Statement of Commissioner Noah Joshua Phillips
FTC v. HyperBeard, Inc., et al
Matter No. 1923109

June 4, 2020

I commend Federal Trade Commission staff for their work investigating and resolving this matter. Given the violations at issue, the harm to consumers, and how we have approached other COPPA cases, my view is that the fine imposed today is too much; and so I dissent.

The recent push to heighten financial penalties—even where the law permits only equitable relief[1]— has been relentless, without clear direction other than to maximize the amount in every case. That may create the appearance of being "tough", but it runs the risk also of being inconsistent and, in some cases, unfair or even counterproductive. That is particularly so in the context of consumer data privacy, and this is not the first time we have confronted the difficulty of getting such penalties right.[2]

HyperBeard, Inc. (HyperBeard) is alleged to have violated the Children's Online Privacy Protection Act (COPPA), which requires, *inter alia*, that online services directed to children and wishing to collect covered information about them must publicly disclose their collection practices; provide direct notice to parents; and obtain verifiable parental consent for the collection, use, or disclosure of the information.[3] According to the Complaint, HyperBeard allowed third-party ad networks to collect information (in the form of persistent identifiers) from the users of its child-directed apps, and those networks in turn served those users with behavioral advertisements using the information collected. HyperBeard permitted that collection without disclosing it or obtaining verifiable parental consent. Pursuant to the COPPA Rule, amended in 2012 to add, among other things, persistent identifiers to the information covered under COPPA,[4] HyperBeard's failures to disclose and obtain consent are violations of law subject to civil penalties under 15 U.S.C. § 45(m).

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[1] The routine description of the need for equitable monetary (and other) relief in terms of penalizing wrongdoers and achieving specific and general deterrence, *see, e.g.*, Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of Progressive Leasing, LLC*, Matter No. 1823127 (Apr. 20, 2020), neglects the legal difference between equitable relief and penalty. Failing to recognize and give credence to that difference runs the risk, among other things, of weakening the suite of relief available to the Commission under Section 5. *Cf.* Kokesh v. SEC, 137 S. Ct. 1635 (2017) (applying penalty statute of limitations period to use by Securities and Exchange Commission of disgorgement remedy, where equitable remedy operated as penalty).

[2] Separate Statement of Commissioner Noah Joshua Phillips, *United States of America and People of the State of New York v. Google LLC and YouTube, LLC*, Matter No. 1723083 (Sept. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1542943/phillips_google_youtube_statement.pdf.

[3] *See* 15 U.S.C. § 6502(b); *see also* 16 C.F.R. § 312.4(b), (d); § 312.5(a)(1).

[4] Congress enacted COPPA to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personally identifiable information from children on the Internet. It gave the Commission responsibility for promulgating a regulation under COPPA, and for enforcing it. The COPPA Rule went into effect in 2000. Among other things, it required Web site operators to obtain verifiable consent from parents before collecting personal information from their children. In December 2012, the FTC revised the COPPA Rule's definition of personal information to include "persistent identifiers", such as IP addresses and mobile device

That statute lays out the factors courts (and, by extension, the Commission) must consider in seeking a penalty under COPPA:

1) The defendant's degree of culpability;
2) The history of prior similar conduct by the defendant;
3) The defendant's ability to pay;
4) The effect on the defendant's ability to continue to do business; and
5) Such other matters as justice may require.[5]

Evaluating a district court's award under this test, the U.S. Court of Appeals for the Seventh Circuit recently advised that "the best way [to ensure that a penalty is within a constitutionally allowable range] is to start with harm rather than wealth", noting that, "[n]ormally the legal system bases civil damages and penalties on harm done".[6] So, while we must consider more than just harm in fashioning a penalty under COPPA, we cannot ignore it.

The role of harm in fashioning penalties is well-trod ground. The economics literature counsels that basing penalties on harm (adjusting upward based on the likelihood of detection) forces defendants to internalize the costs their behavior imposes on others, orienting conduct in a socially beneficial fashion.[7] That aligns with our basic intuitions of justice. As I wrote in my concurring statement in *U.S. v. Google, LLC and YouTube LLC*, another COPPA case, common sense dictates that we punish more that which threatens more harm.[8]

What is the harm in this case? As in the *YouTube* case, rather than seeing contextual advertisements, HyperBeard app users (children, we presume) viewed advertisements based on the collection of persistent identifiers. Under the COPPA Rule, that is something;[9] but it is not

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identifiers that can recognize users over time and across different websites or online services. 16 C.F.R. § 312.2. Liability in this case rests entirely on that rule amendment.

[5] 15 U.S.C. § 45(m)(1)(C).

[6] *U.S. v. Dish Network, L.L.C.*, No. 17-3111, slip op. at 16 (7th Cir. Mar. 26, 2020).

[7] *See, e.g.*, Gary S. Becker, Crime & Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 474-79 (2004); Mitchell A. Polinsky & Steven Shavell, Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?, 10 J.L. ECON. & ORG. 427 (1994); Louis Kaplow, Optimal Deterrence, Uninformed Individuals, and Acquiring Information about Whether Acts are Subject to Sanctions, 6 J.L. ECON. & ORG. 93 (1990). *See also* Richard Craswell, "Deterrence and Damages: The Multiplier Principle and Its Alternatives," 97 MICH. L. REV. 2185 (1999).

[8] Separate Statement of Commissioner Noah Joshua Phillips, *supra* note 2.

[9] We are in the midst of a robust national debate about the collection, use, and transmission of data about people. There are many concerned about the practice of behavioral advertising, including some of my colleagues. *See, e.g.*, Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of Google LLC and YouTube, LLC*, File No. 1723083 (Sept. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf. Readers should note, however, that there are many potential benefits to behavioral advertising, including reduced consumer search costs and consumers seeing fewer ads. *See* Yan Lau, *A Brief Primer on the Economics of Targeted Advertising*, ECON. ISSUES PAPERS, BUREAU OF ECON., FED. TRADE COMM'N at 5-6 (Jan. 2020), https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted- advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf.

everything. The Complaint does not allege, for instance, that HyperBeard shared sensitive personal information about children, or publicized it. Nor does it allege that children were exposed to unauthorized contact from strangers, or otherwise put in danger. Harms like those are understandably frightening, and they played a critical role in animating Congress to pass COPPA in the first place.[10]

Consider another recent COPPA case, against Musical.ly, operators of the popular social network TikTok.[11] The defendant paid a $5.7 million fine, at that point the largest COPPA penalty ever assessed. In that case, the app allowed children, who made up a significant percentage of TikTok's 65 million registered U.S. users, to establish public accounts that shared sensitive personal information and allowed them to receive direct messages; indeed, there were many public reports of adults trying to contact children via TikTok. The defendant, Musical.ly, exhibited considerably more culpability, too. The company was well aware of complaints from parents that children were creating accounts without permission; and, in some cases, even when closing an account in response to a complaint, the company failed to delete a child's personal information from its servers. Musical.ly also sent messages to popular users who appeared to be under 13 instructing them to edit their profiles to indicate that the accounts were being run by an adult, but took no steps to verify that the person responding was, in fact, an adult.

HyperBeard is not Musical.ly, KleptoCats and the other HyperBeard productions are not TikTok, and this case is not that one. As charged in the Complaint, HyperBeard violated the COPPA Rule by collecting the persistent identifiers of users presumed to be children without adequate disclosure and authorization. Those data were then used to serve users with behavioral ads. That is the extent of the harm. The Complaint does not allege that HyperBeard is a recidivist; as the Chairman's statement notes, the company is unable to pay; and, in my opinion, other factors suggesting a comparable degree of culpability are absent. All of that ought to matter, a lot. In my view, given the difference in harms alleged and the other statutory factors, HyperBeard warranted a substantially lesser penalty than that assessed in *Musical.ly*.

In *YouTube*, I wrote that, as Congress considers consumer data privacy legislation, it should consider consumer harm and, in particular, how any penalty relates to the concept of harm.[12] There is an important reason for that, as this case demonstrates. Many violations of data privacy statutes on the books today—including COPPA—regulate conduct that does not involve a great deal of harm, at least as harm is traditionally considered.[13] (As noted above, COPPA violations

[10] *See* 144 CONG. REC. S11,657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

[11] FTC Press Release, *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law* (Feb. 27, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc.

[12] Separate Statement of Commissioner Noah Joshua Phillips, *supra* note 2.

[13] The Chairman's statement relies in substantial part on the fact that the civil penalties penalize conduct proscribed by Congress. That is true to some extent, but it omits an important detail. Congress delegated to the FTC to define information covered under COPPA. 15 U.S.C. § 6501(8). Well over a decade after Congress legislated, this agency used that power to adopt a rule that included persistent identifiers among the information covered under the statute. Only at that point did the conduct at issue here become illegal. The COPPA Rule is the operative law, but Congress did not itself deem the conduct at issue here to be harmful.

also do reach conduct that is more obviously harmful.) But the underlying kind of conduct at issue in our YouTube case, and here—the collection, use, and disclosure of non-sensitive personal information—is endemic to the economy. It goes on everywhere. And it is numerous. That is, any time there is a violation of the kind here, there are likely to be *a lot* of violations. To the extent the number of violations bears on the penalties assessed, that creates the prospect—in data privacy cases categorically and more so than in many other contexts—of routine and overwhelming penalties, and inconsistent ones at that. (Given the endemic quality of the utilization of data, it also raises the specter of selective prosecution.) So making harm a more central consideration in the calculation of privacy penalties is useful to direct law enforcement, to avoid drastic over-penalization, and to ensure penalties fit the violations.

The point is not to immunize that which is illegal from penalties. We must, however, think about penalties in terms of what is being penalized. It is illegal to speed and illegal to steal. But we don't penalize those two the same way, nor do we ignore the difference between driving 76 miles per hour and driving 103; or between stealing $100 and $100 million. To do so would be perverse, both from the perspective of justice and social consequences. As we recognize even in the context of criminal law, the costs necessary to achieve complete deterrence of every kind of legal violation would impose such a burden that society should not bear it.[14] Consistent with the statutory instruction, just as harm should not be the whole of the discussion, neither should deterrence.[15]

As I said in the *YouTube* case, Congress should pay attention to how the FTC is approaching monetary relief, including civil penalties, especially in privacy cases. In this case, at least, I fear we got it wrong; and so I respectfully dissent.

[14] *See* Becker, *supra* note 7 at 180-81 (noting that increasing punishment severity decreases the number of offenses, but that the cost of imposing these severe punishments may be extremely high).

[15] I agree wholeheartedly with the Chairman's comment about the number of non-monetary forces that can combine to deter illegal conduct.