



Office of Commissioner  
Rebecca Kelly Slaughter

UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**Dissenting Statement of Commissioner Rebecca Kelly Slaughter**  
***In the Matter of Google LLC and YouTube, LLC***  
**September 4, 2019**

Today's settlement marks a milestone for enforcement of the Children's Online Privacy Protection Act (COPPA): It includes the largest financial penalty ever paid for COPPA violations and contains injunctive provisions that materially remake the YouTube platform. The settlement is impressive as far as it goes, but, for reasons I explain in more detail below, I am concerned that it does not go far enough to ensure that child-directed content on YouTube will be treated in a COPPA-compliant manner. I therefore respectfully dissent.

Congress passed COPPA in 1998 in response to widespread concern about websites and other internet services marketing themselves to, and more disturbingly collecting information from, children. COPPA's intent is to put parents back in the driver's seat when it comes to whether and what information is collected about their children online. It achieves this goal through an "opt-in" model that requires verifiable parental consent for the collection of information about children and through a requirement that companies are transparent about how they collect, use, and protect children's data. The Federal Trade Commission, along with state attorneys general, has the responsibility to enforce COPPA.<sup>1</sup>

YouTube is likely the online service that today hosts the most violations of COPPA. Those violations are primarily committed by content creators who upload child-directed content and monetize their channels with behavioral advertising that uses persistent identifiers to track children without verifiable parental consent.<sup>2</sup> But, the Commission alleges, YouTube and its parent company, Google, have also committed widespread and brazen violations of COPPA

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<sup>1</sup> The FTC has brought 31 enforcement actions under COPPA, *see Legal Resources*, Fed. Trade Comm'n, [https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field\\_consumer\\_protection\\_topics\\_tid=246](https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=246) (last visited Sept. 3, 2019), along with numerous actions brought by state attorneys general, *see, e.g., A.G. Underwood Announces Record COPPA Settlement With Oath – Formerly AOL – For Violating Children's Privacy*, N.Y. State Office of the Att'y Gen. (Dec. 4, 2018), <https://ag.ny.gov/press-release/ag-underwood-announces-record-coppa-settlement-oath-formerly-aol-violating-childrens>; *Acting Attorney General Announces Settlement Resolving Allegations That Maker of "Dokobots" App Violated Children's Online Privacy Rules*, State of N.J. Office of the Att'y Gen. (Nov. 22, 2013), <https://nj.gov/oag/newsreleases13/pr20131122a.html>; Janet Elliot, *AG's office says two Web sites invade privacy*, Hous. Chron. (Dec. 6, 2007), <https://www.chron.com/business/technology/article/AG-s-office-says-two-Web-sites-invade-privacy-1534421.php>.

<sup>2</sup> COPPA generally makes it "unlawful for an operator of a website or online service . . . to collect personal information from a child" without "verifiable parental consent." 15 U.S.C. § 6502. Under the COPPA Rule, which implements COPPA, "personal information" includes "a persistent identifier that can be used to recognize a user over time and across different Web sites or online services." 16 C.F.R. § 312.2.

because of their actual knowledge<sup>3</sup> of the child-directed content they host and monetize with behavioral advertising. The Commission’s staff, working alongside the Attorney General of New York and her staff, have assembled a powerful complaint against YouTube and Google that should leave no doubt in the mind of a judge—or the minds of parents—that YouTube and Google were knowingly profiting off of the unlawful tracking of children,<sup>4</sup> which is forbidden by COPPA and its implementing rule.<sup>5</sup> I strongly support the complaint that the Commission has approved against YouTube and Google, and I appreciate the steps the proposed settlement takes to remedy the violations alleged.

To assess the effectiveness of the settlement’s provisions, it is important to start with an understanding of YouTube’s business model, which elucidates both why the alleged violations happened in the first place and whether they will be effectively curbed going forward. In sum and substance, YouTube partners with channel owners who, upon crossing a viewership threshold, can elect to monetize the channel to deliver advertisements to viewers; YouTube takes a 45% cut of the advertising revenue and passes the rest to the channel.<sup>6</sup> Advertising on YouTube’s channels can either be contextual (informed by the particular channel or video) or behavioral (informed by the behavior of the device owner as tracked across different websites, apps, and devices).<sup>7</sup> YouTube has long allowed channel owners to turn off default behavioral advertising and serve instead contextual advertising that does not track viewers, but vanishingly few content creators would elect to do so, in no small part because they receive warnings that

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<sup>3</sup> For so-called “general audience” sites, such as YouTube, which are not on the whole directed at children, the COPPA Rule imposes liability only where the general-audience site “has *actual knowledge* that it is collecting personal information directly from users of another Web site or online service directed to children,” such as a child-directed channel on YouTube. *Id.* § 312.2 (emphasis added).

<sup>4</sup> Google marketed YouTube as the “new ‘Saturday Morning Cartoons’ ” and “the #1 website regularly visited by kids,” Compl. ex. C; as “unanimously voted as the favorite website of kids 2–12,” *id.* ex. B; and as “today’s leader in reaching children age 6–11,” *id.* ex. A. Accompanying these smoking guns are dozens of fingerprints. Millions of videos were rated by YouTube as “Y,” for ages 0–7, and they were still subject to behavioral advertising. *See id.* ¶¶ 23–24. The COPPA-compliant YouTube Kids app had staff-curated child-directed content, all of which had to be posted on YouTube to be eligible for promotion on YouTube Kids. In its YouTube versions, this content actually known to be child-directed was still accompanied by behavioral advertising informed by persistent identifiers. *See id.* ¶ 25. Finally, some of YouTube’s most successful channels included those that explicitly identified themselves as for kids, including Mattel’s Barbie, Monster High, Hot Wheels, and Thomas & Friends channels; Cartoon Network’s Powerpuff Girls and Teen Titans Go! channels; Hasbro’s My Little Pony, Littlest Pet Shop, and Play-Doh Town channels; several DreamWorks animated series “made just for kids!,” *id.* ¶ 30; Masha and the Bear, an animated series that targets children ages 3–9, *see id.* ¶ 31; Bratayley, which features content targeting children ages 8–10, *see id.* ¶ 32; CookieSwirlC, ToyScouter, and EvanTubeHD, channels that primarily feature “unboxing” videos in which kids elate over new toys; Sandaroo Kids, Little Baby Bum, and Mother Goose Club, whose child-directed nature is self-explanatory; and so on.

<sup>5</sup> The FTC recently requested comment about the COPPA Rule, with comments due October 23, 2019. *See Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule*, 84 Fed. Reg. 35842 (July 25, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-07-25/pdf/2019-15754.pdf>. There will also be a public workshop on October 7. I invite interested parties to participate in the workshop and submit comments about how to strengthen the Rule.

<sup>6</sup> *See* Eric Rosenberg, *How YouTube Ad Revenue Works*, Investopedia (Oct. 7, 2018), <https://www.investopedia.com/articles/personal-finance/032615/how-youtube-ad-revenue-works.asp>.

<sup>7</sup> *Cf.* Rocco Baldassarre, *7 Great Ways to Advertise on YouTube*, Search Engine J. (Sept. 30, 2015), <https://www.searchenginejournal.com/7-great-ways-advertise-youtube/137472/>; *Personalized and non-personalized ads*, Google Ad Manager Help, <https://support.google.com/admanager/answer/9005435> (last visited Sept. 3, 2019).

disabling behavioral advertising can “significantly reduce your channel’s revenue.”<sup>8</sup> In short, both YouTube and the channels have a strong financial incentive to use behavioral advertising.

Against this backdrop, I consider the proposed settlement. It is indisputable that the civil penalty negotiated here is historically large,<sup>9</sup> but the injunctive relief is likely to have a more lasting impact. The “fencing-in” relief<sup>10</sup> in the consent order requires substantial changes to the YouTube platform. YouTube and Google have agreed to ensure that, every time a video is uploaded to YouTube by a content creator, the content creator will have to designate the video as child-directed or not. For videos designated as child-directed, YouTube will not serve behavioral advertisements or track persistent identifiers. This will help get a good portion of child-directed content out from under COPPA-violating behavioral advertising. Channels’ designations of content as child-directed will give YouTube easily provable actual knowledge of the child-directed nature of the content. If YouTube does then serve behavioral advertisements using persistent identifiers or otherwise engage in tracking for such content, it will have violated both COPPA and the order. I expect YouTube to fully comply.

This relief is important, and I suspect it will result in a substantial amount of child-directed content’s being appropriately designated as such. While we cannot know for certain how creators will respond to the prompt to designate their content, I imagine that many high-profile content creators identified in the complaint—especially those such as Mattel and Hasbro who make most of their money from selling toys rather than from advertising—will forthrightly designate all of their child-directed content as child-directed. They will do so even though the contextual advertising served instead is far less lucrative<sup>11</sup> because they will accurately predict that their risk of COPPA liability for deceitfully designating their content is high.

My concern is with the vast universe of content creators who will conduct a different cost-benefit analysis in which the perceived payoff of monetizing child-directed content through behavioral advertising outweighs the perceived risk of being caught violating COPPA. And that universe is indeed vast. Google marketed YouTube as the new “Saturday Morning Cartoons,”

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<sup>8</sup> *Advanced Settings*, YouTube, [https://www.youtube.com/advanced\\_settings](https://www.youtube.com/advanced_settings) (last visited Sept. 3, 2019) (displaying an option for a content creator to disable interest-based ads on her channel, accompanied by multiple warnings about the revenue the creator could lose by doing so); cf. *About personalized advertising*, Google: AdSense Help, <https://support.google.com/adsense/answer/113771> (last visited Sept. 3, 2019) (“Personalized advertising should help monetize your website more efficiently . . .”).

<sup>9</sup> Commissioner Chopra has deftly laid out various important considerations about the magnitude of civil penalties. I generally agree with his assessment and leave the detailed discussion of civil penalties to him. I add only two points. First, any civil penalty amount should be assessed not against the benchmark of past awards but by applying the statutory factors to the specific facts and firm before the Commission in a particular case. Second, the Commission has never litigated a COPPA enforcement action and therefore has no informed basis on which to assess how a court would assess a civil penalty amount.

<sup>10</sup> “Fencing-in relief” refers to injunctive provisions that go beyond merely requiring the defendant to obey existing law. Fencing-in relief passes muster so long as it bears a “reasonable relation to the unlawful practices found to exist.” *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394–95 (1965).

<sup>11</sup> Although the additional profit of behavioral advertising to channel owners and YouTube is “significant[]” compared to contextual advertising, recent evidence suggests that the value premium for behavioral advertising as opposed to contextual advertising, at least outside the YouTube platform, is smaller than has been widely believed. See, e.g., Keach Hagey, *Behavioral Ad Targeting Not Paying Off for Publishers, Study Suggests*, Wall St. J. (May 29, 2019), <https://www.wsj.com/articles/behavioral-ad-targeting-not-paying-off-for-publishers-study-suggests-11559167195>.

but, unlike the Saturday morning cartoons of old, YouTube is not three channels—it is a virtually infinite smorgasbord of content with, according to recent estimates, more than 23 million channels that upload a combined 500 hours of video every minute.<sup>12</sup> Many if not most of those channels are located outside the United States and therefore likely beyond COPPA’s and the FTC’s practical reach. Many are small enterprises with opaque operations that would be difficult subjects to investigate. Under the order, they will all have to make a designation of whether their content is child-directed. In light of the steep financial cost of such a designation—and the low likelihood of COPPA enforcement for channels under the radar or originating outside of the United States—it is reasonable to anticipate that there will be significant deceit.

And here is the heart of my objection: The order does not require YouTube to police the channels that deceive by mis-designating their content, such as by requiring YouTube to put in place a technological backstop to identify undesignated child-directed content and turn off behavioral advertising. True, a technological backstop is not explicitly mandated by COPPA’s text, but such a requirement would, I believe, be appropriate and necessary fencing-in relief.<sup>13</sup> The order’s requirement that channel owners designate content as child-directed is also not required by COPPA, yet it is a good start to fencing-in relief, to which YouTube has consented, to redress YouTube’s own COPPA violations and reduce its facilitation of others’ violations. Fencing-in relief that goes beyond bare-minimum statutory requirements is a common and important aspect of effective Commission orders.

When it comes to fencing-in relief, the current order looks like a fence but one with only three sides. The missing fourth side is a mechanism to ensure that content creators are telling the truth when they designate their content as not child-directed. And such a mechanism is surely within YouTube’s mighty technological capacity. It already algorithmically classifies videos into age categories, as the complaint details with respect to “Y”-rated videos for ages 0–7.<sup>14</sup> Applying the same or similar classifier to identify mis-designated child-directed content would provide an important technological backstop to the relief already in the order. Would such a classifier mechanism eliminate every last incorrect designation of child-directed content? Surely not. But, especially coupled with adequate training and progressive discipline for recidivist channels, it would fundamentally alter the incentive to profit illegally off of behavioral advertising to children, especially for channels unlikely to face enforcement action by the Commission, such as foreign channels.

A requirement that YouTube police the honesty of child-directed designations—such as with a technological backstop<sup>15</sup>—is also critical to changing YouTube’s incentives. YouTube

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<sup>12</sup> See James Loke Hale, *More Than 500 Hours of Content Are Now Being Uploaded to YouTube Every Minute*, Tubefilter (May 7, 2019), <https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute>; *Information*, Social Blade, <https://socialblade.com/info> (“Social Blade currently tracks 23+ million YouTube channels”) (last visited Sept. 3, 2019).

<sup>13</sup> Again, the Commission has never litigated a COPPA case, so it is difficult to accurately evaluate what injunctive relief litigation might obtain, but a technological backstop directly “relat[es] to the unlawful practices” the complaint alleges. *Colgate-Palmolive*, 380 U.S. at 394–95.

<sup>14</sup> See Compl. ¶ 23.

<sup>15</sup> Chairman Simons and Commissioner Wilson write that such a requirement would be an “empty gesture” that could “give the public a false sense of security” and result in “limiting content to other audiences.” I respectfully disagree. To be sure, the efficacy of a backstop provision would depend both on how well it was drafted and how

profits off of behavioral advertising proportionally with its content creators; when behavioral advertisements are disabled, YouTube also takes a financial hit. A cynical observer might wonder whether in the wake of this order YouTube will be even more inclined to turn a blind eye to inaccurate designations of child-directed content in order to maximize its profit. The firm would know it could offer the content-owner's designation as a rebuttal to any evidence the Commission might gather in the future about YouTube's "actual knowledge" of child-directed content.<sup>16</sup> In that light, the fence looks more like a moat, giving YouTube a handy argument that it should face no COPPA liability for content mis-designated as not child-directed.

The injunctive provisions in this settlement would be substantially more effective if YouTube were to make an enforceable commitment to police the accuracy of channels' designations, for example by using a technological backstop. Because the order does not contain such a requirement, I cannot support it.

Just as the Attorney General of New York contributed to bringing this action, the other 49 states' attorneys general remain empowered by COPPA to take action against the violations that we detail in the complaint. The states could pursue an injunctive remedy that includes an enforceable promise of a technological backstop to keep content creators and YouTube honest about whether content is child-directed. YouTube might insist that an algorithmic classifier should not be included because even better technology could soon eclipse it; I trust that the smart people who represent the states and YouTube alike would be able to draft an adaptable but enforceable provision that serves as the fourth wall to the fence that New York and the Commission have begun constructing.

Children are uniquely vulnerable internet users whose privacy and safety deserve nothing less than our toughest rules and fiercest enforcement. As a parent of three children under 13, I know how bewildering and frightening—and amazing and educational—the internet can be. COPPA violations are not the only serious problem YouTube poses for parents.<sup>17</sup> YouTube Kids, a COPPA-compliant app that YouTube developed, is a signal of its seriousness in becoming a trustworthy service that is safe for our children. This order will make YouTube safer for children than it has been, but, without a backstop to catch inappropriately designated content, it will not make YouTube safe enough. More action is needed, and I hope that our partners in state attorneys' general offices can finish the job.

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enthusiastically it was implemented. In proposing a backstop provision, I do not intend to prescribe a particular type of technological solution. Human review on a large scale could also succeed at stemming the COPPA violations that concern me. But a technological backstop seems to me an efficient and pragmatic mechanism within reach today.

<sup>16</sup> Of course, where a content creator has erroneously designated content as not child-directed, the Commission could still prove with other evidence that YouTube had actual knowledge of the child-directed nature of the content. The practical obstacles in investigating and assembling such evidence, however, call into question whether "actual knowledge" is the appropriate standard for "general audience" sites under the COPPA Rule.

<sup>17</sup> The complaint and my statement have focused on behavioral advertisements, but the persistent identifier YouTube uses to serve behavioral advertisements can also be used to select content for autoplay, which drives much of YouTube's viewer engagement. When a child watches a kids' video on her parent's device, the next video the child sees (prompted by YouTube's autoplay feature) may be informed by the inferred preferences of the parent, perhaps queuing up material that is age-inappropriate, violent, or worse. That is a material harm.