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

September 4, 2019

Today we announce the settlement with Google LLC and YouTube, LLC ("the defendants") of an action under the Children's Online Privacy Protection Act of 1998 ("COPPA"). I voted in favor of this complaint and settlement because I believe that the defendants' collection and use of persistent identifiers from users that viewed child-directed videos on YouTube, as alleged in the complaint, violates the letter of the law as set forth in the amended COPPA Rule. This settlement includes injunctive relief as well as $170 million in monetary relief, which, as Chairman Simons and Commissioner Wilson note in their statement, exceeds defendants' gains from their unlawful collection of persistent identifiers.

I write separately to call attention to a matter of great interest to me – the calculation of civil penalty amounts in privacy cases, where harm is often difficult to quantify. As Congress contemplates privacy legislation that may include civil penalties, it should consider this case.

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 Federal Trade Commission ("FTC") 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 identifiers that can recognize users over time and across different websites or online services.[1]

As set forth in the Commission's complaint, the defendants provide a video-sharing platform on the Internet at www.youtube.com and on mobile applications (collectively, "YouTube"). Users that wish to upload and share content on YouTube create a channel to display their content. Eligible channel owners, which include commercial entities, can monetize their channel by allowing the defendants to serve advertisements to viewers. Behavioral advertising, which is advertising specifically tailored to users based on tracking their Internet activity, is enabled by default on YouTube's monetized channels. In order to serve behavioral advertising on these channels, the defendants collect the user's persistent identifier in order to track the user's online activities and serve advertising tailored specifically to the user's inferred interests. When a channel owner opts out of behavioral advertising on a monetized channel, the defendants instead serve contextual advertising, which generates less revenue for the channel owner and the defendants.

[1] *See* FTC Press Release, *FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information By Amending Children's Online Privacy Protection Rule*, (Dec. 19, 2012) https://www.ftc.gov/news-events/press-releases/2012/12/ftc-strengthens-kids-privacy-gives-parents-greater-control-over. *See also* 16 C.F.R. § 312.2 (defining personal information to include persistent identifiers).

In the case before us, the defendants collected the persistent identifiers of users visiting child-directed websites, and tracked their online activity in order to serve behavioral advertising. The Commission's COPPA Rule covers such information, and special protections to ensure the privacy of children make sense. The prohibited harm in this case isn't children accessing content on the YouTube platform. The harm isn't that children are served advertising on the YouTube platform. They are served advertising regardless. The harm is that, rather than viewing contextual advertising, children see behavioral advertising based on the collection of persistent identifiers prohibited by COPPA.

While often discussed in other terms, much of the economic activity at the heart of the present national debate about consumer privacy involves building profiles about or serving behavioral advertising to individuals who are not particularly vulnerable, as kids are. This conduct is endemic in our modern economy. Congress should consider how the injunctive and monetary relief in this case, in particular the penalties imposed, would look when applied to such conduct in situations where children are not implicated.

In determining a civil penalty amount for a violation of a rule, the Commission is guided by the civil penalty factors set forth in Section 5(m) of the FTC Act: the degree of culpability; any history of prior such conduct; ability to pay; effect on ability to continue to do business; and such other matters as justice may require.[2] Although this framework does not explicitly identify consumer harm as a factor to be considered in determining civil penalty amounts, I believe that under the final prong of this framework – "such other matters as justice may require" – the Commission also should consider the actual harm experienced by consumers as a result of the defendants' conduct. A substantial body of economic literature supports the consideration of harm in the fashioning of penalties.[3] Common sense also dictates that we punish more that which threatens more harm.

Improperly calibrated penalties can deter companies from exploring innovative and consumer-friendly products and services; the risk may simply be too great. Even properly calibrated enforcement can impose costs. While the injunctive relief in this settlement will ensure that Google and YouTube comply with the COPPA Rule, it also will curtail behavioral advertising for child-directed programming. Because behavioral advertising generates more revenue than contextual advertising, our order may reduce content creators' incentives to develop child-directed programming. While kids may see advertising less tied to their Internet activity, they

[2] 15 U.S.C. 45(m)(1)(C).

[3] That the state should set penalties equal to harm (inflated by a factor to account for lack of perfect detection and prosecution) to maximize welfare is a standard result in economics dating back at least to Nobel Laureate Gary Becker's seminal work. *See* Gary S. Becker, *Crime & Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). The intuition behind this result is that setting penalties equal to harm forces actors to internalize the external costs they foist on society, which creates incentives to engage only in activities that generate net social benefits. *See, e.g.*, 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).

may also see less and lower quality content. In this case, this result is justified by COPPA, which is intended to safeguard children, who deserve special protection.

The privacy legislation Congress is now considering may address many privacy harms that not only result in little to no tangible consumer harm, but also are not experienced by a vulnerable class such as children. To account for the impact penalizing such harms may have, I believe that the Commission should consider consumer harm and that any penalty scheme crafted by Congress should balance a range of factors, including consumer harm, to permit the innovation and choice many consumers want.