, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. Rev. 1701, 1705 (2010). In the article, Professor Ohm cites a study conducted by computer science professor Latanya Sweeney. Sweeney found that 87.1 percent of people in the U.S. could be uniquely identified by their ZIP code, birth date, and sex. Furthermore, 53 percent of Americans can be identified by their city, birth date and sex. While Ganz does not collect cities or ZIP codes, they do have another piece of personal information—first name. It seems likely that Ganz could combine the information they do collect with available databases and be able to contact their users offline.

⁴⁶ The resulting article related the process for identifying User No. 4417749: "Search by search, click by click, the identity of AOL user No. 4417749 became easier to discern. There are queries for 'landscapers in Lilburn, Ga,' several people with the last name Arnold and 'homes sold in shadow lake subdivision gwinnet county georgia.' It did not take much investigating to follow that data trail to Thelma Arnold, a 62-year-old widow who lives in Lilburn, GA, frequently researches her friends' medical ailments and loves her three dogs. 'Those are my searches,' she said, after a reporter read part of the list to her." Michael Barbaro & Tom Zeller, Jr., *A Face is Exposed for AOL Searcher No. 4417749*, N.Y. Times, Aug. 9, 2006, at A1, available at <http://www.nytimes.com/2006/08/09/technology/09aol.html?pagewanted=all>.

⁴⁷ Recent research has shown that usernames are likely sufficient to link accounts across websites because people routinely reuse them. Jonathan Mayer, *Tracking the Tracker: Where Everybody Knows Your Username* (Oct. 11, 2011, 7:06 AM), <http://cyberlaw.stanford.edu/node/6740>. Even if usernames across websites are not identical, users often choose ones that are closely related. Daniele Perito, Claude Castelluccia, Mohamed Ali Kaafar & Pere Manlis, *How Unique and Traceable are Usernames* 9 (2011), available at http://planete.inrialpes.fr/papers/high_entropy.pdf. Once a user is identified by usernames across several websites, it becomes possible to put these identities together. It then becomes possible for username linking techniques to be used by profilers and advertisers to "sharpen their knowledge" of users and to do so automatically, invisibly and with little effort.

shares information with third parties, the likelihood that this data could be used to identify and contact a child, either online or offline, is quite high.⁴⁸

The FTC has already acknowledged the difficulty of determining what information is personally identifiable given the proliferation of online and offline databases and advances in technology.⁴⁹ Furthermore, even if a child cannot be identified *today* using the information she gives online, there is no guarantee that she cannot be identified in the future. Therefore, the FTC should find Ganz's privacy policy claim—that the information it collects cannot be used to identify a child—is misleading.

C. Ganz Engages in Unfair Acts Because Cookies and Web Beacons are Used to Track Children's Behavior and Serve Targeted Ads

Ganz's practice of installing cookies on computers that visit Webkinz.com in order to track children's activities and serve them targeted ads without affirmative parental consent—in fact, even after parents have expressly chosen to block third-party ads—contravenes FTC guidance on behavioral advertising and constitutes an unfair trade practice.

In 2009, the FTC issued the *FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising*.⁵⁰ The self-regulatory principles, which were the subject of extensive

⁴⁸ Schwartz and Solove offer a hypothetical to show how even less of an effort and less information about a person can be used to identify him or her. They ask one to consider the case of a child who has not even given his name, but has relayed to a site through his activity that he is thirteen years old, that his favorite toy is Legos, favorite movie is Batman, favorite candy is Snickers, favorite restaurant is McDonald's and that his zip code is 20052. The professors then ask their reader to imagine that same person has a Facebook profile. That Facebook account says the user's name is Billy Doe, that he is 13, lives in Washington, DC and loves to build things with Legos, loves snickers and that he recently saw the Batman movie and thought it was the "coolest movie ever." Then, imagine another database (like LexisNexis Public Records) contains his date of birth and address. Combining these three data sets, someone could link the anonymized information to Billy Doe and contact him offline. Schwartz & Solove, *supra* note 44, at 27.

⁴⁹ Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change* 36 (2010).

⁵⁰ FTC Staff Report, *supra* note 30.

public comment, state that companies should obtain express affirmative consent before collecting sensitive information for behavioral advertising purposes.⁵¹ The Commission considers information about children one of the “clearest examples” of sensitive data.⁵² When the guidelines were published, then-Commissioner Leibowitz explained that extra protection is warranted for children’s information because that data is “so sensitive” and children are “so vulnerable.”⁵³

Because Ganz does not obtain express affirmative parental consent prior to allowing third-party advertisers to engage in behavioral tracking on Webkinz.com, it violates the Commission’s behavioral advertising guidance. CCFC believes that this conduct also amounts to an unfair act under Section 5 of the FTC Act. In assessing whether an act is unfair, the FTC considers whether it causes or is likely to cause substantial injury to consumers, is not reasonably avoidable by the consumer, and is not outweighed by countervailing benefits to the competition.⁵⁴

Ganz’s practice of collecting children’s information for behavioral advertising without prior parental consent is likely to cause substantial injury to consumers. The circumstances presented are similar to those in a complaint filed against Kidscom.com, a children’s website, before the passage of COPPA. The FTC Staff concluded that:

⁵¹ *Id.* at 47.

⁵² *Id.* at 44. Data about health or finances are the other named clear examples of sensitive information.

⁵³ FTC Staff Report, *supra* note 30 (Comm’r Jon Leibowitz, Chairman, Fed. Trade Comm’n, concurring), *available at* <http://www.ftc.gov/os/2009/02/P085400behavadleibowitz.pdf>. Lydia Parnes, the former director of the Commission’s Consumer Protection Bureau, also testified before Congress that consumer tracking concerns are exacerbated when the tracking involves sensitive information about children. Privacy Implications of Online Advertising: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 110th Cong. (July 9, 2008) (prepared statement of the FTC), *available at* <http://www.ftc.gov/os/2008/07/P085400behavioralad.pdf>.

⁵⁴ FTC Policy Statement on Unfairness appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

[I]t would likely be an unfair practice in violation of Section 5 to collect personally identifiable information . . . from children or otherwise disclose such identifiable information to third parties without providing parents with adequate notice . . . and an opportunity to control the collection and use of that information.⁵⁵

The Staff further explained that releasing children’s information creates the risk of injury or exploitation of children by denying parents the opportunity to control that information. Ganz’s behavioral tracking and advertising practices pose the same risks.

Moreover, this risk is not reasonably avoidable by consumers. Consumers have to have the ability to make a “free and informed choice that would have enabled [them] to avoid the unfair practice.”⁵⁶ Here, Ganz denies parents a “free and informed choice” by not explicitly disclosing that it is allowing third-party tracking and by providing no opportunity to affirmatively express consent, or even to opt out of tracking.

Finally, tracking children’s activities on Webkinz World without consent provides no countervailing benefits to consumers. Proponents of unfettered behavioral advertising purport that consumers receive access to free online content in exchange for giving up personal information. This benefit does not apply here because the purchase of a Webkinz toy is necessary to participate fully in Webkinz World.⁵⁷ Ganz in fact operated Webkinz.com for two years without third-party advertisements. It also receives revenues from the sale of other Ganz products promoted on the Webkinz site. Thus, Ganz’s failure to seek affirmative parental consent before allowing tracking of and behavioral advertising to children not only violates the FTC’s principles, but also constitutes an unfair practice under Section 5.

⁵⁵ Letter from Jodie Bernstein, Director, Consumer Protection Bureau, Federal Trade Commission, to Kathryn C. Montgomery, President and Jeffrey C. Chester, Executive Director, Center for Media Education (Jul. 15, 1997) *available at* <http://www.ftc.gov/os/1997/07/cenmed.htm>.

⁵⁶ *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (quoting *J.K. Publ’ns*, 99 F. Supp. 2d at 1201) *aff’d* 604 F.3d 1150 (2010).

⁵⁷ Alternatively, if parents do not wish for their children to have the toy, they may purchase a secret code outright from the Ganz E-Store.

IV. CONCLUSION

Ganz's misleading claims and omissions in its Ad Policy and Children's Privacy Policy violate Section 5's prohibition of unfair and deceptive trade practices. The Ad Policy expressly states parents may opt out of third-party advertisements when that is not true. The Children's Privacy Policy violates COPPA rules and fails to clearly disclose the fact that children are tracked for the purpose of serving them targeted ads. Ganz further violates the FTC's self-regulatory principles for behavioral advertising and engages in unfair practices because it engages in such tracking without affirmative parental consent.

For the foregoing reasons, CCFC requests that the FTC promptly initiate an investigation of Ganz's advertising and behavioral tracking practices and bring appropriate actions to remedy these violations and prevent further unfair and deceptive conduct.

Respectfully submitted

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