

**Comments of**

**TechFreedom**

Berin Szóka<sup>i</sup> & Andy Jung<sup>ii</sup>

**At the**

Open Commission Meeting

**September 14, 2023**

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## INTRODUCTION

On September 14, 2023, two of TechFreedom’s legal scholars delivered remarks at the FTC’s Open Commission Meeting. Their oral remarks are presented here, lightly edited for clarity.

### I. Comments of Berin Szóka

I’m Berin Szóka, an Internet lawyer and President of TechFreedom, a think tank dedicated to striking a careful balance in consumer protection.

The FTC has a long track record around advertising and kids. Indeed, Congress has specifically barred the Commission from making certain rules in this area—and only this area. That says a lot about the Commission’s disastrous attempt in the 1970s to ban much advertising to kids. More recently, in 2019, the Commission settled charges that YouTube had violated the Children’s Online Privacy Protection Act, requiring the site to ban interest-based advertising in channels offering content “made for kids” under 13.

According to a 2019 study, this settlement reduced advertising revenues for content creators between 60 and 90%.<sup>1</sup> A new study explores how this revenue drop affected the supply, quality, and mix of kids’ content.<sup>2</sup> Four economists, led by Garrett Johnson and James Cooper, a former Deputy Director in the FTC’s Bureau of Consumer Protection, studied the top 5,000 YouTube channels. They found that the supply of content made for kids fell 13%, and that content views fell 22%.<sup>3</sup> Smaller channels and those that post “educational and entertainment content” suffered most.<sup>4</sup> Content creators shifted their focus in order to avoid the ban on interest-based advertising: Among channels that produced for a “mixed” audience of kids under 12 and older users, 25% simply stopped producing content for kids.<sup>5</sup> Ultimately, these costs were borne by kids and parents.

*Perhaps* these costs were worth it, but without hard data, we can’t really say. The FTC employs some of the best economists in the country. It can get market data not available to academic researchers. The Bureau of Economics should study how the 2019 COPPA settlement affected content creators, and how the market for kids and teens’ content works today. A report on that question should guide the Commission *before* it makes any major

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<sup>1</sup> Jonathan Katz & Victoria Fener, *Is a YouTube COPPAocalypse coming? FTC rules could start demonetizing creators in 2020*, TUBEFILTER (Nov. 5, 2019), <https://www.tubefilter.com/2019/11/05/youtube-coppa-adpocalypse-ftc-rules-demonetizing-child-directed/>.

<sup>2</sup> Garrett Johnson et al., *COPPAocalypse? The Youtube Settlement’s Impact on Kids Content* (Apr. 26, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4430334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430334).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 22, 31.

<sup>5</sup> *Id.* at 13.

changes in how it regulates children’s advertising, *including* acting on the staff report being voted on today.

## II. Comments of Andy Jung

I’m Andy Jung, a Legal Fellow at TechFreedom.

In July, *The Washington Post* reported that the Commission had opened an investigation into OpenAI<sup>6</sup> by issuing a civil investigative demand regarding potentially unfair or deceptive privacy practices.<sup>7</sup>

Section 20 of the FTC Act authorizes the Commission to issue CIDs requiring the recipient to produce documents, submit tangible things, file written answers, and give oral testimony.<sup>8</sup> These pre-complaint investigations are ordinarily nonpublic.<sup>9</sup> “However, the Commission’s policy has long included exceptions for disclosure of... investigations that involve significant risk of economic harm or risk to public health or safety.”<sup>10</sup> The Commission has the authority “to make appropriate disclosures concerning nonpublic investigations whenever it determines that doing so would be in the public interest.”<sup>11</sup>

Additionally, the Office of Public Affairs may “make limited disclosures about the general nature and scope of a nonmerger investigation in unusual cases where there has been substantial publicity... ”<sup>12</sup>

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<sup>6</sup> Cat Zakrzewski, *FTC Investigates OpenAI over data leak and ChatGPT’s inaccuracy*, WASHINGTON POST (July 13, 2023, 7:26 PM), <https://www.washingtonpost.com/technology/2023/07/13/ftc-openai-chatgpt-sam-altman-lina-khan/>.

<sup>7</sup> Fed. Trade Comm’n, Civil Investigative Demand (“CID”) Schedule, FTC File No. 232-3044, [https://www.washingtonpost.com/documents/67a7081c-c770-4f05-a39e-9d02117e50e8.pdf?itid=lk\\_inline\\_manual\\_4](https://www.washingtonpost.com/documents/67a7081c-c770-4f05-a39e-9d02117e50e8.pdf?itid=lk_inline_manual_4).

<sup>8</sup> 15 U.S.C. § 57b-1(c)(1).

<sup>9</sup> Fed. Trade Comm’n, Policy Concerning Disclosures of Nonmerger Competition and Consumer Protection Investigations, 63 Fed. Reg. 63,477 (Nov. 13, 1998), <https://www.govinfo.gov/content/pkg/FR-1998-11-13/pdf/98-30372.pdf> (“Commission policy is to hold confidential the existence and targets of law enforcement investigations until the Commission issues an administrative complaint, authorizes or files a judicial complaint, announces a proposed settlement, or closes a matter.”).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 63,478.

<sup>12</sup> “[S]ubstantial publicity” signifies that “significant factual material concerning the investigation . . . has appeared in the print or electronic media” as opposed to “mere rumors or statements.” *Id.* at 63,477.

This is one of those unusual cases. The OpenAI investigation leaked and has received substantial publicity.<sup>13</sup> The OpenAI CEO even tweeted about it.<sup>14</sup> Further, AI is a topic of immense “public interest” and significance, as the Commissioners have each noted.<sup>15</sup> The investigation also raises First Amendment concerns around anonymous speech, as flagged by Former FTC Acting Chief Technologist, Neil Chilson.<sup>16</sup>

The OpenAI investigation has meaningful implications for consumers,<sup>17</sup> and the Commission has positioned itself as major regulatory player in the space.<sup>18</sup> Accordingly, the Commission

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<sup>13</sup> Zakrzewski, *supra* note 6. See also David Hamilton, *FTC investigating ChatGPT creator OpenAI over consumer protection issues*, AP (July 13, 2023, 7:55 PM), <https://apnews.com/article/openai-chatgpt-investigation-federal-ftc-76c6218c506996942282d7f5d608088e>; Cecilia Kang & Cade Metz, *F.T.C. Opens Investigation Into ChatGPT Maker Over Technology’s Potential Harms*, N.Y. TIMES (July 13, 2023), <https://www.nytimes.com/2023/07/13/technology/chatgpt-investigation-ftc-openai.html>; Devin Coldewey, *FTC reportedly looking into OpenAI over ‘reputational harm’ caused by ChatGPT*, TECHCRUNCH (July 13, 2023, 1:32 PM), <https://techcrunch.com/2023/07/13/ftc-reportedly-looking-into-openai-over-reputational-harm-caused-by-chatgpt/>.

<sup>14</sup> “it [sic] is very disappointing to see the FTC’s request start with a leak and does not help build trust. that said, it’s super important to us that our technology is safe and pro-consumer, and we are confident we follow the law. of course we will work with the FTC.” @sama, TWITTER (July 13, 2023, 5:24 PM), <https://twitter.com/sama/status/1679602638562918405>.

<sup>15</sup> Commissioners and staff have written about AI issues. Early Thoughts on Generative AI, Remarks of Commissioner Alvaro M. Bedoya, Fed. Trade Comm’n, at 13 (Apr. 5, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Early-Thoughts-on-Generative-AI-FINAL-WITH-IMAGES.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Early-Thoughts-on-Generative-AI-FINAL-WITH-IMAGES.pdf) (“I do think that generative AI presents fundamentally new dynamics for a consumer technology.”); Rebecca Kelly Slaughter, *Algorithms and Economic Justice*, YALE J. L. & TECH. (Aug. 2021), <https://yjolt.org/sites/default/files/23yalej.l.tech.specialissue1.pdf>; FED. TRADE COMM’N, COMBATTING ONLINE HARMS THROUGH INNOVATION, at 4 (June 16, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Combating%20Online%20Harms%20Through%20Innovation%3B%20Federal%20Trade%20Commission%20Report%20to%20Congress.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Combating%20Online%20Harms%20Through%20Innovation%3B%20Federal%20Trade%20Commission%20Report%20to%20Congress.pdf) (“Reflecting this subject’s importance, in November 2021, Chair Khan announced that the agency had hired its first-ever advisors on artificial intelligence.”). See also Michael Atleson, *Keep your AI claims in check*, FTC BUSINESS BLOG (Feb. 27, 2023), <https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check> (“AI is important.”).

<sup>16</sup> Christopher Koopman & Neil Chilson, *The Feds’ ChatGPT Probe Threatens Free Speech*, NATIONAL REVIEW (Aug. 17, 2023, 6:30 AM), <https://www.nationalreview.com/2023/08/the-feds-chatgpt-probe-threatens-free-speech/> (“[T]he FTC wants OpenAI to name all users who dared to ask the wrong questions.”).

<sup>17</sup> “The salvo represents the most potent regulatory threat to date to OpenAI’s business in the United States, as the company goes on a global charm offensive to shape the future of artificial intelligence policy. . . . If the FTC finds that a company violates consumer protection laws, it can levy fines or put a business under a consent decree, which can dictate how the company handles data.” See Zakrzewski, *supra* note 6. See generally *In the Matter of OpenAI, Inc.*, CAIDP Complaint (Mar. 30, 2023), <https://www.caidp.org/app/download/8450269463/CAIDP-FTC-Complaint-OpenAI-GPT-033023.pdf?t=1681139856>.

<sup>18</sup> *The Luring Test: AI and the engineering of consumer trust*, FTC (May 1, 2023), <https://www.ftc.gov/business-guidance/blog/2023/05/luring-test-ai-engineering-consumer-trust> (asserting UDAP authority over AI: “In previous blog posts, we’ve focused on AI-related *deception*, both in terms of exaggerated and unsubstantiated claims for AI products and the use of generative AI for fraud.”).

should, at the least, disclose the general nature and scope of the investigation. The CID leaked two months ago, yet the Commission has yet to release a statement. The public deserves an explanation, in clear, plain language, of the Commission’s intentions regarding this high-profile and high-impact agency action.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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Design or use of a product can also violate the FTC Act if it is *unfair*"); *Generative AI Raises Competition Concerns*, FTC (June 29, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns> (asserting UMC authority over AI: “As competition issues surrounding generative AI continue to develop, the Bureau of Competition, working closely with the Office of Technology, will use our full range of tools to identify and address unfair methods of competition.”). *See also supra* note 15.