



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 to allow 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

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.¹

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

YouTube Kids was ranked far below at number 50.⁸ Another study found that YouTube was the most popular social media platform (83%), with YouTube Kids at a distant second (45%).⁹

(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

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 ██████████, which totaled ██████ million during the period from ██████ to ██████. If we use this data across ██████████ and extend this time period to the full period of noncompliance, while also factoring in a revenue growth rate of ██████, we yield ill-gotten gains in excess of ██████ 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.¹⁶ Had we used a similar multiplier, that would result in a target of ██████ 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.

¹⁶ 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

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.