

Statement of Joseph J. Simon & Christine S. Wilson
Regarding FTC and People of the State of New York v. Google LLC and YouTube, LLC

September 4, 2019

Today the FTC and New York Attorney General announce a groundbreaking \$170 million settlement with Google LLC and YouTube, LLC (“Defendants” or “Google”) for their violations of the Children’s Online Privacy Protection Rule (“COPPA Rule” or “COPPA”). This settlement achieves a significant victory for the millions of parents whose children watch child-directed content on YouTube. It also sends a strong message to children’s content providers and to platforms about their obligation to comply with the COPPA Rule.

Our complaint alleges that Defendants – without parental consent and in violation of the COPPA Rule – collected persistent identifiers from viewers of YouTube “channels” that they knew were directed to children, in order to serve behavioral advertising. Defendants touted YouTube’s popularity with kids, describing YouTube as “the favorite website for kids 2-12.” At the same time, however, Defendants told channel owners that YouTube didn’t have users below 13, and therefore no COPPA compliance was needed. Yet Defendants had actual knowledge that numerous channels on the YouTube platform were directed to children. Taken together, this conduct violated the COPPA Rule.

Here are the most significant aspects of the settlement:

First, it requires Defendants to pay \$136 million to the FTC and \$34 million to New York. The \$170 million total monetary judgment is almost 30 times higher than the largest civil

directed site or service. As detailed in the complaint, YouTube did possess actual knowledge as evidenced by its own marketing efforts, information received from channels, and its review of channel content to curate for the YouTube Kids App.¹

This strong settlement is only one of several actions the Commission recently has taken to protect children online. In July, the Commission announced that it is seeking comment on the COPPA Rule and holding a public workshop on October 7, 2019. We initiated this workshop to seek comment on whether the Rule correctly articulates the factors to consider in determining whether a website or online service is directed to children; whether the Rule should be amended to better address websites and online services that may not include traditionally child-oriented activities but have a large number of child users; and whether the Rule should be modified to encourage general audience platforms to identify and police child-directed content uploaded by third parties.

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Two of our colleagues dissent from today's action. Neither of our dissenting colleagues takes issue with the filing of the complaint or the allegation that Defendants violated the COPPA Rule. Nor do they take issue with the relief we did obtain. Rather, they contend we should have obtained more in our settlement, in terms of both injunctive provisions and monetary relief.

As to injunctive relief, Commissioner Slaughter would like to see the order include a "technological backstop to identify undesignated child directed content and turn off behavioral advertising." Putting aside the question of whether a court would require a company to invent a technology to catch violative conduct when the COPPA Rule does not require platforms to affirmatively seek actual knowledge of whether content on channels is child-directed, adding such a requirement in the order would be an empty gesture. Defendants could easily develop a half-hearted measure that would technically comply with the order and give the public a false sense of security. Moreover, such a measure likely would catch in its net channels not directed at children, therefore limiting content to other audiences while the errors are resolved.

Commissioner Slaughter appears to be concerned that use of a self-designation method under the order could become a safe harbor from enforcement, allowing Google to escape liability if the Commission were to show additional evidence of actual knowledge. However, a technological backstop could similarly be used as a safe harbor. In reality, of course, there are no such safe harbors. If the Commission were to find new evidence of actual knowledge, such as Google's own marketing materials, it could bring a new COPPA case, as it did here.

To be clear, we agree with Commissioner Slaughter's concern that channel creators may not have an incentive to self-designate content as child-directed. We routinely conduct sweeps of industries to determine compliance with our Rules, and we plan to conduct a sweep of YouTube channels following implementation of this order's provisions to determine whether there are any further violations of COPPA.²

¹ YouTube Kids hosts videos for children and includes parental controls and content

Commissioner Slaughter also raises a concern about foreign channel owners that may be beyond the reach of the Commission. The Commission has taken COPPA actions against numerous foreign entities, including Tik Tok, VTech, and inMobi. The Commission has additional tools with respect to foreign entities, such as warning letters copied to related U.S.-entities. These warning letters have successfully induced app stores to remove apps until they came into compliance with COPPA.³ In this context, a warning letter from the FTC, copied to a general audience platform such as YouTube, could help to establish the actual knowledge required for liability of the platform under COPPA.

As to monetary relief, Commissioner Chopra makes the unsupported assertion that, because the disgorgement amount does not exceed all ill-gotten gains, the penalty is too low. We agree that the penalty should be higher than a company's ill-gotten gains, and in this case, it is.

The ill-gotten gains from the violative conduct here consist of gains from behavioral advertising on channels that contained child-directed content that Google actually knew were directed to children. The standard for proving actual knowledge in court is not speculation as to what Google must have known or should have known. Rather, the burden would be on the Commission to establish Google's actual knowledge of the child-directed nature of each of the channels on the YouTube platform.⁴

Commissioner Chopra makes an additional argument, that Google conducts analytics on child-directed content to enhance targeting and monetization across Google properties, and that this revenue should be disgorged. However, conducting analytics on child-directed content is specifically allowed by COPPA. Obtaining penalties in this matter based on the argument that enhancement of Google's other products and services through analytics such as page views, time spent on a video, or algorithms for recommending videos is ill-gotten, is highly speculative.

Finally, Commissioner Chopra's dissent does not account for the significant costs that the injunctive relief will impose on Google. The company will be required to create a system for self-designation of child-directed content and train employees about that system and about COPPA's requirements overall. None of the other platforms – Twitter, Facebook (including Instagram), Snapchat, Apple, Amazon, Netflix, or others –

ongoing cost to Google, borne by no other company. An appropriate assessment of the deterrent effect of this order must take into account these additional costs – both tangible and intangible.⁵

When deciding whether to accept a settlement, we must always consider whether the relief we are obtaining is equal to or better than what we could reasonably obtain through litigation. Our dissenting colleagues suggest that a federal district court judge would grant not just the remarkable injunctive relief staff obtained here – relief that will require Defendants to implement significant changes to their business model that exceed the specific obligations of the COPPA Rule – but also a civil penalty that is significantly higher than the \$136 million the FTC obtained here, and disgorgement of hundreds of millions of dollars of ill-gotten gains (at least, per Commissioner Chopra’s calculations), and a requirement that Defendants invent and then implement a new algorithm designed to automatically identify and tag child-directed content. We choose not to gamble the protection of children now in hopes of hitting a jackpot in the future.

In short, we believe the significant monetary penalty, coupled with the far-reaching conduct relief, is almost certainly better than what we would achieve in litigation. Importantly, the relief for consumers is immediate, rather than after years of litigation. It is for this reason that we have voted for this settlement.

Appendix A

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