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## COPPA KILLED THE VIDEO STAR: HOW THE YOUTUBE SETTLEMENT SHOWS THAT COPPA DOES MORE HARM THAN GOOD

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### ❖ ARTICLE ❖

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## I. INTRODUCTION

The Children’s Online Privacy Protection Act of 1998<sup>1</sup> (“COPPA”) purportedly protects children on the internet,<sup>2</sup> but the reality is that the law is woefully ineffective at this goal and yet terribly burdensome for website operators (and now, people who upload silly videos to YouTube). The Federal Trade Commission (“FTC”), the agency tasked with enforcing COPPA,<sup>3</sup> announced a whopping \$170 million settlement with YouTube in September 2019,<sup>4</sup> with a message that focused more on bragging about the unprecedented size of the financial sum than any tangible benefit the settlement would provide for the well-being of children on the internet.<sup>5</sup> The settlement marks a shift in COPPA enforcement in which the FTC will begin targeting website users rather than the website itself.<sup>6</sup>

This note will argue that, after two decades and countless changes in society and the digital landscape,<sup>7</sup> it is time to completely rethink COPPA and replace it with a more workable and effective piece of legislation. Part II discusses the background of COPPA and the settlement between YouTube and the FTC. Part III analyzes the failures of COPPA using the YouTube settlement as a case study. Part IV proposes a solution which better serves the stated goals of COPPA while both expanding privacy protections and lowering the overall burden on website operators. Part V will conclude.

## II. BACKGROUND

### A. History of COPPA

COPPA was passed in response to growing concerns throughout the 1990s about the safe use of the internet by children.<sup>8</sup> In particular, COPPA was aimed at “(i) [the] overmarketing to children and collection of personally identifiable information from children that is shared with advertisers and marketers, and (ii) children sharing information with online predators

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1. 15 U.S.C. §§ 6501–05 (2018).

2. Anita L. Allen, *Minor Distractions: Children, Privacy and E-Commerce*, 38 HOUS. L. REV. 751, 767 (2001) (“COPPA was designed to protect the informational privacy of children and their families from excessive and unwanted disclosures of personal information.”).

3. 15 U.S.C. § 6505(a) (“Except as otherwise provided, this chapter shall be enforced by the [Federal Trade] Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.)”).

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

5. *FTC Press Conference on Settlement with Google / YouTube*, FED. TRADE COMM’N (Sep. 4, 2019) [hereinafter *Press Conference*], <https://www.ftc.gov/news-events/audio-video/video/ftc-press-conference-settlement-google-youtube> (“The \$170 million judgment is thirty times larger than the largest COPPA civil penalty the FTC has ever previously obtained. It is three times larger than any privacy penalty assessed against Google anywhere else in the world. And it is ten times larger than the civil penalties we have obtained in all of our thirty-one prior COPPA cases combined.”).

6. The FTC notes that this is the first time a *platform* has been liable for the content its users post, but, as a result of the settlement holding YouTube liable as a platform, the FTC will begin directly targeting YouTube users. *Id.*

7. Lauren A. Matecki, Note, *Update: COPPA Is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J. L. & SOC. POL’Y 369, 370 (2010) (“Ten years after the passage of COPPA, the landscape of the Internet, particularly with regard to children and adolescents, has changed dramatically.”).

8. Matecki, *supra* note 7, at 369.

who could use it to find them offline.”<sup>9</sup> COPPA was implemented by the FTC through its Child Online Privacy Protection Rule,<sup>10</sup> which took effect April 21, 2000.<sup>11</sup>

In general, COPPA regulates the collection of personal information from children and applies to websites<sup>12</sup> “directed to children” and those whose operators have “actual knowledge” of child users.<sup>13</sup> Children are identified as individuals under the age of thirteen.<sup>14</sup> The five key requirements of the act are notice, parental consent, parental review, security, and limits on the use of games and prizes.<sup>15</sup> In order to legally collect covered personal information from a child, a website operator must first obtain “verifiable parental consent” in a form that varies based on the intended use of the information.<sup>16</sup> The FTC’s most recent amendments to the COPPA rule took effect in 2013 and clarified that the regulations are applicable to web services and mobile apps and that “personal information” includes geolocation data, device identifiers, and media containing the voice or image of a child.<sup>17</sup>

### B. YouTube COPPA Violation Settlement

In September 2019, the FTC, acting with the Attorney General of New York, announced that it reached a settlement with YouTube and parent company Google in response to allegations that the services “illegally collected personal information from children without their parents’ consent,” in violation of COPPA.<sup>18</sup> The companies agreed to pay \$34 million to New York and \$136 million to the FTC, the latter penalty being “by far the largest amount the FTC has ever obtained in a COPPA case since Congress enacted the law in 1998.”<sup>19</sup>

The complaint lodged against YouTube accused the company of using persistent identifiers to track users across the internet, collecting data which fell within the definition of

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9. Melanie L. Hersh, Note, *Is COPPA a Cop Out? The Child Online Privacy Protection Act as Proof That Parents, Not Government, Should Be Protecting Children’s Interests on the Internet*, 28 *FORDHAM URB. L.J.* 1831, 1854 (2001).

10. 16 C.F.R. § 312 (2020).

11. Hersh, *supra* note 9, at 1854.

12. Though this note will primarily refer to “websites,” the law also applies to web services and mobile apps. *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM’N (Mar. 20, 2015) [hereinafter *COPPA FAQ*], <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions> (“The Rule applies to operators of commercial websites and online services (including mobile apps) . . .”).

13. 16 C.F.R. § 312.3 (2020) (“It shall be unlawful for any operator of a Web site [sic] or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under this part.”).

14. *Id.* § 312.2.

15. Laurel Jamtgaard, *Big Bird Meets Big Brother: A Look at the Children’s Online Privacy Protection Act*, 16 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 385, 388 (2000).

16. 16 C.F.R. § 312.5 (“An operator is required to obtain verifiable parental consent before any collection, use, or disclosure of personal information from children, including consent to any material change in the collection, use, or disclosure practices to which the parent has previously consented.”); Matecki, *supra* note 7, at 377–78 (footnotes omitted) (“[T]he Rule enacts what is referred to as a ‘sliding scale’ of consent; that is, the efforts that website operators must take to ensure that parental consent is legitimate are proportional to the degree to which the personal information will be used. Under this test, e-mail verification of parental consent is justified when the website operator does not provide information to third parties, but a ‘higher’ method of consent (such as a print and mail form) would be necessary for activities that could pose a greater risk to children.”).

17. Gianna Korpita, *It’s Small World After All: How Disney’s Targeted Advertisements Implicate COPPA*, 19 *J. HIGH TECH. L.* 407, 415–16 (2019).

18. Settlement Press Release, *supra* note 4.

19. *Id.*

“personal information” under COPPA.<sup>20</sup> YouTube ran afoul of the law because it never obtained parental consent to collect this information, even though it was aware that children were using the service.<sup>21</sup> YouTube used this information to display targeted ads to users (including children), purportedly earning “millions of dollars.”<sup>22</sup>

YouTube’s noncompliance stems from positioning itself as a general audience site whose terms prohibit users under the age of thirteen.<sup>23</sup> If legitimately enforced, this would have placed YouTube outside of the scope of COPPA.<sup>24</sup> However, the FTC and New York Attorney General took issue with this assertion because certain “channels”<sup>25</sup> and videos were apparently “child-directed,” and in some instances YouTube marketed itself as a popular destination for children.<sup>26</sup> Moreover, beyond the fact that portions of the site could be deemed “child-directed,” the complaint against YouTube alleged that the site fell within the scope of COPPA because the company, per the text of the rule, had “actual knowledge that it [was] collecting or maintaining personal information from a child.”<sup>27</sup>

Pursuant to the settlement agreement,<sup>28</sup> YouTube was required to implement changes on its platform that would bring it into compliance with COPPA going forward.<sup>29</sup> The changes, which YouTube announced on the same day the FTC issued its press release,<sup>30</sup> required the company to “develop, implement, and maintain a system that requires creators<sup>31</sup> to identify their child-directed content on the YouTube platform.”<sup>32</sup> These changes went into effect in early 2020.<sup>33</sup> Marking content as “child-directed” allows YouTube to “treat data from anyone watching children’s content on YouTube as coming from a child, regardless of the age of the user.”<sup>34</sup> Accordingly, the service “limit[s] data collection and use on videos made for kids,” consistent with the minimal amount allowed by COPPA (without obtaining parental consent).<sup>35</sup> In practice, this means that YouTube no longer serves personalized ads and has removed commenting, notification, and other functionalities entirely from child-directed content.<sup>36</sup>

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20. *Id.*; Complaint for Permanent Injunction, Civil Penalties, and Other Equitable Relief at 15, *FTC v. Google LLC*, No. 1:19-cv-2642 (D.D.C. Sep. 4, 2019) [hereinafter Complaint], [https://www.ftc.gov/system/files/documents/cases/youtube\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/youtube_complaint.pdf).

21. Settlement Press Release, *supra* note 4.

22. *Id.*

23. *Id.*

24. See *supra* text accompanying notes 12–14.

25. See *infra* note 31.

26. Settlement Press Release, *supra* note 4.

27. Complaint, *supra* note 20, at 6; 16 C.F.R. § 312.3.

28. Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *FTC v. Google LLC*, No. 1:19-cv-2642 (D.D.C. Sep. 4, 2019) [hereinafter Settlement], [https://www.ftc.gov/system/files/documents/cases/172\\_3083\\_youtube\\_coppa\\_consent\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/172_3083_youtube_coppa_consent_order.pdf).

29. Settlement Press Release, *supra* note 4.

30. *An update on kids and data protection on YouTube*, YOUTUBE OFFICIAL BLOG (Sep. 4, 2019) [hereinafter *YouTube Blog Post*], <https://youtube.googleblog.com/2019/09/an-update-on-kids.html>.

31 “YouTubers,” “creators,” or “channel owners” are users who produce and upload video content onto YouTube. A “channel” is a creator’s collection of videos. *What is a YouTube Creator?*, MEDIAKIX, <https://mediakix.com/blog/what-is-a-youtube-creator-definition/> (last visited Mar. 22, 2020).

32. Settlement Press Release, *supra* note 4.

33. Todd Spangler, *What You Need to Know About YouTube’s New COPPA Child-Directed Content Rules*, VARIETY (Jan. 3, 2020), <https://variety.com/2020/digital/news/ftc-rules-child-directed-content-youtube-1203454167/>.

34. *YouTube Blog Post*, *supra* note 30.

35. *Id.*

36. *Id.*

### III. ANALYSIS

#### A. *The Requirement that Websites Segment Out Children is Ironically the Fundamental Problem with COPPA*

Ironically, virtually all of COPPA's shortcomings can be traced to its premise of singling out children. COPPA's regulations apply only to websites that knowingly cater to children, whether intentionally or not.<sup>37</sup> Websites whose content is "child-directed" are presumed to be dealing with children and must comply,<sup>38</sup> as do websites which have identified users that are children.<sup>39</sup> Therefore, a website may segment users who are subject to COPPA protections based on the age of the user or the theme of the content. Theoretically, a website may treat children and non-children differently on the same website, but, in practice, most sites exclusively cater to children (in which COPPA would apply) or bar children entirely (at least in theory, in which COPPA would not apply).<sup>40</sup>

However, many websites have a general appeal and therefore fall into a grey area: they are not necessarily intentionally directed towards children, they ostensibly prohibit children, and they ignore the reality that many children use them nonetheless.<sup>41</sup> The FTC's action against YouTube signals the agency's intent to crack down on other websites that fall into this grey area and are willfully flouting the requirements of COPPA.<sup>42</sup> But YouTube's old approach (segmenting by age, albeit in name only) and their new, settlement-mandated approach (segmenting by content) both demonstrate the flaws of singling out children in the first place.

#### 1. Segmentation by Age

Segmentation by age is, unsurprisingly, achieved by using an individual's age to classify her as a child or not and tailor the experience accordingly. As had been the policy of YouTube prior to the settlement, for a large swath of websites, the "experience" tailored to children is simply a complete bar.<sup>43</sup> Age may be discerned by asking for the user's birthdate or inferred from information such as a school grade level.<sup>44</sup> However, age segmentation is

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37. See 16 C.F.R. § 312.3.

38. *Press Conference*, *supra* note 5, at 17:06 ("Where the content is directed to children, we are presuming the users are twelve and under.").

39. 16 C.F.R. § 312.3 (identifying "any operator of a Web site [sic] or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child").

40. Matecki, *supra* note 7, at 370 ("[T]he practical effect of COPPA causes websites simply to ban users twelve and under.").

41. *Id.* at 371 (noting that "many websites operate outside of COPPA regulations by making empty attempts to ban users under the age of thirteen").

42. The FTC has previously noted circumstances in which general audience websites must comply with COPPA. See, e.g., *COPPA FAQ*, *supra* note 12 ("[COPPA] applies to operators of general audience websites or online services with actual knowledge that they are collecting, using, or disclosing personal information from children under 13.>").

43. Matecki, *supra* note 7, at 370 ("[T]he practical effect of COPPA causes websites simply to ban users twelve and under.").

44. Jamtgaard, *supra* note 15, at 395–96 (internal quotation marks omitted) ("The FTC will be on the lookout for web sites who do not ask for age but who ask for information that conveys the same idea. The FTC will examine closely sites that do not directly ask age or grade, but ask 'age identifying' questions such as what type of school do you go to: (a) elementary; (b) middle; (c) high school; (d) college.>").

often implemented simply by prompting the user to confirm she is at least thirteen or accept terms of service that stipulate the same.<sup>45</sup> Whatever the case may be, segmentation by age is hopelessly ineffective because it is arbitrary and unworkable (either by virtue of the ease with which users can falsify their age or the inordinate burden imposed by implementing a more effective solution).

First, segmentation by age is arbitrary. The basis for which Congress adopted thirteen as the age in which internet users no longer need the protections afforded by COPPA is tenuous.<sup>46</sup> Many commentators point out that teenagers (individuals between thirteen to seventeen years old) are particularly susceptible to revealing personal information on the internet, especially with the rise of social media.<sup>47</sup> Additionally, children develop and mature at different rates based on a host of factors from biological to socioeconomic.<sup>48</sup> A binary approach ignores individual circumstances and deprives both parents and children of the opportunity to make informed decisions about the information and services they wish to access.<sup>49</sup> While parents are theoretically included in the decision-making process via parental consent mechanisms, there is no option catering to parents who prefer that their children have unfettered access to the internet generally or access to specific services which prohibit children, save for the blessing to falsify parental consent or age.<sup>50</sup>

Second, most methods to segment by age are, in fact, easy to falsify. As mentioned above, the easily falsifiable age verification methods include asking for a birthdate or simply

45. Hersh, *supra* note 9, at 1869 (“To verify age, many websites merely ask a user to check a box indicating whether he or she is over the age of thirteen.”); Shannon Finnegan, Note, *How Facebook Beat the Children’s Online Privacy Protection Act: A Look into the Continued Ineffectiveness of COPPA and How to Hold Social Media Sites Accountable in the Future*, 50 SETON HALL L. REV. 827, 834–35 (2020) (noting that, instead of explicitly verifying age, Instagram’s “terms and conditions restrict the use of [its service] to users who are at least thirteen years old”).

46. Allen, *supra* note 2, at 759, 772 (footnotes omitted) (“Although the FTC states that the age of thirteen is the standard for distinguishing adolescents from young children who may need special protections, it fails to state why it assumes that only young children ‘may not understand the safety and privacy issues . . . and are particularly vulnerable.’ . . . [COPPA] draws a line of dubious justification between teenagers and ‘tweenagers.’ A number of younger children will be as able as many teenagers when it comes to circumventing the requirements of the statute. Some children under thirteen are no more or less in need of parental control than teenagers. Thus the statute seems morally arbitrary.”); Metcki, *supra* note 7, at 399–400 (“While the FTC argues that children under the age of thirteen are particularly vulnerable and in need of special protections online, the expanded abuse of young people’s personal information, along with other dangers from over-sharing online since COPPA’s enactment, have proven that such vulnerabilities are not limited to young people under thirteen. . . . Teenagers, like children, may not be able to grant meaningful consent to the use of their personal information online under the current framework.”).

47. Matecki, *supra* note 7, at 399–400 (“Given the social pressures teens face to interact online, and the prevalence of social networking sites as a means of communication, it is no longer accurate to assume that teenagers are protected from the risks of dissemination of personal information online.”); Allen, *supra* note 2, at 759 (“[O]ne study suggested that teenagers may be a bigger problem for online disclosures of private information about their households than children under thirteen.”). The FTC acknowledges that teens may need special protections as well, but the cutoff age of thirteen is fixed in the statute and cannot be changed directly by the FTC. See *COPPA FAQ*, *supra* note 12 (“Congress determined to apply the statute’s protections only to children under 13 . . . . Although COPPA does not apply to teenagers, the FTC is concerned about teen privacy and does believe that strong, more flexible, protections may be appropriate for this age group.”).

48. See generally Kimberly G. Noble, *Socioeconomic Inequality and Children’s Brain Development*, AM. PSYCHOL. ASS’N (Oct. 2016), <https://www.apa.org/science/about/psa/2016/10/socioeconomic-brain-development>.

49. Hersh, *supra* note 9, at 1858 (“[G]overnment regulation of the Internet does not allow parents to have enough control over what their children see or hear, and this kind of control has been constitutionally placed in their hands.”).

50. Allen, *supra* note 2, at 764 (“Parents cannot waive the protection entailed by certain COPPA requirements and prohibitions.”); Hersh, *supra* note 9, at 1871 (“[S]ome parents would prefer to have their children lie about their ages than to give out their credit card numbers to verify their permission, as required by COPPA.”); Amy Iverson, *Facebook and Instagram are Cracking Down on Underage Users*, DESERET NEWS (Jul. 26, 2018) <https://www.deseret.com/2018/7/26/20649741/facebook-and-instagram-are-cracking-down-on-underage-users> (noting that, with respect to Facebook, “many parents have lied for their kids to get around the age requirement and create accounts”).

prompting the user to verify she is thirteen or older.<sup>51</sup> “Best practice” suggests that these methods should prevent a user from hitting the back button and simply entering a different choice upon realizing they are too young to access the website.<sup>52</sup> Ironically, such a technique would require the website to place a persistent identifier to keep track of the user’s age and continue to block access.<sup>53</sup> Legitimate adults could be obstructed from using the website if they inadvertently clicked the wrong option when attempting to sign up. However effective such methods would be in restricting children from particular sites (tech-savvy children can simply clear their cookies and try again), children will quickly learn that they can simply falsify their age when signing up on websites in the future.<sup>54</sup> Similarly, children will easily figure out how to circumvent parental consent mechanisms that ask for a parent’s email address to obtain consent.<sup>55</sup> These ineffective verification mechanisms are the basis for the prevalence of websites that are purportedly restricted to users thirteen or older yet teeming with children; these sites are effectively compliant with COPPA if it cannot be proven that the operators have “actual knowledge” of their very real child users.<sup>56</sup>

Third, methods that more effectively verify age are unduly burdensome. Accurately verifying a user’s age and verifying parental consent are essentially the same problem: the information must be authenticated such that it is virtually impossible for a child to falsify or circumvent.<sup>57</sup> In the context of parental consent, the FTC originally proposed verification by means of a signed form that was mailed or faxed, a phone call, or a credit card transaction.<sup>58</sup> However, these methods pose a significant financial burden for website operators, are slow and cumbersome for users, and actually do very little to hamper the efforts of a determined child.<sup>59</sup>

Age segmentation methods that are truly effective would require a user to present a document such as government-issued identification or provide private information that can be independently verified by a third-party agency or service—tragic irony for a regulation predicated on the importance of privacy.<sup>60</sup> If COPPA was strictly implemented and enforced based on an effective form of age segmentation on all “general audience” websites (those in a

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51. See *supra* notes 44–45 and accompanying text.

52. *COPPA FAQ*, *supra* note 12 (“[C]onsistent with long standing Commission advice, FTC staff recommends using a cookie to prevent children from back-buttoning to enter a different age.”).

53. *Id.*

54. Matecki, *supra* note 7, at 387 (“[C]ommonly used age-[s]creening methods are technologically ineffective, as computer-savvy children often know how to circumvent these attempted roadblocks.”).

55. Hersh, *supra* note 9, at 1870 (“Many children have realized that all they need to do is open an e-mail account under a parent’s name, and give permission to themselves.”).

56. Matecki, *supra* note 7, at 386–87 (footnotes omitted) (“[W]ebsites now often use age-screening methods to prohibit users under the age of twelve. . . . The ease of age falsification leads to a situation where children may share personal information on a website which seeks to operate outside of COPPA restrictions because it ‘officially’ doesn’t allow underage users.”); see also *supra* note 54.

57. Theoretically, parental consent should also confirm the relationship between the child user and her purported parent or guardian, but that particular concern was entirely lacking in the materials consulted for this note.

58. Matecki, *supra* note 7, at 377.

59. Children may be able to send in a forged form via fax or mail, call a hotline posing as their parent, obtain access to their parent’s credit card, or have a credit card of their own. Hersh, *supra* note 9, at 1871.

60. Matecki, *supra* note 7, at 400 (“Identifiers such as social security or driver’s license numbers could be used to verify age; however, the issue then becomes whether or not these extra verification measures pose an even greater risk to privacy, as websites would then be required to maintain large databases of children, teenagers’, and their parents’ most sensitive information.”); Hersh, *supra* note 9, at 1871 (footnotes omitted) (“[P]arents are not happy supplying their credit card numbers in order to verify their adult status. This exposes them to the same privacy risks as the ones from which they are trying to protect their children.”).

grey area in that they attract children as well as adults, like YouTube), all users (regardless of age) would either be required to submit a nontrivial amount of private information in a cumbersome sign-up form before using the website or sacrifice some level of functionality, compromising the prized efficiency, interactivity, and anonymity of the internet, and likely raising constitutional issues on First Amendment grounds.<sup>61</sup> Considering these issues, segmentation by age fails for being ineffective or unworkable, depending on the method.

## 2. Segmentation by Content

The various weaknesses of the “segmentation by age” approach are likely why the FTC imposed a “segmentation by content” strategy upon YouTube. However, this approach is not without its own issues. This approach, reflected in the changes prescribed by the YouTube settlement, is implemented by selectively adhering to COPPA’s data-collection regulations when the content being accessed is directed towards children.<sup>62</sup> This is effectively a hybrid approach for general audience websites that, while not child-directed as a whole, nonetheless attract children and therefore should comply with COPPA provisions on sections of the site which deliver content deemed to be “child-directed.” This is the first time the FTC has mandated such a content classification strategy.<sup>63</sup> Ultimately, this kind of segmentation is flawed because classifying content as “child-directed” is too subjective, necessarily impacts adults seeking the same content, and is a backwards approach in terms of the overall benefit to children.

First, segmentation by content is incredibly subjective and messy. The term “child-directed” suggests the standard is based on the content creator’s subjective intent to target children, but the guidelines offered by the FTC<sup>64</sup> and acknowledged by YouTube’s new approach to handling “child-directed” content<sup>65</sup> indicate this standard is actually objective, based on what children typically find attractive.<sup>66</sup> Since the “child-directed” standard is based

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61. See *infra* Part III.B.5. See also *Ashcroft v. ACLU*, 542 U.S. 656, 682–83 (2004) (footnotes omitted, emphasis added) (“In addition to the monetary cost, and despite strict requirements that identifying information be kept confidential, the identification requirements inherent in age screening may lead some users to fear embarrassment. Both monetary costs and potential embarrassment can deter potential viewers and, in that sense, the statute’s requirements may restrict access to a site. But this Court has held that in the context of congressional efforts to protect children, restrictions of this kind do not *automatically* violate the Constitution.”); *Reno v. ACLU*, 521 U.S. 844, 876–77 (1997) (footnote and citation omitted) (“As a practical matter, the Court also found that it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet.”).

62. Settlement, *supra* note 28.

63. *Press Conference*, *supra* at note 5 (noting that the settlement requires measures above and beyond COPPA which no other company is currently subject to).

64. See Kristin Cohen, *YouTube Channel Owners: Is Your Content Directed to Children?*, FED. TRADE COMM’N (Nov. 22, 2019) <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children>.

65. See *Set Your Channel or Video’s Audience*, YOUTUBE HELP (last visited May 30, 2020) <https://support.google.com/youtube/answer/9527654>.

66. The FTC provides a list of factors pertaining to characteristics of the content which are used to determine if it is child-directed, which indicates that the standard is not based on subjective intent of the creator. The FTC also suggests a heuristic which is reminiscent of a “reasonable person” objective standard: “if you’ve applied the factors listed in the COPPA Rule and still wonder if your content is ‘directed to children,’ it might help to consider how others view your content and content similar to yours.” Cohen, *supra* note 64.



on vague guidelines and not a bright-line rule, it can be difficult to determine the scope.<sup>67</sup> While websites like Club Penguin<sup>68</sup> or Webkinz<sup>69</sup> are undoubtedly made for kids, and fall squarely within the definition of “child-directed,” other websites, e.g. a breakfast cereal brand marketing site, are less obvious.

The issue becomes more pronounced when applying the “child-directed” standard to discrete pieces of content, as is necessary with this segmentation approach. It’s not hard to see how videos never intended to be for children could be ensnared by the standard.<sup>70</sup> Video games are popular among children, but they have wide appeal among adults as well.<sup>71</sup> Would a video made by an adult video game player with the expectation that it would be viewed by other adults be considered child-directed?<sup>72</sup> What about a video about Legos, suitable for ages four to ninety nine?<sup>73</sup> A new smart phone unboxing video?<sup>74</sup> Crafting tutorials or nature documentaries?

Not only does the generalization about what type of content children like overzealously captures content of general appeal, it ignores the reality that children’s interests are neither monolithic nor static.<sup>75</sup> What is interesting to some children may not be interesting to others, echoing the issues with arbitrarily defining a child as an individual under the age of thirteen in the first place.<sup>76</sup> Moreover, what is interesting to most kids today may no longer be in just a matter of months.<sup>77</sup> Additionally, content which, at first blush, appears to be “child-directed” based on the guidelines could actually be inappropriate for children. Adult-oriented cartoons

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67. The FTC admits, “[t]he determination of whether content is child-directed will be clearer in some contexts than in others.” Cohen, *supra* note 64. See also Spangler, *supra* note 33 (“even attorneys who have worked in the area for years say it’s not a clear-cut process”).

68. See Sarah Perez, *Club Penguin is Shutting Down*, TECHCRUNCH (Jan. 31, 2017) <https://techcrunch.com/2017/01/31/club-penguin-is-shutting-down/>.

69. See WEBKINZ, <https://www.webkinz.com/> (last visited Mar. 22, 2020).

70. 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> (“Some of YouTube’s most popular categories falls into a gray area for the policy, including gaming videos, family vlogging, and toy reviews.”). But see Cohen, *supra* note 64 (“First, unless you’re affirmatively targeting kids, there are many subject matter categories where you don’t have to worry about COPPA. . . . Second, just because your video has bright colors or animated characters doesn’t mean you’re automatically covered by COPPA.”).

71. See *2019 Essential Facts About the Computer and Video Game Industry*, ENT. SOFTWARE ASS’N, <https://www.theesa.com/esa-research/2019-essential-facts-about-the-computer-and-video-game-industry/> (last visited Mar. 22, 2020).

72. According to the FTC, “if your content includes traditional children’s pastimes or activities, it may be child-directed.” Cohen, *supra* note 64. Are video games a traditional children’s activity?

73. *LEGO® Large Creative Brick Box*, LEGO, <https://www.lego.com/en-us/product/lego-large-creative-brick-box-10698> (last visited Mar. 22, 2020).

74. Unboxing videos have caught the attention of lawmakers because of their appeal to children, but does that make them child-directed? See Simon Books, *YouTube Unboxing Videos for Kids Could Face New Limitations with Proposed Law*, MOMS (Mar. 8, 2020), <https://www.moms.com/youtube-unboxing-videos-new-limitations-proposed-law/>.

75. See, e.g., *Encouraging Your Child’s Interests*, LANE KIDS (Apr. 10, 2013), <https://www.lanekids.org/encouraging-your-childs-interests/>; Lauren Lowry, *What Makes Your Child “Tick”? Using Children’s Interests to Build Communication Skills*, HANEN CTR., <http://www.hanen.org/Helpful-Info/Articles/What-Makes-Your-Child-Tick-.aspx> (last visited May 30, 2020).

76. See *supra* Part III.A.1.

77. See generally Tamika S. Laldee, *Fads and Children: The Early Culture of Consumption*, SYRACUSE UNIVERSITY HONORS PROGRAM CAPSTONE PROJECTS (2006) [https://surface.syr.edu/honors\\_capstone/632](https://surface.syr.edu/honors_capstone/632) (analyzing fads among children).

and video game content that feature crass commentary are some examples which merely scratch the surface.<sup>78</sup>

Second, segmentation by content needlessly interferes with adult internet use. By making the dubious determination that a piece of content is child-directed and therefore stripped of certain functionalities for COPPA compliance, adults are universally but needlessly impacted when accessing such content.<sup>79</sup> This affects access of not only the wide range of content that is arguably not actually “child-directed” (but might be classified as such nonetheless) but also access of genuinely child-directed content. Plenty of content that is meant for kids is enjoyed by nostalgic adults.<sup>80</sup> There is little reason to prevent adults from freely consenting to the type of data collection proscribed by COPPA in connection with their interaction with content that has been classified as “child-directed,” whether accurately or not.

Third, segmentation by content based on the “child-directed” standard is arguably backwards. As a preface, COPPA’s privacy-based objective focuses on information *received from*, rather than *delivered to*, children. But use of this standard to classify content by YouTube is primarily meant to protect itself from further COPPA violations rather than provide any meaningful protection to children.<sup>81</sup> Children will still be tracked and delivered targeted ads on any other video on the platform not marked as “child-directed,” and, as discussed, the diverse interests of children will inevitably lead many to view such content anyways.

Instead of employing this new content labelling system to classify content that is *appropriate* for children, enabling filtering software to limit access to inappropriate content (admittedly a different objective), the “child-directed” standard targets only content *meant* for children (and poorly at that). Child-directed content is stripped of features to comply with COPPA, but less appropriate content is feature-rich, fully accessible to children, and still rife with the features prohibited by COPPA.<sup>82</sup> Indeed, the “child-directed” classification would be wholly ineffective if used to filter content because it might simultaneously include some inappropriate content (improperly identified as “child-directed,” as noted above) and exclude some child-appropriate content (consider, for example, a video of a classical music performance: appropriate for children but nonetheless not directed towards children).

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78. *But see* Cohen, *supra* note 64 (“While many animated shows are directed to kids, the FTC recognizes there can be animated programming that appeals to everyone.”). Also note that the classification is only between “made for kids” and “not made for kids,” so a decidedly adult video and a general audience, “all ages” video, if properly tagged, fall into the same category.

79. As indicated by YouTube in its initial statement, child-directed content will be handled consistently regardless of the age of the user. *YouTube Blog Post*, *supra* note 30 (“[W]e will treat data from anyone watching children’s content on YouTube as coming from a child, regardless of the age of the user.”).

80. *See, e.g.*, Comment to Cohen, *supra* note 64 (“What about . . . [c]artoons that are directed towards children but that may not only appeal to children[,] such as My Little Pony, which has many adult and teen fans? . . . Adults can like kid stuff too.”).

81. By implementing this system in accordance with the settlement, YouTube is able to shift the onus *and* liability of content classification onto creators. The FTC has made it clear that its attention will turn to the creators themselves. Kelly & Alexander, *supra* note 70 (“In its September order, the FTC made it clear that it could sue individual channel owners who abuse this new labeling system. Crucially, those lawsuits will fall entirely on channel owners, rather than on YouTube itself. Under the settlement, YouTube’s responsibility is simply to maintain the system and provide ongoing data updates.”). *See also* Makena Kelly, *Google Will Pay \$170 Million for YouTube’s Child Privacy Violations*, VERGE (Sep. 4, 2019, 9:41 AM), <https://www.theverge.com/2019/9/4/20848949/google-ftc-youtube-child-privacy-violations-fine-170-million-coppa-ads> (noting that FTC commissioner Rebecca Kelly Slaughter dissented to the settlement in part because “the agency requires too little of [YouTube] in disciplining creators who mislabel their content”).

82. Kelly & Alexander, *supra* note 70 (“[C]hild-directed videos will no longer include a comments section, click-through info cards, end screens, notification functions, and the community tab . . .”).

Overall, segmentation by content does little to further the supposed goals of COPPA with respect to the protection of children and instead frustrates the free use of the internet by adults.

*B. The Costs of COPPA Far Outweigh the Benefits*

The practical benefits of COPPA are, at best, questionable, but the costs are real and substantial. Since COPPA is largely ineffective because of the various issues stemming from segmenting out children, any benefits, which are debatable even under the best circumstances, are not realized by the law in practice. Yet, whether there are benefits or not, there are still enormous costs that affect children, parents, other adults, website operators, and now YouTubers.

The cost-benefit comparison is starkly apparent from the YouTube settlement. The FTC spent a great deal of their press conference bragging about the size of the settlement and how aggressive they plan to be towards users who upload videos on YouTube.<sup>83</sup> Conspicuously absent was a clear indication of how exactly kids will be better off after this settlement. In fact, as this note will go on to discuss, they may well be worse off.

1. COPPA's Supposed Benefits are Theoretical and Largely Elusive

When COPPA was first enacted, the principal concern was protecting children from sharing personal information that would allow child predators and marketers to directly contact them.<sup>84</sup> In terms of child predators, the concern was that these people would be able to find children in person and abuse them.<sup>85</sup> As the TV show "To Catch a Predator" with Chris Hansen confirms, those individuals are definitely out there, and this concern was and still is valid.<sup>86</sup> In terms of marketers, the concern was that children would be enticed (by promotions, games, etc.) to give out personal information that could then be used to deliver advertisements to their email accounts or homes.<sup>87</sup>

The safety of children remains a paramount concern, but it is unclear whether COPPA makes any difference. Of course, website operators should be expected to limit their collection of data that could facilitate contacting or locating a child if fallen into the hands of a predator. However, not a single FTC settlement in the 20-year history of COPPA has rested on even an accusation that the website's violations have resulted in predatory danger to

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83. See *supra* note 5.

84. Hersh, *supra* note 9, at 1854 ("COPPA was designed to tackle two problems: '(i) overmarketing to children and collection of personally identifiable information from children that is shared with advertisers and marketers, and (ii) children sharing information with online predators who could use it to find them offline.'").

85. See Matecki, *supra* note X, at 374 ("[T]he FTC was concerned with the safety risks that could arise from children sharing their personal information online. By 1997, the FBI and Department of Justice had begun to take a more proactive role in alerting the public to the risks of meeting sexual predators online.").

86. See *To Catch a Predator (TV Series 2004–2007) - Plot Summary*, IMDB, <https://www.imdb.com/title/tt3694654/plotsummary> (last visited May 30, 2020). *But see* Joan Bertin et al., *Should Cyberspace be a Free Speech Zone?*, 15 N.Y.L. Sch. J. Hum. Rts. 67, 103–04 (1998) ("The number of confirmed cases where the Internet facilitated pedophilia is extraordinarily small, but has become the focal point for anxiety about this new medium, and where it may take us.").

87. See Matecki, *supra* note 7, at 374 ("In addition to safety concerns, the FTC also was concerned with the collection of personal information from children by commercial websites seeking such information for marketing purposes.").

children.<sup>88</sup> And, as the failings of “segmentation by age” illustrate, many services where children might share personal information are still easily accessible to them—and that’s just considering the websites that feign COPPA compliance.<sup>89</sup> In the vast, international network that is the internet, there are countless completely noncompliant websites, and the FTC has only limited resources to police those based within the United States and limited authority to police those based abroad.<sup>90</sup>

The marketing angle of COPPA was and is questionable. Marketing is fundamental to the success of businesses: both those engaged in marketing and those which rely on advertising revenue.<sup>91</sup> Providing free services on the internet (like YouTube), which children and adults alike benefit from, is impossible without advertising revenue.<sup>92</sup> The FTC acknowledges this and does not suggest that marketing to children is prohibited completely—only those practices which would run afoul of COPPA, such as “behavioral” marketing that, without parental consent, tracks the activity of individual users as they use the service.<sup>93</sup> Hence why YouTube will continue to run advertising on “child-directed” videos; the difference is that these ads will be “contextual,” based on the content of the video rather than based on behavioral data of the individual user.<sup>94</sup> In terms of children, it is hard to see how this will make much of a difference. If videos are marked as “child-directed,” and advertisers will be able to target based on that criteria and the content of the video, there remains plenty of latitude to target children and particular subsets thereof.

The relative merits or criticisms of behavioral marketing aside, restricting the practice does not fairly fall within the scope of COPPA. Critics allege that behavioral marketing allows businesses to prey on the psychological weaknesses of children.<sup>95</sup> While this may be a valid concern, it’s important to note that this criticism predates the proliferation of behavioral marketing and has been lodged against the practice of marketing to children in any form (including the still-legal and arguably necessary practice of traditional contextual

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88. See *History of COPPA Violations*, PRIVO, <https://www.privo.com/history-of-coppa-violations> (last visited May 30, 2020).

89. E.g. Matecki, *supra* note 7, at 381 (“An estimated 1.7 million users under the age of thirteen created user accounts on Xanga by checking the over thirteen box following this prompt.”); *id.* at 396 (“A study in the United Kingdom found that more than a quarter of eight to eleven year olds online have a profile on a social networking website.”).

90. Kelly & Alexander, *supra* note 70 (“The FTC is a small agency and doesn’t employ nearly enough staffers to tackle every COPPA failure that gets uploaded to YouTube. (Chairman Joe Simons has repeatedly called for more money to address the staff shortage.)”). *But see COPPA FAQ*, *supra* note 12 (“Foreign-based websites and online services must comply with COPPA if they are directed to children in the United States, or if they knowingly collect personal information from children in the U.S. The law’s definition of ‘operator’ includes foreign-based websites and online services that are involved in commerce in the United States or its territories.”).

91. Matecki, *supra* note 7, at 397 (noting that social media sites “use a legitimate business model which relies on advertising revenues to support their products”).

92. *Id.* at 389 (footnotes omitted) (“Internet providers and website operators argue that personal information for the use of behavioral targeting ads is a necessary predicate to useful, free Internet services. Websites generate profits and cover costs of operation through such advertisements, and as such are able to operate such sites free of cost.”).

93. See *COPPA FAQ*, *supra* note 12 (noting what forms of advertising are permitted under COPPA).

94. Kelly & Alexander, *supra* note 70 (“Once a video is labeled as kids’ content, all personalized ads will be shut off, replaced with ‘contextualized’ advertising based on the video itself.”).

95. Comments in re FTC Proposal to Amend COPPA Rule to Respond to Changes in Online Technology, CTR. DIGITAL DEMOCRACY ET AL., at 14 (Dec. 23, 2011) [hereinafter CDD Comments], <https://www.democraticmedia.org/sites/default/files/COPPA%20Rule%20Comments%20of%20Children%27s%20Privacy%20Advocates.pdf> (“Given children’s limited cognitive abilities and the sophisticated nature of contemporary digital marketing and data collection, strong arguments can be made that behavioral targeting is an inappropriate, unfair, and deceptive practice when used to influence children under 13.”).

marketing).<sup>96</sup> Additionally, since data used for behavioral marketing is typically (and should be) anonymized,<sup>97</sup> and since the practice can be used to effectively target and influence adults,<sup>98</sup> the use of COPPA—legislation concerned with the *privacy of children*—to push an anti-behavioral-marketing agenda is misplaced.<sup>99</sup> COPPA was tellingly motivated in large part by a 1996 report by the Center for Media Education which actually warned about tracking-based behavioral targeting and its purported impact on children,<sup>100</sup> yet the drafters of COPPA didn't see fit to address this particular issue.<sup>101</sup> Furthermore, with its concept of “verifiable parental consent,” COPPA emphasized the importance of parental control over children's behavior. But, fundamentally, marketing serves to influence consumer behavior, and parents already maintain plenary control over their financially dependent children's participation in the market (to the extent they exert their control).<sup>102</sup> It is also worth noting that behavioral targeting can be particularly valuable for addressing laudable objectives, such as youth intervention in terms of nicotine addiction, drug use, and other pressing societal ills, but COPPA prohibits these altruistic applications as well.

Other legitimate harms posed to children by the internet, such as cyberbullying,<sup>103</sup> access to inappropriate content,<sup>104</sup> and excessive “screen time,”<sup>105</sup> are conspicuously neglected by COPPA.<sup>106</sup> Because COPPA is focused on what a child sends (i.e., personal information) on the internet rather than what she receives, the act is ill-suited to address any of the above concerns. Limiting a child's screen time also has little to do with the collection of personal information from children. Additionally, determinations about the proper amount of screen time and appropriateness of content are highly dependent on characteristics of the individual

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96. See generally Blandina Šramová, *Children's Consumer Behavior*, INTECHOPEN (Nov. 21, 2017), <https://www.intechopen.com/books/consumer-behavior-practice-oriented-perspectives/children-s-consumer-behavior> (tracing child-focused marketing to the 1960s); *How Marketers Target Kids*, MEDIASMARTS, <https://mediasmarts.ca/digital-media-literacy/media-issues/marketing-consumerism/how-marketers-target-kids> (last visited May 30, 2020) (providing background on the history of leveraging psychology to more effectively market to children).

97. But see Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701 (2010).

98. See, e.g., *Behavioral Marketing: A Closer Look at What Gets Consumers Clicking*, NEIL PATEL: BLOG, <https://neilpatel.com/blog/behavioral-marketing/> (last visited May 30, 2020).

99. However, this author concedes that there is value in using any available tool to advance an agenda and even if the changes are incremental.

100. CENTER FOR MEDIA EDUCATION, WEB OF DECEPTION 11 (1996), <https://www.democraticmedia.org/sites/default/files/field/public-files/2020/cmewebofdeception1996.pdf> (“Using individualized advertising, based on intimate knowledge of each child's interests, behavior, and socio-economic status, will give online marketers unprecedented powers to tap each child's unique vulnerabilities.”); Hersh, *supra* note 9, at 1853–54 (“This study prompted a Federal Trade Commission (‘FTC’) investigation of online marketing practices that ultimately lead to the enactment of COPPA.”). The Center for Media Education was the predecessor of the Center for Digital Democracy. CTR. DIGITAL DEMOCRACY, <https://www.democraticmedia.org/> (last visited May 30, 2020).

101. CDD Comments, *supra* note 95, app. B, at 13 (“[T]he COPPA Rule does not directly address behaviorally targeted advertising . . .”).

102. See *How Marketers Target Kids*, *supra* note 96.

103. See generally *What Is Cyberbullying*, STOPBULLYING.GOV (May 7, 2020), <https://www.stopbullying.gov/cyberbullying/what-is-it>.

104. See generally *What Parents Need to Know About Inappropriate Content*, INTERNET MATTERS, <https://www.internetmatters.org/issues/inappropriate-content/learn-about-it/> (last visited May 30, 2020).

105. See generally Jennifer F. Cross, *What Does Too Much Screen Time Do to Children's Brains?*, NEWYORK-PRESBYTERIAN HOSP.: HEALTH MATTERS, <https://healthmatters.nyp.org/what-does-too-much-screen-time-do-to-childrens-brains/> (last visited May 30, 2020).

106. Cyberbullying and excessive screen time, to be fair, were not yet prominent concerns at the time COPPA was enacted, and content filtering was avoided due to the prior two attempts at legislation. See *infra*, note 151 and accompanying text.

child and the philosophies of her parents.<sup>107</sup> As such, parents are better equipped and should be entitled and entrusted to exercise proper discretion in this area—more so than legislators or website operators employing blanket regulations that lack nuance.

Overall, COPPA fails at providing any meaningful protection for children. And yet, despite the theoretical and elusive nature of the supposed benefits, the costs of the regulations are tangible and substantial.

## 2. COPPA Negatively Impacts Small Businesses

COPPA is difficult and expensive to properly comply with. When COPPA went into effect, “[s]maller websites began to feel the increased burden of COPPA compliance, as separate costs were required to hire legal teams to write expansive privacy policies [sic], and to enforce privacy requirements in chat rooms and message boards.”<sup>108</sup> The cost of COPPA compliance “could reach upwards of \$200,000 per year” (in early 2000s dollars) according to some estimates.<sup>109</sup> This reflects merely the costs of complying with COPPA, but sites may face additional financial burdens due to the law.

Even after attempting compliance, websites run the risk of fines if the FTC concludes they have violated the rule’s poorly defined guidelines. As discussed, what counts as a website “directed to children” is not perfectly clear. For websites that do not consider themselves to be child-directed, simply banning users twelve and younger may not shield them from liability.<sup>110</sup> Similarly, what counts as “verifiable parental consent” (outside of the prohibitively costly and slow methods suggested by the FTC)<sup>111</sup> is also not clearly defined, as evidenced by settlements the FTC has reached with companies that attempted to comply with COPPA in good faith.<sup>112</sup> Since most bigger websites do take steps to comply with COPPA now, “the FTC’s strategy in seeking enforcement has shifted from targeting sites that were merely not compliant with COPPA to seeking enforcement against sites that attempted to meet COPPA’s standards but were deemed ineffective.”<sup>113</sup> From a financial standpoint, the FTC can levy fines in excess of \$42,000 *per violation* (though the FTC asserts that it does take into account the relative size of the offending business so as not to completely jeopardize its survival).<sup>114</sup>

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107. See, e.g., *What Parents Need to Know About Inappropriate Content*, *supra* note 104 (“What you think is inappropriate material for your child will probably differ from your child’s view or that of other parents. It will also depend on your child’s age and maturity level.”).

108. Matecki, *supra* note 7, at 382.

109. *Id.*

110. Jamtgaard, *supra* note 15, at 394 (“If [a website is] considered ‘directed to children,’ statements meant to dissuade participation by children will not matter - all users will need to demonstrate that they are an adult or, if a child, that they have their parental consent before the site can collect information from them . . .”).

111. Matecki, *supra* note 7, at 385 (“Some methods of parental consent contemplated by COPPA (print and mail forms, faxing signatures, and telephone hotlines) were not viable or cost effective options.”).

112. *Id.* at 380 (“[E]nforcements against Hershey’s and UMG illustrate the difficulty for website providers in interpreting COPPA’s vague statutory requirements as to what actually constitutes sufficient parental consent.”).

113. *Id.* at 379.

114. Cohen, *supra* note 64 (“The Rule allows for civil penalties of up to \$42,530 per violation, but the FTC considers a number of factors in determining the appropriate amount, including a company’s financial condition and the impact a penalty could have on its ability to stay in business.”).

Small businesses do not have the resources to ensure proper compliance, which gives an anticompetitive advantage to well-established businesses and others entering the market with a sizable financial backing. “Websites have been forced to spend inordinate amounts of money to comply with COPPA regulations, and many start-up websites simply do not have these funds.”<sup>115</sup> Internet regulations like COPPA present a barrier to entry for new companies. In the context of the General Data Protection Regulation (“GDPR”), a broader internet privacy regulatory scheme from the European Union that is cut from the same cloth as COPPA, one commentator warned that the law has “increased the market share of larger tech companies” and, instead of promoting more competition, serves to “merely enshrine existing giants.”<sup>116</sup> This is because “[w]hile large players may [be able] to shift resources to handle such hefty burdens, regulations are particularly costly for newer emerging players who lack the personnel and financial resources to absorb such costs.”<sup>117</sup> While Congress has begun to scrutinize the inordinate power wielded by big tech companies, the ability to comply with COPPA remains an anticompetitive advantage enjoyed by these larger entities in the child-focused market and beyond.<sup>118</sup>

In the case of YouTube, the platform has led to a cottage industry of video production. Countless so-called “creators” have established careers by parlaying their YouTube channels into small businesses that generate revenue from advertising and brand sponsorships.<sup>119</sup> These small businesses now find themselves caught in the crosshairs of the FTC’s COPPA enforcement crusade as a result of the YouTube settlement, which, in itself, acutely demonstrates how disparate the impact of COPPA can be between large and small businesses.<sup>120</sup> Despite the FTC’s landmark \$170 million settlement, the reality is that it will make little impact on YouTube’s bottom line.<sup>121</sup> However, the new “child-directed” classification scheme is likely to decimate the income of many family-friendly creators: some estimates place the ad revenue loss for videos marked as “child-directed” at upwards of 90%.<sup>122</sup> On top of that, creators are now subject to the possibility of fines from the FTC.

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115. Hersh, *supra* note 9, at 1865.

116. Jennifer Huddleston, *Preserving Permissionless Innovation in Federal Data Privacy Policy*, 22 J. INTERNET L. 1, 24 (2019).

117. *Id.*

118. See, e.g., Makena Kelly, *All the Ways Congress is Taking On the Tech Industry*, VERGE (Mar. 3, 2020), <https://www.theverge.com/2020/3/3/21153117/congress-tech-regulation-privacy-bill-coppa-ads-laws-legislators>; Adi Robertson, *Sonos and Tile Execs Warn Congress that Amazon, Google, and Apple are Killing Competition*, VERGE (Jan. 21, 2020), <https://www.theverge.com/2020/1/21/21070812/sonos-tile-basecamp-popsocket-congressional-hearing-amazon-google-apple-competition>; see also *infra* note 120.

119. Jim Salter, *The FTC’s 2020 COPPA Rules Have YouTube Creators Scared*, ARS TECHNICA (Jan. 6, 2020) (“[P]eople have built entire careers around the production of popular, well-loved content both for children and for ‘child-hearted adults’—and those people have no control over how their viewers’ data is harvested and used, nor do they have enormous legal teams to beat settlements down into ‘pocket change’ territory as YouTube did.”).

120. *Id.*; see also Spangler, *supra* note 33 (noting that, unlike small-time creators, “[t]he likes of Disney and ViacomCBS have armies of lawyers to navigate YouTube’s new requirements”); Press Conference, *supra* note 5, at 18:09 (discussing an alleged double-standard of enforcement that favors larger companies).

121. *Id.* (“The \$170 million in fines that YouTube paid is, compared with parent company Alphabet’s staggering \$38.9 billion quarterly revenue, chump change.”).

122. Salter, *supra* note 119; see also Spangler, *supra* note 33 (“Socratica Kids, a small channel that produces educational science videos, in November announced that it was ceasing operations because it would lose upwards of 95% of its ad income under the new YouTube rules.”).

The settlement is designed to shield YouTube from future COPPA liability, shifting the burden to individual content creators and directly exposing them to financial and legal risk.<sup>123</sup> As long as YouTube complies with COPPA data-collection regulations on videos marked as “child-directed,” they will not face any penalty for a video that the FTC considers to be made for kids but is improperly classified.<sup>124</sup> According to the FTC, creators are considered “operators” under the COPPA rule and are subject to compliance and the risk of fines.<sup>125</sup> As a result of YouTube’s new content classification system prescribed by the settlement, complying with COPPA from the standpoint of a creator means properly tagging videos (or entire channels) as “child-directed” when appropriate.<sup>126</sup> Creators that are deemed to have improperly classified their videos could face a fine of up to \$42,530 per violation (apparently per improperly tagged video).<sup>127</sup> In theory, a person could face a fine of well over the annual median personal income in the United States<sup>128</sup> just for uploading a single kid-friendly video to YouTube and failing to mark it as “child-directed.”<sup>129</sup> Most troubling of all is that these hefty fines are contingent upon correctly interpreting and applying the vague and problematic “child-directed” standard. Aside from very rough guidelines, neither YouTube nor the FTC will help decide whether a video is “child-directed,” characterizing such assistance as “legal advice.”<sup>130</sup> Creators, instead, should consult an attorney about the videos they upload.<sup>131</sup>

Whether creators should (or even could) actually be held individually liable under COPPA is debatable. Holding website *users* liable under COPPA, rather than the website itself, is uncharted territory.<sup>132</sup> It is possible that a creator, if targeted by the FTC, could challenge their alleged liability under COPPA in court since there is no legal precedent with which to interpret the COPPA rule’s definition of “operator” in this new context. However, fearing steep legal fees on top of the FTC’s fine if defeated in court, creators may prefer to just negotiate a settlement with the FTC. Regardless, the threat is real: the FTC has made it perfectly clear that it plans to go after creators, callously characterizing these individuals,

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123. Press Conference, *supra* note 5 (“YouTube, as a general audience platform, is not directly strictly liable under COPPA for the content of the videos uploaded by others to its platform, unless it has actual knowledge that the content is child-directed.”); *id.*, at 43:50 (conceding that there is a higher risk for content creators than for the platform itself); Spangler, *supra* note 33 (“YouTube is putting the burden of complying with COPPA on creators. If the FTC determines a channel has violated the law (by mislabeling its YouTube content), civil penalties of up to \$42,530 per violation are allowed . . .”).

124. See Press Conference, *supra* note 5 (explaining that an “actual knowledge” standard applies to YouTube, whereas a “strict liability” standard applies to creators). See also *COPPA FAQ*, *supra* note 12 (“COPPA covers operators of general audience websites or online services only where such operators have *actual knowledge* that a child under age 13 is the person providing personal information.”).

125. Cohen, *supra* note 64 (“If a channel owner uploads content to a platform like YouTube, the channel might meet the definition of a ‘website or online service’ covered by COPPA, depending on the nature of the content and the information collected.”).

126. *Id.* (“YouTube and Google agreed to create a mechanism so that channel owners can designate when the videos they upload to YouTube are – to use the words of COPPA – ‘directed to children.’ The purpose of this requirement is to make sure that both YouTube and channel owners are complying with the law.”).

127. *Id.*

128. *Real Median Personal Income in the United States*, FED. RES. BANK ST. LOUIS (Sep. 10, 2019), <https://alfred.stlouisfed.org/series?seid=MEPAINUSA672N> (indicating a figure of \$33,706 for 2018).

129. See *supra* note 114 and accompanying text.

130. Cohen, *supra* note 64 (“If you’re still unsure about how COPPA applies to you, consider contacting an attorney . . .”); *Determining If Your Content is “Made for Kids,”* YOUTUBE HELP (last visited May 30, 2020) <https://support.google.com/youtube/answer/9528076>. (“We provide some guidance on what is considered ‘made for kids’ below, but we cannot provide legal advice. If you are unsure whether your videos meet this standard, we suggest you seek legal counsel.”).

131. See *supra* note 130.

132. See *supra* note 6.



many of whose livelihoods currently depend on their YouTube income, as “fish in a barrel.”<sup>133</sup> One may wonder, should COPPA really be wielded as a weapon against individuals just trying to make a living through producing content for children on account of some attenuated, theoretical harm? Since the crux of COPPA is the collection of data, as the actual website operator and data collector, liability rests more appropriately on multi-billion-dollar YouTube than the individual content creators—without whom such outsized profits would be a chimera.<sup>134</sup>

### 3. COPPA Reduces the Supply of Child-Friendly Content

After COPPA first went into effect, instead of making an effort to serve children, many websites simply became restricted to those “thirteen or older”<sup>135</sup> and others removed their child-friendly content.<sup>136</sup> When Disney restricted its chatrooms to visitors thirteen and older, it lamented, “[r]egrettably, the overbearing scrutiny and disparity of interpretation of law and guidelines by federal regulators and advocacy groups may ultimately result in fewer and fewer options for kids to interact on the Web.”<sup>137</sup> The negative impact on businesses means less competition, and less competition means fewer choices of services and content for children. After COPPA took effect, less investment was designated for new child-directed projects due to the complexity, expense, and liability of attempting a COPPA-compliant business.<sup>138</sup> Indeed, COPPA significantly compromises the financial incentive to operate child-directed websites. Websites often generate their revenue from advertising or monetizing the data they collect, and COPPA restricts both funding sources when children are involved.<sup>139</sup> Subscription-based profit models are rarely effective, but, when they are, economically disadvantaged children suffer by losing access to a service that would otherwise have been offered for free.<sup>140</sup>

This consequence is readily apparent with YouTube, where the supply of children’s content is expected to suffer due to the imposed changes.<sup>141</sup> Many content creators have announced an intent to cease production of their videos altogether, and some have completely

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133. Press Conference, *supra* note 5, at 15:15.

134. *See supra* notes 119–121.

135. Matecki, *supra* note 7, at 400 (“When COPPA created protections only to users under the age of thirteen, website operators adopted age screening mechanisms to purportedly ban underage users from their sites.”).

136. Matecki, *supra* note 7, at 383 (“[W]ebsites had an incentive to remove content for children in order to avoid the financial burden of COPPA compliance.”).

137. Hersh, *supra* note 9, at 1866.

138. Ben Sperry, *What’s the Point of COPPA?*, TRUTH ON THE MARKET (Nov. 20, 2013), <https://truthonthemarket.com/2013/11/20/senator-markeys-do-not-track-kids-act-of-2013-raises-the-question-whats-the-point-of-coppa/> (recognizing the “foregone innovation and investment in children’s media” caused by COPPA).

139. Tianna Gadbow, *Legislative Update: Children’s Online Privacy Protection Act of 1998*, 36 CHILD. LEGAL RTS. J. 228, 230 (2016) (“Targeted advertisements usually provide more revenue for websites because they are more relevant to users.”); *supra* notes 16, 111 (discussing “verified parental consent,” which would be required to collect meaningful data that could be monetized, and the impracticality of obtaining such consent).

140. Hersh, *supra* note 9, at 1870–71 (footnote omitted) (“Attempts at implementing subscription-based models have also failed because parents are generally unwilling to pay.”); Gadbow, *supra* note 139, at 230 (“To make up for this revenue loss, developers may increase the number of advertisements shown to children or move away from advertisement-based income models to fee-based income models. This will impact the quality of free applications and websites available to children.”).

141. “The most plausible scenario is you’re going to see tens of thousands of YouTube creators just go away.” Spangler, *supra* note 33 (quoting Jim Dunstan, “general counsel at technology policy think tank TechFreedom”).

closed down their channels.<sup>142</sup> For creators that produce content for children, the loss of a majority of advertising revenue eliminates the incentive to continue their craft on YouTube.<sup>143</sup> Creators that produce content not specifically geared towards children worry their content could be deemed “child-directed” nonetheless and face fines from the FTC.<sup>144</sup> Needing a lawyer to help navigate whether a video might be considered “child-directed” might just not be worth the cost or hassle, especially considering even some experienced lawyers are not confident in their ability to apply the vague standards of COPPA.<sup>145</sup>

YouTube anticipated this exodus from its platform. In its announcement of the post-settlement changes, YouTube pledged \$100 million to establish a fund to finance “the creation of thoughtful, original children’s content.”<sup>146</sup> However, it isn’t clear which creators will benefit and to what extent—or whether the fund will ever be replenished.<sup>147</sup> It seems plausible that the fund will favor well-established creators who, over time, have amassed an audience while developing their identity and work to polish their programming with better equipment and expertise.<sup>148</sup> If true, those trying to break into the child-focused market are, yet again, disadvantaged.

#### 4. COPPA Drives Children to Age-Inappropriate Content

In practice, COPPA has the unintended effect of diverting children to less appropriate content. With fewer choices that are designed for them, children will be left seeking other options: those that are *not* designed for them. Because of COPPA’s provisions, sites not meant for children are inevitably easier to access and more feature rich. For instance, a child-directed website that properly implements COPPA’s “verifiable parental consent” requirement merely presents a child with more obstacles to use the service. Why jump through those hoops when other sites are easier to access and possibly offer better features?

Since COPPA limits what sites can do when children are involved, certain features may be outright prohibited, or a website’s diminished ability to generate revenue under COPPA could result in fewer or lower quality features offered. This is borne out by YouTube’s offering

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142. *E.g.*, Socratica Kids (@SocraticaKids), TWITTER (Nov. 14, 2019), <https://twitter.com/SocraticaKids/status/1195156921256251392> (“We will no longer be making videos for our Socratica Kids YouTube channel.”); @Lockstin, TWITTER (Nov. 19, 2019), <https://twitter.com/Lockstin/status/1196925745525772288> (“No joke, I AM going to quit YouTube in February based on how much COPPA is enforced in January.”).

143. *See, e.g.*, Socratica Kids, *supra* note 142 (“Socratica Kids is made by a small team of educators and puppeteers who love making SMART + FUN videos for your kids. . . . Our channel was growing, and we made our videos as a labor of love to spread STEM knowledge to our youngest viewers. But we can’t go on making videos for free, and we certainly can’t ask the people who work with us to work for free. . . . By removing targeted ads from kids’ content on YouTube, revenue for kids’ channels may drop by as much as 95%. We are effectively out of business.”).

144. *E.g.* Todd Spangler, *YouTube Creators Worried and Confused Over New Kid-Video COPPA Rules, Potential Fines*, VARIETY (Nov. 22, 2019), <https://variety.com/2019/digital/news/youtube-coppa-rules-children-videos-fines-1203413642/> (“‘This COPPA shit is terrifying,’ Danielle Pitts (aka Doopie), a YouTube animator and voice actor, tweeted this week. ‘My videos aren’t directed to children but I can still get fined \$42k for marking my videos as meant for adults because it isn’t mature enough? Because it can easily be mistaken?? I’m heartbroken. YouTube was my dream.’”).

145. *See, e.g.*, Spangler, *supra* note 33 (“[E]ven attorneys who have worked in the area for years say it’s not a clear-cut process.”).

146. *YouTube Blog Post*, *supra* note 30.

147. *See* Salter, *supra* note 119 (“[The fund] seems unlikely to help creators . . . who make ‘child-hearted’ content for general audience consumption.”).

148. *See id.*

following the settlement: child-directed content has been stripped of key features.<sup>149</sup> Children, missing the interactive elements that have been removed, may seek and find them on non-child-directed videos. Additionally, the incentive to falsify age information when signing up for a “thirteen and up” website could lead to recommendations and advertising that are not age appropriate, such as alcohol, gaming, and adult content.<sup>150</sup> Not only does this overall phenomenon expose children to a greater possibility of encountering content that is plainly inappropriate, it completely eliminates the supposed protective measures of COPPA since those measures do not apply to videos and websites not meant for children. In short, COPPA merely incentivizes children to go where COPPA does not apply.

### 5. COPPA Implicates First-Amendment Concerns

Though COPPA has resisted constitutional challenge for two decades, First Amendment rights are arguably still impacted—perhaps now more than ever. It is helpful to note that COPPA was preceded by two attempts aimed at protecting children on the internet, and both of these laws were struck down as unconstitutional.<sup>151</sup> The key difference between COPPA and its predecessors is that these earlier laws targeted indecent content and a child’s access thereto.<sup>152</sup> As restrictions on free speech, the courts strictly scrutinized the laws by weighing the chilling effect against the state interest and availability of less restrictive means to that end.<sup>153</sup> While similarly rooted in protecting children on the internet, COPPA, of course, centers around the issue of privacy rather than censoring content.<sup>154</sup> However, some commentators have noted that COPPA undermines the free speech rights of children and has a censoring effect nonetheless.<sup>155</sup>

With the YouTube settlement, the FTC is reimagining COPPA in a way which mirrors the fatal flaws of the earlier legislation. With those laws, the Court took issue with the vague standard used to classify the proscribed speech, the deterrent effect on protected speech, impeding access to information by adults, and the availability of less restrictive alternatives

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149. Spangler, *supra* note 144 (“[A] whole slew of other features that depend on user data will be disabled, including: comments, channel branding watermarks; the ‘donate’ button; cards and end screens; live chat and live chat donations; notifications; and ‘save to playlist’ or ‘watch later’ features.”).

150. *See supra* notes 51–54 and accompanying text.

151. “The Communications Decency Act of 1996 was the first substantial attempt by the government to regulate the Internet with respect to the protection of children. . . . The Supreme Court [held] . . . that Congress violated the First Amendment by attempting to regulate content on the Internet. The Court found the statute was overbroad and lacked the precision needed to statutorily limit the First Amendment.” Hersh, *supra* note 9, at 1847–48 (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)). The following year, Congress passed the Child Online Protection Act, which was eventually struck down on First Amendment grounds as well. *Id.* at 1848–50.

152. *Id.* at 1837 (“The two major attempts to protect children from accessing pornographic material on the Internet, CDA and COPA, were both found unconstitutional.”).

153. *Reno v. ACLU*, 521 U.S. 844, 871–72, 874 (1997) (“[T]he CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. . . . [T]he CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”).

154. *See supra* note 2.

155. *E.g.* Allen, *supra* note 2, at 769 (“COPPA’s requirements are not specifically designed to deny children access to content, but, as civil libertarians observe, that is one of their effects.”); Gadbaw, *supra* note 139, at 230 (“One major critique is that COPPA violates children’s right to freedom of speech and expression.”).

for furthering the governmental interest.<sup>156</sup> The standard here, as discussed, is also vague. Although the “child-directed” standard has been applied for two decades under COPPA, its application under YouTube’s compulsory content classification system is a marked departure from earlier applications. Previously, the standard has only been used to classify entire websites or services and, while vague, is more practicable in this context than applied to discrete pieces of content.<sup>157</sup> Additionally, in classifying whole websites, the unintended restrictions on adults, who are less likely to use child-oriented sites, are less pronounced.

COPPA, as applied in the YouTube settlement, has a far greater restrictive effect on adults and therefore deserves stricter scrutiny under the First Amendment. The effect cuts both in terms of adult users who post videos (i.e., creators) and those who view them. The content classification scheme restricts the protected speech of creators because it stifles the reach of their message<sup>158</sup> and has a deterrent effect on engaging in such speech due to fear of steep fines from misclassification<sup>159</sup> (combined with arbitrary enforcement of the vague “child-directed” standard)<sup>160</sup> and the financial disadvantage of posting child-directed content.<sup>161</sup> From the perspective of viewers, all child-directed content is stripped of certain functionality no matter the age of the viewer, particularly the comments section, which offers a public forum for viewers to engage with each other and with the creator.<sup>162</sup> Such a “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”<sup>163</sup> Considering the ineffectiveness of COPPA in achieving its general goal of protecting children and the existence of alternatives that would likely be more effective and less restrictive,<sup>164</sup> it is quite possible that the FTC’s application of COPPA in the manner used in the YouTube settlement could be deemed unconstitutional.

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156. *Reno*, 521 U.S. at 874 (“We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”).

157. There are still grey areas when it comes to entire sites or services, but classifying an entire site as “directed to children” (which often has voluminous pages, text, visuals, services, messaging, advertising, etc. with which to base an assessment upon) seems inherently more feasible than a single video (or even a collection of videos) that merely has an appeal to children. *See supra* Part III.A.2.

158. Salter, *supra* note 119 (“[V]ideos marked ‘for kids’ will have no notifications, no comments, will not be searchable, [and] will not be suggested or recommended . . . .”); Spangler, *supra* note 33 (“YouTube . . . will exclude videos tagged as made for kids from search results.”).

159. *See supra* notes 125–129 and accompanying text; *cf.* *Reno*, 521 U.S. at 872 (“The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.”).

160. *See Reno*, 521 U.S. at 872 (“As a practical matter, this increased deterrent effect, coupled with the ‘risk of discriminatory enforcement’ of vague regulations, poses greater First Amendment concerns . . . .”).

161. *See, e.g.,* Socratica Kids (@SocraticaKids), TWITTER (Jan. 13, 2020, 2:05 PM), <https://twitter.com/SocraticaKids/status/1216813635508428800> (sharing a graph which shows that its average advertising revenues precipitously dropped to zero following the changes on YouTube with respect to “child-directed” videos). *See also* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (“[A] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”).

162. *See supra* note 158; *see also* *Reno*, 521 U.S. at 875 (cleaned up) (“The Government may not reduce the adult population to only what is fit for children.”).

163. *Reno*, 521 U.S. at 874.

164. *See infra* Part IV.

### C. Current Efforts to Expand COPPA Fail for the Same Reasons

Recognizing that COPPA has faced plenty of criticism in its twenty-year history, there have been numerous efforts to modify the law. So far, aside from the FTC's evolving strategies for enforcing the law,<sup>165</sup> the only official change has come via its amended rule which took effect in 2013.<sup>166</sup> More recently, the FTC made a public call for comments to reevaluate its COPPA rule, which closed in late 2019.<sup>167</sup> In the past year, there have been at least four proposed bills which attempt to augment the children-oriented internet protection scheme of COPPA: COPPA 2.0,<sup>168</sup> the KIDS Act,<sup>169</sup> the PROTECT Kids Act,<sup>170</sup> and the Kids PRIVCY Act.<sup>171</sup> But rather than discuss the merits of any proposed legislation individually, it is enough to say that each is predicated on segmentation by age and therefore suffers from the same fundamental flaw as COPPA itself.

## IV. PROPOSAL

All of this is not to say that children's privacy on the internet is an unattainable goal. But a lot has changed technologically since COPPA took effect in 2000,<sup>172</sup> so it is logical to revisit its objectives and offer a fresh approach that is better adapted to today's society and digital landscape. It is possible to not only preserve but build upon the original objectives of COPPA in a way which produces more effective results and lessens the overall burdens and side-effects posed by such regulations.

### A. Implement General, Age-Neutral Privacy Regulations

Congress should adopt internet privacy regulations that apply protections to all users regardless of age. As this note highlights, the fundamental failure of COPPA is that its applicability is contingent upon age. Removing this distinction closes the loophole which enables websites to skirt privacy regulations,<sup>173</sup> eliminates the need to classify content (or

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165. See *supra* text accompanying note 113.

166. See *supra* text accompanying note 17.

167. *FTC Seeks Comments on Children's Online Privacy Protection Act Rule*, FED. TRADE COM'n (Jul. 25, 2019) [hereinafter *FTC Request for Comments*], <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-seeks-comments-childrens-online-privacy-protection-act-rule>.

168. Makena Kelly, *New Privacy Bill Would Give Parents an 'Eraser Button' and Ban Ads Targeting Children*, VERGE (Mar. 12, 2019), <https://www.theverge.com/2019/3/12/18261181/eraser-button-bill-children-privacy-coppa-hawley-markey>.

169. *Senators Markey and Blumenthal Introduce First-of-Its-Kind Legislation to Protect Children Online from Harmful Content, Design Features*, ED MARKEY: NEWS (Mar. 5, 2020), [https://www.markey.senate.gov/news/press-releases/senators-markey-and-blumenthal-introduce-first-of-its-kind-legislation-to-protect-children-online-from-harmful-content-design-features\\_](https://www.markey.senate.gov/news/press-releases/senators-markey-and-blumenthal-introduce-first-of-its-kind-legislation-to-protect-children-online-from-harmful-content-design-features_).

170. Mallory Jones et al., *Bipartisan Legislation Aims to Expand Federal Protections for Children's Online Privacy*, JD SUPRA (Jan. 16, 2020), <https://www.jdsupra.com/legalnews/bipartisan-legislation-aims-to-expand-91935/>.

171. Allen St. John, *Bill Introduced to Strengthen Kids' Online Privacy Law*, CONSUMER REPORTS (Jan. 30, 2020), <https://www.consumerreports.org/privacy/bill-to-strengthen-kids-online-privacy-law/>.

172. *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004) ("The technology of the Internet evolves at a rapid pace."); *FTC Request for Comments*, *supra* note 167.

173. See *supra* notes 41, 56.

entire websites) based on the ambiguous “child-directed” standard,<sup>174</sup> avoids the various issues of age verification,<sup>175</sup> and resolves the free-speech-related issues discussed here.<sup>176</sup>

In many cases, a general privacy regulatory scheme would either reduce or leave unchanged the burden on a website operator in the absence of COPPA. Since COPPA took effect, two major general privacy regulatory schemes were introduced that apply to a large swath of the websites that would be subject to a United States-based scheme, including that subset which is subject to COPPA. The General Data Protection Regulation (GDPR) went into effect in 2018, affecting websites that serve citizens of the European Union,<sup>177</sup> and the California Consumer Privacy Act (CCPA) went into effect in 2020, affecting websites that serve citizens of California.<sup>178</sup>

The two schemes overlap in many respects<sup>179</sup> and mimic most of the objectives of COPPA<sup>180</sup>—only without respect to age.<sup>181</sup> These include notice,<sup>182</sup> consent,<sup>183</sup> review,<sup>184</sup> and security,<sup>185</sup> plus additional protections that go beyond COPPA.<sup>186</sup> However, the differences between the laws<sup>187</sup> mean that website operators potentially have to navigate and juggle the varying provisions of GDPR, CCPA, and COPPA simultaneously, depending on their audience. A general privacy regulation at the federal level could strive for parity with GDPR wherever possible, preempt CCPA,<sup>188</sup> and obviate COPPA, leaving effectively a single privacy framework for websites to follow.<sup>189</sup> While a such a regulation would inevitably place a new burden on some websites that were not subject to any of the other three

174. See *supra* Part III.A.2.

175. See *supra* Part III.A.1.

176. See *supra* Part III.B.5.

177. Matt Burgess, *What is GDPR? The Summary Guide to GDPR Compliance in the UK*, WIRED UK (Mar. 24, 2020), <https://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018>.

178. Gilad Edelman, *California’s Privacy Law Goes Into Effect Today. Now What?*, WIRED (Jan. 1, 2020, 7:00 AM), <https://www.wired.com/story/ccpa-guide-california-privacy-law-takes-effect/>.

179. Aleksandra Popova, *The Fine Line Between Identifiers Capable of Identifying and “Identifiable Information,”* 24 SUFFOLK J. TRIAL & APP. ADVOC. 255, 262 (2019) (“[T]he CCPA is considered the first regulation in the U.S. to attempt to match the GDPR’s broad definitional scope of what type of information is covered under PII while also granting consumers extensive rights to control that information.”).

180. See *supra* text accompanying note 15. Only one of the five major objectives (the use of games and prizes to manipulate children) is missing from these two schemes.

181. However, both pieces of legislation include special parameters covering minors. *Comparing Privacy Laws: GDPR v. CCPA*, DATAGUIDANCE & FUTURE PRIVACY F. 19–20 (2018) [hereinafter *Comparing Privacy Laws*], [https://fpf.org/wp-content/uploads/2018/11/GDPR\\_CCPA\\_Comparison-Guide.pdf](https://fpf.org/wp-content/uploads/2018/11/GDPR_CCPA_Comparison-Guide.pdf).

182. *Comparing Privacy Laws*, *supra* note 181, at 28 (“Both the GDPR and the CCPA include prescriptive provisions with regards to the information organizations must provide to individuals when collecting and processing their personal information.”).

183. *Id.* at 30 (“Both the GDPR and the CCPA guarantee a right for individuals to ask organizations to cease the processing, and selling respectively, of their data.”).

184. *Id.* at 31 (“Both the GDPR and the CCPA establish a right of access, which allows individuals to have full visibility of the data an organization holds about them: they can obtain details about the data being processed, but also copies of the data items themselves.”).

185. *Id.* at 39 (“Both the GDPR and the CCPA provide individuals with a cause of action to seek damages for violation of privacy laws with regard to security measures violations and data breaches.”).

186. Both GDPR and CCPA extend additional rights, such as the right to request deletion of personal information, the right to exercise protected rights free from discrimination by the operator, and the right to data portability (to export personal data or transfer it to another service). *Comparing Privacy Laws*, *supra* note 181, at 26, 33–35.

187. See generally *Comparing Privacy Laws*, *supra* note 181.

188. See generally *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (discussing types of preemption).

189. But see W. Gregory Voss, *Obstacles to Transatlantic Harmonization of Data Privacy Law in Context*, 2019 U. ILL. J.L. TECH. & POL’Y, at 405 (discussing the history of data protection regulations around the world and the prospects for reaching parity across nations).

laws,<sup>190</sup> it would reduce or leave unchanged the burden of many others as a result of the consolidation of provisions and simplification of standards.<sup>191</sup>

### *B. Reinforce Measures that Protect the Physical Safety of Minors*

Special care should still be given to ensuring the physical safety of minors, as was a primary concern in enacting COPPA. Children face genuine threats from sexual predators and human traffickers, and these threats are inexcusably magnified when personal information which helps to locate or contact a child is exposed.<sup>192</sup> Websites should be held accountable for ensuring that the collection of sensitive information pertaining to children is limited,<sup>193</sup> properly secured, and disclosed only with utmost care.

While data security is an important concern for every website operator and user, data security practices must strike a balance between the burden to the operator and the potential harm to the user.<sup>194</sup> Elaborate requirements can be prohibitively expensive and stifle innovation.<sup>195</sup> With this in mind, the risk tolerance and rigidity of required precautions surrounding data handling is often relative to how sensitive the data is. For example, stricter regulations (and thus heavier burdens) are currently imposed in some sensitive situations, such as with “health records under [the] Health Insurance Portability and Accountability Act (HIPAA), banking information under the Graham-Leach-Bliley Act, and credit information under the Fair Credit Reporting Act.”<sup>196</sup>

A new privacy scheme could draw from these laws to inform the data collection and handling requirements with respect to sensitive children’s data. However, unlike COPPA’s expansive definition of “personal information,”<sup>197</sup> the regulations should be tailored to address only data that poses a real threat to children if exposed: that which would allow a predator to locate or contact a child.<sup>198</sup> With that in mind, only information that could be reasonably thought to belong to a child and could facilitate contact should fall within the scope. For instance, a general audience website whose data provides no indication of which

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190. However, many states are likely to follow California’s lead, thereby ensnaring still other websites (not to mention, piling on additional provisions that must be juggled by some websites already subject to any of the other privacy regimes). See Kim Hart & Margaret Harding McGill, *States Will Be the Battlegrounds for 2020 Tech Policy Fights*, AXIOS (Jan. 2, 2020), <https://www.axios.com/states-2020-tech-policy-fights-f467033d-c5f2-4467-a256-ee894c62190d.html> (“Industry watchers expect to see privacy legislation come up in New York, Washington and Illinois in 2020.”).

191. Ideally, new legislation would eliminate ambiguous standards like “child-directed” and provide clear guidance for how websites can comply with the law.

192. See *supra* text accompanying notes 85–86.

193. A recurring theme with privacy regulation is requiring operators to limit their collection of personal data to that which is necessary to operate the service. See, e.g., *Comparing Privacy Laws*, *supra* note 181, at 19; *COPPA FAQ*, *supra* note 12 (discussing limiting data collection pursuant to “activities necessary for the site or service to maintain or analyze its functioning”).

194. Thus far, this need for balance is demonstrated by a number of stricter but narrowly applied privacy laws, which “have been targeted at areas where the risks of potential harm from exposure of the information is considered great enough to favor restriction at the expense of potential benefits like more experimentation and innovation.” Huddleston, *supra* note 116, at 18.

195. E.g. Huddleston, *supra* note 116, at 18 (“According to a survey by PwC, over 80 percent of companies, including many based in the United States, spent more than \$1 million preparing for GDPR and more than 40 percent spent more than \$10 million.”); see *supra* note 194.

196. Huddleston, *supra* note 116, at 18.

197. *COPPA FAQ*, *supra* note 12 (enumerating what is considered personal information).

198. But see International Computer Science Institute, *There is No Anonymity on the Internet*, TEACHING PRIVACY, <https://teachingprivacy.org/theres-no-anonymity/> (last visited Jun. 1, 2020) (“[D]ata mining and inference techniques . . . can be used to match anonymized users to their real identities with a high degree of accuracy . . .”).

users are children versus which are adults, or a website whose data does not provide any means to make contact with its users, could be outside of the scope. Additionally, COPPA's arbitrary definition of "child" should be supplanted by the more widely used distinction of legal minors as individuals under the age of eighteen.<sup>199</sup>

### C. Empower and Entrust Parents to Moderate their Children's Online Activity

Parents should be not only empowered but entrusted with decision-making pertaining to their child's use of the internet.<sup>200</sup> A criticism of CDA and COPA was that neither allowed a parent to make their own decisions about what content was appropriate for their child.<sup>201</sup> COPPA attempted to address this shortcoming with its "verifiable parental consent" provision, but this too has fallen short since: parental consent mechanisms are either prohibitively cumbersome or ineffective;<sup>202</sup> easy-to-falsify age verification mechanisms circumvent consent;<sup>203</sup> parents are given no option to provide blanket consent;<sup>204</sup> and parents of teenagers are completely neglected.<sup>205</sup>

As a foundation, legislation should promote education pertaining to safe internet practices for children, with involvement from parents.<sup>206</sup> Just as a law would be limited in its effectiveness to protect a child from the dangers of talking to a stranger on the street, attempts to restrict internet usage have limited efficacy for the safety of children online.<sup>207</sup> Recognizing that, no matter the precautions, there is always the possibility that a child may encounter a malicious actor online (just like on the street), children should be educated about the risks of sharing personal information online and interacting with strangers. Additionally, technologically adept children will inevitably find ways to circumvent restrictive measures, further limiting their efficacy.<sup>208</sup> Education could help children make informed and responsible decisions about their online activity, with or without the presence of restrictive

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199. UNICEF & YOUTH POL'Y LABS, AGE MATTERS! AGE-RELATED BARRIERS TO SERVICE ACCESS AND THE REALISATION OF RIGHTS FOR CHILDREN, ADOLESCENTS AND YOUTH 1 (2016) [https://agemattersnow.org/downloads/YPL\\_Age\\_Matters\\_Final\\_Report\\_Oct2016.pdf](https://agemattersnow.org/downloads/YPL_Age_Matters_Final_Report_Oct2016.pdf).

200. Matecki, *supra* note 7, at 400. ("In implementing COPPA, the FTC argued for measures that would return parents to their traditional role as gatekeepers of what information children access and what information others access about their children.").

201. *See, e.g., Reno*, 521 U.S. at 845 ("The CDA differs from the various laws and orders upheld in [the aforementioned] cases in many ways, including that it does not allow parents to consent to their children's use of restricted materials . . .").

202. *See supra* note 57–59 and accompanying text.

203. *See supra* note 55 and accompanying text.

204. *See supra* note 50 and accompanying text.

205. *See supra* note 46–47 and accompanying text.

206. Dorothy A. Hertz, Note, *Don't Talk to Strangers: An Analysis of Government and Industry Efforts to Protect A Child's Privacy Online*, 52 FED. COMM. L.J. 429, 449 (2000) ("[P]rotecting a child's privacy online would first require educating parents about the dangers their children confront in the Internet world. However, this education is not only for those Internet literate parents. The education would consist of a campaign . . . to alert parents about the information collection practices and the resulting risks."). The government must make every effort to reach parents who are less technologically literate and those with fewer resources. *See, e.g., Hersh, supra* note 9, at 1871 (criticizing the FTC for targeting its COPPA educational sessions primarily at technologically literate parents). *See also Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000)) ("[A] court should not presume parents, given full information, will fail to act[.]").

207. "[M]any advocate that the most effective solution to protecting children online is through the old school approach: education. These advocates feel that by simply educating parents and children about what is happening online, we can better protect children then [sic] any provision in COPPA." Gadlaw, *supra* note 139, at 231.

208. *See Gadlaw, supra* note 139, at 230 ("Critics posit that children can easily outwit even the more advanced age verification technologies and get around many parental consent processes.").



“guard rails,” and could come both in the form of school instruction and in encouraging parents to have this kind of conversation with their children.<sup>209</sup>

On top of education, there are mechanisms that can assist parents in taking a more proactive role in their child’s online activity which are more effective and less burdensome on website operators than the provisions in COPPA. Another criticism of CDA and COPA, which actually factored largely into their demise, was the availability of filtering software that could control access not at the sending end (the website) but at the receiving end (the device).<sup>210</sup> Filtering mechanisms greatly reduce the burden placed upon website operators and place more control in the hands of the parents and other adults.<sup>211</sup> At the time, a filter-based approach was criticized for its cost to parents,<sup>212</sup> its limited accuracy,<sup>213</sup> and lack of parental control on some manners of online access (computers at schools, libraries, a friend’s house, etc.).<sup>214</sup> Nevertheless, even at the time, a congressional report indicated that filtering was a more effective approach than age verification.<sup>215</sup>

Twenty years later, filtering technology has only become more viable. Whereas when COPPA was introduced, children accessed the internet exclusively from computers, some of which were not necessarily in the parents’ control (e.g. in a school or library),<sup>216</sup> today, most internet usage by children is from a mobile device or laptop, which is most likely to be provided and controlled by the parent.<sup>217</sup> Virtually all operating systems and devices have some built-in form of parental control, and choices abound for free and low-cost parental control software.<sup>218</sup> With the advent of artificial intelligence and machine learning, filtering

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209. Hersh, *supra* note 9, at 1874 (“The answer is, therefore, to cease formal regulations, and to focus more on educating parents, mentors, and teachers. These people will have the most influence over children . . .”).

210. *See, e.g., Ashcroft*, 542 U.S. at 667 (“Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source.”).

211. “[The District Court] noted that ‘[t]he record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors’ access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators.’” *Id.* at 663 (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 497 (E.D. Pa. 1999)). However, such control in the hands of parents is not always a good thing. *See, e.g., Bertin et al., supra* note 86, at 88–89 (footnotes omitted) (“Among those most threatened by [filtering] software are gay, lesbian and bisexual and transgendered youth. The resources available on the Internet - again, the Web sites, the chat rooms and educational resources - are literally lifesaving to these young people, many of whom live in isolation, both geographically and emotionally.”).

212. *Ashcroft*, 542 U.S. at 685 (Breyer, J., dissenting) (“[F]iltering software costs money. Not every family has the \$40 or so necessary to install it.”).

213. *Id.* at 668 (plurality opinion) (“Filtering software, of course, is not a perfect solution to the problem of children gaining access to harmful-to-minors materials. It may block some materials that are not harmful to minors and fail to catch some that are.”).

214. *Id.* at 685 (Breyer, J., dissenting) (“[F]iltering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. . . . [M]any . . . children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents.”).

215. *Id.* at 668 (plurality opinion) (“[The Commission on Child Online Protection] unambiguously found that filters are more effective than age-verification requirements.”).

216. *See supra* note 214.

217. *See* Jamie Ducharme, *Kids Are Spending More Time on Mobile Devices than Ever Before*, TIME (Oct. 19, 2017), <https://time.com/4989275/young-children-tablets-mobile-devices/>; PEW RES. CTR., MOBILE FACT SHEET (2019), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

218. Michelle Crouch, *A Guide to Parental Controls by Device*, PARENTS, <https://www.parents.com/parenting/better-parenting/advice/a-guide-to-parental-controls-by-device/> (last visited Jun. 2, 2020); Jon Martindale, *The Best Free Parental Control Software for PC, Mac, iOS, and Android*, DIGITAL TRENDS (Apr. 14, 2020), <https://www.digitaltrends.com/computing/best-free-parental-control-software/>; Neil J. Rubenking & Ben Moore, *The Best Parental Control Software for 2020*, PCMAG (Apr. 6, 2020), <https://www.pcmag.com/picks/the-best-parental-control-software>.

software continues to become more and more sophisticated and accurate.<sup>219</sup> Similarly, parents concerned about the marketing efforts aimed at their children can make use of various ad-blocking tools at their disposal.<sup>220</sup>

Congress, in cooperation with the tech industry, can take additional steps that would give parents more granular control over their child's online activity. A standard could be developed in which websites could optionally send a content rating that would be used by filtering software to control access on a child's device.<sup>221</sup> Additionally, filter software could be configured by the parent to send data to the website about what standardized types of functionality should or should not be enabled on the site (e.g. commenting, uploading, direct messaging, etc.), and, in responding to the web request, the website would automatically indicate which of those preferences, if any, it will honor.<sup>222</sup>

Since implementing the standard would be optional on the part of the website, the burden on the website operator is voluntary and contingent upon whether they wish to cater to users browsing behind filter software. The filter software could presumptively block access to any website which does not implement the standard (or will not honor the preferences), thereby offering an incentive for websites to comply or risk losing traffic. Parents could manually authorize access to certain websites on an individual basis regardless of its use of the standard, in addition to configuring the filter software to employ one or more community-

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219. Terri Coles, *How AI Can Help Filter the Worst of the Web*, ITPRO TODAY (Jun. 30, 2019), <https://www.itprotoday.com/data-analytics-and-data-management/how-ai-can-help-filter-worst-web>.

220. Andrew Chaikivsky, *Want to Protect Against Websites That Spy on You? Get an Ad Blocker*, CONSUMER REPORTS (Feb. 15, 2018), <https://www.consumerreports.org/digital-security/to-protect-against-websites-that-spy-on-you-get-an-adblocker/>.

221. The World Wide Web Consortium, the primary organization responsible for promulgating web standards, has previously proposed various standards to cater to filtering technology and manage an individual's privacy preferences as early as 1997, including PICS, POWDER, and P3P. *Privacy*, W3C, <https://www.w3.org/standards/webdesign/privacy> (last visited Jun. 2, 2020); *Platform for Internet Content Selection (PICS)*, W3C (2003), <https://www.w3.org/PICS/>. These standards were never widely adopted by the industry, and it has been proposed that they be declared obsolete. Philippe Le Hegaret (@plehegar), *Proposal to Obsolete PICS\*, CC/PP\*, POWDER*, GITHUB (Aug. 31, 2018), <https://github.com/w3c/transitions/issues/86>. The key difference with the proposal here is the involvement of Congress to promote (and, perhaps in some cases, compel) use of such technology.

222. The concept of sending ancillary information to a web server along with the request for a particular resource ("request headers") and receiving ancillary information from the server along with the requested resource ("response headers") is an integral part of the HTTP standard upon which the web is built. See *HTTP Headers*, MDN WEB DOCS (Apr. 27, 2020), <https://developer.mozilla.org/en-US/docs/Web/HTTP/>. In fact, this concept has already been employed to give users the ability to instruct websites that they don't wish to be tracked, which is effectively just one of many user preferences that could be established for a broader, kid-focused privacy scheme. *HTTP Headers: DNT*, MDN WEB DOCS (May 21, 2020), <https://developer.mozilla.org/en-US/docs/Web/HTTP/Headers/DNT> (detailing the header sent by the user's device to indicate tracking preference); *HTTP Headers: Tk*, MDN WEB DOCS (Mar. 23, 2019), <https://developer.mozilla.org/en-US/docs/Web/HTTP/Headers/Tk> (detailing the header sent by the web server indicating its tracking behavior). Similar headers exist for indicating preferred languages, *HTTP Headers: Accept-Language*, MDN WEB DOCS (Dec. 9, 2019), <https://developer.mozilla.org/en-US/docs/Web/HTTP/Headers/Accept-Language>, and for indicating a preference for lower data usage, *HTTP Headers: Save-Data*, MDN WEB DOCS (May 31, 2020), <https://developer.mozilla.org/en-US/docs/Web/HTTP/Headers/Save-Data>. A related concept allows users to configure their devices to send preferences to a website related to its visual display, such as requesting a "dark mode," Andy Clarke, *Redesigning Your Product and Website for Dark Mode*, STUFF & NONSENSE (Nov. 2, 2018), <https://stuffandnonsense.co.uk/blog/redesigning-your-product-and-website-for-dark-mode>, or requesting fewer animations (especially for users with vestibular disorders), Eric Bailey, *An Introduction to the Reduced Motion Media Query*, CSS TRICKS (Apr. 24, 2019), <https://css-tricks.com/introduction-reduced-motion-media-query/>. While honoring such preferences is currently voluntary, the web development industry continues to embrace the philosophy that web services should cater and adapt to the varying needs, preferences, and forms of access (e.g. mobile phone vs. desktop computer) among users, which is exemplified by efforts to promote better accessibility considerations for disabled users. See Oyetoke Tobi Emmanuel, *Why Web Accessibility Is Important and How You Can Accomplish It*, MEDIUM (Feb. 7, 2018), <https://medium.com/fbdevclagos/why-web-accessibility-is-important-and-how-you-can-accomplish-it-4f59fda7859c> (recognizing concurrent justifications for following web accessibility practices, which could mirror those for a privacy protection scheme as proposed here, including altruism, good business sense, and legal mandate).

curated “white lists” that would grant access to websites that have been prescreened by fellow parents or family interest groups.<sup>223</sup> The filter software could also connect to a parent’s mobile device, allowing a child to send her parent an ad hoc request to access a website, giving the parent the opportunity to review the website and instantly grant or deny access from anywhere.<sup>224</sup> Congress, for its part, can take steps to make filter software freely available, promote its use, and facilitate drafting and adoption of standards within the industry.<sup>225</sup>

Filtering technology of this kind is feasible, and it would empower parents to make precise decisions that more effectively cater to the individual needs and characteristics of their children while simultaneously reducing the burden and liability for website operators.

## V. CONCLUSION

COPPA has been a failure, and it continues to do more harm than good. Its goals of protecting children on the internet are laudable and attainable, but it is time to completely rethink the approach. With the cooperation of the tech industry and parents, Congress can reach its goals with a solution that is much more effective and workable and that maximizes the benefits among all players.

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223. Critics may note that the internet consists of an ever-changing patchwork of billions of websites, posing a daunting, if not impossible, task of monitoring or rating the entire breadth of information. But, as a general proposition, this limitation is far more problematic with a “blacklist” strategy of filtering content (where “bad” sites are blocked, creating essentially an endless game of whack-a-mole) than with a “whitelist” strategy (where “good” sites are expressly permitted). The caveat is that “good” sites may be blocked until added to the “whitelist,” but the danger of access to “bad” content is effectively eliminated. However, the “whitelist” would ideally work in tandem with an artificial-intelligence-based filter to ensure certain sites are permitted, at the discretion of the parent, to manually (and preemptively) override instances where the machine-based filter might be overzealous in its blocking.

224. Such a mechanism would realize the unattained objective of COPPA’s “verifiable parental consent.”

225. *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 658 (2004) (citation omitted) (“Congress may act to encourage such use by giving strong incentives to schools and libraries and by promoting the development of filters by industry and their use by parents.”).