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Note

Embedded Deception: How the FTC's Recent Interpretation of the Children's Online Privacy Protection Act Missed the Mark

*Olivia Levinson**

INTRODUCTION

My nephew Theo cannot talk yet,¹ but he is always eager to tap, slap, and lick the nearest iPhone.² By the time he is a toddler, he will be using an iPad to access digital games and videos.³ Parents plop their kids in front of screens to get a break and peace of mind. During screen time, kids are shown advertisements in shows and YouTube channels.⁴ Advertisements that are attached to popular Internet

* J.D. Candidate 2021, University of Minnesota Law School. Thank you to my nephew Theo for teaching me the joys of being an aunt—all of the fun, (almost) none of the responsibility. To my sister and brother-in-law for hot meals and encouragement, my mom for catching the tiniest grammatical errors, and my late father who would have loved to turn this topic into an impassioned political debate. Finally, thank you to Professor Ann Burkhart and the *Minnesota Law Review* editors and staff members for their significant help throughout the writing and publication process. Copyright © 2021 by Olivia Levinson.

1. At the time of publishing, Theo has started to develop his vocabulary. Some of his most frequent words are “Dory,” “Nemo,” “Auntie-O,” and “iPad.”

2. See, e.g., Bjorn Nansen & Darshana Jayemanne, *Infants, Interfaces, and Intermediation: Digital Parenting and the Production of “iPad Baby” Videos on YouTube*, 60 J. BROAD. & ELEC. MEDIA 587, 591 (2016) (describing videos of infants “encountering tablet computers, mostly iPads, and how they interact with these touchscreen interfaces, mostly banging and tapping, though also by licking, shaking, and sometimes swiping”).

3. COMMON SENSE MEDIA, ZERO TO EIGHT: CHILDREN'S MEDIA USE IN AMERICA 2013, at 23 (2013).

4. YouTube was founded in 2005 by former PayPal employees. Paige Leskin, *YouTube Is 15 Years Old: Here's a Timeline of How YouTube Was Founded, Its Rise to Video Behemoth, and Its Biggest Controversies Along the Way*, BUS. INSIDER (May 30, 2020, 10:00 AM), <https://www.businessinsider.com/history-of-youtube-in-photos-2015-10> [<https://perma.cc/EZ9U-B3EL>]. It was sold to Google in 2006 for \$1.65 billion. *Id.* The basic premise of YouTube is to allow users to upload videos that are free for other users to view. Those who upload videos must establish accounts with the site, but accounts are not necessary to view most videos. See *Viacom Int'l, Inc. v. YouTube*,

personalities can impact a child's privacy on two fronts. On the consumer side, advertisements for products presented by YouTube stars can shift interests and entice children to request items like themed toothbrushes and "reviewed" toys.⁵ From the business perspective, advertisers can learn about children's preferences by observing what videos they respond well to and suggesting new advertising content in a way that parents cannot readily control.⁶

The collection of online data from children was the basis of a 2019 settlement between the Federal Trade Commission (FTC) and YouTube, in which the tech giant agreed to \$170 million in damages and an injunction to comply with the Children's Online Privacy Protection Act (COPPA).⁷ In response, YouTube revamped its YouTube Kids application⁸ and placed the onus on content creators to comply with COPPA. While the changes from the settlement will have an impact on behavioral data collection, they fail to adequately address more deceptive embedded advertisements in children's videos.

Embedded advertisements weave consumer product placements into programs and videos.⁹ The Federal Communications Commission (FCC) has approached regulation of embedded advertisements as a balance between First Amendment rights of programmers and the need to inform the public about the source of a product's sponsorship.¹⁰ It is important for consumers to know if a product in a program is sponsored because that might impact their impression of the product.¹¹ This is especially relevant in programs that *review* products. If the sponsorship of a review is not disclosed, consumers will have a difficult time determining if the product is being promoted because

Inc., 676 F.3d 19, 28 (2d Cir. 2012) (noting that "[b]efore uploading a video to YouTube, a user must register and create an account with the website").

5. Pocket.Watch, an entertainment platform, partners with popular children's YouTube stars to create franchises out of their personalities. *See* POCKET.WATCH, <https://pocket.watch> [<https://perma.cc/M47Y-MLRM>].

6. *See* Steven C. Bennett, *Regulating Online Behavioral Advertising*, 44 J. MARSHALL L. REV. 899, 899 (2011) (describing online behavioral advertising as a way for advertisers to be more efficient and effective).

7. Press Release, Fed. Trade Comm'n, Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law (Sept. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations> [<https://perma.cc/K7PF-QQQ>].

8. YOUTUBE KIDS, <https://www.youtube.com/kids> [<https://perma.cc/VSC7-84JK>].

9. *See* Sponsorship Identification Rules and Embedded Advertising, 23 FCC Rcd. 10,682 (June 26, 2008) (describing notice of inquiry and proposed rulemaking).

10. *Id.* at 10,689.

11. *Id.*

the reviewer genuinely likes it or because the reviewer is being paid.¹² Adults may be able to rationalize that a product review is not entirely authentic, but children are not so distrusting, especially when the review comes from a peer.¹³

Ryan's World¹⁴ is one of the most lucrative and frequently viewed YouTube channels in the platform's history.¹⁵ Ryan got his start on YouTube in 2015 when he was just three years old.¹⁶ His first videos consisted of his parents recording him playing with toys and describing his experience. Ryan has been the highest grossing YouTuber for several years in a row, in part due to advertisement revenue and his own line of products.¹⁷ But he has drawn criticism from watch groups, like Truth in Advertising, for including embedded advertisements in his videos.¹⁸ As a result of litigation over the issue, some of Ryan's videos now contain written disclaimers when he presents an advertisement. Disclaimers may be the most common consumer protection

12. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 759 (2010).

13. J. Howard Beales, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 873 (2004); see also Deborah Roeder John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research*, 26 J. CONSUMER RSCH. 183, 185 (1999) ("In the preschool and kindergarten years, the egocentric stage (ages 3-6), children are unaware of any perspective other than their own.").

14. Ryan's World was called Ryan ToysReview until October 24, 2019. Ryan's World, *No More Ryan ToysReview*, YOUTUBE (Oct. 24, 2019), <https://www.youtube.com/watch?v=VOBz6LquuY> [<https://perma.cc/25ZR-PYA3>]. Ryan announced the change through a video, stating that he was no longer just doing toy reviews and was branching out to "science experiments," "challenges," and "educational videos." *Id.* This change came two months after Truth in Advertising made a complaint with the FTC about the deceptiveness of Ryan's toy reviews. See Letter from Laura Smith & Bonnie Patten, Dirs., Truth in Advert, Inc., to Andrew Smith & Mary Engle, Fed. Trade Comm'n (Aug. 28, 2019) [hereinafter Truth in Advertising Complaint], https://www.truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf [<https://perma.cc/4BQ2-PHB9>].

15. Samantha Schmidt, *6-Year-Old Made \$11 Million in One Year Reviewing Toys on YouTube*, WASH. POST (Dec. 11, 2017, 9:02 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/12/11/6-year-old-made-11-million-in-one-year-reviewing-toys-on-you-tube> [<https://perma.cc/5XH6-UBVH>].

16. *Id.*

17. Vicky McKeever, *This Eight-Year-Old Remains YouTube's Highest-Earner, Taking Home \$26 Million in 2019*, CNBC: MAKE IT (Dec. 20, 2019, 9:29 AM), <https://www.cnbc.com/2019/12/20/ryan-kaji-remains-youtubes-highest-earner-making-26-million-in-2019.html> [<https://perma.cc/2KFY-TAF8>].

18. See, e.g., Truth in Advertising Complaint, *supra* note 14.

remedy, but they fall short of COPPA's purpose.¹⁹ An advertisement disclaimer will mean little to a toddler who is trusting the word of a YouTube "kidfluencer,"²⁰ especially because that toddler cannot read.²¹

The FTC should revisit COPPA to address problems that arose from the FTC's settlement with YouTube. This Note proposes that the FTC expand its interpretation of COPPA to encompass embedded advertisements within children's videos. First, this Note suggests that YouTube should be held responsible for COPPA compliance.²² Putting the onus for regulatory compliance on YouTube may deter YouTubers from turning to more deceptive forms of advertising. Second, this Note suggests that the FTC should focus on the content of YouTube videos as opposed to their categorization as "child-directed."²³ Finally, this Note advocates two solutions: (1) a novel advertisement-detecting technology that YouTube could use to monitor the prevalence of embedded advertisements in its videos; and (2) legislation.²⁴ Working toward these proposals, this Note will analyze the role children play in the consumer market, the prevalence of embedded advertisements in children's media, the concept of "cookies" as it relates to privacy, and legislation around these issues. Throughout this Note, the YouTube channel Ryan's World will serve as a model for children's shows with embedded advertisements.

This Note proceeds as follows: Part I gives an overview of the legal and regulatory landscape regarding online advertisements geared toward children and looks at Ryan's World as an example of how massive this industry is. Part II discusses how YouTube's 2019 settlement with the FTC incentivizes content creators to be deceitful about their content either through categorization or increasing embedded advertisements. Part III proposes that these advertisements can be

19. See Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506 (imposing requirements for operators of sites with content directed toward children to protect the information they are gathering from children).

20. A term used to describe young social media influencers. Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> [<https://perma.cc/3FD5-6XVG>].

21. *But see* IAHP Videos, *14-Month-Old Zeke Can Read!*, YOUTUBE (Apr. 27, 2015), <https://www.youtube.com/watch?v=unccWxXPvP8> [<https://perma.cc/3GK5-ELS7>] (showcasing a toddler who can apparently read). Note that this is an anomaly and perhaps toddlers who could read would not be impacted by the issues identified in this Note.

22. See *infra* Part III.A.

23. See *infra* Part III.B.

24. See *infra* Part III.C.

monitored through an expanded interpretation of COPPA and a mandate that YouTube monitor the content of videos. The ideas introduced throughout the Note will prove valuable for pending legislation about children's online privacy protection.²⁵

I. TECHNOLOGY AIMED AT CHILDREN IS DEVELOPING AT A QUICKER PACE THAN PROTECTIVE REGULATIONS

While children's technological capabilities are rapidly developing, protections around the types of media they are consuming are at risk of weakening.²⁶ FTC regulations particularly affect YouTube because of the platform's wide use and accessibility, making it a representative example of online protection efforts.²⁷ This Part begins by discussing the role of children as consumers and how COPPA was designed to protect children online.²⁸ Children's advertising has transcended Saturday-morning cartoons into the online arena. In turn, the rest of Part I focuses on online advertising²⁹ and YouTube's role in children's advertising.³⁰ This Part concludes with an explanation of YouTube's approach to COPPA compliance and an example of YouTube Ryan Kaji's successful advertising techniques despite COPPA regulations.³¹

25. See, e.g., Press Release, Kathy Castor, Representative, U.S. Congress, Castor Introduces Kids PRIVCY Act To Strengthen COPPA (Jan. 30, 2020), <https://castor.house.gov/news/documentsingle.aspx?DocumentID=403195> [<https://perma.cc/XB6E-NEER>] (arguing for an expansion of COPPA); Press Release, Tim Walberg, Representative, U.S. Congress, Walberg, Rush Introduce Bipartisan Legislation To Protect Children's Privacy Online (Jan. 9, 2020), <https://walberg.house.gov/media/press-releases/walberg-rush-introduce-bipartisan-legislation-protect-children-s-privacy-online> [<https://perma.cc/H4WF-GFC4>] (proposing a slightly less extreme expansion of COPPA than Castor).

26. See, e.g., Editorial Board, *Don't Weaken Privacy Protections for Children*, N.Y. TIMES: OP. (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/opinion/coppa-children-online-privacy.html> [<https://perma.cc/GUX9-AARZ>] (arguing that the FTC might be becoming too friendly toward behavioral-targeted advertising and that the recent settlement with YouTube was too lax).

27. See, e.g., Natasha Singer & Kate Conger, *Google Is Fined \$170 Million for Violating Children's Privacy on YouTube*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/technology/google-youtube-fine-ftc.html> [<https://perma.cc/TE4T-BXZE>] (describing the recent settlement between YouTube and the FTC).

28. See *infra* Part I.B.

29. See *infra* Parts I.C–D.

30. See *infra* Part I.E.

31. See *infra* Parts I.F–G.

A. CHILDREN ARE PARTICULARLY VULNERABLE CONSUMERS OF GOODS AND MEDIA

The family-room radios of the 1950s have been usurped by TVs in every room, video-enabled smartphones in hand, and iPads in strollers' storage compartments.³² New methods of media consumption are rolled out every year, and parents are taking advantage of these technologies to provide streams of entertainment to their children.³³ In 2013, seventy-two percent of American children under eight years old and thirty-two percent under two used a mobile device for media activity.³⁴ While this increase in media mobility makes it easier for parents to do other things while their children are entertained, it also creates new opportunities for advertisers to target young audiences.

Children are an attractive audience for marketers because their interest in a product can influence a family's purchasing habits and shape future behaviors.³⁵ Studies have shown that children who watch alcohol advertisements are more likely to start drinking at an earlier age and have a higher likelihood of adult alcohol dependence.³⁶ Exposure to e-cigarette ads is linked to underage tobacco use.³⁷ Curiosity for learning about the world means that children are more vulnerable to persuasion.³⁸ They develop consumer behaviors by absorbing attitudes about products through advertisements without being able to attribute those attitudes to someone else.³⁹

Preschool-age children are especially susceptible to advertisements because they have a harder time parsing out what

32. See, e.g., Shane McGlaun, *iStroll Kid iPad Holder Connects to a Stroller Letting Kids Communicate, Play, and Learn*, SLASH GEAR (Jan. 31, 2013, 4:28 AM), <https://www.slashgear.com/istroll-kid-ipad-holder-connects-to-a-stroller-letting-kids-communicate-play-and-learn-31267555> [<https://perma.cc/M48P-BJPN>] (marketing a special stand that connects iPads to strollers).

33. Cf. Teresa Correa, *Acquiring a New Technology at Home: A Parent/Child Study About Youths' Influence on Digital Media Adoption in a Family*, 60 J. BROAD. & ELEC. MEDIA 123, 125 (2016) (arguing that because youth are more technologically savvy than adults, they drive household technological adoption).

34. COMMON SENSE MEDIA, *supra* note 3.

35. Matthew A. Lapierre, Frances Fleming-Milici, Esther Rozendaal, Anna R. McAlister & Jessica Casonguay, *The Effect of Advertising on Children and Adolescents*, 140 PEDIATRICS S152, S153 (2017).

36. *Id.*

37. *Id.*

38. *Id.*

39. See Roedder John, *supra* note 13, at 187 (describing three- to seven-year-olds as being unable to juggle both their perspective and another's at the same time).

representations of a product are real and what are puffery.⁴⁰ For instance, a child may see a toy helicopter floating in a TV ad and expect that helicopter to float in real life, when in reality the toy is operated with strings.⁴¹ An older child might have a better grasp of the physics of that toy, whereas a preschooler will take advertisements suggesting that the toy can fly on its own at face value.⁴² The confusion between advertising and reality makes preschoolers more vulnerable to deceptive marketing techniques.⁴³ Developmental differences in perceptions of advertisements⁴⁴ impact which specific age groups need to be protected from unsolicited advertising.

In response, the FCC created limits around the amount of time commercials could be shown during kids' programming.⁴⁵ These FCC limits may not have much of an impact given that children are able to remember the content of commercials, regardless of their length.⁴⁶ It is possible for a thirty-second advertisement to make a lasting impression on a child, especially a younger child who is less able to distinguish their own reality from what is on the screen.⁴⁷ For the small percentage of children who are able to recognize the fantasy or deceit involved in an advertisement, they still may not objectively judge the merits of the advertised product.⁴⁸ This is particularly a problem

40. Beales, *supra* note 13, at 874–75; *see also* Roedder John, *supra* note 13.

41. Beales, *supra* note 13, at 874; Hasbro, Inc., 116 F.T.C. 657, 659 (1993) (“In truth and in fact, Battle Copter toys cannot hover and are not able to fly in a sustained and directed manner. Therefore, the representation set forth . . . was, and is, false and misleading.”).

42. Beales, *supra* note 13, at 874.

43. *Id.*

44. *See* Roedder John, *supra* note 13, at 184 (introducing a conceptual framework to understand the effects of advertising on children at different levels of development).

45. *Id.*

46. BRIAN L. WILCOX, DALE KUNKEL, JOANNE CANTOR, PETER DOWRICK, SUSAN LINN & EDWARD PALMER, AM. PSYCH. ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 28 (2004), <https://www.apa.org/pi/families/resources/advertising-children.pdf> [<https://perma.cc/NDJ6-3ZLJ>] (“When experiments measure recall of advertisements immediately following viewing, more than half of the children studied tended to remember an ad for such products as toys, cereals, and ice cream even when each ad is shown just once during a program.” (citing Gerald J. Gorn & Marvin E. Goldberg, *The Impact of Television Advertising on Children from Low-Income Families*, 4 J. CONSUMER RSCH. 86, 86–88 (1977))).

47. Sidney M. Wolinsky & Janet Econome, *Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children*, 4 HASTINGS CONST. L.Q. 249, 249–50 (1977).

48. *Id.* at 252.

when advertisers use children to market their products to other children.⁴⁹

Despite these examples of negative advertising outcomes, “marketing may help socialize children as consumers, inform them about products, and help them carve out unique identities.”⁵⁰ Children as young as two or three are able to recognize brands and product packaging which helps them develop their abilities to categorize objects with similar attributes.⁵¹ Advertisements also help children learn about “marketplace transactions” through consumerism.⁵² It is impossible to navigate the global economy without having working knowledge of what money looks like and how it works. While children do not need to interact with money on a global scale just yet, knowing how to navigate retail stores and shopping is an essential skill.⁵³

In addition to learning how to shop, children also develop abilities to influence their parents’ purchasing patterns.⁵⁴ Once a parent knows which toys, candy, and food their children like, they are more likely to purchase it.⁵⁵ Expressing their likes and dislikes of these

49. See, e.g., Truth in Advertising Complaint, *supra* note 14 (asserting that “[a] preschooler’s cognitive ability to identify and understand that they are being presented with marketing materials is generally lacking” and “there can be no support for the proposition that a preschool YouTube channel . . . can present its target audience with native advertising videos and expect that any disclosure will clearly and conspicuously inform this young and vulnerable population that they are being lobbed a sales pitch”).

50. Lapiere et al., *supra* note 35 (citing Roedder John, *supra* note 13, at 183–213).

51. See Roedder John, *supra* note 13, at 192–93 (dividing the types of knowledge young children may develop through categorizing advertisements as “structural” and “symbolic”). Structural knowledge governs the ability to categorize like-objects through “perceptual cues.” *Id.* at 192. Symbolic knowledge tends to develop during the analytical stage of adolescence (ages seven to eleven) and represents the understood meaning behind a brand or object. *Id.* at 193. For instance, the symbolic meaning of a luxury vehicle is that it is owned by a wealthy person. The older a child is, the more likely they are to attribute symbolic values to objects and brands. A toddler likely does not know the status symbol of Adidas shoes, whereas a pre-teen might wear Adidas strictly because of their symbolic value.

52. *Id.* at 194.

53. *Cf. id.* There was a program at my elementary school that allowed seven-year-old students to accumulate mock-money for performing well in class. The students could then use that classroom money to “buy” trinkets like pencils and erasers from the instructor. Ironically, the items bought in class were then used to complete classroom work, which in turn generated more money. This classroom structure was the epitome of the “spend money to make money” trope.

54. *Id.* at 200.

55. *Id.* Of course, this depends on a parent’s purchasing ability.

products helps children to develop bargaining and persuasion skills.⁵⁶ These outcomes might be desirable developmental achievements,⁵⁷ but they can also be influenced by advertisers. When a child repeatedly sees a brand represented in advertisements and develops a recognition for that brand, they are more likely to then want to own that brand.⁵⁸

As advertising toward children expanded beyond television to online forum, Congress tried to keep pace through enactments like the Children's Online Privacy Protection Act (COPPA). The next Section gives a brief history of COPPA.

B. THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT WAS DESIGNED TO GIVE PARENTS CONTROL OVER THEIR CHILDREN'S ONLINE EXPERIENCES

COPPA was enacted in 1998 to protect the privacy and safety of children under age thirteen during their online activities and give parents more control over what information websites gather from their children's online activities.⁵⁹ Congress gave the FTC rule-making authority under COPPA to achieve its goals.⁶⁰ Two primary aims of COPPA were to stop invasive collection of data from children that would then be sold to third parties and to protect children from Internet predators.⁶¹ COPPA makes it unlawful for an operator of a website to collect personal information from a child without obtaining parental consent and disclosing what information they are collecting.⁶² If a

56. *Id.* at 201 (describing the classic child sitting in a shopping cart who grabs items off of store shelves and plops them into the carriage). Of course, this characterization of children as consumerist influencers is narrowed to those in socioeconomic classes that allow for it.

57. Though parents who are returning grabbed items to store-shelves may disagree.

58. See Roedder John, *supra* note 13, at 196 (noting the importance of brand names to children as compared to factors like price).

59. 15 U.S.C. § 6502(a)(1) ("It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed . . .").

60. Complaint at 2, *United States v. Playdom, Inc.*, No. 102-3036 (C.D. Cal. May 11, 2011) [hereinafter *Playdom Complaint*].

61. Nancy L. Savitt, *A Synopsis of the Children's Online Privacy Protection Act*, 16 ST. JOHN'S J. LEGAL COMMENT. 631, 633-34 (2002).

62. 15 U.S.C. § 6502(a)(1). The Act does, however, allow websites to make good faith disclosures of a child's personal information to that child's parent. *Id.* § 6502(a)(2). Personal information includes a child's name, address, email, phone number, Social Security number, and any other identifier that the FTC determines could be used to contact the child. *Id.* § 6501(8). The FTC expanded this definition in 2013 to include the passive tracking of a child online, which covers Internet cookies.

website does not comply with the requirements of COPPA, it can face civil fines and penalties of up to \$43,792 per violation.⁶³ There is no private right of action under COPPA, but public enforcement agencies, such as the FTC, can request an injunction, compliance, and damages in addition to the fine.⁶⁴ COPPA only applies to content that is considered child-oriented, which can be determined using a set of factors laid out by the FTC.⁶⁵ COPPA protections extend to anyone under the age of thirteen but are not differentiated for younger age groups.⁶⁶

Under COPPA's disclosure requirement, website operators must "provide notice on the website of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure practices for such information."⁶⁷ After providing notice, the website must then obtain revocable consent from parents for the "collection, use, or disclosure of personal information from children."⁶⁸ No more information should be collected from children than is necessary to participate in the website's activities, and whatever information is collected should be secure and confidential.⁶⁹ Any information that is collected from children should be reviewable by parents and able to be limited to strictly internal use by the operator, or rather, restricted from being disclosed to third

16 C.F.R. § 312.2 (2013). See *infra* Part I.C.1 for an explanation of cookies. The FTC's authority to alter the reach of COPPA gives the Act flexibility to change at pace with technology. See, e.g., *In re* Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 287 (3d Cir. 2016).

63. *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions> [<https://perma.cc/3NBW-H32D>] ("A court can hold operators who violate the Rule liable for civil penalties of up to \$43,792 per violation."). COPPA does not offer a private right of action, so only public agencies can enforce it. See 15 U.S.C. § 6504 (describing the process for states and the FTC to bring actions under the Act).

64. 15 U.S.C. § 6504(a)(1)(A)-(D).

65. The Commission looks at: (1) the "subject matter"; (2) "visual . . . content"; (3) use of "animated characters and/or child-oriented activities and incentives"; (4) the kind of music or other "audio content"; (5) "age of models"; (6) "presence of child celebrities or celebrities who appeal to children"; (7) "language or other characteristics of the . . . site"; (8) "whether advertising promoting or appearing on the website . . . is directed to children"; and (9) "competent and reliable empirical evidence" about the age of the audience and intended audience. 16 C.F.R. § 312.2 (2013).

66. There are not stricter rules for younger children like preschoolers. *Id.* ("Child means an individual under the age of 13.").

67. 15 U.S.C. § 6502(b)(1)(A)(i).

68. *Id.* § 6502(b)(1)(A)(ii).

69. *Id.* § 6502(b)(1)(D).

parties.⁷⁰ The COPPA rule disclosures can take different forms and are typically triggered when a child tries to register a profile for a website and indicates that they are under thirteen.⁷¹ Some disclosures simply ask for a parent's email address in lieu of the child's,⁷² whereas others describe COPPA protections in more detail.⁷³

1. COPPA Violations

COPPA violations can have large ramifications. In a 2011 complaint against Playdom Inc., an online gaming company, the FTC alleged that the website asked for parental permission for users under age thirteen but then allowed those users to engage in online forums that were open to people of all ages.⁷⁴ Users were registered to use Playdom's gaming sites once they pressed "Register," regardless of whether the email address they entered was verified by a parent.⁷⁵ Registered children had full access to the sites, including community forums, and could create profiles with their real names, locations, emails, and instant messenger IDs.⁷⁶ The FTC brought suit on the grounds that the up-front disclosures were inadequate, parental consent was unverifiable, and Playdom used the children's information unlawfully.⁷⁷ As part of Playdom's settlement with the FTC, the

70. Playdom Complaint, *supra* note 60, at 3.

71. See, e.g., *id.* at 5–6 (describing a pop-up disclosure that appears after a child under thirteen attempted to register for a website).

72. *Id.*; see also Press Release, Fed. Trade Comm'n, FTC Alleges Operators of Two Commercial Websites Failed To Protect Consumers' Data (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-alleges-operators-two-commercial-websites-failed-protect> [<https://perma.cc/C3AB-SGN2>] ("If a user indicated he or she was under 13, the registration field asked for a parent's email. When a user clicked the 'Join Now' button, an email notice was sent to the parental email address the user entered. In that email, parents could provide consent by clicking the 'Activate Now' button in the email.").

73. See, e.g., *COPPA Privacy Policy*, CLASSKICK, <https://classkick.com/coppa-privacy-policy> [<https://perma.cc/QCT7-6LUW>] (listing the information collected from children as "the minimal amount of information from students necessary to work or create accounts on our Service"). Some examples of information collected are names, passwords, usernames, and/or email addresses. *Id.*

74. Playdom Complaint, *supra* note 60, at 6. Playdom became a subsidiary of Disney Enterprises, Inc. in 2010. Press Release, Fed. Trade Comm'n, Operators of Online "Virtual Worlds" To Pay \$3 Million To Settle FTC Charges that They Illegally Collected and Disclosed Children's Personal Information (May 12, 2011), <https://www.ftc.gov/news-events/press-releases/2011/05/operators-online-virtual-worlds-pay-3-million-settle-ftc-charges> [<https://perma.cc/29L7-D7BN>].

75. Playdom Complaint, *supra* note 60, at 6.

76. *Id.*

77. *Id.* at 8.

company had to disgorge all stored information about children from its sites, pay three million dollars, and subject itself to agency oversight for four years.⁷⁸

Technology has changed immensely since the 2011 Playdom settlement, and the FTC is trying to keep up.⁷⁹ The agency started a new review of COPPA in 2019 to address changes in the educational technology sector, voice-enabled devices (such as Siri and Google Home), and general-audience platforms that host third-party child-directed content (such as YouTube).⁸⁰ The Commission sought comment on whether the definition of “website or online service directed to children” should be amended to cover websites that are accessed by people of all ages but have a large number of child users.⁸¹ The review looked at advertising attributions, the methods used to determine whether a particular advertisement enticed behavior in the consumer, which are not currently regulated by COPPA.⁸² In essence, advertising attributions can measure what advertisements are effective for each user, which will lead to more targeted ads in the future. One of the ways that regulators are able to keep up with changing technology is to delegate some responsibility for compliance to more easily adaptable safe harbor programs.⁸³

2. COPPA’s Safe Harbor Provision

COPPA contains a safe harbor provision that enables industry groups to submit self-regulatory guidelines to the FTC.⁸⁴ These programs are supposed to be as strong as COPPA and require groups to submit annual reports to the FTC.⁸⁵ Congress and the FTC intended

78. Settlement Order, *United States v. Playdom, Inc.*, No. 102-3036 (C.D. Cal. May 11, 2011).

79. *The Future of the COPPA Rule: An FTC Workshop*, FED. TRADE COMM’N (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_events/1535372/transcript_of_coppa_workshop_part_1_1.pdf [<https://perma.cc/5G8P-KMW2>].

80. Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule, 84 Fed. Reg. 35,842 (July 25, 2019).

81. *Id.* at 35,844.

82. *Id.*

83. 15 U.S.C. § 6503 (COPPA’s safe harbor provision); 16 C.F.R. § 312.11 (2013) (FTC rules for safe harbor programs). For a list of currently approved safe harbor organizations, see *COPPA Safe Harbor Program*, FED. TRADE COMM’N, <https://www.ftc.gov/safe-harbor-program> [<https://perma.cc/LK9E-V6XE>]. Safe harbor organizations typically have a specialized focus, such as video games or educational software. *Id.*

84. 15 U.S.C. § 6503.

85. See *Ctr. for Digit. Democracy v. FTC*, 189 F. Supp. 3d 151, 153 (D.D.C. 2016) (“In 2014, the FTC began requiring safe harbor programs to submit annual reports to

the self-regulation aspect of COPPA to lead to industry-specific developments and concerns.⁸⁶ For example, advertising agencies are incentivized to develop controls that both apply to their needs and comply with COPPA.⁸⁷ Safe harbor programs are only approved after a public notice-and-comment period.⁸⁸ Once the program is approved, businesses and programs can subscribe. These subscriptions take fees, which creates a competitive market of safe harbor programs.⁸⁹ Programs distinguish themselves through “the strength of [their] protections,” “compliance guidance [they] provide,” “the sophistication and reliability of [their] privacy oversight technology,” “the effectiveness of [their] approved parental consent methods,” “[their] ability to resolve compliance issues,” and “the trust [they] generate[]” among parents.⁹⁰

Safe harbor programs “must: (1) ‘provide substantially the same or greater protections for children’ as the COPPA Rule; (2) implement ‘[a]n effective, mandatory mechanism for the independent assessment’ of operators’ compliance that includes ‘a comprehensive review’ of each operators’ [sic] ‘information policies, practices, and representations’; and (3) impose ‘[d]isciplinary actions for subject operators’ non-compliance with self-regulatory program guidelines.’”⁹¹ Disciplinary actions allow the safe harbor programs to internally regulate the privacy procedures of subscribers, which

the agency . . . concerning safe harbor program’s monitoring and enforcement of their members.”). “Although Congress left it to the FTC to develop rules to implement COPPA, in a rather unique regulatory scheme, it largely left the enforcement of those rules to the private industry.” *Id.* at 154.

86. *Id.* at 154.

87. *COPPA Safe Harbor Services*, BBB NAT’L PROGRAMS, <https://bbbprograms.org/programs/all-programs/children’s-advertising-review-unit/COPPA-Safe-Harbor-Services> [<https://perma.cc/4WZ5-KDEC>].

88. *See Ctr. for Digit. Democracy*, 189 F. Supp. 3d at 155 (citing 15 U.S.C. § 6503(b)(2)).

89. *Id.*

90. *Id.*

91. *Id.* (first and third alterations in original) (quoting 16 C.F.R. § 312.11(b)); *see also* Lesley Fair, *FTC Gives New COPPA Safe Harbor the Aye-Aye*, FED. TRADE COMM’N (Aug. 6, 2014, 11:04 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2014/08/ftc-gives-new-coppa-safe-harbor-aye-aye> [<https://perma.cc/Z2AC-XBKN>] (arguing that safe harbor programs must be approved by the FTC and implement “the same or greater protections for children” as COPPA). These goals are reiterated when the FTC approves of new safe harbor organizations. *See, e.g.*, Letter from Donald S. Clark, Sec’y, Fed. Trade Comm’n, to Marsali S. Hancock, President, Internet Keep Safe Coal. (Aug. 1, 2014), <https://www.ftc.gov/system/files/documents/public-statements/573811/140806ikeepsafeapp.pdf> [<https://perma.cc/D3FM-YKS8>].

circumvents FTC law enforcement.⁹² Because of the safe harbor program subscription fees, organizations that create the programs are incentivized to develop programs that industry members find favorable.⁹³ That incentive does not necessarily translate to better protection for children.

One of the primary COPPA safe harbor programs that regulates advertising to children is the Children's Advertising Review Unit (CARU).⁹⁴ CARU works toward its goals of protecting children from deceptive advertising and data collection by "work[ing] with companies to ensure their advertising and data collection practices comply with all relevant laws . . . which take into account the uniquely impressionable and vulnerable child audience."⁹⁵ If a company chooses to participate with CARU and adhere to its guidelines, it will be "deemed in compliance with COPPA and essentially insulated from FTC enforcement action."⁹⁶ This insulation takes form when problems in children's advertising are detected and concerned parties file reports with CARU as opposed to with the source of the ad itself.⁹⁷

CARU offers general guidance on deceptive advertising practices that may be inappropriate when directed toward children.⁹⁸ Advertising toward children is measured for deception through a "net impression" approach which considers express and implied claims in the advertisement that might be misleading to children.⁹⁹ Misleading impressions are "determined by assessing how reasonable children in

92. Fair, *supra* note 91 (describing this internal regulation as "a win-win-win for industry compliance, parental control, and efficient government").

93. See, e.g., *Ctr. for Digit. Democracy*, 189 F. Supp. 3d at 161–62 (describing how safe harbor programs have confidential information about the marketplace that could be used by "rivals").

94. *COPPA Safe Harbor Services*, *supra* note 87.

95. *Id.*

96. *Id.*

97. See, e.g., Ellen J. Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 LOY. L.A. L. REV. 93, 93 (2006) (describing the process by which a private organization filed complaints). Reports can be filed by consumers and competitors through CARU's website. *CARU Complaints and Challenges*, BBB NAT'L PROGRAMS, <https://bbbprograms.org/programs/all-programs/children's-advertising-review-unit/complaintsandchallenges> [<https://perma.cc/QK9X-XFSS>]. Once a report is filed, CARU will investigate the site's compliance and either approve it, recommend changes, or refer it to the FTC. *Id.*

98. CHILD.'S ADVERT. REV. UNIT, CARU'S REQUEST FOR COMMISSION APPROVAL OF CONTINUANCE OF SAFE HARBOR STATUS, exhibit B at 5 (2013), <https://www.ftc.gov/system/files/attachments/press-releases/revised-childrens-online-privacy-protection-rule-goes-effect-today/130701carusafeharborapp.pdf> [<https://perma.cc/D68N-5PEQ>] (Self-Regulatory Program for Children's Advertising).

99. *Id.* at 6.

the intended audience would interpret the message, taking into account their level of experience, sophistication, and maturity; limits on their cognitive abilities; and their ability to evaluate the advertising claims."¹⁰⁰ Personal endorsements must be a representation of the actual thoughts and experience of the endorser.¹⁰¹ This endorsement rule aligns with federal guidelines,¹⁰² and the consideration of varying maturity reflects research about how young children are more susceptible to manipulation through advertisements.¹⁰³

Industry self-regulation can pave the way for industry self-interest which is evident, in part, by CARU's sponsorship and fee structure.¹⁰⁴ The specific fees that CARU charges certain organizations are only available upon request.¹⁰⁵ Special interest groups such as the Grocery Manufacturers of America sponsor CARU and play a role in the assessment of its guidelines.¹⁰⁶ What results is a kind of half-regulation in which food manufacturers continue to publish deceptive ads long after CARU requests that they be modified.¹⁰⁷ Kellogg's has even gone so far as to ignore CARU guidelines and decisions condemning certain types of advertisements.¹⁰⁸ This may mean that companies are buying into CARU's system of self-regulation through its sponsorship and membership fees, purporting their commitment to CARU's self-regulatory process, while seemingly exempting themselves from those very regulations.¹⁰⁹

3. Legislative Proposals for Revamping COPPA

Legislators have recently been stepping up to address how COPPA's current regulatory system is failing to keep pace with

100. *Id.*

101. *Id.* at 9.

102. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1 (2009).

103. *See generally* Roedder John, *supra* note 13 (researching the effect of advertisements on children).

104. Elizabeth L. Lascoux, *Children's Advertising Review Unit*, 16 ST. JOHN'S J. LEGAL COMMENT. 649, 650 (2002).

105. *COPPA Safe Harbor Services*, *supra* note 87. Organizations can receive discounts on CARU services by joining CARU's National Partner Program. The National Partner Program uses a tiered revenue system to determine annual dues. BBB NAT'L PROGRAMS, NATIONAL PARTNER PROGRAM APPLICATION 2 (2020), https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/national-partners-program/bbb_national_programs_national_partner_application.pdf [<https://perma.cc/HVB7-6PC6>].

106. Fried, *supra* note 97, at 100.

107. *Id.* at 118.

108. *Id.* at 126.

109. *Cf. id.* (discussing how large corporations have ignored CARU guidelines).

industry developments and online data collection.¹¹⁰ In 2020, U.S. Representative Kathy Castor, a Democrat out of Florida's 14th District, proposed a large expansion of COPPA called the "Vulnerable Children and Youth Act" (Kids PRIVCY Act).¹¹¹ Her bill would create a class of "young consumers" ages thirteen to seventeen that would have control over what companies could do with their personal information.¹¹² Children under thirteen would have increased protections stemming from a prohibition on targeted advertisements, an expansion of protected information,¹¹³ and an opportunity for individuals to "access, correct, or delete their personal information at any time."¹¹⁴ Castor also proposed removing COPPA's safe harbor provision, which would prohibit industry self-regulation.¹¹⁵ Finally, her bill would give parents a private right of action for violations of the Act,¹¹⁶ whereas COPPA currently lacks private enforcement.¹¹⁷ Though this legislation is in its infant stages, it received endorsements from a number of children's advocacy groups such as Common Sense and the Center for Digital Democracy.¹¹⁸ If this legislation were enacted, it would significantly impact how Big Tech companies like YouTube conduct business.¹¹⁹

YouTube does not participate in a safe harbor program, which means that it is directly responsible to the FTC as opposed to an industry regulator.¹²⁰ However, the FTC cannot solely moderate COPPA

110. See Castor Introduces Kids PRIVCY Act To Strengthen COPPA, *supra* note 25 ("Online and digital technology, tracking and data gathering have outpaced current privacy protections for children and consumers Companies shouldn't be allowed to unreasonably use and abuse our children's personal information, yet many companies have been violating the minimal privacy protections in place today, while devices and applications have become more sophisticated in targeting kids.").

111. *Id.*

112. *Id.*

113. *Id.* (explaining that the Act seeks to "[e]xpand[] the type of information explicitly covered to include physical characteristics, biometric information, health information, education information, contents of messages and calls, browsing and search history, geolocation information, and latent audio or visual recordings").

114. *Id.*

115. *Id.* (arguing that safe harbor provisions "allow for lax enforcement and rubberstamping of potentially unlawful practices").

116. *Id.*

117. 15 U.S.C. § 6504(a)(1).

118. Castor Introduces Kids PRIVCY Act To Strengthen COPPA, *supra* note 25 (claiming that Castor's proposed legislation would give more teeth to COPPA).

119. *Id.*

120. Safe harbor programs act as the first check for compliance and only refer their participants to federal regulators if the participants fail to take remedial measures. See Lascoutx, *supra* note 104.

compliance for all of YouTube and other Big Tech companies' practices. In the absence of a private right of action under COPPA, YouTube might be more regulated if it was part of a safe harbor program. Until legislation like the Kids PRIVCY Act is enacted,¹²¹ CARU and other safe harbor programs¹²² may help the FTC keep up with emerging advertising strategies,¹²³ despite concerns about industry bias. The next Section takes a step back to look at aspects of advertising strategies, from cookies to behavioral advertising.

C. THE MECHANICS OF ONLINE ADVERTISING

This Section discusses the mechanisms behind online advertising, specifically looking at Internet cookies. These cookies are used to store information about Internet users that can then be sold to third parties for advertising or data-tracking purposes.¹²⁴ Cookies are particularly relevant to conversations around children's online privacy because they operate regardless of a user's age.¹²⁵

1. Cookies as Tools for Storing User Data

Despite their cute name, Internet cookies are a stealth way for web providers to store information about users across multiple websites.¹²⁶ Cookies are small text files that a web server places on a computer or tablet that allows the server to remember information about the user.¹²⁷ This data can be used to save login information and make the Internet user's experience faster and easier, but it can also be used for behavioral advertising.¹²⁸ Advertising companies can use these data-bits to target customers who might be more prone to purchase a

121. Castor Introduces Kids PRIVCY Act To Strengthen COPPA, *supra* note 25.

122. See *COPPA Safe Harbor Program*, *supra* note 83 (providing a list of different safe harbor programs, some of which focus on education).

123. Lascoutx, *supra* note 104, at 652.

124. Bennett, *supra* note 6, at 901.

125. *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 268 (3d Cir. 2016).

126. These cookies can remain in effect even when users opt out of them through their web browsers. This has created questions about cookies, privacy, and seclusion. See, e.g., *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 320 (3d Cir. 2019) (describing how Google "created a web browser 'cookie' that tracks an internet user's data" and how "[f]or some Safari or Internet Explorer browser users, the cookie may have operated even if the user configured privacy settings to prevent it from tracking data").

127. Cf. *In re Nickelodeon*, 827 F.3d at 268 (describing cookies as small files that websites can put on computers to remember user information).

128. See *infra* I.C.2.

certain product.¹²⁹ When a host site, such as Google or its affiliate YouTube, collects information from a user on one of its sites, it can use that information to manipulate the user's experience on other sites.¹³⁰ By tracking a user's interaction with the web across multiple sites, Google can use information from one site to inform targeted ads on another.¹³¹

Cookies can be used as safeguards to prevent children from lying about being over thirteen.¹³² If a child was honest on one site about being under thirteen, that information could be stored in a cookie which can then be used by other sites to prevent that child from accessing information for older children.¹³³ Advertising regulation safe harbor programs like CARU¹³⁴ have even worked with websites that might be accessed by children under thirteen to utilize these age-check cookies.¹³⁵ While these age-check cookies are arguably a benefit of storing personal information when children visit websites, that data can still be used to learn about children's preferences for targeted advertisements.¹³⁶

2. Behavioral Advertising Monetizes Cookies

Advertisers can buy information about Internet users stored in cookies and use that information to effectively target audiences by tailoring ads to their individual interests.¹³⁷ This process, known as behavioral advertising, uses data that was compiled across multiple site

129. *In re Nickelodeon*, 827 F.3d at 268 ("Advertising companies use third-party cookies to help them target advertisements more effectively at customers who might be interested in buying a particular product.").

130. Bennett, *supra* note 6, at 901.

131. *Id.*

132. Savitt, *supra* note 61, at 633.

133. *Id.*

134. See *supra* notes 94–96 and accompanying text.

135. Lascoux, *supra* note 104, at 652.

136. Cf. Erica M. Scott, *Protecting Consumer Data While Allowing the Web To Develop Self-Sustaining Architecture: Is a Trans-Atlantic Browser-Based Opt-In for Behavioral Tracking the Right Solution*, 26 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 285, 290 (2013) ("Ad servers analyze this data to make inferences about the consumer's preferences, including habits and hobbies.").

137. See Bennett, *supra* note 6, at 901; see also Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Bobby Rush & Rick Boucher, Representatives, U.S. House of Representatives 1 (June 16, 2009), https://www.ftc.gov/system/files/documents/public_statements/309751/p095413onlineadvertising.pdf [<https://perma.cc/349V-CD9G>] ("[O]nline behavioral advertising – the practice of collecting information about an individual's online activities in order to serve advertisements tailored to that individual's interests.").

operators to create profiles for Internet users.¹³⁸ The user's profile allows advertisers to choose what ads to present, leading to an increase in "clicks" and likelihood that the advertisement will result in a purchase.¹³⁹ This benefits advertisers because it "avoids wast[ing] . . . advertising money in marketing to consumers who have 'no interest' in the products and services offered."¹⁴⁰ Consumers are also able to avoid seeing advertisements that are of no interest to them.¹⁴¹ While consumers may be more likely to follow up on advertisements that are catered to them, there is a tradeoff for privacy implications.¹⁴²

Privacy issues in behavioral advertising stem from the use of cookies to aggregate information about users from across different websites, linking website use to a user's identity.¹⁴³ Behavioral advertising happens behind the screen; users do not know or have control over how they are being profiled and monitored.¹⁴⁴ Even if users attempt to clear their browsing history caches, some information about their web behavior is permanently stored or immediately regenerated through "flash cookies."¹⁴⁵ Flash cookies store information about user preferences across Internet browsers and can "circumvent cookie deletion" by "respawning" standard cookies that have been deleted.¹⁴⁶ Consumers cannot delete behavioral advertising profiles, either for themselves or their children, because "market-dominant actors control the very platforms [they] use to access the web."¹⁴⁷ With little

138. Bennett, *supra* note 6, at 901.

139. Caroline McCarthy, *Study: Like It or Not, Behavioral Ad Targeting Works*, CNET (Mar. 24, 2010), <https://www.cnet.com/news/study-like-it-or-not-behavioral-ad-targeting-works> [<https://perma.cc/Y6GB-2JR4>].

140. Bennett, *supra* note 6, at 905.

141. *Id.*

142. *Id.* at 901.

143. See Chris Jay Hoofnagle, Ashkan Soltani, Nathaniel Good, Dietrich J. Wambach & Mika D. Ayenson, *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL'Y REV. 273, 276 (2012).

144. Bennett, *supra* note 6, at 905–06 (listing the FTC's concerns with behavioral advertising: it is "conducted without consumers' knowledge"; it creates a detailed personal profile of users from "vast numbers of seemingly minor details"; it can disrupt Internet anonymity; it is difficult to turn off or determine when it is on; it poses a security risk that information could be hacked; it creates concerns that companies could adjust prices depending on the consumer's profile; and it could cause people to become distrustful of the Internet and wary to use it for controversial searches).

145. For an empirical study about the prolific use of flash cookies, see Hoofnagle et al., *supra* note 143.

146. *Id.* at 277–78.

147. *Id.* at 278 (describing behavioral advertising "and the tracking that goes with it . . . [as] the offer you cannot refuse").

control in parents' hands, either for themselves¹⁴⁸ or their children, regulators have important power and responsibility over users' advertising profiles.

The FTC began looking into behavioral advertising in 1999, when it first grew concerned about online profiling.¹⁴⁹ When looking at how it could or should regulate behavioral advertising, the Commission weighed the "benefits to consumers in the form of free content and a more personalized online experience" with "privacy concerns."¹⁵⁰ Most of these FTC efforts did and continue to result in calls for industry self-regulation,¹⁵¹ but the FTC entered into at least one settlement with a company that failed to disclose it was data collecting.¹⁵²

Behavioral advertising has privacy implications because of how it capitalizes on user data.¹⁵³ That said, at least behavioral advertisements are separate from online content and easy to identify. The next Section addresses *embedded* advertisements, which are more difficult for Internet users to detect.

148. See, e.g., *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 320 (3d Cir. 2019) (describing the ways that adult Internet users do not always have control over cookies, even when they turn them off through their browsers).

149. See Letter from Donald S. Clark, *supra* note 137.

150. *Id.* at 2.

151. See *supra* Part I.B.2 for an analysis of how current industry self-regulation may fail to protect children from online advertising schemes.

152. See *Sears Holdings Mgmt. Corp.*, FTC File No. 082-3099 (complaint June 4, 2009), <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090604searscomplaint.pdf> [<https://perma.cc/USH7-LKP8>]; *Sears Holdings Mgmt. Corp.*, FTC File No. 082-3099 (consent order June 4, 2009), <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090604searsagreement.pdf> [<https://perma.cc/LBX7-LGK8>]; *Sears Settles FTC Charges Regarding Tracking Software*, FED. TRADE COMM'N (June 4, 2009), <https://www.ftc.gov/news-events/press-releases/2009/06/sears-settles-ftc-charges-regarding-tracking-software> [<https://perma.cc/78H9-H9DK>] (settling a case with Sears after the shopping company paid certain consumers to participate in research software that would track their online browsing, but failed to adequately disclose all of the information that would be gathered). *But see FTC Approves Sears Holdings Management Corporation Petition To Reopen and Modify Commission Order Concerning Tracking Software*, FED. TRADE COMM'N (Feb. 28, 2018), <https://www.ftc.gov/news-events/press-releases/2018/02/ftc-approves-sears-holdings-management-corporation-petition> [<https://perma.cc/S8YY-SKU4>] (approving a petition by Sears Holding Management to reopen and modify the 2009 settlement in order to add exemptions to the definition of "tracking application" which would help Sears to keep up with "current market practices"). The FTC's decision to revisit the Sears case fell in line with its dual missions to "promote competition, and protect and educate consumers." *Id.*

153. See generally Hoofnagle et al., *supra* note 143 (discussing new and persistent website tracking technology that users cannot disable).

D. EMBEDDED ADVERTISEMENTS ARE DECEPTIVE AND POORLY REGULATED

Advertisements that spawn from Internet tracking have privacy implications but are easy to identify. Embedded advertisements such as product placements, however, can be more deceptive because they show up *inside* the content people intentionally view.¹⁵⁴ “Embedded advertising necessarily consists of the insertion of immaterial promotional messages in entertainment content.”¹⁵⁵ These ads allow sponsors to include their brand in programming and online videos, making them difficult to avoid.¹⁵⁶ Adults can more easily recognize embedded advertisements for what they are, but children are not yet so skeptical.¹⁵⁷ They are even more trusting of information that is coming from peers,¹⁵⁸ making YouTube videos by kids particularly ripe for embedded advertisements.

Kid YouTubers can earn tens of thousands of dollars on their videos from ad revenue alone, before product endorsements.¹⁵⁹ In the YouTube-verse, video views are a form of currency.¹⁶⁰ Channels like Ryan’s World¹⁶¹ receive millions of views a day, enough to generate around half a million dollars a month in external advertisement revenue.¹⁶² Ryan of Ryan’s World gets a second round of income through

154. See, e.g., Ann K. Hagerty, *Embedded Advertising: Your Rights in the TiVo Era*, 9 J. MARSHALL REV. INTELL. PROP. L. 146, 147 (2009); see also Jennifer Fujawa, *The FCC’s Sponsorship Identification Rules: Ineffective Regulation of Embedded Advertising in Today’s Media Marketplace*, 64 FED. COMM’NS L.J. 549, 552–53 (2012) (describing four types of product placement: classic, institutional/corporate, evocative, and stealth).

155. Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99, 107 (2010).

156. Hagerty, *supra* note 154 (“Embedded advertising is the inclusion of sponsored brands in . . . programming.”).

157. Cf. Lapiere et al., *supra* note 35, at S154 (“[E]vidence shows that children have more difficulty understanding that they are being marketed to . . .”).

158. See generally Ken J. Rotenberg, Serena Petrocchi, Flavia Lecciso & Antonella Marchetti, *Children’s Trust Beliefs in Others and Trusting Behavior in Peer Interaction*, 2013 CHILD DEV. RSCH. 1 (studying how children trust their peers).

159. A YouTube channel named EvanTubeHD “gets on average 1.1 million views a day. That means just on ads alone he is making about \$49,500 a month. That is almost \$600,000 a year.” Steve Cooper, *How Much Do Kid Youtubers Make—Unbelievable!, HOW TO MAKE MONEY AS KID* (Oct. 23, 2018), <https://www.howtomakemoneyasakid.com/how-much-do-kid-youtubers-make> [<https://perma.cc/D2V8-8YFQ>].

160. *Id.* (“Kid Youtubers on average make \$1.50 per thousand views from the Youtube Partner Program. With brand deals, they can earn \$10,000 for every 100,000 views a video will get in the first 30 days.”).

161. Formerly known as Ryan ToysReview. See discussion *supra* note 14.

162. Cooper, *supra* note 159 (“It is reported that in 2017 Ryan from Ryan’s [World] made an incredible \$11 million from his channel. With an average of 9.7 million views a day Ryan would make just under \$500,000 a month.”).

his social media influencer status; businesses pay him to use and represent their products.¹⁶³ For example, Ryan's channel featured an ad for Hardee's fast food chain that gained four million views.¹⁶⁴ Ryan gets paid by the restaurant for the internal advertisement and paid through YouTube for any advertisements that played before his video.¹⁶⁵ Ryan will get paid even if he labels his video as an advertisement.¹⁶⁶ Young children are unable to recognize that Ryan is being paid to eat the fast food and only understand that one of their favorite YouTube stars seems to be enjoying the food.¹⁶⁷ The kids inside the videos are not the only ones making money. Advertisements geared toward children have the potential to bring in massive revenue for media services.¹⁶⁸ The growth of the Internet and child-oriented websites has exponentially increased the opportunities for advertisers to reach children.¹⁶⁹ In 2004 alone, advertisers spent twelve billion dollars in advertisements meant to appeal to children.¹⁷⁰ YouTube's cut of the children's advertising market is about five to seven hundred million dollars a year.¹⁷¹

By the age of five, children can distinguish commercials from regular TV programs, but they are not yet able to parse out the

163. Truth in Advertising Complaint, *supra* note 14.

164. *Id.*; see also Danielle Wiener-Bronner, *First on CNN Business: Hardee's Partners with Child YouTube Star To Relaunch Kids' Meals*, CNN (June 11, 2019), <http://cnn.com/2019/06/11/business/hardees-youtube-partnership-ryan-toysreview/index.html> [<https://perma.cc/VNX9-UFDH>] ("Ryan's natural interest in fast food made the Hardee's deal a good fit.").

165. *Cf. id.*

166. Advertising disclosures may help parents to sift through types of videos that they do not want their children viewing, but otherwise, most children will not be able to parse out the difference between a video with "this is an ad for Nickelodeon" at the top of the screen and a regular video about a product. See Truth in Advertising Complaint, *supra* note 14 (discussing inadequacy of advertising notice in *Ryan's Rise of the Teenage Mutant Ninja Turtles Pretend Play Adventure!*, YOUTUBE (Mar. 23, 2019), <https://www.youtube.com/watch?v=Ukl8Ej9x-SU>).

167. See generally Rotenberg et al., *supra* note 158 (discussing children's trusting behavior during peer interactions).

168. See, e.g., Fried, *supra* note 97, at 103–04 ("According to Magazine Publishers of America, [National Geographic Kid's] advertising revenue increased from zero for January 2002, to \$258,075 for January 2003. Advertising revenue has continued to increase, reaching \$4,971,283 for the period from January to July 2004." (citation omitted)).

169. WILCOX ET AL., *supra* note 46, at 4.

170. *Id.*

171. Mark Bergen, *YouTube Plans To End Targeted Ads on Videos Aimed at Kids*, BLOOMBERG (Aug. 20, 2019), <https://www.bloomberg.com/news/articles/2019-08-20/youtube-plans-to-end-targeted-ads-to-kids-to-comply-with-ftc> [<https://perma.cc/ZQ7Y-PV89>].

motivational difference between the two.¹⁷² Commercials are trying to sell goods whereas programs are meant to entertain.¹⁷³ The cues that assist preschoolers in distinguishing between commercials and programming, like “we’ll return shortly” messaging, are absent when advertisements are embedded in videos.¹⁷⁴ Video streaming services like YouTube are beginning to include designators inside videos that say “ad,” but the preschool audiences viewing those videos cannot read yet.¹⁷⁵ Even though the word “advertisement” appears on the same screen as the video, it is unlikely that younger children can discern that what they are seeing is actually an advertisement.¹⁷⁶

Endorsements, another form of embedded advertisement, must also be clearly and conspicuously designated.¹⁷⁷ Benign acts like eating at a fast food restaurant or playing with a toy may be subject to FTC endorsement regulations.¹⁷⁸ Under these regulations, “advertising message[s] . . . that consumers are likely to believe reflect[] the opinions . . . or experiences of a party other than the sponsoring advertiser” qualify as endorsements.¹⁷⁹ Like other embedded advertisements, endorsements influence a consumer’s buying habits.¹⁸⁰ The FTC has repeatedly pointed influencers and content creators to its “Endorsement Guides,”¹⁸¹ which outline when relationships to brands should be disclosed.¹⁸² These guides indicate that any “material connection” between an endorser and an advertiser should be clearly

172. Roedder John, *supra* note 13, at 188.

173. *Id.*

174. Truth in Advertising Complaint, *supra* note 14, at 7.

175. See, e.g., *The Future of the COPPA Rule: An FTC Workshop-Session 1*, FED. TRADE COMM’N (Oct. 7, 2019), <https://www.ftc.gov/news-events/audio-video/video/future-coppa-rule-ftc-workshop-session-1> [<https://perma.cc/H6HR-J5FR>] (stating that children under age six can’t read the advertisement warning).

176. Fried, *supra* note 97, at 106 (describing how National Geographic Kids magazine had a fake cover with an ad for Arby’s fast food that said “advertisement” in small, red type but was probably not distinguishable by children as a magazine cover).

177. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.1–.5 (2020).

178. *Id.*

179. 16 C.F.R § 255.0(b).

180. See generally *The FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N (Aug. 27, 2020), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/ZT5W-K2D3>].

181. *Id.*

182. *FTC Staff Reminds Influencers and Brands To Clearly Disclose Relationship*, FED. TRADE COMM’N (Apr. 19, 2017), <http://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/D4JH-C2U9>].

disclosed, unless the connection is clear.¹⁸³ In ambiguous cases, content creators are advised to disclose their relationship with the marketed product.¹⁸⁴ This disclosure may be as simple as putting “#ad” in a post or video’s description.¹⁸⁵ Again, this modest disclosure may not mean much to children.

YouTube draws in huge revenue from advertisements aimed at children.¹⁸⁶ The manner by which YouTube does so may violate COPPA. The next Section addresses a recent dispute between YouTube and the FTC over COPPA violations that sparked an early review of the COPPA rule.

E. THE 2019 FTC SETTLEMENT WITH YOUTUBE AND THE SUBSEQUENT COPPA NOTICE-AND-COMMENT PERIOD

The FTC pushed its ten-year review of COPPA up from 2023 to 2019 in response to growing concerns about platforms hosting third-party child-directed content.¹⁸⁷ This fast-tracked review came after criticism that the FTC’s 2019 \$170 million settlement with YouTube was too weak, given the company’s net worth.¹⁸⁸ As part of the settlement, the FTC and YouTube agreed to hold individual content creators liable for COPPA compliance in the future.¹⁸⁹ Under this new schema, content creators are considered in charge of their own “websites,” even though they are hosted on YouTube’s platform and generating money for YouTube.¹⁹⁰

183. *Id.*; 16 C.F.R. § 255.5 (2020).

184. *FTC’s Endorsement Guides*, *supra* note 180 (responding to a query about a YouTube channel doing a product review of a knife, “[e]ven if you don’t think it affects your evaluation of the product, what matters is whether knowing that you got the knife for free might affect how your audience views what you say about the knife. It doesn’t matter that you aren’t required to review every knife you receive. Your viewers may assess your review differently if they knew you got the knife for free, so we advise disclosing that fact.”).

185. *Id.*

186. Bergen, *supra* note 171.

187. Request for Public Comment, 84 Fed. Reg. 35,824 (July 25, 2019).

188. See, e.g., Greg Sandoval, *Morgan Stanley Figured Out How Much YouTube Would Be Worth If It Were a Separate Company, and It’s More Valuable than Disney*, BUS. INSIDER (May 19, 2018, 2:22 AM), <https://www.businessinsider.com/morgan-stanley-values-youtube-160-billion-dollars-2018-5> [<https://perma.cc/9WR3-FLY5>].

189. Kristin Cohen, *YouTube Channel Owners: Is Your Content Directed to Children?*, FED. TRADE COMM’N (Nov. 22, 2019, 12:56 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-to-children> [<https://perma.cc/YH5V-3YLL>].

190. Johan Moreno, *YouTube Disables Personalized Ads, Comments on Children’s Videos*, FORBES (Jan. 6, 2020, 3:17 PM), <https://www.forbes.com/sites/johanmoreno/>

The new system asks YouTube channel owners to explicitly tag their videos as child-oriented, allowing YouTube to verify that the content complies with COPPA.¹⁹¹ It is up to individual YouTubers to determine if their content is child-oriented lest they risk being individually liable for a costly COPPA violation.¹⁹² When content is marked as child-oriented, comments and notification are disabled, paid ads are limited, and data collection stops.¹⁹³ Critics commented that this YouTube-FTC settlement engages in a form of content censorship,¹⁹⁴ is unfair to content creators,¹⁹⁵ and represents “government overreach at its worst.”¹⁹⁶ Those who favor robust regulation of children’s content see the settlement as overly broad and punishing to content creators who might inadvertently violate the rule.¹⁹⁷

In response to the FTC’s scrutiny of COPPA, YouTube revamped its YouTube Kids program.¹⁹⁸ The following Section describes YouTube Kids, which takes big steps toward giving parents control

2020/01/06/youtube-disables-personalized-ads-comments-on-childrens-videos [https://perma.cc/J429-ZEVM].

191. Press Release, *supra* note 7.

192. Cohen, *supra* note 189 (noting that one COPPA violation could carry a penalty of up to \$42,530).

193. *Id.*

194. See, e.g., Comment on FTC Implementation of COPPA (Jan. 14, 2020), <https://www.regulations.gov/document?D=FTC-2019-0054-54986> (“[M]ake sure the good youtubers [are not] affected. Protecting children is a noble cause, but [it’s] also censorship. Which should really be overseen by the parents. So be very careful not to overstep. You could easily ruin the lives of countless honest entertainers by going a bit too far.”).

195. See, e.g., Vanessa Nadolska, Comment on FTC Implementation of COPPA (Dec. 11, 2019), <https://www.regulations.gov/document?D=FTC-2019-0054-23025> (“If this continues, content creators will lose their jobs, us viewers will lose any passion and love for hobbies. This is quite unfair on behalf of the YouTube community. We [should not] be punished for other [people’s] problematic ways. Parents should monitor their children on technology and devices, instead of allowing them to freely search the internet.”).

196. See, e.g., Timothy Ward, Comment on FTC Implementation of COPPA (Dec. 16, 2019), <https://www.regulations.gov/document?D=FTC-2019-0054-28586> (“If the FTC sues someone for making something allegedly appealing to children, then the FTC can call virtually anything appealing to children and come after individuals with varied political, social, and religious persuasions.”).

197. See, e.g., Alex Cannella, Comment on FTC Implementation of COPPA (Jan. 2, 2020), <https://www.regulations.gov/document?D=FTC-2019-0054-49015> (“The new rules are incredibly broad, to the point where I don’t know how to appropriately follow them.”).

198. Sarah Perez, *YouTube Kids Launches on the Web*, TECH CRUNCH (Aug. 30, 2019, 9:20 AM), <https://techcrunch.com/2019/08/30/youtube-kids-launches-on-the-web> [https://perma.cc/EJ65-JS5A].

over their children's interactions with the site but still allows for external and embedded advertisements.

F. YOUTUBE KIDS GIVES PARENTS MORE CONTROL BUT DOES NOT ADDRESS EMBEDDED ADVERTISEMENTS

YouTube developed a special subsection of its services, YouTube Kids, to address some of the concerns about advertising to children.¹⁹⁹ YouTube Kids corresponds with COPPA's goals by increasing the control parents have over what their children watch.²⁰⁰ The site provides tools for parents to curate how much screen time children get, control what age group's content they can access, and monitor their watch history.²⁰¹ Videos on YouTube Kids disable comments, scan for "family-friendly" qualities, and limit data collection.²⁰² YouTube Kids's features are "built by [YouTube's] engineering teams, human review, and feedback from parents to protect our community."²⁰³ The company acknowledges that, while not all videos are manually reviewed, community flagging of inappropriate content would lead to fast review.²⁰⁴

The release of YouTube Kids was overshadowed by the large settlement between the FTC and Google around allegations that YouTube illegally collected personal information from children without

199. YOUTUBE KIDS, *supra* note 8.

200. Jessica Campisi, *FTC Reaches Reported Settlement with Google over YouTube Child Privacy Violations*, HILL (July 20, 2019, 9:31 AM), <https://thehill.com/policy/technology/technology/453993-ftc-reaches-settlement-with-google-over-youtube-child-privacy> [<https://perma.cc/6W4J-FK32>] ("YouTube has said it is working to address [COPPA compliance], saying it removed more than 800,000 videos in the first quarter of 2019 that violated their child safety rules. In June [2019], it announced other changes, such as restricting minors from live-streaming without an adult to disabling comments on videos with minors.").

201. *A Safer Online Experience for Kids*, YOUTUBE, <https://youtube.com/kids/safer-experience> [<https://perma.cc/FUZ3-3DFW>] ("Our built-in timer lets parents limit screen time by telling kids when it's time to stop watching. The timer will display a friendly alert and stop the app when the session is over so [the parent does not] have to."); Perez, *supra* note 198 ("The company . . . introduced new age groupings on YouTube Kids to now include a 'Preschool' filter for those age 4 and younger, in addition to a 'Younger' group for ages 5 to 7, and an 'Older' group for kids over 7.").

202. *A Safer Online Experience for Kids*, *supra* note 201.

203. *Id.*

204. *Id.* ("In order to find a variety of the best family-friendly videos from the broader universe of content on YouTube, we use a mix of automated filters built by our engineering teams, human review, and feedback from users.").

parental consent.²⁰⁵ In addition to the \$170 million settlement,²⁰⁶ YouTube now has its content creators manually sort their videos into categories that will restrict child-oriented videos to the YouTube Kids app.²⁰⁷ As part of this new operation, YouTube must provide notice to parents about their data collection practices and obtain parental consent before collecting personal information from children.²⁰⁸ Parental consent—one of the pinnacle requirements of COPPA—is specifically facilitated in YouTube Kids.²⁰⁹

YouTube's advertising system is stricter for YouTube Kids; the ads are shorter and specifically kid-appropriate.²¹⁰ YouTube still uses paid advertisements on YouTube Kids so that they "can provide an experience free of charge."²¹¹ Limiting the length of ads is reminiscent of the FCC compromise in the 1970s to limit the length of television advertisements toward children as opposed to banning ads outright.²¹² "Paid ads" undergo a review process and do not allow for children to click through to purchase products.²¹³ The ads are prefaced with short animated videos that warn the child that they are about to be shown

205. "[T]he FTC and New York Attorney General alleg[ed] that YouTube violated the COPPA Rule by collecting personal information – in the form of persistent identifiers that are used to track users across the Internet – from viewers of child-directed channels, without first notifying parents and getting their consent." See Press Release, *supra* note 7. YouTube earned millions of dollars with this information through targeted ads, even though it knew that the channels it was displaying those ads on were directed toward children. *Id.* At the time of the complaint, YouTube was manually reviewing videos with children's content and placing them on YouTube Kids, which does not collect identifiers, but those videos were still on the general YouTube site. *Id.* It even told advertisers "that it did not have users younger than [thirteen] on its platform and therefore channels on its platform did not need to comply with COPPA." *Id.* Aside from the monetary aspects of the settlement, the FTC had YouTube develop a system that allowed content creators to identify their content as child-oriented so that it's COPPA compliant. *Id.* Essentially, this aspect of the settlement ignores what YouTube was saying to advertisers about not having to worry about COPPA and instead places the impetus for action on the content creators.

206. See Singer & Conger, *supra* note 27 (arguing that the \$170 million penalty is a "slap on the wrist for one of the world's richest companies").

207. See Press Release, *supra* note 7.

208. *Id.*

209. See *supra* Part I.B for a broader overview of COPPA.

210. *Ads in YouTube Kids*, YOUTUBE, <https://support.google.com/youtubekids/answer/6130541> [<https://perma.cc/L3VX-547N>].

211. *A Safer Online Experience for Kids*, *supra* note 201 ("All paid ads must be in strict compliance with [YouTube's] advertising policies, are clearly marked as advertisements and are only approved to be shown on YouTube Kids if they are family-friendly.").

212. See WILCOX ET AL., *supra* note 46, at 8.

213. *Ads in YouTube Kids*, *supra* note 210.

an advertisement.²¹⁴ These regulations do not extend to embedded advertisements in videos uploaded by users.²¹⁵

YouTube specifically addresses that “toy unboxing, family vlogging and/or let’s play gaming videos” benefit children by modeling “imaginative play” and “problem solving.”²¹⁶ But YouTube also acknowledges that commercial elements in unboxing videos may concern some parents.²¹⁷ Perhaps one of the most successful examples of a toy unboxing YouTube channel is Ryan’s World, which this Note discusses in the next Section.

G. RYAN’S WORLD: ONE KIDFLUENCER, TWENTY-THREE MILLION SUBSCRIBERS, BILLION DOLLAR ADVERTISING IMPLICATIONS

Ryan Kaji got his kidfluencer start in 2015 after he watched videos of kids on YouTube and asked his parents why he did not have his own channel.²¹⁸ Ryan’s parents’ decision to start recording their kid playing with toys paid off, transforming into millions of dollars in ad revenue and Ryan’s own brand of toys and clothes.²¹⁹ Some of his most successful videos feature Ryan breaking open large “eggs” that contain toys and other products.²²⁰ Smaller versions of these eggs are now available for purchase so that viewers can experience the same

214. *Id.*

215. *Advertising on YouTube Kids*, YOUTUBE, <https://support.google.com/youtube/answer/6168681> [<https://perma.cc/N5C8-H62X>] (“Content uploaded by users to their channels are not considered Paid Ads. For example, a search for ‘trains’ could result in a TV commercial for toy trains uploaded by a user or a toy train company, none of which are Paid Ads. Likewise a search for ‘chocolate’ can show a user-uploaded video on making chocolate fudge even though we do not allow paid advertising for chocolatiers.”).

216. *A Safer Online Experience for Kids*, *supra* note 201 (offering parents an option to “block videos or channels or limit YouTube Kids to only videos or channels that you have approved” in response to concerns about commercial content).

217. *Id.*

218. Rupert Neate, *Ryan Kaji, 9, Earns \$29.5m as This Year’s Highest-Paid YouTuber*, GUARDIAN (Dec. 18, 2020), <https://www.theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber> [<https://perma.cc/K299-RQEA>] (describing how Ryan was the highest paid YouTube star for the third year in a row and how he made an additional \$200 million in sales of branded items).

219. *See id.*; McKeever, *supra* note 17; *see also* Sahil Patel, *9-Year-Old YouTube Star Ryan Kaji Opens Virtual World on Roblox*, WALL ST. J. (Dec. 4, 2020), <https://www.wsj.com/articles/9-year-old-youtube-star-ryan-kaji-opens-virtual-world-on-roblox-11607079600> [<https://perma.cc/E6R7-25DJ>] (claiming Ryan’s franchise earned \$500 million between 2018 and 2020).

220. *See, e.g.*, Ryan’s World, *Giant Egg Surprise Opening Transformer Toys*, YOUTUBE (July 13, 2015), https://www.youtube.com/watch?v=YCYFXwYo_Bc (reporting over 96 million views).

excitement as Ryan.²²¹ Over the years, Ryan's channel evolved from primarily depicting him playing with toys to educational videos where he shows viewers how tsunamis work²²² or how to replicate his science experiments.²²³ Though Ryan is most famous for "unboxing" videos, as his popularity and variety has grown, so too have his opportunities for monetization.

Ryan's process of unwrapping toys, playing with them, then providing a review tapped into the "unboxing" trend in videos.²²⁴ Unboxing videos feature people expressing great amusement while opening presents or toys.²²⁵ The most popular unboxing videos tend to be of expensive objects like video game consoles or smartphones.²²⁶ Creators dramatize the act of opening a product and promote the superiority of that product's first use.²²⁷ Associating expensive material goods with joy can be particularly harmful for children who might view unboxing videos and think that "the key to happiness is having lots of toys."²²⁸ This sort of anti-"hand-me-down" mentality sets up difficult expectations for families with less means but is great for advertisers who are trying to sell new products.

Ryan's World's ad revenue originally came from both embedded and external ads.²²⁹ External ads function on an opt-in system where channels can choose to let advertisers show a short clip before the chosen content played.²³⁰ Advertising monetization is the primary

221. See, e.g., *Ryan's World Eggstravaganza 6pk*, TARGET, <https://www.target.com/p/ryan-s-world-eggstravaganza-6pk/-/A-75666434> [<https://perma.cc/7V7N-QZ9D>].

222. Ryan's World, *How Tsunamis Are Formed??? | Educational Video for Kids wit [sic] Ryan ToysReview!!!*, YOUTUBE (Aug. 10, 2019), <https://www.youtube.com/watch?v=G2cznwPY13M>.

223. Ryan's World, *DIY Science Experiment for Kids Rainstorm and Baking Soda and Vinegar!!!*, YOUTUBE (Jan. 2, 2020), <https://www.youtube.com/watch?v=O2mwGjTRY>.

224. E.g., Robert D. Hof, *'Unboxing' Videos a Gift to Marketers*, N.Y. TIMES (Dec. 6, 2015), <https://www.nytimes.com/2015/12/07/business/media/unboxing-videos-a-gift-to-marketers.html> [<https://perma.cc/DX89-R3QZ>].

225. See generally Heather Kelly, *The Bizarre, Lucrative World of 'Unboxing' Videos*, CNN (Feb. 13, 2014, 10:49 AM), <https://www.cnn.com/2014/02/13/tech/web/youtube-unboxing-videos/index.html> [<https://perma.cc/5MLV-CBPL>].

226. *Id.*

227. Angela J. Campbell, *Rethinking Children's Advertising Policies for the Digital Age*, 29 LOY. CONSUMER L. REV. 1, 5-6 (2016).

228. *Id.* at 48.

229. See Steve Cooper, *supra* note 159 (discussing Ryan's World's external ad revenue); Truth in Advertising Complaint, *supra* note 14, at 2-3 (discussing brands paying for embedded endorsements on Ryan's World).

230. See Eric Rosenberg, *How YouTube Ad Revenue Works*, INVESTOPEDIA (June 4, 2020), <https://www.investopedia.com/articles/personal-finance/032615/how>

way that YouTube and content creators get revenue from their videos.²³¹ The more views a video gets, the more times an ad plays, and the more money a YouTuber makes.²³² Before regulations, these commercials would air between videos as part of YouTube's auto-play feature, which meant that children could view multiple videos and ads without interacting with the platform themselves.²³³ YouTube benefits doubly from this system by collecting money from the initial ads and valuable behavioral data about the underage viewers that can then be used by its parent company, Google, to generate more ads (and money).²³⁴ This advertisement system impacts both children and parents.²³⁵

The FTC interpreted these external ads in children's videos like Ryan's as COPPA violations because the ads collected data about children without parental consent.²³⁶ In response, YouTube implemented "child-safe" procedures on children's videos by shutting down external advertisements, comments, and data collection.²³⁷ Currently, none of Ryan's videos play external ads or allow for comments. The videos still have an auto-play feature, which plays one video after another without any parental approval. Auto-play means that a video with embedded advertisements could play after a video that a parent approved.

Ryan's "toy review" created an opportunity for toymakers to give a kid toys and get free reviews with millions of viewers. In essence, every one of Ryan's review videos was an embedded advertisement for that toy. Kids would see Ryan playing with the toy and want to have

-youtube-ad-revenue-works.asp [<https://perma.cc/A6MH-MC2V>] (noting that content creators have to first "turn on" the service for external ads).

231. *Id.*

232. *Id.*

233. *Cf.* ROHIT CHOPRA, FED. TRADE COMM'N, DISSENTING STATEMENT IN THE MATTER OF GOOGLE LLC AND YOUTUBE, LLC 5 (2019), https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf [<https://perma.cc/7NG2-CZYT>] (discussing the value of YouTube's auto-play feature in the monetization of behavioral ads).

234. *Id.*

235. *Id.* ("By illegally collecting children's data on YouTube, Google can better monetize data collected from parents and children across properties, giving the company a clear competitive advantage when targeting them.").

236. *See generally* Campisi, *supra* note 200 (discussing the FTC's case against YouTube).

237. *See* Natalie Jarvey, *New YouTube Policies Aim To Make Kids' Videos Safer, but Creators Will Suffer*, HOLLYWOOD REP. (Sept. 20, 2019, 6:00 AM), <https://www.hollywoodreporter.com/news/new-youtube-policies-aim-make-kids-videos-safer-but-creators-will-suffer-1239664> [<https://perma.cc/2A5S-NEXM>] (discussing the changes in YouTube's policies after the FTC COPPA settlement).

that experience for themselves.²³⁸ Companies are able to generate new sales from children viewing Ryan's videos without having to navigate advertisement regulations. This creates a work-around in COPPA compliance that could have been addressed in YouTube's settlement with the FTC but was not.

II. YOUTUBE'S SETTLEMENT WITH THE FTC PLACES THE PRESSURE FOR COPPA COMPLIANCE ON CONTENT CREATORS

COPPA is designed to manage content on websites geared toward children, in part so that those sites do not profit from children's data.²³⁹ COPPA achieves this by requiring that "website operators notify parents and obtain their consent *before* they collect, use, or disclose children's personal information" and set up clear privacy policies.²⁴⁰ Traditionally, the FTC enforced this rule by bringing claims against the parent companies of websites and not the individuals overseeing specific subsets of those sites.²⁴¹ This type of top-down enforcement ensures that the FTC regulates large entities with the resources to create changes and achieve compliance²⁴² as opposed to individuals who may lack the legal literacy to know what makes something COPPA-compliant. With that in mind, the FTC's 2019 settlement with YouTube over COPPA violations misses its mark for two reasons: (1) it places YouTube's burden as a website under COPPA onto content creators, and (2) it focuses on how videos are labeled as opposed to their advertising content, which creates an incentive for creators to deceptively advertise. This Part will examine those issues

238. See generally Roedder John, *supra* note 13 (analyzing the effects of advertising on children as consumers).

239. See *Complying with COPPA: Frequently Asked Questions*, *supra* note 63.

240. Press Release, *supra* note 74.

241. See, e.g., Playdom Complaint, *supra* note 60 (suing Playdom, Inc. as a parent company for COPPA violations that individual websites under its control were conducting); *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262 (3d Cir. 2016) (suing Viacom as the parent company of Nickelodeon for unlawfully collecting personal information about children under thirteen); *App Stores Remove Three Dating Apps After FTC Warns Operator About Potential COPPA, FTC Act Violations*, FED. TRADE COMM'N (May 6, 2019), <https://www.ftc.gov/news-events/press-releases/2019/05/app-stores-remove-three-dating-apps-after-ftc-warns-operator> [<https://perma.cc/FR5R-EJSH>] (describing a warning letter that the FTC sent to a Ukraine-based company, Wildec LLC, for operating several dating apps that were allowing access to children as young as twelve, because even though the apps all indicated that they were limited to people thirteen and up, twelve-year-olds were still able to use them and communicate with adults).

242. Cf. Zach, *How Much Is YouTube Worth in [Year]*, LOOXCIE (Oct. 6, 2019), <https://www.looxcie.com/youtube-worth> [<https://perma.cc/VH9G-EW6L>] ("YouTube's revenue in 2015 was estimated to be \$3.5 billion.").

individually and then demonstrate how they manifest in Ryan's World.

A. WEALTHY YOUTUBE'S SETTLEMENT WITH THE FTC SHIFTED ITS RESPONSIBILITY ONTO MORE VULNERABLE CONTENT CREATORS

According to the FTC's settlement with YouTube, content creators are now held directly responsible for adhering to COPPA.²⁴³ While compliance seems easy on its face—creators only have to label their videos as child-directed and the platform will implement the regulatory rules—many content creators have a difficult time knowing if their videos are just attractive to children or actually made for them.²⁴⁴ The implications of failing to label a video or channel as child-directed are huge for independent content creators who could be blocked from the platform and financially devastated by a \$42,530 FTC fine.²⁴⁵ YouTube, which is estimated to be worth up to \$160 billion,²⁴⁶ needs only to apply COPPA standards to the creator-labeled videos and continue business as usual.

There are three new COPPA-driven categories for YouTube channels and videos to fall into: general, mixed, and "made for kids"/child-directed.²⁴⁷ These new categories, made in response to the FTC settlement, are meant to guide content creators in their COPPA compliance but can be contradictory. The only YouTube content that will not fall under COPPA is considered "general" and must not be made with any suggestion of an intent to target kids.²⁴⁸ Examples of general audience videos are "gaming video[s] that feature adult humor" and "[a]nimated content that appeals to everyone."²⁴⁹ Yet one of the factors that YouTube suggests creators look to when determining if their video has a child audience is whether the video has animated content

243. See Press Release, *supra* note 7.

244. See, e.g., Makena Kelly & Julia Alexander, *YouTube's New Kids' Content System Has Creators Scrambling*, VERGE (Nov. 13, 2019, 3:06 PM), <https://www.theverge.com/2019/11/13/20963459/youtube-google-coppa-ftc-fine-settlement-youtubers-new-rules> (quoting a YouTuber who reviews collectable toys as saying "the verbiage of 'kid directed' vs 'kid attractive' isn't very clear It's hard to know if we're in violation or not.>").

245. *Complying with COPPA: Frequently Asked Questions*, *supra* note 63.

246. Geoff Weiss, *Morgan Stanley Pegs YouTube's Valuation at \$160 Billion, Above Disney, Comcast, and Netflix*, TUBEFILTER (May 21, 2018), <https://www.tubefilter.com/2018/05/21/morgan-stanley-youtube-valuation-160-billion> [<https://perma.cc/9P4L-EXUZ>].

247. *Determining If Your Content Is "Made for Kids,"* YOUTUBE HELP, <https://support.google.com/youtube/answer/9528076> [<https://perma.cc/6PAG-Y8BW>].

248. *Id.*

249. *Id.*

because animation is attractive to child audiences.²⁵⁰ So animation flags that content might be child-directed, but if the animated video appeals to everyone then it might be “general.” This teetering edge means risking an FTC fine for violating COPPA or foregoing traditional advertising revenue.

If a YouTuber wants to avoid this risk, they should designate their content as one of the two COPPA-compliant categories. Content that is made for kids is easier to categorize because it is determined by the intent of the creator.²⁵¹ For instance, Ryan of Ryan’s World is a kid who speaks to other kids as his audience. Ryan’s World is unambiguously “made for kids.”

The more ambiguous “mixed audience” category is construed broadly to encompass anything that may have viewers under the age of thirteen, even if under-thirteen-year-olds are not the main audience.²⁵² YouTube provides creators with a list of factors to consider when determining whether their content is mixed or made for children, but ultimately says to creators, “you know your videos and your audience best, and it is your legal responsibility to comply with COPPA . . . and designate your content accurately.”²⁵³ YouTube picked up the \$170 million settlement tab in 2019 but now tells content creators that, moving forward, they are operating as their own “websites” under COPPA.

Proponents of the shift in responsibility to comply with COPPA, namely YouTube and its parent company, Google, likely see it as a practical move. If videos are going to be categorized en masse, then it would be more efficient for content creators to do it themselves than for YouTube to sort through millions of uploads. One of the problems with this theory, however, is that it relies on the average content creator to be conversant with COPPA rules.²⁵⁴ YouTube and Google are

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. Lesley Fair, *\$170 Million FTC-NY YouTube Settlement Offers COPPA Compliance Tips for Platforms and Providers*, FED. TRADE COMM’N (Sept. 4, 2019, 9:16 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/09/170-million-ftc-ny-youtube-settlement-offers-coppa> [<https://perma.cc/NCE2-LT53>] (“Content creators need to be conversant with COPPA.”). See generally Todd Spangler, *What You Need To Know About YouTube’s New COPPA Child-Directed Content Rules*, VARIETY (Jan. 3, 2020, 9:45 AM), <https://variety.com/2020/digital/news/ftc-rules-child-directed-content-youtube-1203454167> [<https://perma.cc/7Y7W-NKUP>] (“The big problem is, nobody is sure what ‘child-directed content’ means exactly, and producers and creators are worried they could be socked with thousands of dollars of fines or other penalties depending on how the rules are interpreted.”).

tech giants with independent legal teams; they have the capability to interpret federal regulations and determine compliance where creators likely do not. If a creator wants to avoid the labyrinthine regulatory jargon, they should by default designate their videos as mixed or child-directed. In doing so, their videos will be moved over to YouTube Kids, causing some channels to shut down due to loss of external ad revenue.²⁵⁵ This could be particularly devastating for content creators who make YouTube videos as their career,²⁵⁶ causing them to recalibrate what kind of videos they produce²⁵⁷ or risk losing the monetization that they depend on from their videos. YouTube as a parent company, however, is unlikely see much of a dent in its revenue given that kids videos are only a subset of the content that it hosts.

One could argue that the content creators do not have to work hard to navigate COPPA compliance because all they have to do is sort their videos into the correct category. Therefore, it might not matter that they are less legally sophisticated than YouTube. This argument ignores the fact that content creators are not in control over the gathering of data from underage users; YouTube is.²⁵⁸ Because content creators do not play a role in what is done with the information belonging to their viewers, they should not be required to forego the “general content” designation, one that increases their viewership across age groups, for fear of FTC backlash.

Responding to the FTC settlement, Google asserted that content developers are better equipped to categorize their own content.²⁵⁹

255. See James Wellemeyer, *YouTube Considers Removing Child Stars—Their Parents Say That’s a Drastic Solution to a Complex Problem*, MARKETWATCH (June 26, 2019, 3:24 PM), <https://www.marketwatch.com/story/parents-of-youtube-child-stars-say-proposed-safety-protections-could-cost-them-money-2019-06-26> [<https://perma.cc/64Z9-LCY6>] (“Some parents of child YouTube stars worry that moving children’s content off the main site could dramatically decrease the revenue they make on their videos.”); Spangler, *supra* note 254 (“YouTube’s new COPPA-compliance rules have led some creators – fearful of potential fines and projecting massive advertising-revenue losses – to shut down.”).

256. Jarvey, *supra* note 237 (quoting YouTuber LaToya Moore-Broyles, operator of a channel called MyFroggyStuff, “Whether you are an adult collector who loves toys or not, you will no longer be able to monetize your videos the same way. . . . For us people who have YouTube as a career, that’s kind of detrimental.”).

257. *Id.* (describing one YouTuber’s decision to produce more teen-focused videos and fewer videos about toys, which attract children); see also Spangler, *supra* note 254 (describing how one children’s channel is going to focus on “stuff that’s more tween-oriented and older” because “you don’t want it to be misinterpreted.” (internal quotation marks omitted)).

258. CHOPRA, *supra* note 233.

259. GOOGLE, RESPONSE TO REQUEST FOR COMMENTS ON THE FTC’S IMPLEMENTATION OF THE CHILDREN’S ONLINE PRIVACY PROTECTION RULE 11 (2019), <https://www.regulations>

Creators “know the intended audience of their content, the actual audience of their content, where and how the content is marketed or advertised, and other indicia of child-directedness that [YouTube] can’t ascertain by looking only at the content itself.”²⁶⁰ That claim makes sense—those who create content should know it best. This claim does not, however, address the discrepancy between YouTube’s legal knowledge and a content creator’s ability to navigate regulatory requirements.²⁶¹

Larger-scale content creators, like Ryan Kaji, may be called to bear some of the responsibility of COPPA compliance because they benefit far more from viewership than smaller channels.²⁶² Ryan’s family makes millions through his channel every year,²⁶³ so FTC fines may not be too damaging for them. But even though Ryan’s channel is riddled with embedded advertisements and makes millions, he should not be held liable for COPPA compliance instead of YouTube. Ryan’s channel is a subsidiary of YouTube, not an independent website.²⁶⁴ Though Ryan may earn money from his videos on YouTube, the platform earns from his videos *and* every other monetized video channel that it hosts. Further, if more successful content creators like Ryan were faced with fines and others were not, a controversial line would have to be drawn regarding what level of success warrants liability.

Of course, not all YouTubers make millions from their channels, and typically only the most successful ones receive embedded advertisement and product placement opportunities.²⁶⁵ If smaller-scale content creators have to designate their videos as child-directed to

.gov/contentStreamer?documentId=FTC-2019-0054-21661&attachmentNumber=1&contentType=pdf.

260. *Id.*

261. Google, speaking on behalf of itself and “smaller companies,” claims it is challenging to make legal evaluations of content that it did not develop. *Id.* But unlike the smaller companies that it is speaking for, Google has a robust legal team that can ensure compliance.

262. See, e.g., Cooper, *supra* note 159 (describing how Ryan makes millions of dollars a year from his channel’s 9.7 million views per day).

263. See Truth in Advertising Complaint, *supra* note 14, at 1.

264. See *Ryan’s World*, YOUTUBE, https://www.youtube.com/channel/UChGjGhZ9S00HvBB0Y4D00_w [<https://perma.cc/5G7S-KKZR>] (demonstrating that Ryan’s World is housed within YouTube, not separate from it).

265. See, e.g., *Influencer Marketing with YouTube Product Placement Videos*, MEDIKIX, <https://mediakix.com/blog/how-youtube-product-placement-videos-reach-millions> [<https://perma.cc/XG28-ADWM>] (describing how YouTubers and other social media influencers integrate a product or service into their content “in a way that seems authentic” and plays on the relationship that they have with their audience).

avoid regulative pressure or liability, those creators may have to turn to embedded advertisements to gain income. YouTube permits these advertisements²⁶⁶ but requires that they comply with YouTube's ad policies.²⁶⁷ Embedded advertisements within children's videos are subject to a specific subset of those policies which forbids the content from being "deceptive, unfair or inappropriate for its intended audience, [from making] use of any third party trackers or otherwise attempt[ing] to collect personal information without first obtaining parental consent, and [it] must otherwise comply with all applicable laws and regulations."²⁶⁸ Again, this puts the impetus on content creators to determine if they are complying with applicable laws and regulations.

Perhaps what's of most concern is the unknown: content creators do not know how the new YouTube video categorization system will impact their income.²⁶⁹ The next Section explores how a decrease in external advertisement revenue may cause some content creators to turn to more *internal* advertisement methods to make up for the loss.

B. DESIGNATING A VIDEO AS CHILD-DIRECTED DOES NOT CONTROL ITS ADVERTISING CONTENT

YouTube's child-directed categorization limits behavioral advertising and data collection, but it does not control for embedded advertising.²⁷⁰ By ignoring such content, YouTube both fails to check whether creators are designating videos properly and allows channels

266. *Add Paid Product Placements, Sponsorships and Endorsements*, YOUTUBE, <https://support.google.com/youtube/answer/154235> [<https://perma.cc/EPC5-ZG5C>] ("You[Tubers] may include paid product placements, endorsements, sponsorships, or other content that requires disclosure to viewers in your videos."). They must designate the video as containing a paid promotion and conform to YouTube's advertisement policies. *Id.*

267. *Google Ads Policies*, YOUTUBE, <https://support.google.com/adspolicy/answer/6008942> [<https://perma.cc/LH7R-SRXC>].

268. *Ads & Made for Kids Content*, YOUTUBE, <https://support.google.com/adspolicy/answer/9683742> [<https://perma.cc/UVG7-2DY4>] (specifically restricting ads promoting consumable food and drinks, fighting sports, and, interestingly, astrology).

269. Jarvey, *supra* note 237 ("While creators won't know the full impact of the changes until they go into effect, one think tank estimates that some channels could see their advertising revenue decline by more than half.").

270. *See An Update on Our Efforts To Protect Minors and Families*, YOUTUBE BLOG (June 3, 2019), <https://youtube.googleblog.com/2019/06/an-update-on-our-efforts-to-protect.html> [<https://perma.cc/P32F-HYGM>] (describing YouTube's efforts to protect minors on its platform by developing technology that sifts for exploitative content and inappropriate behaviors, but not for advertising content).

to include unchecked deceptive advertising.²⁷¹ Users can flag videos that they think are inappropriate, but that does not necessarily mean that the video will be taken down.²⁷² Some of the forbidden content includes “pornography, incitement to violence, harassment, or hate speech.”²⁷³ Embedded advertisements are not one of the categories that YouTube considers inappropriate.

YouTube Kids has an option for parents who want to prevent their children from seeing certain content to block either specific videos or whole channels.²⁷⁴ This feature does a good job of allowing parents to monitor content but does not replace the value of YouTube making sure that videos are not deceptively advertising to vulnerable populations. Currently, there is no method of detecting if videos contain sponsored content unless that video is marked as an advertisement.

Many YouTubers rely on revenue from behavioral advertisements and use it as incentive to create new content.²⁷⁵ Though behavioral advertisements have privacy implications, they are out in the open and easily monitored. Embedded advertisements, however, are interspersed with content and difficult to avoid. They are especially problematic for children who cannot tell the difference between advertisements and content.²⁷⁶ When external advertisement revenue is limited, content creators will have more reasons to be deceptive in their advertising. This problem may be limited to famous YouTubers who are attractive to advertisers for their large subscribership. As discussed in the next Section, YouTubers with large followings—like Ryan Kaji—are more likely to be sponsored to present products.

271. *See id.*

272. *Contra YouTube Community Guidelines Enforcement*, GOOGLE TRANSPARENCY REP., <https://transparencyreport.google.com/youtube-policy/removals> [<https://perma.cc/K2RH-2QRW>] (citing over seven million videos as being taken down between June and September 2020 by community and automated flagging because of their violative content).

273. *Id.*

274. *See Parent Resources*, YOUTUBE, <https://www.youtube.com/kids/parent-resources> [<https://perma.cc/X8FU-P8KS>] (listing video and channel blocking as one of the tools for parents on YouTube Kids).

275. *Cf. Cooper*, *supra* note 262 (discussing the high compensation YouTubers receive for external ads based on number of views).

276. *See Truth in Advertising Complaint*, *supra* note 14, at 7–8.

C. RYAN'S WORLD DEMONSTRATES THE Pervasiveness of Embedded Advertisements and Their Specific Influence on Young Viewers

Ryan Kaji has been sponsored by Hardee's, Nickelodeon, Hasbro, Walmart, and numerous other companies.²⁷⁷ Ryan's endorsement videos often look similar to his genuine videos with no disclosure that there is something different about them.²⁷⁸ Some of his videos are more explicit, such as entire advertisements for amusement parks that come with several disclaimers.²⁷⁹ An issue with these disclaimers is that they fall deaf upon preschoolers who cannot yet read or understand what sponsored content is.²⁸⁰ Preschoolers are Ryan's primary audience—most of his videos feature “at least one product that is recommended for children under the age of five.”²⁸¹ This trend was less of an issue when Ryan was under five himself, but now he is reviewing toys for audiences half his age, which toes the line of unlawful endorsements.²⁸² It is hard to imagine that, at nine years old, Ryan is genuinely enjoying a product made to teach preschoolers to count, yet he plays with one in a video.²⁸³ Ryan's promotion of products targeted toward young children takes advantage of a group that is particularly susceptible to commercial content.²⁸⁴

The COPPA regulatory system makes a loophole for Ryan's videos because it does not look for advertising content in videos, only age-appropriate content. All of Ryan's videos are child-appropriate under traditional guidelines, as children are his primary audience. Because of that, the FTC's settlement with YouTube makes little impact on Ryan's channel because he and his parents do not have to guess about whether their videos should be labeled as child-directed.²⁸⁵ It is possible that their viewership will decrease slightly on YouTube Kids, impacting their ad revenue, but that is less likely because their videos

277. *See id.* at 2.

278. *Id.*

279. Ryan's World, *Legoland Amusement Theme Park Rides for Kids with Ryan's World!!!*, YOUTUBE (Jan. 5, 2020), <https://www.youtube.com/watch?v=-0cfp7WL690> (amassing over ten million views despite being labeled as an ad).

280. *See Truth in Advertising Complaint*, *supra* note 14, at 4.

281. *Id.* at 5.

282. Consumer endorsements must reflect the honest opinions and experiences of the endorser. For a description of lawful consumer endorsements, see Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1 (2009).

283. *See Truth in Advertising Complaint*, *supra* note 14, at 6.

284. *See Roedder John*, *supra* note 13, at 204 tbl.2.

285. *See generally* Spangler, *supra* note 254 (describing how Ryan's World “will not see big drops in revenue because [it] is not solely dependent on ad sales and can sell context-based spots”).

are still on the general YouTube site. A complaint from nonprofit Truth in Advertising²⁸⁶ might have had more of an impact on Ryan's channel than the FTC settlement. Right around when the complaint was made, Ryan announced that he was expanding his channel from just toy reviews to more elaborate science experiments and instructional videos.²⁸⁷ This change did not mean that he no longer showed sponsored content. In fact, by expanding his channel's scope, Ryan opened up entirely different markets of sponsorship. Ryan's videos, through embedded advertisements, blend "organic" content with promotions.²⁸⁸ Children watch the promotional videos and decide that they want the toy or product advertised, without realizing that Ryan is paid to sell that item.²⁸⁹ While the FTC is focusing on YouTube's content categorization scheme, content with embedded advertisements is openly targeting and influencing children's consumer behavior without being subject to parental control.

This Part explained how the FTC's settlement with YouTube over COPPA violations puts pressure on content creators and fails to address the consumer effects of embedded advertisements. The following Part proposes solutions to these concerns.

III. THE FTC SHOULD NOT LET YOUTUBE DEFLECT RESPONSIBILITY FOR COPPA COMPLIANCE

The FTC's settlement with YouTube was a missed opportunity to hold the platform accountable for the ways that it monetized child audiences.²⁹⁰ YouTube had to become COPPA compliant as a result of the settlement. It did so by revamping the YouTube Kids platform, making content creators designate their videos as child-directed or not, and providing annual COPPA compliance training for creators.²⁹¹ While these are important improvements, they have the downside of

286. Truth in Advertising Complaint, *supra* note 14.

287. See *supra* note 14 and accompanying text.

288. See Adam Bulger, *The Big Problems with Ryan's World, According to Parents and Experts*, FATHERLY (Feb. 28, 2020, 5:15 PM), <https://www.fatherly.com/love-money/ryans-world-review-expert-parents> (explaining that "it [is] really hard to tell the difference" between organic and promotional videos).

289. *Id.* (suggesting that parents help their children develop critical thinking about media by explaining that Ryan is paid to sell toys to them).

290. See *supra* Part I.C.2.

291. See Joseph Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks of Chairman Joseph Simons, YouTube Settlement Press Conference 2 (Sept. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543118/simons_remarks_youtube_settlement_press_conference.pdf [<https://perma.cc/E23M-J5VQ>] (listing the three primary components of the FTC settlement with YouTube).

incentivizing content creators to use deceptive advertising behavior to make up for lost behavioral advertising revenue. Instead, the FTC should have required YouTube to establish a mechanism that would ensure content creators are adequately designating their videos as child-directed and not including embedded advertisements as a means to avoid losing revenue.

If the FTC settlement foreshadows how the COPPA rule will be reinterpreted, then not only will content creators be liable for huge fines, but other platforms may abscond responsibility for COPPA compliance. This Part addresses these concerns by first suggesting that platforms, like YouTube, carry some liability for content creators' COPPA violations. Then, this Part suggests the FTC focus more attention on embedded advertisements rather than solely on data collection. One way of addressing embedded advertisements would be through the development of ad-detecting software, as discussed in Section C of this Part. Finally, this Part proposes new legislative attention to COPPA, which has potential for bipartisan support.

A. YOUTUBE SHOULD BE HELD LIABLE FOR CONTENT CREATORS' COPPA VIOLATIONS

The FTC's settlement with YouTube put the pressure on content creators to comply with COPPA, while only requiring YouTube to facilitate that compliance.²⁹² The "first impression" interpretation of COPPA that was established in the YouTube settlement asserts that individual content creators are "standalone 'operators' under COPPA, subject to strict liability for COPPA violations."²⁹³ In doing so, the FTC established YouTube as a third-party content host, thereby absolving YouTube of responsibility to inquire as to whether content is child-directed.²⁹⁴ FTC Commissioners Simons and Wilson argue that this categorization is consistent with previous interpretations of COPPA and that requiring any technical relief against YouTube is more than the FTC previously demanded of third parties.²⁹⁵ FTC Commissioners

292. JOSEPH J. SIMONS & CHRISTINE S. WILSON, FED. TRADE COMM'N, REGARDING FTC AND PEOPLE OF THE STATE OF NEW YORK V. GOOGLE LLC AND YOUTUBE, LLC 1 (2019) https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_youtube_statement.pdf [<https://perma.cc/L9YM-VMKD>] ("This settlement now makes Defendants responsible for creating a system through which content creators must self-designate if they are child-directed.").

293. *Id.*

294. *Id.*

295. *Id.* at 2.

Slaughter²⁹⁶ and Chopra²⁹⁷ disagree and correctly suggest that the FTC's settlement with YouTube "brings down the hammer on small [companies], while allowing large [companies] to get off easier."²⁹⁸ By treating individual YouTubers as owners of their own "websites" within YouTube, the FTC turns these content creators into small companies.²⁹⁹ Here, YouTube, a huge corporation,³⁰⁰ is only "paying a slice of their profits from wrongdoing and executives avoid scrutiny."³⁰¹

YouTube "baited children using nursery rhymes, cartoons, and other kid-directed content on curated YouTube channels to feed its massively profitable behavioral advertising business."³⁰² This is especially egregious because YouTube knew that it was collecting information from children³⁰³ and did not shut off data tracking. Instead, it

296. REBECCA KELLY SLAUGHTER, FED. TRADE COMM'N, DISSENTING STATEMENT IN THE MATTER OF GOOGLE LLC AND YOUTUBE, LLC (2019), https://www.ftc.gov/system/files/documents/public_statements/1542971/slaughter_google_youtube_statement.pdf [<https://perma.cc/Z4BP-5TTQ>].

297. CHOPRA, *supra* note 233.

298. *Id.* at 1.

299. *Id.* Later extrapolating that "[w]hen small players and upstarts violate COPPA, the companies pay dearly and the executives are investigated and, if liable, held personally accountable." *Id.* at 7. For example, the FTC stuck a start-up called Musical.ly with a \$5.7 million penalty for COPPA violations after it collected personal information from users without asking for their age. See Lesley Fair, *Largest FTC COPPA Settlement Requires Musical.ly To Change Its Tune*, FED. TRADE COMM'N (Feb. 27, 2019, 12:57 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/02/largest-ftc-coppa-settlement-requires-musically-change-its> [<https://perma.cc/23J4-ZQ66>]. However, this settlement did not shut down Musical.ly, which rebranded itself as the monumentally popular app TikTok.

300. A 2018 settlement between the FTC and VTech is another example of a large international corporation being given a slap on the wrist by federal regulators. See *Electronic Toy Maker VTech Settles FTC Allegations that It Violated Children's Privacy Law and the FTC Act*, FED. TRADE COMM'N (Jan. 8, 2018), <https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated> [<https://perma.cc/KP2U-YATZ>]. There the FTC settled with VTech, a multi-billion-dollar electronic manufacturing company based out of Hong Kong, for \$650,000 after it allegedly "failed to provide direct notice to parents or obtain verifiable consent from parents concerning its information collection practices as required under [COPPA]." *Id.*

301. CHOPRA, *supra* note 233, at 7.

302. *Id.* at 1.

303. *Id.* at 3 ("Google claims that they 'have always been clear that YouTube has never been for people under 13.' The facts suggest that the opposite is true. Google curates a vast collection of content on YouTube channels that is clearly aimed at kids." (citing Mark Bergen, *YouTube Videos Aimed at Kids Are the Most Popular*, *Pew Finds*, BLOOMBERG (Aug. 30, 2019, 9:26 AM), <https://www.bloomberg.com/news/articles/2019-07-25/youtube-videos-aimed-at-kids-are-the-most-popular-pew-finds> [<https://perma.cc/E2H4-FZ5L>])).

and its parent company, Google, used that information to create psychological profiles of underage users to determine what ads would be most persuasive to them.³⁰⁴ This was a “business decision” on behalf of YouTube and Google, made to maximize profit from YouTubers’ videos over concerns for children’s privacy.³⁰⁵ While content creators may reap benefits from behavioral advertisements though monetization of their videos, it is YouTube that is in control of the data collection. Despite that imbalance in *who* is collecting data, the FTC determined that content creators should be liable for any of their videos that might attract a child audience.³⁰⁶

COPPA was designed to regulate websites, not independent content creators within a website.³⁰⁷ Moving forward, the FTC should require YouTube—which is profiting off of data collection from child-viewers—to take measures to monitor incoming videos for child-directed content. For instance, YouTube could flag all videos promoting children’s toys and ensure that no behavioral data is collected from users who watch those videos. Because YouTube alone profits off data collection, limiting the information it collects but maintaining ads can bring it in compliance with COPPA without sticking it to content creators. With ads still on their videos, content creators can generate income without turning to more deceptive embedded advertisements. If YouTube wants to create consequences for creators who deceptively advertise on their site, then it can do so by warning them, removing videos, or blocking them all together. The FTC, however, should not take on the responsibility of penalizing creators who are at a disadvantage in understanding the complex regulatory language of COPPA.³⁰⁸

The Commissioners who are in favor of the YouTube settlement argue that it indeed requires a lot on behalf of the company, by forcing YouTube to disgorge all of its advertising profits from videos that it

304. *Id.*

305. *Id.* at 7 (“Google and YouTube made a business decision to allow behavioral advertising without human review. The settlement’s provisions requiring a function for content creators to disclose whether the content is child-directed may have the perverse effect of allowing Google to pin the blame on content creators, even when they already know when YouTube videos are clearly for children.”).

306. SIMONS & WILSON, *supra* note 292, at 1.

307. See 15 U.S.C. §§ 6501(2), 6502(a)(1) (regulating “operators” of websites, which are defined as whoever collects and maintains personal information about users of the website).

308. YouTube does have an annual COPPA training for employees, but it is unclear what that training consists of, and it does not extend to content creators. See *generally* Simons, *supra* note 291, at 2–3 (“YouTube must provide annual training about complying with COPPA for employees who deal with channel owners.”).

knew were directed at children and “create a system for self-designation of child-directed content and train employees about that system and about COPPA’s requirements overall.”³⁰⁹ They claim that other large online companies like Twitter and Facebook do not have to implement such systems, so YouTube’s punishment was uniquely harsh.³¹⁰ In pointing to these other companies, the Commissioners state that the settlement will create a “ripple effect” in the industry that will lead other companies to also rethink COPPA compliance.³¹¹ That is not the only way it could shake out; large companies with individual content creators may see this settlement as permission to create moderate controls for child data collection then leave it to their creators to do the rest.

The settlement’s establishment of content creators as independent companies disrupts COPPA’s safe harbor structure. COPPA’s safe harbor programs, like CARU, are more effective if utilized by one larger organization than innumerable individual content creators. CARU works with individual companies to ensure their advertisements comply with COPPA.³¹² CARU is a membership-supported organization.³¹³ It would be unreasonable to require content creators, acting as independent companies, to pay CARU. Such a requirement would likely cause many YouTubers to shut down their channels. It would be similarly unreasonable to require CARU to oversee so many channels. Doing so could overrun the organization’s quasi-adjudicative structure.³¹⁴ Though there are many problems with CARU’s operating structure, it is still the leading safe harbor program that addresses children’s advertisements. As long as CARU is the standard, its emphasis on self-regulation would be more feasible for larger companies than smaller ones with fewer resources.

309. SIMONS & WILSON, *supra* note 292, at 3.

310. *Id.* at 3–4.

311. *Id.* at 4.

312. See *COPPA Safe Harbor Services*, *supra* note 87.

313. See *Children’s Advertising Review Unit*, BBB NAT’L PROGRAMS, <https://bbbprograms.org/programs/all-programs/children’s-advertising-review-unit> [<https://perma.cc/BG8V-K4FJ>] (featuring the logos of many large companies identified as “CARU Supporters”).

314. Letter from Wayne J. Keely, CARU Dir., to Donald S. Clark, Sec’y, FTC, CARU’s Request for Commission Approval of Continuance of Safe Harbor Status (Apr. 2, 2012), <https://www.ftc.gov/system/files/attachments/press-releases/revise-childrens-online-privacy-protection-rule-goes-effect-today/130701carusafeharborapp.pdf> [<https://perma.cc/D68N-5PEQ>].

B. THE FTC SHOULD FOCUS ON REGULATING EMBEDDED ADVERTISEMENTS

The FTC's settlement with YouTube focused on how videos would be categorized rather than diving into the reason for categorization: content. Embedded advertisements within the content of videos are difficult for parents to control on their own and are currently unchecked by programs like YouTube Kids.³¹⁵ If the FTC ignores the role embedded advertisements play in children's content, it will miss the purpose of COPPA.³¹⁶

Embedded advertisements are already on the FTC's radar but only as they apply to adult consumers.³¹⁷ The FTC has raised flags about "advertising and promotional messages that are not identifiable as advertising."³¹⁸ It warns against deceptive advertising techniques that "capture the attention and clicks of ad-avoiding consumers."³¹⁹ Ad-avoiding consumers fall into the general category of "reasonable consumer"—the benchmark for determining if an embedded advertisement is deceptive.³²⁰ Reasonability varies based on an advertisement's targeted audience.³²¹ Framed this way, embedded advertisements could be regulated differently for child audiences.³²² The FTC's settlement with YouTube, however, fails to address that concern.

YouTube currently invests in artificial intelligence that automatically flags content that violates its rules and community guidelines.³²³ YouTube's CSAI (Child Sexual Abuse Imagery) technology specifically

315. See *supra* Part I.D (discussing embedded advertisements).

316. See *supra* Part I.B (providing an introduction to COPPA).

317. See *generally* FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS (2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [<https://perma.cc/JR2C-76F9>].

318. *Id.* at 1.

319. *Id.* at 2.

320. *Id.* at 10 ("Deception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material.").

321. *Id.* at 12.

322. *Id.* (citing Press Release, Fed. Trade Comm'n, Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising (Oct. 21, 1970), www.ftc.gov/system/files/documents/public_statements/288851/701021tvad-pr.pdf [<https://perma.cc/RZ6C-C62L>]).

323. See, e.g., *YouTube Community Guidelines Enforcement*, *supra* note 272; *Protect Your Content and Online Community from Child Exploitation Videos*, YOUTUBE, <https://youtube.com/csai-match> [<https://perma.cc/G9DB-LFGQ>].

targets online child exploitation videos,³²⁴ which are unarguably more harmful than advertisements. These sorts of videos should be flagged and removed as fast as possible, and it is responsible of YouTube to invest in technology that combats such online abuse. But since that technology exists, it could be expanded further to look out for embedded advertisements.

Using artificial intelligence to pick up embedded advertisements in children's videos may cut against the FTC's reasonable consumer standard.³²⁵ It is likely more difficult to develop artificial intelligence that reasons like a child would reason than technology that picks up on objectively exploitative images (such as CSAI). Perhaps then, a screening approach to embedded advertisements in children's videos should move away from the reasonability standard and toward an objective standard. If any embedded advertisements are present in videos, not just those that a child may be deceived by, the video should be flagged. Content creators would not be required to take down their flagged videos. Instead, parents would be presented with an option to hide videos with embedded advertisements.³²⁶

This system aligns with COPPA's goals by giving parents more control over their children's online experience. It is also feasible because it utilizes image-identifying technology that already exists, rather than requiring the development of a more complex reasoning program. The following Section offers an example of such ad-detecting technology.

C. DEVELOPING TECHNOLOGY TO DETECT DECEPTIVE ADVERTISING

Ryan Kaji's channel has made strides, moving away from the toy reviews that made it famous and toward educational material. There are many merits to the work that Ryan and his parents are doing, and his friendly appeal is immediately evident. But Ryan's benign charm does not negate the negative implications of deceptive advertisements that target preschoolers. This could be curbed if YouTube developed a version of its CSAI technology to monitor for advertising within videos.

Advertisement-detecting technology, or AD tech, would work by flagging every "toy reveal" video and determining whether it was

324. *Protect Your Content and Online Community from Child Exploitation Videos*, *supra* note 323.

325. *See supra* note 320 and accompanying text (establishing a reasonable consumer standard for determining whether an advertisement is deceptive).

326. YouTube Kids already provides numerous toggles for parents to customize their child's experience with the platform. *See supra* Part I.F.

sponsored by the toymaker. Currently, content creators like Ryan have to label explicit advertisement videos with “#ad” and a short disclaimer before the video plays.³²⁷ They do not need to label every toy that he plays with in videos as being advertisements. While plenty of those videos are benign, some may be sponsored.³²⁸ Sponsored content could be detected by searching for promotional language within videos or by comparing *who* the YouTuber is with *what* they are selling. For instance, if a ten-year-old makes a video of themselves playing with a toy marketed toward toddlers, then that video is likely sponsored. AD tech would sort all sponsored content into a specific category that could then be shut on and off by parents through the YouTube Kids application.³²⁹ Ideally, AD tech’s sponsored content categories could then be toggled by users on the general YouTube site to create more user-control.

Opponents of AD tech might argue that identifying sponsored ads and creating an option to block them could cause content creators to lose money. Any costs, however, are worth it for COPPA compliance. AD tech will fulfill some of COPPA’s mission of putting control over Internet experiences back into the hands of parents.³³⁰

D. LEGISLATIVE SOLUTIONS

There is already bipartisan support for protecting children from being taken advantage of online.³³¹ One of the significant legislative proposals already made is the establishment of a private right of action under COPPA.³³² A private right of action would allow parents to directly enforce their children’s rights under COPPA. The downside of such a provision is that it may limit who can bring these actions to families with means to afford a lawsuit. Such a downside could be avoided if fee-shifting provisions are included.

Legislation could also clear up the confusion around what constitutes a website under COPPA. As it currently stands, YouTube channels are considered individual websites within the larger platform.

327. *E.g., Ryan’s World, supra* note 264.

328. It is highly unlikely that Ryan would choose to play with a toy made for toddlers, but he does so in some of his sponsored videos.

329. Though it may seem like a lofty task to develop this sort of artificial intelligence software, it will probably cost less than \$230 million—the amount of YouTube’s settlement with the FTC.

330. Surely there are parents out there who have no problem with their children viewing embedded advertisements in videos. That is entirely fine. The AD tech solution simply turns that into a choice.

331. *See supra* Part I.B.3.

332. *See* Castor Introduces Kids PRIVCY Act To Strengthen COPPA, *supra* note 25.

Because channels are treated as websites, their owners can be found liable for COPPA violations. New COPPA legislation should designate platforms like YouTube as wholly or primarily liable for content by specifically excluding channels from being treated like websites. YouTube can avoid being liable for any COPPA violations by content creators by simply removing those channels from its platform.

Finally, legislation could specifically include embedded advertisements as COPPA concerns. The goal of new legislation, and of all the proposed solutions in this Part, is to clarify types of control over children's Internet experiences. Parents should have control over what advertising materials their children are exposed to. YouTube should have control over, and responsibility for, content hosted on its platform.

CONCLUSION

The Children's Online Privacy Protection Act was created to give parents control over their children's online experiences. YouTube violated COPPA by collecting online data from children and using that data for behavioral advertising. YouTube also did little to ensure that content was child-friendly, instead focusing on the bottom line: ad revenue. Ad revenue presents in two primary ways: behavioral advertisements, which are easier to detect, and embedded advertisements within the videos themselves. The two types of advertisements are highlighted by the YouTube channel Ryan's World, by which a kidfluencer (and his parents) are amassing a fortune through behavioral advertising revenue and by partnering with sponsors to "review" their products. These product sponsorships take the form of embedded advertisements, which are especially difficult for young viewers to judge because they do not know if the review is a genuine opinion or a paid advertisement. A 2019 settlement between the FTC and YouTube purported to remedy the COPPA violations but did so by putting pressure on content creators and sparing the platform from future liability.

The FTC should require YouTube to account for embedded advertisements in children's videos and prevent content creators from profiting from deceptive advertising. In doing so, it should relieve content creators from the newly established COPPA liability that they are facing and disincentivize deceptive advertising. There is no question that children will use technology; it is a matter of protecting them from being taken advantage of by deceptive advertising. Hopefully, these changes will be bolstered by legislative action and create a more transparent online world for children like my nephew Theo to grow up with.