

FTC Settlement Over COPPA Will Change YouTube's Biz Model

By **Allison Fitzpatrick** (September 19, 2019, 1:28 PM EDT)

The Federal Trade Commission and the New York state attorney general made headlines earlier this month when they announced that Google LLC and its subsidiary YouTube LLC agreed to pay a record \$170 million to settle allegations that YouTube collected personal information from children in violation of the Children's Online Privacy Protection Act.[1]

Notably, the total civil penalty paid by Google and YouTube is nearly 30 times larger than the largest civil penalty previously imposed by the FTC for COPPA violations and three times larger than any privacy penalty assessed against Google anywhere else in the world.



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While the \$170 million monetary judgment received most of the headlines, the recent settlement includes notable provisions that will result in significant changes to YouTube's platform, which ultimately could expose content creators and YouTube channel owners to COPPA liability.

The Complaint

COPPA requires websites and apps that are directed to children under 13 years of age or have "actual knowledge" they are collecting personal information from children to provide direct notice to parents and obtain verifiable parental consent before collecting personal information from children. The definition of personal information under COPPA includes full name, email address and telephone number, as well as cookies and other persistent identifiers that are used to track children for behavioral advertising purposes.

While YouTube states in its terms of service that the platform is not intended for children under 13, YouTube allegedly hosted numerous channels that are "directed to children" under COPPA, as several of YouTube's individual channels featured child-directed video content, including child-friendly animated characters and depictions of children playing with toys and engaging in child-oriented activities.

According to the complaint, YouTube violated COPPA by using cookies to track viewers of child-directed YouTube channels (who were presumably children) in order to serve them behaviorally targeted advertisements without first obtaining their parent's verifiable consent to collect this information. Google and YouTube allegedly made millions of dollars from behavioral advertising on their child-directed channels.

The FTC and New York attorney general claimed that the defendants had “actual knowledge” that they were collecting personal information from children under 13 years of age because several channel owners told YouTube that their content was directed to children and YouTube created a content rating system that categorized content for children under 13 years of age, including “Y” (generally intended for ages 0-7) and “Made for Kids.” In addition, YouTube manually reviewed and curated content from its child-directed channels for its separate YouTube Kids app, which is targeted to children ages two-12.

The most damaging evidence of YouTube’s “actual knowledge” was likely YouTube’s own words — as YouTube allegedly promoted itself to child brands as a top destination for kids, a “leader in reaching children 6-11 against top channels” and the “#1 website regularly visited by kids.” Not surprisingly, the FTC did not take kindly to YouTube’s disavowing knowledge of any children being on its platform, when its marketing materials boasted about the platform’s popularity with kids.

The Settlement

The settlement made headlines, in part, because of the parties involved — Google and YouTube — as well as the size of the monetary judgment. However, the injunctive provisions of the settlement also deserve attention.

According to the FTC Chairman Joseph Simons,[2] the settlement imposes additional obligations on Google and YouTube that go beyond the requirements of COPPA, including notifying channel owners about their potential COPPA obligations and developing a system through which channel owners must identify their child-directed content on the YouTube platform, so that content can be treated in COPPA-compliant manner. Through this system, YouTube will have actual knowledge of, and COPPA liability for, all content designated as child-directed and, therefore, cannot turn a “blind eye” to the existence of children’s content on its platform.[3]

Most importantly, the FTC will designate these child-directed channels on YouTube to be “websites and online services” under COPPA and vowed to conduct sweeps of the YouTube platform to ensure that child-directed channels are properly designated, thereby raising important questions with respect to COPPA liability, such as which entity will be liable for COPPA violations if a child-directed channel does not designate itself as child-directed and whether channels would need to designate themselves as child-directed if only some of their content is child-directed.

It is our understanding that the FTC is considering imposing COPPA liability on the child-directed channels that fail to properly self-designate themselves as child-directed to YouTube, leading us to wonder whether the injunctive provisions ultimately punished YouTube or the child-directed channels on YouTube.

It should be noted that, while the settlement is groundbreaking in several respects, not all of the FTC commissioners and privacy groups were satisfied with the proposed settlement, arguing that it should have gone farther with respect to both injunctive relief and monetary provisions.

YouTube’s Response

YouTube announced that, starting in approximately four months, it would treat data from any user watching children’s content on YouTube as coming from a child, regardless of the age of the user.[4] YouTube also announced that it would stop serving personalized ads on children’s content and that it

would turn off some of the features on this content, such as comments and notifications.

In addition, creators would be required to identify child-directed content to YouTube, and YouTube would use “machine learning” to find videos that clearly target children, including those with an emphasis on kid’s characters, themes, toys and games. YouTube also announced that it would launch YouTube Kids on the web and established a \$100 million fund dedicated to the creation of thoughtful children’s content on both YouTube and YouTube Kids globally.

Lessons Learned

There are several lessons that can be learned from the FTC’s and New York attorney general’s recent action against Google and YouTube:

- Online services can no longer hide behind their terms of service when their services include child-directed content and they have “actual knowledge” that children are on their services. The FTC emphasized this point earlier in the year when it announced an action against video social networking app Musical.ly, now known as TikTok, which agreed to pay \$5.7 million (which at the time was a record penalty) to settle allegations that Musical.ly knew that children were using its app but failed to seek parental consent before collecting names, email addresses and other personal information from users under the age of 13 in violation of COPPA.[5]
- Online services can no longer boast about the millions of children on their platforms and rate their videos and other content as child-directed and then disavow knowledge that children are actually using their platforms. In other words, the days of turning a “blind eye” to the thousands of children on websites and apps that are popular with children are over.
- Online services that have “actual knowledge” they are collecting personal information from children should treat the service as a mixed audience service and implement a system, such as an age gate, to help guard against the collection of personal information on the areas of the site that are not intended for children. While YouTube implemented an age gate to prevent children from creating an account on YouTube, it still allowed children to watch videos and access areas of the platform that engaged in behavioral targeting and were not otherwise COPPA-compliant.
- When asked to self-designate, content creators and YouTube channel owners should identify their child-directed content to YouTube, as failure to self-identify could result in COPPA liability and/or removal of their channel from the YouTube platform.

It should be noted that the FTC has promised to take aggressive action and seek civil penalties to the fullest extent permissible under the law against companies that violate COPPA. In addition to bringing record-breaking COPPA enforcement actions this year, the FTC is seeking comments as to whether COPPA should be amended and is holding a public workshop on Oct. 7 to examine COPPA.

One of the specific questions for which the FTC is seeking comments is at the heart of the FTC’s action against YouTube: whether COPPA should be amended to better address websites and online services that may not include traditionally child-oriented activities, but have large numbers of child users.[6] Unfortunately for YouTube, the FTC has already answered this question for them.

In addition to the FTC, states have the authority to bring actions under COPPA. Since 2016, we have seen the New York attorney general take a more active role in protecting children’s privacy under COPPA,

beginning with its “Operation Child Tracker,” which ended illegal online tracking of children on some of the most popular websites with children. With its recent action against YouTube, I suspect the New York attorney general will bring even more COPPA actions in the upcoming year, and I expect to see other states following the NY AG’s lead in protecting children’s privacy.

Conclusion

The settlement reached by the FTC and the New York attorney general with Google and YouTube imposes significant costs on the companies, even beyond the record-breaking \$170 million civil penalty and forever will change YouTube’s business model as we know it. This action should be a signal that both federal and state regulators are serious about enforcing COPPA and will impose significant monetary judgments and novel injunctive provisions in order to protect children’s privacy.

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[1] See <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

[2]

See https://www.ftc.gov/system/files/documents/public_statements/1543118/simons_remarks_youtube_settlement_press_conference.pdf.

[3] Id.

[4] See <https://youtube.googleblog.com/2019/09/an-update-on-kids.html>.

[5] See <https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc>.

[6] See <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-seeks-comments-childrens-online-privacy-protection-act-rule>.