

TECH FREEDOM

Comments of

TechFreedom

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In the Matter of

COPPA Rule Review, 16 CFR Part 312

Request for Comment

Project No. P195404

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I. Background

The FTC requested comments on the future of COPPA on July 25, 2019.³ In this proceeding (Project No. P195404, Docket ID: FTC-2019-0054), the FTC, consistent with the statute,⁴ and Section 312.11 of its original COPPA rules,⁵ is undertaking a comprehensive review of its rules. The original filing deadline for comments was October 23, 2019. By Order, the FTC extended the comment period until December 9, 2019.⁶ Because of a problem with the Regulations.gov website, the FTC further extended the filing date until December 11, 2019.⁷ These comments are timely filed.

To the best of our knowledge, this proceeding has attracted more public attention than any proceeding in the FTC's history: nearly 175,000 comments filed in this docket and more than 850,000 signatures on a Change.org petition to the FTC urging the agency to reconsider its approach (also filed in this docket)⁸. Indeed, the only proceeding that can compare with this one in its notoriety is the Commission's 1978 proposal to ban the advertising of sugared cereal to children — the so-called “KidVid rulemaking.”⁹

³ Implementation of the Children's Online Privacy Protection Rule, 84 Fed. Reg. 35842 (Jul. 25, 2019) [hereinafter “FTC COPPA RFC”], <https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online>.

⁴ 15 U.S.C. § 6506 (Lexis 2019) (requiring the FTC to undertake a review not later than five years after the effective date of the regulations and report to Congress).

⁵ 16 C.F.R. § 312.11 (2010) (The FTC removed the original Section 312.11, which provided for a review of its COPPA regulations as part of its 2013 amendments); *See also* 2011 Children's Online Privacy Protection NPRM, 76 FR 59804, note 169 (Sept. 27, 2011) (“The Commission proposes moving the current § 312.10 (Safe Harbors) to § 312.11, and deleting as obsolete the current § 312.11 (Rule-making review).”), *available at* <https://bit.ly/2RzCH2y>. Nonetheless, the FTC still refers to its review powers under the prior Section 312.11.

⁶ Implementation of the Children's Online Privacy Protection Rule Extension Order, 84 Fed. Reg. 56391 (Oct. 22, 2019) [hereinafter “FTC COPPA Extension Order”].

⁷ *See* FTC, *FTC Extends Deadline for Comments on COPPA Rule until December 11* (Dec. 9, 2019), *available at* <https://bit.ly/38rv6sX>.

⁸ *See* SAVE Family-Friendly Content on YouTube, Change.org (last visited Dec. 9, 2019), *available at* <https://bit.ly/2YGtrLt>.

⁹ *See* J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FTC (speech given at the Marketing and Public Policy Conference, May 30, 2003), *available at* <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection>.

That effort led *The Washington Post* to dub the FTC the “National Nanny,” warning that the FTC’s crackdown would make “parents less responsible, not more.”¹⁰

A. About TechFreedom

TechFreedom is a non-partisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity.

TechFreedom has been engaged on COPPA and similar privacy issues for many years. TechFreedom’s President Berin Szoka co-authored a paper in 2009 presaging some of the issues being addressed in the current proceeding.¹¹ We filed comments in the last round of COPPA review, in 2012.¹² Last year we hosted a panel discussion entitled “20 Years of Coping with COPPA,”¹³ and TechFreedom General Counsel James E. Dunstan participated as a speaker at the workshop hosted by the FTC on October 7, 2019.¹⁴

II. Summary

Over the past decade at least, our analysis, message, and themes have been clear: COPPA is an important tool for empowering parents to better protect their children’s online safety and privacy. But every change in the COPPA rules brings with it trade-offs and unintended consequences, and if those consequences thwart parents’ intentions, the fundamental purposes of COPPA will be hindered, not advanced. There is grave danger that if the FTC adopts many of the COPPA rule changes proposed in this proceeding, it will undercut the purposes of COPPA, interject itself into the role of

¹⁰ See TechFreedom, *Thanks, FTC, but we Don’t Need a National Nanny* (Jul. 24, 2014) (including a snapshot of the March 1, 1978 *Washington Post* article, “The FTC as National Nanny”), available at <https://techfreedom.org/thanks-ftc-but-we-dont-need-a-national-nanny/>.

¹¹ Szóka, Berin & Thierer, Adam, *COPPA 2.0: The New Battle Over Privacy, Age Verification, Online Safety & Free Speech* (Oct. 26, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408204.

¹² See TechFreedom, *TechFreedom Urges FTC Not to Expand COPPA by Changing Definitions* (Sept. 26, 2012), available at <https://techfreedom.org/techfreedom-urges-ftc-not-to-expand-coppa-by/>.

¹³ See TechFreedom, *TechFreedom Event: 20 Years of Coping with COPPA* (July 26, 2018), available at <https://techfreedom.org/techfreedom-event-20-years-coping-coppa/>.

¹⁴ See Dunstan, Jim, *The Future of the COPPA Rule: An FTC Workshop* (Oct. 7, 2019), available at <https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop>. TechFreedom also filed comments in the FTC’s “Loot Box” proceeding which has implications for children’s privacy as well. See Comments of Berin Szóka & Jim Dunstan, *Comments of TechFreedom, Video Game Loot Boxes*, FTC Matter No. P194502 (Oct. 11, 2019), available at <https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-FTC-Loot-Box-Comments-10-11-19.pdf>.

parens patriae, become the *de facto* NetNanny, and in so doing, destroy vast Internet ecosystems that have flourished under the current rules.

With this proceeding, the FTC should listen to the nearly million people who have told the FTC that they appreciate the free content YouTube offers, and are willing to part with a small bit of their and their devices' privacy in exchange for billions of free videos. The FTC should find a middle ground that doesn't restrict the rights of adults, and encourages the delivery of quality content and innovative services for children, while still protecting children from actually being contacted based on information collected about them.

III. The Roots and Purposes of COPPA

A. COPPA Was Intended to Protect Children from Predators, not Commercials

As the FTC undertakes its current review, it should start at the beginning—by revisiting the legislative history of COPPA and the FTC's own testimony before Congress as it shaped the COPPA legislation. In introducing S. 2326, the bill that became COPPA, Senator Bryan emphasized safety as a primary concern: "Commercial Web sites are currently collecting and disseminating personal information collected from children that may compromise their safety and most certainly invades their privacy."¹⁵ Sen. Bryan discussed the types of information being collected from children at that time without parental consent, including highly personal and identifiable information:

I was, frankly, surprised to learn the kinds of information these web sites are collecting from our children. Some were asking where the child went to school, what sports he or she liked, what siblings they had, their pet's name, what kind of time they had after school alone without the supervision of parents.

Others were collecting personal financial information like what the family income was, does the family own stocks or certificates of deposit, did their grandparents give them any financial gifts?

Web sites were using games, contests, and offers of free merchandise to entice children to give them exceedingly personal and private information about themselves and their families. Some even used cartoon characters

¹⁵ See 144 Cong. Rec. S8482 (Jul. 17, 1998) (Statement of Sen. Bryan), *available at* <https://bit.ly/2RzA1C2>.

who asked children for personal information, such as a child's name and address and e-mail address, date of birth, telephone number, and Social Security number.¹⁶

Others expressed concern that such information could be used to threaten children's safety. In his testimony before the Senate Committee considering the COPPA bill, then-FTC Chairman Robert Pitofsky emphasized the need for additional tools for the FTC to protect children from sexual predators:

Further, the FBI and Justice Department's "Innocent Images" investigation into the use of the Internet by pedophiles and other sexual predators reveals that online services and bulletin boards are rapidly becoming the most prevalent sources used by such predators to identify and contact children. Although there is little evidence directly linking commercial data collection to these problems, the practice of collecting personal identifying information directly from children without parental consent is clearly troubling, since its [sic] *teaches children to reveal their personal information to strangers and circumvents parental controls over their family's information.*¹⁷

In other words, the legislative history makes clear not only that Congress's primary concern was with child safety, but also that its concern with the online marketing practices of the time was driven, at the root, by concerns over child safety. That is, Congress was concerned with the kind of data collection that also jeopardized the safety of children.

B. COPPA Was Designed to Empower Parents, Not Substitute the Government's Decisions as to Content Appropriateness for Children

Shortly after introducing S. 2326, Senator Bryan addressed the Senate to "explain the purpose and some of the important features" of COPPA:

The goals of this legislation are: (1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the

¹⁶ *Id.*

¹⁷ Children's Online Privacy Protection Act of 1998: Hearing on S. 2326 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation, 105th Cong. 19-54 at 11 (Comm. Print, Sept. 23, 1998), available at <https://bit.ly/2LDuS88>. Chairman Pitofsky went on later in that hearing to say: "we had testimony at our hearings from the FBI and the DOJ that when young people list their name, zip code, actual address on the Internet, that is a real security concern, and we are troubled by that as well." *Id.* at 17.

online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent.¹⁸

Chairman Pitofsky's testimony before the Senate Subcommittee hearing echoed the key role of parents in the process. "The parents should be in control of dealings, for example, with an 11-year-old on a commercial Web site."¹⁹

C. The FTC's Unwarranted Expansion of the Definition of Personal Information in 2013 Set the Stage For Unprecedented Intrusion into the Internet Ecosystem

It was against this backdrop that Congress defined the types of "personal information," the collection of which from children under 13 should be controlled by parents. The COPPA statute defines personal information as follows:

- (A) a first and last name;
- (B) a home or other physical address including street name and name of a city or town;
- (C) an e-mail address;
- (D) a telephone number;
- (E) a Social Security number;
- (F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual; or
- (G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.²⁰

There has long been consensus on the first five of these definitions. Each type of information can be used to physically contact a specific child or contact a specific child

¹⁸ 144 Cong. Rec. S11657 (Oct. 7, 1998) (Statement of Sen. Bryan), *available at* <https://bit.ly/35bi14P>.

¹⁹ Children's Online Privacy Protection Act of 1998 Hearing, *supra* note 17, at 6.

²⁰ 15 U.S.C. § 6501(8) (Lexis 2019).

online in an inappropriate manner. For 20 years the FTC used these definitions to successfully stop hundreds of unscrupulous actors from collecting Personal Information from children.²¹ The sixth definition, however, has allowed the FTC to fundamentally rework the statute.

In 2011, the FTC undertook a further review of COPPA, claiming a need to redefine Personal Information in light of changing technologies.²² As noted above, 47 U.S.C. § 650a(8) permits the Commission to expand the definition of “personal information” to include, besides five specific categories, “other identifier that the Commission determines permits the physical or online contacting of a specific individual.” In its 2013 revisions the COPPA Rule, the Commission used this discretion to expand the scope and reach of COPPA in novel and unprecedented ways. The FTC has expanded the COPPA Rule’s definition of Personal Information to include:

- “Online contact information” such as an email address or any other substantially similar identifier that permits direct contact with a person online, including but not limited to, an instant messaging user identifier, a voice over internet protocol (VOIP) identifier, or a video chat user identifier;
- A screen or user name where it functions in the same manner as online contact information;
- A persistent identifier that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;
- A photograph, video, or audio file where such file contains a child’s image or voice;

²¹ See FTC, *Implementing the Children’s Online Privacy and Protection Act: A Report to Congress*, at 16 (Feb. 2007) (“Over the past five years, the FTC has filed eleven civil penalty actions that illustrate different core violations of COPPA and the Rule, and obtained more than \$1.8 million in civil penalties.”), available at <https://bit.ly/2PwCOUT>; See also FTC, *Privacy & Data Security: Update: 2018*, at 7 (Mar. 2019) (“Since 2000, the FTC has brought 25 COPPA cases and collected millions of dollars in civil penalties”), available at <https://bit.ly/2E8HBve>. In virtually every case cited in these reports, the information collected from children included “name, home address, telephone number, and email address,” information that could compromise both a child’s safety as well as their privacy.

²² Children’s Online Privacy Protection Rule, Final Rule, 78 Fed. Reg. 3972 (Jan. 17, 2013) [hereinafter “2013 Final Rule Order”] (“These amendments to the final Rule will help to ensure that COPPA continues to meet its originally stated goals to minimize the collection of personal information from children and create a safer, more secure online experience for them, even as online technologies, and children’s uses of such technologies, evolve.”).

- Geolocation information sufficient to identify street name and name of a city or town; or
- Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this definition.²³

TechFreedom, among others, warned the FTC that labelling all persistent identifiers as Personal Information went beyond the scope of the statute, because persistent identifiers, on their own, can only identify a device, not a “specific person,” as the COPPA statute requires, and certainly cannot identify whether that device is being used by a child under the age of 13 at the time the persistent identifier is collected.²⁴ The Commission rejected our comments. We urge the Commission to reconsider its decision and to focus the definition of “personal information” on that information that can actually be used to contact a “*specific individual*.”

D. The FTC Should Clarify How Content Creators Should Decide whether Their Content is “Child-Directed”

The *2013 Final Rule Order* also clarified the definition of “child-directed” website, as distinct from a “general audience” site:

To make clear that it will look to the totality of the circumstances to determine whether a site or service is directed to children (whether as its primary audience or otherwise), the Commission has revised and reordered the definition of *Web site or online service directed to children* as follows. Paragraph (1) of the definition contains the original Rule language setting forth several factors the Commission will consider in determining whether a site or service is directed to children. In addition, paragraph (1) amends this list of criteria to add musical content, the presence of child celebrities, and celebrities who appeal to children, as the Commission originally proposed in the 2011 NPRM. Although some commenters expressed concern that these additional factors might capture general audience sites, produce inconsistent results, or be overly broad (since musicians and celebrities often appeal both to adults and

²³ 16 C.F.R. § 312.2; *See also*, 2013 Final Rule Order, *supra* note 22.

²⁴ Comments of Berin Szóka, *Comments of TechFreedom, Children’s Online Privacy Protection Act (COPPA) Rule Review*, Project No. P104503 (Dec. 23, 2011), available at <https://bit.ly/2P8dg6r>; *See also* 2013 Final Rule Order, *supra* note 22, at 3979, note 97 (citing TechFreedom comments).

children), the Commission believes that these concerns are unfounded. The Commission reiterates that these factors are some among many that the Commission will consider in assessing whether a site or service is *directed to children*, and that no single factor will predominate over another in this assessment.²⁵

The 2013 *Final Rule Order* specifically identified both YouTube and Facebook as general audience websites.²⁶ The FTC's Frequently Asked Questions (FAQs) later were updated to discuss general audience websites.²⁷ Although there remained significant uneasiness about the demarcation between the two types of sites (and indeed, the role of the "mixed audience" definition for websites), the 2013 rule amendments didn't significantly alter FTC enforcement,²⁸ and content creators could gain some comfort from the fact that content aggregators such as YouTube and Facebook would be considered general audience sites — thus making it unnecessary for them to decide whether the content they created for these platforms was child-directed.

²⁵ 2013 Final Rule Order, *supra* note 22, at 3984 (emphasis and internal citations omitted).

²⁶ *Id.* at note 126 ("The Commission notes that this amendment would not apply to uploading photos or videos on general audience sites such as Facebook or YouTube, absent actual knowledge that the person uploading such files is a child").

²⁷ See *FTC, Complying with COPPA: Frequently Asked Questions*, at G. General Audience, Teen, and Mixed-Audience Sites or Services (Mar. 20, 2015), <https://bit.ly/2saF4hJ>. TechFreedom has warned against regulating through FAQs and consent decrees, and the unfair burden it places on small businesses to constantly keep abreast of non-official legal pronouncements from the FTC. See Berin Szóka & Graham Owens, *Testimony of TechFreedom, FTC Stakeholder Perspectives: Reform Proposals to Improve Fairness, Innovation, and Consumer Welfare*, Hearing before S. Comm. on Commerce, Science, & Transportation (Sept. 26, 2017) [hereinafter "2017 FTC Testimony"], http://docs.techfreedom.org/Szoka_FTC_Reform_Testimony_9-26-17.pdf. Both in comments filed in this proceeding and on YouTube videos, creators are decrying the fact that they must now hire lawyers to navigate COPPA waters because of lack of clarity and specificity in FTC regulations, and the fact that the 'lore' (analysis buried in settlement agreements and FTC complaints as well as FAQs) now obscures the 'law.' See Comments of Jordan Moore, FTC COPPA RFC (Dec. 05, 2019) ("As a small creator I can't afford a lawyer to tell me if each of my videos are kid friendly or not"), <https://bit.ly/38tDrMv>; Comments of Johnny Mitchell, FTC COPPA RFC (Nov. 29, 2019) ("I truly hope to grow on Youtube to the point that I can live off of this platform. I do not have money to hire a lawyer just to decide if my content is valid to be uploaded"), <https://bit.ly/38t1GdG>; see also YouTube Creators, *Important Update for All Creators: Complying with COPPA*, (Nov. 12, 2019) (YouTube's "important update" video encouraging creators to consult a lawyer), available at <https://www.youtube.com/watch?v=-JzXiSkoFKw&t=62s>

²⁸ The FTC did reach a settlement with LAI Systems and Retro Dreamer for building apps directed to children that collected persistent identifiers and allowed advertisers to target ads to children. See *FTC, Two App Developers Settle FTC Charges They Violated Children's Online Privacy Protection Act*, (Dec 17, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/two-app-developers-settle-ftc-charges-they-violated-childrens>.

Now that content creators must make this decision themselves, the Commission must do more to explain how to apply its criteria. More than anything, the Commission needs to hear from content creators themselves. The comments they have filed in this docket provide an excellent starting point for understanding how difficult it may be to distinguish the interests of adults and children. The Commission should also hold at least one field hearing in the San Francisco Bay area to create an opportunity for direct dialogue with content creators.

IV. The YouTube Settlement Has Destroyed the Distinction Between General Audience and Child-Directed Sites

COPPA's most important provisions are those limiting the law's applicability to operators who either (a) have actual knowledge that they are dealing with children or (b) who offer child-directed content. Together these provisions have focused the law's effect where it should be, on children under thirteen, and prevented the law from affecting the rest of the Internet enjoyed by adults and teens.²⁹

A. The Impact of the Back-Room Settlement

The uneasy balancing act between "child-directed" and "general audience" was upended by the FTC's \$170 million settlement with YouTube in September, 2019, in the midst of the current proceeding.³⁰ Thanks to a back-room settlement requiring YouTube to institute new policies, the over one billion users of YouTube, and the tens of thousands of content creators who make a living off of advertising revenues derived from videos, woke up to a very different world on September 9, 2019. YouTube is now no longer a general audience site — at least, not as a whole. Instead, each of the over **seven billion** videos on YouTube may be scrutinized under the amorphous definition of "child-directed," and if its content be declared appealing to children, the video can be deemed directed to children, potentially subjecting its creators to a \$42,530 fine.³¹

Let that sink in for a moment. If just one-one hundredth of one percent (0.0001%) of YouTube's videos were misclassified as general audience, when someone could argue

²⁹ See generally Szóka & Thierer, *supra* note 11.

³⁰ See FTC, *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law* (Sept. 4, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

³¹ See Adjustment of Civil Monetary Penalty Amounts, 16 C.F.R. § 1.98(d) (specifying a maximum civil penalty for violations of Section 5 of the FTC Act of \$42,530 as of February 14, 2019).

that they are child-directed (say, because they use animations), there would be a \$29.8 trillion potential liability lurking on YouTube — ***more than the entire U.S. Gross Domestic Product (GDP) in 2019.***³² The FTC, quite literally, could shut down the entire U.S. economy by sweeping YouTube videos and assessing fines for innocent misclassification of videos. As discussed more fully below, if left unmodified or uninterpreted in this proceeding, the YouTube settlement will weaponize certain people to destroy entire sectors of the Internet economy by claiming to content creators that: (a) their content is child-directed or (b) that children have watched the video.³³ The only safe thing for YouTube to do, in the face of potentially staggering legal liability, is to be ultra-conservative in tagging videos. Indeed, YouTube has already begun to do just that. There are many examples already of YouTube’s new algorithm classifying clearly general audience videos as directed to children.³⁴

What harm does it do to over-classify YouTube videos as directed to children? To understand these questions, to get to the heart of why this is the single-most important moment in the history of COPPA, one has to understand the motivation of the groups that first complained to the FTC about YouTube.³⁵ Their complaint has nothing to do sexual predators, or the fear that children watching YouTube videos are in danger of

³² See Country Economy, *United States (USA) GDP - Gross Domestic Product* (last visited Dec. 10, 2019 at 1:43PM EST), <https://countryeconomy.com/gdp/usa> (U.S. GDP was \$20,580,200,000 in 2018 and is on track to be over \$21 trillion in 2019).

³³ It is quite possible, for instance, to write a computer program that would stream videos in the corner of a day-care, and then automatically e-mail the content creator stating that their video has just been watched by a child. The content creator would then have actual knowledge and be subject to COPPA.

³⁴ See, e.g., KreekCraft, *This is the END of Roblox YouTubers... (ROBLOX BANNED!) | New FTC COPPA YouTube Update & New Changes*, YouTube at 5:00 (Nov. 13, 2019; last visited at Dec 10, 2019 at 1:58PM EST) (At 5:00 mark of video, YouTube creator says that his video mashup featuring characters of the of Netflix series “Stranger Things,” rated TV-14, was flagged by YouTube as “child-directed”), <https://bit.ly/2sXcVuH>; and see Matthew Hart, *YouTube’s FTC-Mandated Rules for Kids Content Infuriate Creators*, Nerdist (Nov. 18, 2019; last visited Dec. 10, 2019 at 1:59PM EST) (YouTube creator “Versy” states that “most of my channel just got auto-flagged as being ‘for kids’ because of [*sic*] [P]okemon and cartoon characters. Meaning 60-90% of my revenue will disappear. Very cool. Thanks YouTube. This will destroy my channel.”), <https://bit.ly/38sJOQ7>; see also Pixel Dan, *The Future of this Channel | COPPA & YouTube*, YouTube at 11:45 (Nov. 14, 2019; last visited Dec. 10, 2019 at 2:03PM EST) (toy collector “Pixel Dan” at the 11:45 mark stating that the YouTube algorithm marked all of his videos reviewing Teenage Mutant Ninja Turtles collectibles as child-directed), <https://bit.ly/2qISuB8>.

³⁵ See *In the Matter of Request to Investigate Google’s YouTube Online Service and Advertising Practices for Violating the Children’s Online Privacy Protection Act*, filed by the Center for Digital Democracy, the Campaign for a Commercial-Free Childhood, (Apr. 2018) [hereinafter “CCFC Complaint”], available at <https://bit.ly/2YKX5PX>. The CCFC Complaint makes no allegations that YouTube’s prior policies place any children at risk of actual harm from sexual predators or physical contact. Instead, it is based on allegations that YouTube’s system, by collecting persistent identifiers, “permit the online contacting of a specific individual.” *Id.* at 22.

being physically contacted—the core concerns that motivated Congress in enacting COPPA. No, the core concern of these groups is stopping advertising to children—and restricting the collection of persistent identifiers is merely their means to restrict advertising. By labeling a video as “general audience,” YouTube allows for the collection of persistent identifiers that permit advertisers to place behavioral (targeted) advertising, rather than TV-style blunderbuss advertising that is far less effective.³⁶ Content creators and others have predicted that the switch from general audience to child-directed results in a loss of revenue of somewhere between 50 percent and 90 percent.³⁷

The new YouTube policies³⁸ also take power out of the hands of parents, where Congress intended COPPA to vest it. YouTube’s new policies will (a) disable all the interactive features on child-directed videos, including the ability of viewers to create playlists, like videos, comment and makes suggestions on videos (and thus provide feedback to content creators for how to improve their videos), and (b) prohibit auto-play, which seamlessly moves from one video to the next. Parents will no longer be able to sit their toddler in front of a tablet to be educated and/or entertained by a series of short videos. Instead, parents will have to sit with their children to manually move from video to video— even if the parent has already approved the content through the creation of playlists. Instead of requiring YouTube to enhance the decision-making power of parents, COPPA now requires YouTube to eliminate parental decision-making altogether and replace it with a set of algorithms created by YouTube designed to hunt out, mark as “directed to children,” and put into greatly reduced functionality any video that the FTC, or any complainant, might tag as appealing to children. Truly, the FTC is once again the “National Nanny.”

B. Public Reaction to the Settlement

The YouTube settlement has unleashed a torrent of protest from those who create YouTube videos that are, or might be, considered directed to children, and those who

³⁶ YouTube’s policies will also disable a number of significant features on child-directed videos, including the ability of viewers to comment and suggestions on videos (and thus provide feedback to content creators for how to improve their videos), suggestions for other videos, play lists, and auto-play.

³⁷ See, e.g., Katz, Jonathan & Fener, Victoria, *Is A YouTube COPPAcalypse Coming? FTC Rules Could Start Demonetizing Creators In 2020*, tubefilter (Nov. 5, 2019) (preliminary experiment of turning off targeted ads resulted in losses of revenue between 60 and 90 percent), <https://bit.ly/2E7i1Hk>; B. Sperry, *What’s the Harm of Targeted Ads on Children’s Content Anyway*, Truth on the Market (Sept. 12, 2019) (discussion of the impact of removing behavioral advertising on YouTube), <https://bit.ly/34bQ3oe>.

³⁸ See YouTube Creators, *Important Update for All Creators: Complying with COPPA*, (Nov. 12, 2019) (video from YouTube explaining the changes by January 1, 2020), available at <https://www.youtube.com/watch?v=-JzXiSkoFKw&t=62s>.

watch such videos. Over 850,000 people have signed a Change.org petition asking the FTC to reconsider the settlement.³⁹ These petition signers, and more than 150,000 commenters in the COPPA proceeding, are telling the FTC that they'll gladly permit the use of persistent identifiers that enable targeted ads, as well as other features, in exchange for free access to diverse and creative content, and the use of features that greatly enhance their interaction with video content.

This sentiment tracks what economic research has shown. When asked in a vacuum whether consumers value their privacy, they universally agree.⁴⁰ But when the government moves to restrict the ability of content creators to monetize content through targeted advertising and interactive features such as comments and playlists—to protect consumers—consumers rightfully revolt.⁴¹

There's a fundamental disconnect between the theoretical notion of protecting children from too much advertising, and the practical implications of trying to restrict advertising — and a fundamental disconnect between the theoretical notion of "Privacy Rights" and the practical implications of making those rights absolute. There's also a fundamental misunderstanding among policymakers of the economics of the Internet, especially social media aggregators such as YouTube. Billions of YouTube videos are free precisely because content creators are able to monetize the views by including advertisements. They are paid on a per-view basis. Views can be generated randomly, through a consumer searching for a type of video, or through mechanisms that help viewers find similar types of videos, such as playlists, suggestions, *etc.* Take that all away (which is happening with a wide swath of YouTube content), and the chances that a content creator's audience will find and view more videos drops precipitously. Further, the amount content creators are paid depends on the type of advertising that viewers see. "Contextual ads," which amount to TV-style guessing what ads to show during a particular video, earn content creators anywhere from 60 to 90 percent less than "targeted advertising," advertising that is fine-tuned to fit the interests and viewing habits of users. Advertisers will pay more to get their product in front of people who actually might be interested in it, and there is nothing the government can do to

³⁹ See *SAVE Family-Friendly Content on YouTube*, *supra* note 8.

⁴⁰ See generally, Comments of the Program on Economics & Privacy (PEP) at George Mason University's Antonin Scalia Law School, FTC's Informational Injury Workshop P175413 (Oct. 28, 2017), available at <https://bit.ly/34bQH58>.

⁴¹ See, e.g., Athey, Susan *et al.*, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, Stanford (Feb. 13, 2017) (discussing the "privacy paradox, where people say they care about privacy but are willing to relinquish private data quite easily"), available at https://athey.people.stanford.edu/sites/g/files/sbiybj5686/f/digital_privacy_paradox_02_13_17.pdf.

change that fact. And, frankly, most people are fine with that once they understand the value of free content they receive in exchange for receiving targeted ads.⁴²

There also is an absurd notion floating around that the government can somehow force content creators to make the same content available on the same terms if they are unable to fully monetize such content. In fact, the result of YouTube settlement, if not modified, will be that both sets of consumers will get the same content: nothing at all. Or more precisely, consumers will get access only to content that is created by large entities that can use platforms such as YouTube as “loss leaders”—giving away content for free in hopes of somehow getting a viewer’s business for their products and services in some other manner.

Some content creators are already shutting down their YouTube channels.⁴³ Others are intentionally adding vulgar language to their videos so that they can claim that they

⁴² See e.g. Comments of Jennifer McAllister, FTC COPPA RFC (Nov. 6, 2019) (“Regardless of what advocacy groups are stating, behavioral advertising is NOT a privacy concern for a majority of parents. How can I state this? Because there are already options for parents with these concerns and even with these options available most parents don’t use them”), <https://bit.ly/2rAG1jb>; see also Comments of Elaine Garner, FTC COPPA RFC (Nov. 18, 2019) (“Advertising to pay for a free programming is everywhere in visual entertainment. Commercials have been around since before television. I’d rather have an ad telling me about craft paints than a new car. I’m not going to buy a new car. I might buy new paint. Targeted ads are ultimately helpful”), <https://bit.ly/2RGoqRA>; see Comments of Pamela Morris, FTC COPPA RFC (Nov. 12, 2019) (“Just to ket tou [sic] know that we as a family want targeted adds to stay on facebook”), <https://bit.ly/36xAPf5>; and see Comments of Brian Berry, FTC COPPA RFC (Nov. 7, 2019) (“Our family very much enjoys watching family friendly video content on YouTube. We are concerned that by prohibiting targeted advertising on videos whose audience is primarily children will either stop or significantly decrease new content from being posted”), <https://bit.ly/2LHTWLR>; see Comments of Gina C, FTC COPPA RFC (Nov. 15, 2019) (“As a parent, if I choose to allow my daughter to use my personal youtube account to watch videos, rather than a Youtube Kids account, then I have given my consent for her to do so, as well as for targeted advertising”), <https://bit.ly/36nQEol>; see Comments of Caroline Roberts, FTC COPPA RFC (Nov. 15, 2019) (“it should be considered that those using YouTube Main are consenting to their data being collected and receiving targeted ads based on their history”), <https://bit.ly/36ffp6a>; and see Comments of Jade Blais-Ellis, FTC COPPA RFC (Nov. 19, 2019) (“Since generally speaking, parents are giving their children access to YouTube, that access should be seen as content to targeted ads. While the idea behind this law is good, it will ultimately destroy family-friendly content and do little to protect children”), <https://bit.ly/2qJajjw>. This is just a small sample of comments from parents and YouTube users who understand both the cost, and ultimate value, of targeted advertising on YouTube.

⁴³ See, e.g., Eat Pray Crunch, *I’m Quitting Youtube | Not Clickbait, Sadly | FTC & COPPA*, YouTube (Dec. 1, 2019: last visited Dec. 10, 2019 at 2:22PM EST) (creator of “Eat Pray Crunch” channel tearfully announcing that she is discontinuing the channel because of concerns over the impact of the YouTube settlement), <https://bit.ly/2PqJzgw>; see also Brian Hull, *Coppa and the Future of My Channel*, YouTube (Nov. 20, 2019: last visited Dec. 10, 2019 at 2:23PM EST) (Brian Hull, with 1.97 **million** subscribers, announcing that with the loss of income from targeted advertising, he will no longer be a full-time YouTube creator, cutting back from one to two new videos a week to one to two videos a month or less while he “tries to make ends meet” with other employment), <https://bit.ly/2YF4gcm>; see also AFOL Man, *This is probably my last video! COPPA*, YouTube (Nov. 14, 2019: last visited Dec. 10, 2019 at

are not child-directed.⁴⁴ Is this really the environment COPPA was intended to create? We think not.

The losers in the new YouTube environment will be consumers, who will lose free access to a huge amount of content that will dry up, and small content creators, who will not be able to sustain their businesses when 90 cents of every dollar they previously made evaporates. The result inevitably will be a desert of content—what Andrew Smith, Director of the FTC’s Bureau of Consumer Protection memorably called a “desert of crap”⁴⁵—with only a few oases created by the large media conglomerates that have dominated television since its inception. These giants are, no doubt, silently cheering as the government destroys their smaller media competitors—the “Long Tail” that has made the Internet so quirky, so diverse, and so different from traditional television.⁴⁶

2:24PM EST) (AFOL Man, a LEGO collector announces that he’ll no longer due new videos, because the thought of being fined “even it is were \$10.00, . . . ain’t worth the risk.”), <https://bit.ly/2LGVZiJ>.

⁴⁴ See, e.g., Chris Stuckmann, *Frozen II - Movie Review*, YouTube (Nov. 18, 2019: last visited Dec. 10, 2019 at 2:27PM EST) (video review of the Disney Movie Frozen 2 laced with obscenities at the beginning followed by the host saying “so this video is not for kids.”), <https://bit.ly/36lztUs>.

⁴⁵ See Wendy Davis, *FTC May Loosen Children’s Privacy Rules*, Digital News Daily (Sept. 23, 2019) (“‘We have heard that the inability to engage in interest-based advertising on YouTube is going to hurt content creators,’ Andrew Smith, head of the FTC’s Consumer Protection Bureau, said Monday at the annual conference of the National Advertising Division, a unit administered by the Better Business Bureau. Smith added that the agency is ‘worried’ that Google’s YouTube will become a ‘desert of crap’ if content creators can’t monetize their material with behaviorally targeted ads”), <https://www.mediapost.com/publications/article/341089/ftc-may-loosen-childrens-privacy-rules.html>. This prompted several of the anti-advertising groups to call for his recusal, apparently just for wanting to study the impact of demonetizing YouTube Creators. See Public Citizen, *Andrews Smith Children’s Online Privacy Protection Act (COPPA) recusal request* (Oct. 7, 2019), <https://www.citizen.org/article/andrews-smith-childrens-online-privacy-protection-act-coppa-recusal-request/?eType=Email-BlastContent&eId=20fb1979-80e2-43d6-9416-5c1c3c47a621>.

⁴⁶ See *SAVE Family-Friendly Content on YouTube*, *supra* note 8, (“While large corporations will survive these changes, small business creators face terminating employees, changing their business model, or shutting down production altogether. These regulations will particularly hurt young underserved audiences who participate in YouTube communities on topics like special needs, faith, and minority groups”); *But See Don’t Weaken Privacy Protections for Children*, New York Times (Oct. 10, 2019) (New York Times editorial concluding that the loss of Navajo language teaching videos on YouTube are a fair trade for making “privacy protections stronger”), <https://www.nytimes.com/2019/10/10/opinion/coppa-children-online-privacy.html>. Apparently, losing one of the great indigenous languages is less important than keeping children from seeing behavioral ads. See Pauly Denetclaw, *Data Shows Huge Reduction in Dine Speakers*, (Nov. 16, 2017) (Census data show that since 1980 the percentage of Navajos who speak their language fell from 93 percent to 51 percent in 2010, and it is estimated that that decline will continue such that by 2030, it may fall to 10 percent or less, rendering the language virtually extinct), <https://navajotimes.com/reznews/data-shows-huge-reduction-in-dine-speakers/>.

V. Specific Response to the Request for Comment

Here, we provide more specific responses to the questions posed by the FTC's July, 2019, Request for Comment. Much of the discussion above responds to Questions 1 through 3 of the RFC.⁴⁷ TechFreedom continues to support the COPPA statute. But restrictions imposed by the 2013 amendments and now manifest in the YouTube settlement, and continued ambiguity on what constitutes "child-directed," imperil the Internet ecosystem and run the great risk of creating a new content desert by squeezing out all but the largest and most traditional media voices and severely limiting content from small and minority creators.

A. The FTC Should Revisit the Definition of Personal Information

Questions 9 through 11 ask whether the definitions contained in Section 312.2 "accomplish COPPA's goal of protecting children's online privacy and safety."⁴⁸ Question 12 asks:

The 2013 revised COPPA Rule amended the definition of "Personal information" to include, among other items, a "persistent identifier that can be used to recognize a user over time and across different websites or online services." Has this revision resulted in stronger privacy protection for children? Has it had any negative consequences?⁴⁹

⁴⁷ *FTC COPPA RFC*, *supra* note 3 at 35983, ("1. Is there a continuing need for the Rule as currently promulgated? a. Since the Rule was issued, have changes in technology, industry, or economic conditions affected the need for or effectiveness of the Rule? b. What are the aggregate costs and benefits of the Rule? c. Does the Rule include any provisions not mandated by the Act that are unnecessary or whose costs outweigh their benefits? If so, which ones and why? 2. What effect, if any, has the Rule had on children, parents, or other consumers? a. Has the Rule benefited children, parents, or other consumers? If so, how? b. Has the Rule imposed any costs on children, parents, or other consumers? If so, what are these costs? c. What changes, if any, should be made to the Rule to increase its benefits, consistent with the Act's requirements? What costs would these changes impose? 3. What impact, if any, has the Rule had on operators? a. Has the Rule provided benefits to operators? If so, what are these benefits? b. Has the Rule imposed costs on operators, including costs of compliance in time or monetary expenditures? If so, what are these costs? 4. How many small businesses are subject to the Rule? What costs (types and amounts) do small businesses incur in complying with the Rule? How has the Rule otherwise affected operators that are small businesses? Have the costs or benefits of the Rule changed over time with respect to small businesses? What about small businesses that control and process large sets of data?").

⁴⁸ *Id.* at 3984.

⁴⁹ *Id.*

The discussion of the YouTube settlement above brings this 2013 decision into sharp relief. Were persistent identifiers (*e.g.*, “cookies”) not considered Personal Information, as was the case prior to 2013, almost all of the new requirements imposed on YouTube would be unnecessary,⁵⁰ and virtually all of the negative consequences of the YouTube settlement would have been avoided.

TechFreedom therefore urges the FTC to undertake a full review of the impact of the 2013 changes to the COPPA rule. As we’ve said before, persistent identifiers can only track a device, they cannot identify a *specific*, knowable person — as the COPPA statute requires.⁵¹ TechFreedom further urges the FTC to consider whether there is some other regulatory approach to categorizing persistent identifiers, a middle ground so to speak, which would both protect the actual safety of children while not devastating the YouTube ecosystem and destroy the livelihood of thousands of small businesses.⁵²

As part of that discussion, the FTC should endeavor honestly to gauge what the public thinks about targeted advertising. If the comments in this proceeding track the sentiments of the general public,⁵³ the outcry against targeted advertising may be only the voices of a small minority of people who wish government to tightly control the advertising media in America, becoming the National Nanny for the Internet.⁵⁴

⁵⁰ The only YouTube policy that could come under scrutiny under the pre-2013 definition of Personal Information might be the fact that children under 13 could volunteer traditional Personal Information as part of comments to a video. The YouTube settlement does not discuss whether YouTube has algorithms in place to detect and delete such comments.

⁵¹ See TechFreedom 2011 Comments, *supra* note 24, at 14 (“in the case of advertising, analytics and embeddable content platforms, how could such access be limited to logs of visits to (or embed views on) child-directed sites? ‘On the Internet, nobody knows you’re a dog—and in this case, how could the operator distinguish between the parent, the child and anyone else who might happen to get access to devices, especially mobile devices that are easily accessible outside the home?’”).

⁵² For example, the Federal Communications Commission (FCC) is required under the Regulatory Flexibility Act of 1980 to examine the impact of any of its rule changes on small businesses. 5 U.S.C. §§ 601-612 (Lexis 2019). TechFreedom urges the FTC to conduct a similar analysis here so that the agency can assess the impact of any rule changes or reinterpretations, including the impact of the YouTube settlement, on small businesses.

⁵³ See Public Comments *generally*, *supra*, note 27, note 42; *infra* note 58, note 60, note 61, and note 62. TechFreedom has also been told by many creators that they do not even have time to participate in this proceeding because they are so busy trying to review and reclassify, if necessary, all of their videos by the end of the year to make sure the FTC doesn’t come after them. Further, some creators are reluctant to go on the record, for fear that their participation will make them a target of enforcement. As such, the comments the FTC sees may actually significantly understate the depth of disagreement with the FTC on these issues.

⁵⁴ To the extent that the FTC’s new interpretation of COPPA burdens the speech of adults, it also raises significant First Amendment concerns. The FTC’s prior regulations interpreting the statute (and using

B. The FTC Should Clarify the Definition of “Child-Directed”

Question 15 asks whether the definition in Section 312.2 “correctly articulate[s] the factors to consider in determining whether a website or online service is directed to children.⁵⁵ First and foremost, the FTC should reject the notion that merely “appealing to children” or being “attractive to children” qualifies as “child-directed,” as the COPPA statute requires.⁵⁶ Such an expansive definition of “child-directed” would sweep a whole host of websites, platforms, and content into the “bucket” of “child-directed”—everything from sports sites to “mixed audience,” to “family friendly” content. For the first time in its 21-year history, COPPA would affect content enjoyed by significant numbers of adults. The YouTube creator community is deeply concerned that video concerning collecting toys, reviewing computer games, or crafting may be swept up into a new definition of child-directed, even though the main audience for such videos is adults and children 13 and over.⁵⁷

Second, there is tremendous fear spreading across YouTube and other parts of the Internet that any content that might appeal to a child is now “child-directed” following

the catch-all “any other identifier” language) have never been challenged on First Amendment grounds.

⁵⁵ *FTC COPPA RFC*, *supra* note 3 at 35984.

⁵⁶ The *RFC* itself uses language that conflates and confuses the issue. “The online environment for children continues to evolve at a rapid pace, including, for example, the significant increase in education technology in the classroom and social media and platforms **with third-party content appealing to children.**” *Id.* at 35843 (emphasis added).

⁵⁷ See, e.g., KreekCraft, *This Is How COPPA Will Destroy YouTubers... (It's Really Bad) | FTC YouTube COPPA Update*, YouTube (Nov. 19, 2019: last visited Dec. 10, 2019 at 2:37PM EST) (“Kreekcraft,” with over 800,000 subscribers, explains how difficult it is for creators to understand the definition of “child-directed”), <https://bit.ly/2ryk6JA>; NerdECrafter, *NEW RULES MIGHT SHUT DOWN FEMALE CREATORS/ Arts & Crafts Channels FTC COPPA*, YouTube (Nov. 12, 2019: last visited Dec. 10, 2019 at 2:37PM EST) (“NerdECrafter,” with almost 1,000,000 subscribers, explains how crafting channels, such as hers (and many other female creators) may have to shut down), <https://bit.ly/38qBdgS>.

the YouTube settlement.⁵⁸ The FTC should reinforce its prior decision to apply a “totality of circumstances” test in determining whether content is child-directed.⁵⁹ The Commission must make clear that the presence of one, or a few, of the factors elucidated in Section 312.2 does not necessarily make the content “child-directed.”

Third, the comments in this proceeding make clear that there are a number of content types, and creator approaches to making videos, that, while they might be *attractive* to some children under 13, nonetheless are not *directed to* children. Ample comments

⁵⁸ See Comments of Robert Krampf, FTC COPPA RFC (Sept. 20, 2019) (“The Happy Scientist” who creates videos for science education states, “After reading the COPPA rule, the amendments, the statements from each of the Commissioners who ruled on the YouTube settlement, and talking on the phone with your Assistant Director, Division of Privacy and Identity Protection, I am incredibly frustrated by the lack of a clear, precise definition of ‘child directed content’. Without a solid, legal definition, what I think is a general audience, science education video might or might not be considered to be child directed, depending on the mood and personality of whoever sees it”), <https://bit.ly/38mXDQ9>; Comments of Josefine Olstad, FTC COPPA RFC (Nov. 17, 2019) (YouTube creator who turns toys into works of art says “Should I loose [sic] all conections [sic] with my community and a very large part of my income because my content is child appealing? the rules as of now will punish artwork, upbeat, colorful and feminine channels”), <https://bit.ly/2RCvT43>; see also Comments of Rory Baker, FTC COPPA RFC (Nov. 15, 2019), <https://bit.ly/2PyQqnr>:

i am both a part time creator and a full time viewer. I used to suffer from major depression and one of my coping mechanisms was to watch crafting videos. The process and creation of sculptures, paintings and diys literally saved my life. I was about to end my life but instead i wanted to finish a project i started to follow from a creator, i had actual willpower to continue a project which i had lost for a very long time. Everytime i felt like harming myself, id watch "child appealing" crafting videos that included sculpting cute characters that had bright colours and upbeat music. I was not a child and i'm genuinally scared that if you create these new laws that people in need could be really badly affected. I gained joy from watching and participating in the artsy community and thats all at risk. If someone was like me and then all of a sudden couldnt comment and engage in content that helps them cope, they might have no where else to go to.

⁵⁹ 16 CFR § 312.2 (“In determining whether a Web site or online service, or a portion thereof, is directed to children, the Commission will consider its 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.”).

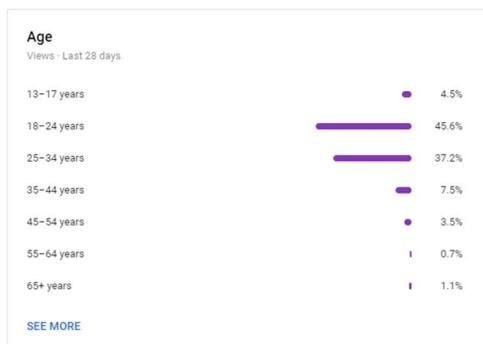
have been filed concerning “crafting” content,⁶⁰ animation software creation communities,⁶¹ and toy collecting,⁶² that both creators and adult viewers do not consider to be directed to children under 13.

⁶⁰ Almost 750 comments in the docket address the issue of “crafting” and the problem of categorizing “crafting” as directed to children. *See e.g.*, Comments of Angela (no last name provided), FTC COPPA RFC (Nov. 14, 2019), <https://bit.ly/2LGXXzC>:

You can not deem child content into crafting and toys. Parents and adults alike enjoy craft kits. As a parent, I pay for products. I want to ensure the product I'm buying is at least decent for my children. I then search YouTube to see if a creator has reviewed the craft kit I want to purchase. I watch the whole video, sometimes multiple videos, before I decide if I should purchase said item. By deeming this child content, and therefore removing said content, I am at a loss of what to do. Parents should have the option of allowing their children to view videos on YouTube but you should not deem all content with toys or crafting or gaming to be child content. It's not.

⁶¹ Over 750 Comments address the issue of categorizing “animation” as child-directed. *See, e.g.*, Comments of Holly Moore (“As an artist, I create what COPPA potentially refers to as “animated characters.” However, despite the stylization of the characters in my art, the characters belong to an IP and body of writing that is NOT intended for young audiences. I would be hesitant to even say that the subject-matter is appropriate for young teens, let alone children under the age of 13”); Comments of William Whitfiled (YouTube content creator, “I also use 3D animation a lot of the time. I believe the central messages are for adults (faith, gun violence, satire). I just wouldn't want someone to mistake it for children content just because it's bright and colorful. There are plenty of cartoons on TV today that are no where near appropriate for children”); Comments of Charlett (no last name provided) (17 year old artist creating content for YouTube, “Since animation is often seen as “strictly kid friendly” I fear the AI will flag my videos as such, thus disabling comments so I can't interact with my subscribers and lose potential future monetization. Not to mention the rules YouTube states are far too vague, but it seems like I can get my channel terminated if I ‘mislabel’ my videos”). *See also* Comments of Ross O'Donovan:

I'm an animator who uses his YouTube platform to publish animated content that is not at all aimed at kids. Automated systems/machine learning may target comedic adult animation as children's content due to bright colors, it's a huge concern. The wording being used here to describe children's content is too vague when it comes to animation. This needs to be addressed. I've attached analytics data showing how small an animation channels younger audience can be given the subject matter of the content.



⁶² *See* Comments of Glenn Morris, FTC COPPA RFC (Nov. 18, 2019) (“You're killing my YouTube channel with this. All I wanted to do was talk about toys. I buy my own toys, I edit my videos, I maintain my

Finally, the FTC must find a way to both give greater clarity to the definition of “child-directed,” and not penalize good faith categorizations of “general audience,” or “mixed audience” sites. The creator community currently is running scared, and the possibility of fines of \$42,530 per video posted on a YouTube channel has the real potential of drying up new content creation. The FTC should clarify that, while it *will* prosecute unscrupulous actors, it will not “sweep” YouTube and other platforms looking to destroy creators who honestly believe they are creating content for a family audience or for adults, like “shooting fish in a barrel.”⁶³ This is especially true in light of the continued uncertainty about the definition of “child-directed.” To continue on with the FTC’s own “fish in a barrel” analogy, it is like the government has just removed all speed limit signs and replaced them with a multi-factor test for safe driving speed (including curvature of the road, road conditions, temperature, and weather conditions), and then authorized officers to pull over motorists and shoot them (or at least issue them a \$42,530 ticket) if the officer determines, in his/her subjective analysis, that the motorist was exceeding the safe speed limit. In such a situation, all reasonable motorists would simply stop driving.

C. The FTC Should Allow Parents to Agree to the Collection of Persistent Identifiers for Internal Use as Part of Their Social Media Platform Subscriptions

The FTC should consider whether, in signing into their social media accounts (such as YouTube), parents have given adequate consent to the collection of persistent identifiers — even if the collection of other forms of personal information continues to require more robust, specific verifiable parental consent mechanisms. In this way, sites such as YouTube would be able to offer parents (or anyone over the age of 13 who has a legitimate YouTube account) the tools they’ve come to expect, including the ability

channel. I do hours of unpaid work and it feels like it's all been for nothing”), <https://bit.ly/2YzMkzE>; Comments of Emalea Smith, FTC COPPA RFC (Nov. 14, 2019) (“I also watch ‘toy channels’, who really only want to help people make informed decisions on things to see if they’re worth your money or not. I have used the knowledge these types of creators inform to the general public to either purchase the products, or simply change my mind because it was not what I thought it was. What will happen to these creators? Will they be flagged as child content when in reality they simply want to inform people about the products?”), <https://bit.ly/2E7yETg>.

⁶³ Comments made by the FTC at the press conference announcing the YouTube settlement have been particularly unsettling and bordered on mean-spirited. See Zeitgeist Eater, *The FTC Exploits Children for Cash Windfall - Credits Centralization as “Fish in a Barrel” – MGTOW*, YouTube (Nov. 19, 2019: last visited on Dec. 10, 2019 at 2:56PM EST) *Compilation of FTC press conference comments available at* <https://www.youtube.com/watch?v=yXP7RK8RiLg>. The FTC’s recent blog post has provided creators operating in good faith little comfort that they will not be the next “fish” to be “shot.”

to build playlists, subscribe to videos, like videos, search all videos, authorize autoplay, info cards, end screens, notification bells, and a community tab, as well as feeding behavioral ads. This “sliding scale” approach to parental consent has been in the FTC’s COPPA rules since 1999 and reflects the FTC’s early conclusion “that internal uses of information, such as marketing to children, presented less risk than external disclosures of the information to third parties or through public postings”.⁶⁴ We believe that properly informed, adults should be allowed to agree to the collection of persistent identifiers as part of their subscription to YouTube to allow them, and their children, access to both tools and behavioral advertising.

D. The FTC Should Revisit its 2017 Policy Statement on Audio Files

Question 24 asks whether the FTC should revisit its 2017 Policy Statement on audio files.⁶⁵ As the *RFC* states:

The Commission explained that it would not take an enforcement action against an operator for not obtaining parental consent before collecting an audio file with a child’s voice when the audio file is collected solely as a replacement for written words, such as to perform a search, ***so long as the audio file is held for a brief time and used only for that purpose***. Should the Commission amend the Rule to specifically include such an exception? If the Commission were to include such an exception, should an operator be able to de-identify these audio files and use them to improve its products?⁶⁶

Yes and yes.

The FTC’s Policy Statement contemplates a limited role for voice technology—and a similarly narrow set of acceptable use cases in which the Commission will not take enforcement action:

Nevertheless, the Commission recognizes the value of using voice as a replacement for written words in performing search and other functions on

⁶⁴ See 16 C.F.R. § 315.2(b). See also 2013 Final Rule Order, *supra* note 22, at 3990; See also 1999 Children’s Online Privacy Protection Rule, Statement of Basis and Purpose, 64 FR 212 at 59901 (Nov. 3, 1999), <https://bit.ly/2E5Ftoo>.

⁶⁵ See FTC COPPA RFC, *supra* note 3; see also FTC, *Enforcement Policy Statement Regarding the Applicability of the COPPA Rule to the Collection and Use of Voice Recordings*, (October 23, 2017) [hereinafter “Voice Policy Statement”], available at <https://bit.ly/2REnrS4>.

⁶⁶ *FTC COPPA RFC*, *supra* note 3, at 35985 (emphasis added).

internet-connected devices. Verbal commands may be a necessity for certain consumers, including children who have not yet learned to write, or the disabled. In addition, when the operator only uses the audio file as a replacement for written words, such as to effectuate an instruction or request, and only maintains the file long enough to complete that purpose and then immediately deletes it, there is little risk the audio file will be used to contact an individual child.⁶⁷

The Policy Statement vastly underestimates the utility of voice recognition as a new paradigm of human-computer interaction — and clearly excludes the use case that is the essential prerequisite for making computer recognition work for children’s voices work anywhere near as well as it does for adults: maintaining the file in some de-identified form as the basis for the kind of machine learning necessary to train automatic speech recognition systems. Such uses should *not* be covered by the COPPA statute because, if voice recordings are properly deidentified, they do not allow the contacting of a specific individual child. We are concerned that the status quo creates enormous regulatory uncertainty, in three ways:

1. The Commission’s policy statement is merely an announcement that the Commission will not take enforcement action against something it considers to be a violation of the statute — and the Commission could potentially reverse that position at any time without notice.
2. A company offering a general audience services, such as Amazon Echo, Google Assistant or Apple’s Siri, may already be discouraged from developing automatic speech recognition for children by the possibility that the FTC — or, more likely, one of the activist groups that have weaponized COPPA as a way to attract publicity and raise money — might allege that their analysis of children’s voices, insofar as it can distinguish young children from older users, gives the companies “actual knowledge” that they have collected personal information from children.
3. More generally, operators will naturally hesitate to attempt to build “COPPA-compliant” systems by which machine learning could improve recognition of children’s voices (and, indeed, already appear to hesitating to do so) because of (a) the difficulty of obtaining parental consent, (b) the legal risks inherent in being subject to COPPA, even after parental consent has been obtained, and (c) the fact that activist groups have already attacked those few companies that have attempted to enter this market.

⁶⁷ Voice Policy Statement, *supra* note 65, at 2.

Most notably, in early 2017, Mattel announced plans for Aristotle, a kid-focused smart hub that relied on speech recognition to interact with children. As an obviously child-directed service, Aristotle would have been covered by COPPA, and was therefore designed to be COPPA-compliant, including obtaining verifiable parental consent.⁶⁸ Mattel ultimately shelved plans for the system after the Campaign for a Commercial-Free Childhood organized a petition that received 15,000 signatures urging the company to abandon the program.⁶⁹ That one of America's largest manufacturers of child-directed products ultimately decided that it could not offer a COPPA-compliant system of child-computer action suggests that COPPA is actually harming children rather than protecting them. It also makes clear that being subject to COPPA entails much, much more than simply being required to offer a parental consent mechanism.

At stake is not merely whether companies will offer what the Commission's Policy Statement called a "necessity" for "some" users. Rather, automatic speech recognition is making possible paradigm shift of profound significance, as *The Economist* noted two years ago:

The Amazon Echo, a voice-driven cylindrical computer that sits on a table top and answers to the name Alexa, can call up music tracks and radio stations, tell jokes, answer trivia questions and control smart appliances; even before Christmas it was already resident in about 4% of American households. Voice assistants are proliferating in smartphones, too: Apple's Siri handles over 2bn commands a week, and 20% of Google searches on Android-powered handsets in America are input by voice. Dictating e-mails and text messages now works reliably enough to be useful. Why type when you can talk?

This is a huge shift. Simple though it may seem, voice has the power to transform computing, by providing a natural means of interaction. Windows, icons and menus, and then touchscreens, were welcomed as more intuitive ways to deal with computers than entering complex keyboard commands. But being able to talk to computers abolishes the need for the

⁶⁸ See Mattel, *Mattel's nabi® Brand Introduces First-Ever Connected Kids Room Platform In Tandem With Microsoft And Qualcomm - Aristotle™*, Newsroom (Jan. 4, 2017) ("Aristotle has been designed with security top of mind, with special attention to COPPA compliance measures and how data is collected, transferred, and stored," "Access to data is through mobile devices that have been paired in close proximity to the Aristotle hub, and with proper approval through parental controls"), available at news.mattel.com/news/mattel-s-nabiR-brand-introduces-first-ever-connected-kids-room-platform-in-tandem-with-microsoft-and-qualcomm-aristotleTM.

⁶⁹ See David Monahan, *Experts and Advocates Ask Mattel to Stop AI 'Aristotle' from Spying on Babies & Kids*, CFCC (May 9, 2017), available at <https://commercialfreechildhood.org/experts-and-advocates-ask-mattel-stop-ai-aristotle-spying-babies-kids/>.

abstraction of a “user interface” at all. Just as mobile phones were more than existing phones without wires, and cars were more than carriages without horses, so computers without screens and keyboards have the potential to be more useful, powerful and ubiquitous than people can imagine today.

Voice will not wholly replace other forms of input and output. Sometimes it will remain more convenient to converse with a machine by typing rather than talking (Amazon is said to be working on an Echo device with a built-in screen). But voice is destined to account for a growing share of people’s interactions with the technology around them, from washing machines that tell you how much of the cycle they have left to virtual assistants in corporate call-centres. However, to reach its full potential, the technology requires further breakthroughs—and a resolution of the tricky questions it raises around the trade-off between convenience and privacy.⁷⁰

The shift towards voice as the basis for human-computer interaction may offer the greatest benefits for the youngest children, who naturally master oral language before written language.

The Commission could allow automatic speech recognition for children to flourish *while also protecting children’s privacy* by incorporating into the definition of “personal information” in 16 C.F.R. § 312.2, immediately following that definition, the framework intended to encourage responsible de-identification of personal information contained in the Obama administration’s proposed 2015 comprehensive baseline privacy legislation (modifying the introductory sentence of that to use the terminology of COPPA’s definitions of “personal information”):

The term “personal information” shall not include audio files otherwise described by paragraph (8) that a covered entity:

- (i) alters such that there is a reasonable basis for expecting that the data could not be linked as a practical matter to a specific individual or device;
- (ii) publicly commits to refrain from attempting to identify with an individual or device and adopts relevant controls to prevent such identification;

⁷⁰ Economist, *How voice technology is transforming computing*, The Economist (Jan. 7, 2017), <https://econ.st/2RCwPW7>. comScore, a leading source of industry analysis, has projected that 50% of all search queries will be via voice tech by 2020. Wesley Young, *The voice search explosion and how it will change local search*, Search Engine Land (Jun. 20, 2016), <https://bit.ly/2YLdrrP>.

(iii) causes to be covered by a contractual or other legally enforceable prohibition on each entity to which the covered entity discloses the data from attempting to link the data to a specific individual or device, and requires the same of all onward disclosures; and

(iv) requires each entity to which the covered entity discloses the data to publicly commit to refrain from attempting to link to a specific individual or device.⁷¹

The Commission could also build upon this approach by requiring companies to follow de-identification plans approved by the Commission in something like today's safe harbor program.

While this may seem like a significant modification to the COPPA Rule, it would actually be well grounded in the COPPA statute. Indeed, Congress authorized the Commission to expand the definition of "personal information" only so far as "permit[] the physical or online contacting of a specific individual."⁷² The Commission exceeded that authority when, in its 2013 update to the COPPA rule, it expanded the definition of "personal information" to include "[a] photograph, video, or audio file where such file contains a child's image or voice" *regardless of whether such information actually could be used to contact a child*.⁷³ Whether or not, as the Commission asserted in 2013, photographs and videos are inherently difficult to de-identify, the Commission has never shown that *audio* recordings cannot be de-identified. All we ask is that innovators be given the *opportunity* to develop systems for automatic speech recognition — subject to the same system of legal controls that the Obama administration proposed for all consumer data, to ongoing oversight by the Commission, and, if necessary, to pre-approval by the Commission in safe harbors.

VI. Conclusion

The most immediate question facing the Commission is how to minimize the damage done by the YouTube settlement to the currently thriving ecosystem of videos created by a "Long Tail" of content creators. This rulemaking will take much too long to address such concerns; the Commission must act by clarifying how it will enforce that settlement. We urge the Commission to issue an enforcement policy statement at the

⁷¹ White House, Administration Discussion Draft: Consumer Privacy Bill of Rights Act of 2015 (Feb. 27, 2015), <https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/letters/cpbr-act-of-2015-discussion-draft.pdf>.

⁷² 15 U.S.C. § 6501(8) (Lexis 2019).

⁷³ 2013 Final Rule Order, *supra* note 22 at 3981.

earliest possible date, bearing in mind that the new YouTube procedures are set to go into force in just a few weeks (January 1, 2020).

As part of this proceeding, we urge the Commission to make four changes to the 2013 rule:

1. Amend the definition of Personal Information to include persistent identifiers only insofar as they can be used to track a particular individual (*i.e.*, they only track the use of a device);
2. Allow websites, including social media sites such as YouTube, to obtain parental consent as part of their Terms of Service for the limited purposes of collecting persistent identifiers in order to serve behaviorally targeted ads to a device signed into by that parent;
3. Clarify the definition of “child-directed,” including providing further examples, and reinforcing the “totality of circumstances” test; and
4. Allow websites to collect and retain deidentified audio files for the limited purpose of improving voice recognition algorithms, provided those recordings have been properly de-identified to prevent the operator from using them to contact the child.

These changes are necessary to ensure that COPPA does what it was intended to do: protect children and empower parents to control how their children’s information is collected *without* denying children or parents the benefits innovation in new services and the creativity of a “long tail” of diverse content creators.

Respectfully submitted,

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