FTC Shoots Fish and the Barrel in YouTube COPPA Settlement

Andrew Magloughlin¹

Today’s most valuable companies are Internet platforms like Google, Facebook, and Amazon that permeate daily activity. “Platforms” are companies that facilitate “two sided markets,” or intermediaries coordinating activity between two distinct groups of consumers.² On the Internet, these two groups often are platform service users and advertisers.³ For example, YouTube passively tracks its video viewers and provides targeted advertising on behalf of third parties to those viewers based on videos they watch.⁴

One recent area of government interest towards platforms is data privacy.⁵ While changes could come soon for federal data privacy regulation, the United States government continues regulating data privacy under a patchwork of laws applicable only to certain types of data.⁶ One such law is the Children’s Online Privacy Protection Act (“COPPA” or “COPPA Rule”), which applies when websites request, provide opportunity to publicly display, or passively collect personal information of children below age thirteen.⁷ In short, COPPA requires website operators to obtain prior parental consent before tracking or collecting personal information from children online.⁸ Until recently, no Internet platform faced a lawsuit, settlement, or court ruling for violating COPPA.⁹

On September 4, 2019, the Federal Trade Commission (“FTC”) settled an action with Google and its subsidiary YouTube for violating the COPPA Rule (“YouTube Settlement”).¹⁰ The settlement imposed a historically large civil penalty and conduct requirements on YouTube.¹¹ Under the settlement’s terms, YouTube must ask content producers to identify child-directed

---

¹ Andrew Magloughlin is a 2L at George Washington University Law School.
³ This is true of Google/YouTube, Facebook, Twitter, etc. The Apple/Android app stores and Amazon are different.
⁶ See Matthew Hettrich, Data Privacy Regulation in the Age of Smartphones, 31 TOURO L. REV. 981, 983 (2015) (federal data privacy regulations largely involve sector-specific regulations on finance and health care, along with protections for children online).
⁸ See 16 C.F.R. § 312.3 2019.
¹¹ Statement of Chairman Joseph J. Simons and Commissioner Christine Wilson, Regarding FTC and People of the State of New York v. Google LLC and YouTube, LLC.
content. YouTube must also presume that all viewers of identified child-directed content are children and cease offering targeted advertising on these videos without parental consent. And moving forward, the FTC will treat failure by YouTube channels to self-identify child-directed content as a COPPA violation. The YouTube Settlement suggests that despite the lack of new data privacy laws, the FTC sees a larger role for itself in policing online platform privacy.

The terms imposed by the YouTube Settlement mark a pivotal shift that draws unintended consequences for the children’s content market. During the YouTube Settlement press conference, Andrew Smith, Director of the FTC Consumer Protection Bureau, analogized fining individual channels for COPPA violations to “shooting fish in a barrel.” This article argues that the FTC inadvertently shot a hole through the barrel while aiming at the fish, draining YouTube, and society, of useful content. By reducing incentives for the creation and distribution of children’s content while eliminating only a de minimis harm, the YouTube Settlement reveals why COPPA’s protections offer little benefit for children, parents, and consumers in the context of online platforms.

First, this article explains the COPPA Rule’s purpose and black letter law. Then, this article describes YouTube’s conduct that led to a COPPA violation and the terms of the settlement. Finally, this article concludes by explaining how the YouTube Settlement disincentivizes quality children’s content and unintentionally shifts content to the teen market. Such problems would be reduced by limiting COPPA’s scope to circumstances involving greater, more tangible harms such as publicly posting children’s personal information.

I. UNDERSTANDING COPPA

Congress passed COPPA in 1998 to protect children ages twelve and under online. Lawmakers feared unique vulnerability for children this young sharing personal information, possibly endangering their safety. Congress sought to lessen this risk by boosting parental control over children’s online activities through requiring parental consent for the collection of personal information. Personal information includes name, address, contact information, username, phone number, social security number, persistent identifiers such as cookies or IP address, a personal

---

12 Id.
16 See id.
17 See, e.g., Nichoel Forrett, Cookie Monster: Balancing Internet Privacy with Commerce, Technology, and Terrorism, 20 TOURO L. REV. 507, 511-12 (2004) (explaining that cookies are text files stored for each individual
photo or voice recording, and geolocation.\textsuperscript{18} Collection includes requesting or encouraging submission of a child’s personal information, enabling public display of a child’s personal information, or obtaining personal information by passively tracking a child online.\textsuperscript{19} Passive tracking is a legally undefined\textsuperscript{20} term that involves storing information provided by a website user as the user progresses through pages of a website, often through cookies. Information obtained through passive tracking helps websites display advertisements specifically targeted to an individual’s interests, demographics, and behaviors.\textsuperscript{21}

COPPA tasked the FTC with implementing the law through its rulemaking authority.\textsuperscript{22} The existing COPPA Rule was last updated in 2013, but the FTC recently concluded a public comment period regarding potential COPPA Rule updates on December 11, 2019.\textsuperscript{23} The FTC enforces COPPA through its civil penalty and legal action authority found in the Federal Trade Commission Act.\textsuperscript{24}

The COPPA Rule requires website operators to obtain prior parental consent before collecting personal information from children. This requirement distinguishes between two types of website operators depending on whether they “direct content towards children.”\textsuperscript{25} Website operators that direct content towards children are strictly liable for failing to obtain prior parental consent.\textsuperscript{26} Otherwise, website operators that do not direct content towards children are liable if they have actual knowledge that they collect children’s personal information.\textsuperscript{27} Thus, there are two methods of COPPA compliance for website operators. One method is obtaining parental consent prior to directing content towards children. The other method of compliance, which is most relevant to platforms, is to neither direct content towards children nor collect children’s personal information.

\textsuperscript{18} 16 C.F.R. § 312.2 2019.
\textsuperscript{19} Id.
\textsuperscript{21} See, e.g., Age Targeting and Ads, YouTube, https://support.google.com/youtube/answer/1304654?hl=en-GB&ref_topic=9257990
\textsuperscript{25} See 16 C.F.R. § 312.3 2019.
\textsuperscript{26} Id.; Andrew Smith, Director, Bureau of Consumer Protection, Fed. Trade Comm’n, Remarks at FTC Press Conference on Settlement with Google / YouTube (explaining that operators directly marketing content towards children are strictly liable).
\textsuperscript{27} 16 C.F.R. § 312.3 2019; Andrew Smith, Director, Bureau of Consumer Protection, Fed. Trade Comm’n, Remarks at FTC Press Conference on Settlement with Google / YouTube (explaining that operators not directly marketing content towards children have liability based on a knowledge standard).
Congress did not define a standard for identifying whether a website “is directed towards children,” leaving this determination to FTC rulemaking authority. The COPPA Rule establishes a subjective test for identifying content “directed towards children” based on a list relevant factors, including full-scale review of the website’s subject matter. Many factors involve marketing that specifically appeals to children, such as use of child actors, animations, and language appealing to children.

Operators comply with the prior parental consent requirement by making reasonable efforts to obtain consent and ensure that the consenting party is the child’s parent, accounting for available technology. The COPPA Rule provides a nonexclusive list of compliant methods for obtaining consent from a parent. Each method is time- and resource-intensive for websites with large user bases like platforms. The methods include:

1. postal mail forms;
2. tying consent to monetary transactions that notify the parent’s payment account upon transaction;
3. toll-free call verification;
4. video conference;
5. cross-referencing a government ID with public databases;
6. email verification if the operator agrees not to publicly disclose the child’s personal information; and
7. other methods adopted through the FTC’s safe harbor program.

Lastly, the COPPA Rule requires website operators seeking to collect personal information from children to post notice of this intent. Generally, notice must be clear and understandable. Notice must explain what information the website operator intends to collect from a child and how it will be used. A website must display a prominent, clearly labeled link to its information.

---

29 16 C.F.R. § 312.2 2019 (The full list of factors considered by the FTC in determining whether a website is “directed towards children” is the website’s subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience).
30 See id.
31 16 C.F.R. § 312.5 2019.
32 Id.
34 16 C.F.R. § 312.4 2019.
35 Id.
practices on its homepage and each page where a child’s information might be collected.\textsuperscript{36} Website operators also must make reasonable efforts to directly notify parents upon requesting consent.\textsuperscript{37}

II. YOUTUBE’S VIOLATIVE CONDUCT AND SETTLEMENT TERMS

The FTC and New York’s Attorney General concurrently sued YouTube and its parent company, Google, for violating the COPPA Rule and settled the case on September 4, 2019.\textsuperscript{38} The claim against YouTube relied on statements demonstrating knowledge of collection of children’s personal information through YouTube ads.

The YouTube Settlement made two historical developments specific to COPPA. First, it imposed the largest monetary penalty ever charged under COPPA.\textsuperscript{39} Second, the YouTube Settlement assessed COPPA liability to an Internet platform for the first time.\textsuperscript{40} By finding COPPA liability for an Internet platform, the YouTube Settlement establishes that the FTC does not treat the “knowing” requirement as a blanket protection for platforms.\textsuperscript{41} Additionally, the YouTube Settlement imposes conduct requirements specific to YouTube that permanently modify the platform’s business.

This section details how YouTube violated COPPA according to the FTC and then explains the YouTube Settlement terms.

A. YouTube’s Communications with Advertisers Demonstrated Actual Knowledge

YouTube violated COPPA by demonstrating actual knowledge that it collected personal information, i.e. cookies, from children. While YouTube claimed to be a general audience website,\textsuperscript{42} several statements Google made while marketing YouTube’s advertising services to potential customers indicated knowledge of targeting of children. While pitching YouTube ads to clients, Google claimed that YouTube is: “The number one website regularly visited by kids”;

\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{40} See id.
\textsuperscript{41} See id. (noting that the YouTube Settlement is the “first and only mandated requirement on a platform or third party to seek actual knowledge of whether content is child-directed”).
“Unanimously voted as the favorite website of kids ages 2-12”; “Today’s leader in reaching children age 6-11”; and “The new Saturday Morning Cartoons.”

Google made some of these statements directly to toy manufacturers Hasbro, High Monster Toys, and Mattel, each of which direct their YouTube content towards children. Additionally, YouTube manually swept its channels for child-directed content to feature on its YouTube Kids app, labeled some content as child-directed, and heard directly from some channels that their content targeted children. YouTube continued placing targeted ads based on cookies from viewers on these channels despite plain statements of knowledge that these cookies often came from children. Therefore, according to the FTC’s complaint, YouTube knowingly collected personal information from children in violation of COPPA.

B. Settlement Terms

The YouTube Settlement assessed a historic penalty and liability finding under COPPA. First, the FTC fined YouTube $170 million for violating COPPA—$136 million to the FTC’s coffers and $34 million for the state of New York. This is the largest fine ever issued for a COPPA violation by thirty times. Second, the YouTube Settlement is the first instance of a COPPA violation for an Internet platform under COPPA’s knowledge standard. This settlement establishes agency precedent for investigating and penalizing other platforms under COPPA.

Next, the FTC prescribed rules specific to the YouTube platform that permanently alter its business. The settlement requires YouTube to ask content providers through a permanent website mechanism whether their content is directed towards children at the time of upload. Based on the response, YouTube has automatic knowledge-based liability under COPPA for content identified by channels as directed towards children. The settlement also imposes strict liability on

---

43 What Google Said about YouTube, FED. TRADE COMM’N, Sept. 4, 2019, https://www.ftc.gov/sites/default/files/u52513/what_google_said_about_youtube.png (“Saturday morning cartoons” were a prominent television time slot and cultural institution for children’s content in prior decades).
45 Id.
46 Id.
47 Id.
48 Content providers on YouTube are colloquially referred to as “Channels” or “YouTube Channels.” Channels might focus on a single person, such as “Miley Cyrus” or an entire organization, such as “Mattel.”
50 Andrew Smith, Director, Bureau of Consumer Protection, Fed. Trade Comm’n, Remarks at FTC Press Conference on Settlement with Google / YouTube (explaining that designation of a video or channel as “directed towards kids” provides YouTube with automatic knowledge under COPPA); see also Makenna Kelly & Julia Alexander, YouTube’s New Kids’ Content System Has Creators Scrambling, VERGE, Nov. 13, 2019, https://www.theverge.com/2019/11/13/20963459/youtube-google-coppa-ftc-fine-settlement-youtubers-new-rules (explaining that YouTube software updates developed to comply with the YouTube Settlement immediately shut off targeted ads and comments sections for content channels designate as “directed towards kids”).
YouTube’s channels to disclose whether content is directed towards children through the aforementioned mechanism at the point of upload. While no channels were parties to the YouTube Settlement, YouTube’s requirement to obtain self-reporting from channels prior to publication on the platform creates a mechanism for the FTC to police channels for potential COPPA violations. For example, in the future, compliant channels will self-identify content as directed towards children. If a channel incorrectly self-reports that its content is “not directed towards children,” then the FTC could sue that channel directly. Indeed, the agency announced intent to conduct a “sweep” of YouTube channels for possible COPPA violations in the near future.51

YouTube will presume all viewers of channels labelled as “directed towards children” are children. Therefore, YouTube must obtain prior parental consent before running targeted ads on content from these channels. The YouTube Settlement’s presumption that all viewers of channels labelled as “directed towards children” are children gives YouTube a simple COPPA compliance method. YouTube’s obligation is simply to block targeted ads from channels self-identified as directed towards children until parental consent is obtained. YouTube complies as long as it withholds targeted ads from these self-identified channels, a much simpler obligation for YouTube than having to review millions of channels itself and determining which direct content towards kids.

Lastly, YouTube must provide annual training for its employees on COPPA compliance and meet the COPPA Rule’s notice requirements for displaying its data collection practices.52

III. THE YOUTUBE SETTLEMENT CAUSES UNINTENDED CONSEQUENCES FOR CHILDREN’S CONTENT

During the FTC’s press conference announcing the YouTube settlement, Consumer Protection Bureau Director Andrew Smith analogized future COPPA enforcements against individual YouTube channels to “shooting fish in a barrel.”53 Smith’s statement implies that the FTC believes its YouTube Settlement will preserve the website’s current content creator ecosystem while simplifying the process for finding bad actors. But the settlement might end up shooting holes in the barrel due to unintended consequences.

a. Behavioral Incentives

51 Andrew Smith, Director, Bureau of Consumer Protection, Fed. Trade Comm’n, Remarks at FTC Press Conference on Settlement with Google / YouTube (explaining that the FTC will soon investigate individual YouTube channels for COPPA violations).
52 Id.
53 Andrew Smith, Director, Bureau of Consumer Protection, Fed. Trade Comm’n, Remarks at FTC Press Conference on Settlement with Google / YouTube (explaining that the FTC will easily punish individual channels that fail to self-identify child-directed content in the future with a “shooting fish in the barrel” analogy).
The YouTube Settlement’s immediate effect is to disincentivize children’s content creation by demonetizing that type of content.\textsuperscript{54} Children’s content providers likely will receive reduced revenue from YouTube’s targeted advertising as some parents may not consent to the collection of their children’s personal information.\textsuperscript{55} Without adopting alternative compensation, this sends a strong, negative message to children’s content creators—your work is worth more elsewhere.

And since the settlement only applies to YouTube, content creators might shift to other websites and platforms without triggering its terms, but at the sacrifice of YouTube’s massive audience and scale. YouTuber Rob from “Art for Kids” notes he develops his content on mobile apps and his own website in addition to YouTube, which should help him mitigate some of the loss from targeted ad revenues on his YouTube channel.\textsuperscript{56} It seems unlikely that Rob risks another FTC action on his own website, given the agency lacks resources to police and punish each individual website for COPPA violations. But Rob likely faces difficulty drawing web traffic comparable to YouTube’s 1.3 billion users or its ability to pay content creators ad royalties.\textsuperscript{57} Rob will have to recover diminished ad revenue through alternative streams, possibly cutting his overall revenue. Thus, the YouTube Settlement disincentivizes Rob’s and others’ production of children’s content.

For children’s-content creators who choose to remain on YouTube, their incentive is to do whatever it takes to keep targeted ad payments. Content providers have little power over obtaining parental consent. Since a parent must provide affirmative consent through a COPPA-compliant method, content providers hoping to run targeted ads on child-directed content are completely at the whims of YouTube’s mechanism for obtaining consent and parents’ willingness to provide such consent. There is no telling how effective obtaining parental consent might be and therefore how many viewers will be turned away from the content due to the consent requirement.

The obvious path for retaining targeted ad revenue would be making the bare minimum effort for COPPA compliance by altering content so it is not “directed towards children.” In a sense, this path achieves the FTC’s goals because channels technically would comply with COPPA. However, this compliance option reduces supply of children’s content by forcing channels to reform in ways that avoid COPPA’s triggers. Instead of creating children’s content without passive tracking, content creators could make age-ambiguous or age-thirteen-plus content that arguably does not implicate COPPA’s parental consent requirement for passive tracking. Kids might continue watching this content under a new age-ambiguous format and still see targeted ads.


\textsuperscript{55} See \textit{YouTube Partner Earnings Overview}, YOUTUBE, \url{https://support.google.com/youtube/answer/72902?hl=en}.

\textsuperscript{56} Alexander, \textit{YouTube Creators Have Begun Shifting Channels after FTC Fine Leaves Futures in Jeopardy}.

\textsuperscript{57} See 37 Mind Blowing YouTube Facts, Figures and Statistics, MERCHDOPE, Sept. 29, 2019, \url{https://merchdope.com/youtube-stats/}.
without parental consent given the reduced monetary incentives for producing COPPA-compliant children’s content.

The effort to avoid “child-directed content” designations is already happening. Multiple top YouTube channels dedicated to kids, including MyFroggyStuff, Kelli Maple, and Art for Kids are rebranding their channels for the thirteen-and-up demographic not covered by COPPA.58 These channels are making changes to avoid suspicion under COPPA’s subjective test for evaluating whether content is “directed at children,” including language use and animations appealing to kids.59 For example, MyFroggyStuff channel, which formerly unboxed toy dolls and analyzed their features, will no longer refer to its main character as “Froggy” and instead use her real name, Toya.60 Toya’s latest video (posted after the YouTube Settlement) explicitly notes within the first thirty seconds that the doll she unboxes is “INTENDED ONLY FOR PERSONS AGES 15 PLUS.”

Assuming they are lawful, COPPA compliance methods like Toya’s defeat the purpose of the YouTube Settlement. The YouTube Settlement envisioned child-directed content creators self-designating child-directed content under threat of strict liability, leading to immediate removal of targeted ads without parental consent. Or in other words, a “fixed pie” fallacy where today’s YouTube content ecosystem statically accepts FTC rules without altering behavior and the nature of their content to get around the COPPA Rule.62 Instead, incentives lead them to avoid the designation, which provides no benefits for assessing YouTube COPPA liability moving forward. It just reduces kids’ content.

Even worse, there is little guidance as to what constitutes “content directed towards children” in the context of YouTube channels. The YouTube Settlement gives no guidance for subjective evaluation for child-directed content under the COPPA Rule. But the YouTube Settlement determined that the COPPA Rule subjects YouTube channels to strict liability for failing to identify content directed towards children. This leaves some channels clueless as to how to comply with the law.

Video game and sports content makers are particularly wary. For example, YouTube videos about games like Minecraft, enjoyed by adults, teens, and children, might constitute child-directed content, but nobody knows for sure.63 And it is unclear whether content that includes

58 Alexander, YouTube Creators Have Begun Shifting Channels after FTC Fine Leaves Futures in Jeopardy.
59 Id.
60 Id.
sports figures that might appeal to children as well as a broader audience should be deemed child-directed. The FTC’s COPPA rule review should provide clarity on these issues, but in the meantime, content creators face a chilling effect.

The YouTube Settlement’s blanket removal of targeted ads on children’s content absent parental consent might skew YouTube’s content towards lower-quality children’s content. Smaller, independent channels that provided unique, high-quality, educational content in exchange for targeted ad commissions lose their entire revenue source under the YouTube Settlement without parental consent. Meanwhile, content sources with alternative revenue streams, such as toy manufacturers, maintain strong incentives to produce children’s content for product promotion. Their children’s content serves as twenty-minute long ads for toys, despite absence of targeted advertising. Independent content like Rob’s art lessons for kids could turn into a twenty-minute video that is basically a toy advertisement.

b. Considering Consumer Harm Would Decrease the Unintended Consequences

Commissioner Noah Phillips hypothesized unintended consequences in his YouTube Settlement statement. Phillips supported the settlement but noted that privacy regulation should consider the harm at hand. In this instance, the consumer harm was exposing children to targeted advertising. While Congress determined that passive tracking is inappropriate for children when it passed COPPA in 1998, such tracking raises less significant concerns than others addressed by COPPA, such as public display of certain categories of information like name, location, and phone number. These forms of personal information could expose children to physical harms from stalking, kidnapping, or sexual predation. It is tough to imagine a scenario where a targeted ad based on recent browsing history causes comparable harm to public display of information that could expose a child to a physical and/or sexual predator.

Imposing strict conduct requirements on platforms that address de minimis harms could deter innovation and useful children’s content. Losing this content might be more costly for consumers than the harm of targeted ads themselves. Compare the harm from a kid watching an ad to online lender Avant, LLC’s unfair practice of withdrawing its customers monthly loan payments up to eleven times per month and refusing refunds. While these examples involve two

---

different types of FTC consumer protections, the comparison highlights that tough enforcement might not always make sense. Targeted ads do not plainly pilfer pocketbooks or provide information to stalkers. Now compare the harm from a targeted ad to the potential for demonetizing children’s content on one of the Internet’s most popular platforms. COPPA’s approach towards passive tracking sacrifices valuable content for minimal consumer protection.

Proponents of COPPA claim that the YouTube Settlement will not seriously jeopardize children’s content because the law only requires parental consent, not a blanket ban on targeted advertising for kids’ content. It follows that parents who hold my view—that targeted ads are minimally harmful—could easily consent and deliver targeted ad revenues to children’s content providers. We do not have any data on consent rates for YouTube yet, but the risk is not worth it. Content creators will not be able to predict consent rates, causing them substantial uncertainty about potential earnings. They may perceive great enough uncertainty to give up on children’s content production as a whole or disguise it as previously discussed. Given the limited harm from targeted ads, risking a market exodus for quality kids content is not worth fringe privacy benefits.