



Office of Commissioner  
Rohit Chopra

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

**DISSENTING STATEMENT OF  
COMMISSIONER ROHIT CHOPRA**  
*In the Matter of Google LLC and YouTube, LLC*  
*Commission File No. 1723083*  
*September 4, 2019*

**Summary**

- For the third time since 2011, the Federal Trade Commission is sanctioning Google for privacy violations. This latest violation is extremely serious. The company baited children using nursery rhymes, cartoons, and other kid-directed content on curated YouTube channels to feed its massively profitable behavioral advertising business.
- Illegally harvesting children's data was extremely lucrative. It generated short-term profits and advanced its long-term dominance in the children's video market. Google knew that content on YouTube channels was directed to young children, but did not disable illegal data collection.
- The FTC frequently points to its insufficient authority to protect the privacy of Americans, but when it comes to children, the Commission already has strong tools provided by the Children's Online Privacy Protection Act (COPPA). Despite this specific authority, the Commission repeats many of the same mistakes from the flawed Facebook settlement: no individual accountability, insufficient remedies to address the company's financial incentives, and a fine that still allows the company to profit from its lawbreaking. The terms of the settlement were not even significant enough to make Google issue a warning to its investors.
- The approach in this matter is inconsistent with other children's privacy enforcement actions against small companies, where individuals are closely scrutinized and settlement terms are crippling. This outcome reinforces my concerns that the Commission brings down the hammer on small firms, while allowing large firms to get off easier.

## **Protecting Privacy for Children and the Public**

Over twenty years ago, Congress enacted COPPA, which gave the FTC exclusive authority to seek penalties for children's privacy violations, in addition to seeking the forfeiture of gains stemming from illegal harvesting of children's data.

In this matter, by seeking in settlement, and then agreeing to an amount that in my view results in Google (NASDAQ: GOOG, GOOGL) profiting from its widespread violations, I believe the Commission is contravening clear Congressional intent to substantially penalize violators of children's privacy beyond their ill-gotten gains. Neither state regulators, nor private litigants have the ability to ensure that those who abuse children's data are penalized beyond their gains.<sup>1</sup>

The Federal Trade Commission has repeatedly asked Congress for comprehensive privacy legislation that includes civil penalties. Commissioners often point to our lack of explicit authority as an obstacle to effective data protection enforcement. However, in the recent Facebook matter involving flagrant violations of a binding FTC order and in this matter involving children's privacy rules, the agency already has significant authority to seek penalties and other relief.

The reality is that our enforcement outcomes are not always driven by differences in authority; they often differ according to company size. We should not hold small businesses and large corporations to different law enforcement standards. Just a few months ago, the government settled with a small company violating COPPA by naming multiple executives as defendants.<sup>2</sup> The Commission has also sought penalties that wiped out a company's revenue accumulated over a long period of time. While larger firms can certainly mount an aggressive defense, we must work harder to be even-handed.

## **Google, YouTube, and its Monetization Model**

It is important to evaluate the outcome of this investigation within the broader context of the market. With the majority of commerce and communications now happening online, Google's reach has become unprecedented in both scale and scope. As one of the biggest platform companies in the world, Google wields enormous power to shape our lives and especially those of children. Google's ever-expanding empire of online properties plays a key role in forming our children's view of the world and their place in it.

YouTube is one of Google's flagship properties and the number one online destination for Americans to consume videos. Last year, analysts valued YouTube at \$180 billion,<sup>3</sup> placing it

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<sup>1</sup> State attorneys general can seek certain types of relief in federal court for violations of the Children's Online Privacy Protection Act, but cannot seek penalties.

<sup>2</sup> Press Release, Fed. Trade Comm'n, FTC Alleges Operators of Two Commercial Websites Failed to Protect Consumers' Data (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-alleges-operators-two-commercial-websites-failed-protect>.

<sup>3</sup> See, e.g., Greg Sandoval, *Morgan Stanley Figured Out How Much YouTube Would Be Worth if It Were a Separate Company, and It's More Valuable Than Disney*, BUSINESS INSIDER (May 18, 2018, 10:22 PM), <https://www.businessinsider.com/morgan-stanley-values-youtube-160-billion-dollars-2018-5>. The Commissioners supporting this settlement do not point to audited financial statements or analysis from the YouTube business segment.

among the most valuable companies in the economy. Google purchased YouTube in 2006 and integrated the acquisition into its broader advertising business, which relies heavily on behavioral advertising.

Behavioral advertising, unlike contextual advertising, is about targeting each individual – a demographic of one. Google is able to do this by tracking and collecting an enormous amount of information on users’ behavior wherever Google embeds its technology. This includes activity on their phones, home devices, on YouTube, and nearly everything they do online. When individuals use a mobile device with Google’s Android operating system or give commands to a Google Home device, Google is able to glean more and more insights about their personal lives. Google then monetizes these insights by using them to psychologically profile each user and predict in real time what content will be most engaging and which ads will be most persuasive. For any person, this is worrisome. But when it happens to a child, it can be illegal.

### **Google Knew It Was Targeting Children on YouTube**

The law has special protections for children from the pervasive data harvesting that fuels behavioral advertising. Collecting data on children under 13 is forbidden under COPPA, absent parental consent and other requirements. Google claims that they “have always been clear that YouTube has never been for people under 13.”<sup>4</sup> The facts suggest that the opposite is true. Google curates a vast collection of content on YouTube channels that is clearly aimed at kids. As the complaint details, Google marketed the YouTube platform to major children’s product brands, including Hasbro (the maker of My Little Pony and Play-Doh) and Mattel (the maker of Barbie and Hot Wheels).

Google also provides a 94-page field guide to help content creators produce the “best content for children.”<sup>5</sup> This guide provides detailed tips for developing programming for kids, including the suggestion to “feature real kids in your videos” because “kids often like to see real kids and families onscreen.”<sup>6</sup> This field guide is seemingly aimed at generating content for YouTube Kids, a separate platform Google says is “made for kids” and can be customized by age to show “videos that interest children in that age range.”<sup>7</sup>

In reality, Google solicits and encourages the creation of content that young children can easily find on YouTube, rather than on YouTube Kids. A study released in August 2019 ranked YouTube the number one kids brand across 350 brands spanning 19 consumer categories, while

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<sup>4</sup> Mark Bergen, *YouTube Videos Aimed at Kids are the Most Popular, Pew Finds*, BLOOMBERG (Aug. 30, 2019, 10:00 AM), <https://www.bloomberg.com/news/articles/2019-07-25/youtube-videos-aimed-at-kids-are-the-most-popular-pew-finds>.

<sup>5</sup> *YouTube Kids Field Guide*, YOUTUBE, <https://static.googleusercontent.com/media/www.youtube.com/en//yt/family/media/pdfs/creating-for-youtube-kids-fieldguide.pdf> (last visited Aug. 30, 2019).

<sup>6</sup> *Id.* at 24.

<sup>7</sup> In describing the process for selecting the content to put on the platform, Google says “we work hard to keep videos on YouTube Kids family-friendly and use a mix of automated filters built by our engineering teams, human review, and feedback from parents to protect our community.” *A safer online experience for kids*, YOUTUBE, <https://youtube.com/kids/safer-experience/> (last visited Aug. 30, 2019).

YouTube Kids was ranked far below at number 50.<sup>8</sup> Another study found that YouTube was the most popular social media platform (83%), with YouTube Kids at a distant second (45%).<sup>9</sup>

Not only are kids watching their videos on YouTube, it is clear that they are a big part of the YouTube audience. They are spending a lot of time watching a significant amount of content, averaging nearly an hour and a half each day.<sup>10</sup> Kids-themed channels and videos are amongst the most popular on the platform.<sup>11</sup> According to Pew, videos directly aimed at a young audience that featured a child under the age of 13 have more views than any other content on the platform.<sup>12</sup> Indeed, Google plays a significant role in shaping kids' YouTube content experience. A recent study on how kids find content on YouTube found 60% of kids report using the search bar, 43% use YouTube's "suggested videos" function, 39% browse channels, 35% use "history," and 30% use "popular" suggestions.<sup>13</sup>

There is growing concern about how all of this is affecting children. Google's behavioral advertising business model, and the technology that supports it, seems to fuel dark and disturbing content, which includes the content on YouTube Kids. Parents and medical experts are concerned about the prevalence of fear-inducing videos that influence brain development and negatively affect mental health. The long-term harmful effects of the company's conduct are difficult to measure.

### **Economic Incentives Drive the Children's Privacy Violations by Google**

Violating the law was lucrative for the Defendants. Google earned – and will continue to earn<sup>14</sup> – enormous sums by illegally tracking kids in many ways, including:

#### *(1) Enhanced Targeting and Monetization Across Google Properties*

As a subsidiary of Google, YouTube is not an independent company. Google uses insights from other properties to enhance its targeting and monetization of YouTube, and it uses YouTube viewing behavior to better monetize its other properties. Tracking users across properties makes all of the properties more valuable, since the detailed data collected on each user can be used to induce them to watch or click on ads. By illegally collecting children's data on YouTube, Google can better monetize data collected from parents and children across properties, giving the company a clear competitive advantage when targeting them.

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<sup>8</sup> *Smarty Pants® Study Finds YouTube Is #1 Brand Among U.S. Kids*, PR NEWSWIRE (Aug. 1, 2019, 5:43 PM), <https://www.prnewswire.com/news-releases/smarty-pants-study-finds-youtube-is-1-brand-among-us-kids-300894505.html>.

<sup>9</sup> Alexandra Whyte, *The surprising social sites where kids spend their time*, KIDSCREEN (Apr. 4, 2019), <http://kidscreen.com/2019/04/04/the-surprising-social-sites-where-kids-spend-their-time/>.

<sup>10</sup> Alexandra Whyte, *Breaking down the whos, whats and hows of YouTube*, KIDSCREEN (Apr. 3, 2019), <http://kidscreen.com/2019/04/03/breaking-down-the-whos-whats-and-hows-of-youtube/>.

<sup>11</sup> Patrick van Kessel, Skye Toor, & Aaron Smith, *A Week in the Life of Popular YouTube Channels*, Pew Research Center (July 25, 2019), <https://www.pewinternet.org/2019/07/25/a-week-in-the-life-of-popular-youtube-channels/>.

<sup>12</sup> Google's own field guide recognized how much kids are drawn to other kids in videos, another clear sign that the company is well aware of the kids on its platform.

<sup>13</sup> Whyte, *supra* note 10.

<sup>14</sup> Unlike other recent cases, the compliance date for this case is four months after the entry of the order, and for existing videos, Google and YouTube have an additional 90 days from that date to "refrain .... from disclosing, using, or benefiting from personal information previously collected from users...."

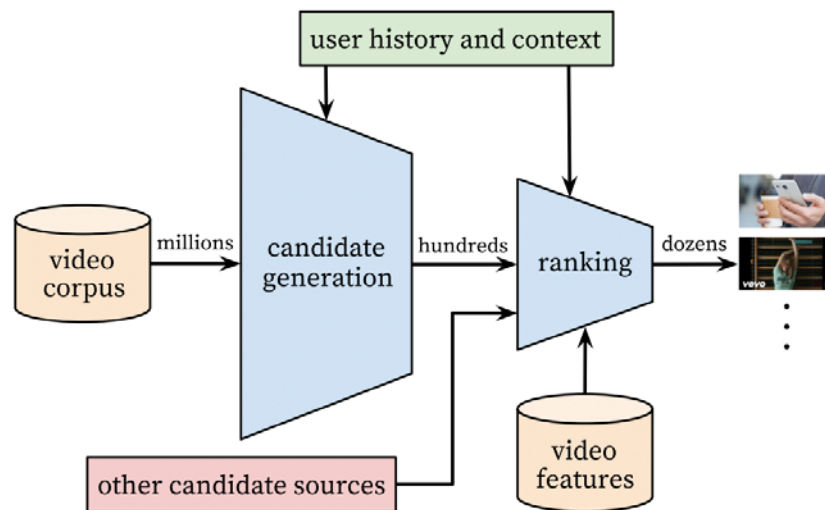
## (2) Premium for Behavioral Advertisements on YouTube

The behavioral advertising business model is especially profitable for the video platform. With text, users have to scroll or click to see more content, so ad revenue depends on ongoing active engagement. But with video, users can passively stay tuned, which means that YouTube can sell ads as long as they have a captive audience. The platform makes more money by capturing more time, so YouTube profits by matching each user with the content they are most likely to continue to watch. Google and YouTube rely on the vast collection of user information to plug into the sophisticated algorithms that animate the technologies designed to keep users hooked. Through recommendations, the “autoplay” automated video feed, and search results, YouTube uses what it knows about each user to draw them deeper into the content rabbit holes that its algorithms can create.

Google commands a substantial price premium for behavioral advertising compared to contextual advertising. This makes sense, since an advertiser is willing to pay for a narrower demographic. Since YouTube was able to sell behavioral advertisements – ads targeted to a demographic of one – to command prices far higher than contextual advertisements, its violations allowed it to generate enormous amounts of additional revenue.

## (3) First-Mover Advantages and Preservation of YouTube’s Dominance in Child-Directed Video

YouTube is the second-most visited website on the internet and the dominant platform for consumption of video content. To increase consumption and ad revenue, YouTube relies on deep learning and neural networks to power its recommendation engine. In a paper, Google engineers explain how user watch history and data collection power a recommendation engine in a dynamic environment with a constant slew of newly uploaded content.<sup>15</sup>



Source: Covington, Adams, and Sargin (2016)

There are significant first-mover advantages when it comes to technologies that rely on more data to improve. As with other artificial intelligence, the recommendation engine is more effective at hooking viewers into watching more videos the more its user surveillance trains its

<sup>15</sup> Paul Covington, Jay Adams & Emre Sargin, *Deep Neural Networks for YouTube Recommendations*, Google AI (2016), <https://storage.googleapis.com/pub-tools-public-publication-data/pdf/45530.pdf>.

recommendation engine to pick videos that keep the viewer engaged. The unlawful collection of data on children allowed Google's YouTube recommendation engine to glean deep insights on children's viewing habits. This further solidifies YouTube's dominance among children, which in turn, makes creators of child-directed content more reliant on YouTube for distribution. Video content platforms that adhered to COPPA's requirements would not be able to realize similar benefits.

### **When Google Pays a Fine and Still Profits from Misconduct, this is Not a Penalty**

When enacting COPPA, Congress sought to deter children's privacy misconduct by including civil penalties for violations. As Commissioner Slaughter notes, the government has never litigated a children's privacy case in federal court to a penalty judgment. Given the limited case law, it is important that we look to the law to determine how to seek monetary relief.

Critically, civil penalties are available *in addition to* the standard remedies available for violations without penalties, such as the forfeiture of ill-gotten gains. Despite this authority to ensure that bad actors are meaningfully penalized for violating children's privacy, the Commission is agreeing to a settlement that will result in Google profiting from its violations.

Some of my colleagues assert that the "penalty" exceeds Google's gains. I respectfully disagree. As part of the evidence I evaluated in this investigation, I reviewed the revenues generated from behavioral advertising on [REDACTED], which totaled [REDACTED] million during the period from [REDACTED] to [REDACTED]. If we use this data across [REDACTED] and extend this time period to the full period of noncompliance, while also factoring in a revenue growth rate of [REDACTED], we yield ill-gotten gains in excess of [REDACTED] million.

This estimate may even be conservative, as it does not consider Google's avoided costs of compliance, any ill-gotten gains from data being used by Google's other properties, the increased value of its predictive algorithm trained by ill-gotten data (which will not be reversed), and other considerable benefits from lawbreaking. Using this conservative base of ill-gotten gains, I favor using a calibrated multiplier for penalties to reflect clear congressional intent to penalize wrongdoers. For example, in the Commission's 2012 action against Google, the FTC obtained a penalty of more than five times the company's unjust gains.<sup>16</sup> Had we used a similar multiplier, that would result in a target of [REDACTED] billion.

My colleagues argue that they do not want to gamble by litigating in the hopes of seeking more relief. I respect this point of view, and I often support settlements that are below my preferred level of relief. In this matter, had we opened negotiations with an opening ask that was clearly above Google's gains or a remedy that corrected the underlying business incentives, the argument about litigation risk and timing would be more persuasive. However, given our approach to settlement, it is a false choice between settlement and litigating.

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<sup>16</sup> After the FTC's proposed settlement with Google was challenged in court as being inadequate, the Commission responded that "Google's penalty was many times over the upper-bound of what the FTC estimates the company earned from the alleged violation [.]". United States' Resp. to Consumer Watchdog's Amicus Curiae Br., *United States v. Google, Inc.*, No. 3:12-cv-04177-SI, 2012 WL 13080180, at \*9-10 (N.D. Cal. Sept. 28, 2012) (comparing estimated unjust gains of \$4 million to the \$22.5 million civil penalty).

This outcome here is also inconsistent with how we approach other violators of COPPA. When small players and upstarts violate COPPA, the companies pay dearly and the executives are investigated and, if liable, held personally accountable. Here, where a dominant incumbent engaged in widespread violations, the company is paying a slice of their profits from wrongdoing and executives avoid scrutiny. It is unclear to me whether YouTube CEO Susan Wojcicki, Google CEO Sundar Pichai, and other senior executives had knowledge of or involvement in the company's COPPA violations. I am concerned that the monetary relief and the absence of critical information on the role of individuals sends the wrong signal to the marketplace.

## Conclusion

First, Google's privacy practices are highly problematic, and I thank the staff from the New York Attorney General and the FTC for investigating it. However, I agree with Commissioner Slaughter's assessment of the injunctive provisions of the settlement. They are insufficient, and I would add that Google and YouTube made a business decision to allow behavioral advertising without human review. The settlement's provisions requiring a function for content creators to disclose whether the content is child-directed may have the perverse effect of allowing Google to pin the blame on content creators, even when they already know when YouTube videos are clearly for children. Absent an enforceable commitment from Google that it will fundamentally change its business practices to ensure that child-directed content is not subject to impermissible data harvesting, children will still be at risk.

Second, in my view the Commission often makes a low opening bid for monetary relief. Then, Commissioners point to litigation risk, lack of clear authority, and resource constraints to rationalize an outcome that allows a defendant to profit from the wrongdoing. Financial penalties need to be meaningful or they will not deter misconduct.

If Congress enacts privacy legislation, it should not cut and paste COPPA's approach to penalties. It should move away from vague factors for civil penalties and shift toward ones that are easier for agencies and courts to administer.<sup>17</sup> There are many alternative approaches, such as requiring a minimum penalty per violation, adjusted upward if the violation is intentional or reckless. In addition, Congress should give *all* enforcers of any privacy law a robust set of enforcement tools, including penalties. In COPPA, state attorneys general can only seek forfeiture of ill-gotten gains and refunds to victims, but not financial penalties beyond that. In this matter, the New York Attorney General was unable to pursue civil penalties, since the FTC has exclusive authority to do so. This should change.

Finally, Congress must address how mass surveillance and privacy intrusions can harm competition. YouTube dominates the online video marketplace, allowing it to tax content creators at massive rates. When companies ingest so much data, either by legal or illegal means, this data can be weaponized to increase barriers to entry for new platforms and businesses, allowing a dominant company to charge higher fees to those operating on their platform with less

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<sup>17</sup> I thank Commissioner Phillips for articulating his views about the application of the civil penalty factors outlined in Section 5(m) of the FTC Act. He rightfully notes that "harm" is difficult to calculate in privacy cases. I agree, especially as it relates to harms to our health, safety, honest competitors, and national security. I believe this discussion is more suitable in the context of the consideration of equitable relief, not civil penalties, which are intended to deter, not to redress.

innovative features and services. Enforcers and honest businesses need the legal tools to redress harms to competition from poor privacy practices.

For these reasons, I respectfully dissent.