

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

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I. INTRODUCTION

Mark Zuckerberg, the co-founder, chairman, and CEO of Facebook, Inc.,¹ recently made news when he implied he believed a law was not necessary to cover and protect teenagers on social networks.² Although Zuckerberg acquiesced that this topic “deserves a lot of discussion,” he was criticized for responding in a manner that many interpreted as too cavalier when acknowledging the sensitive nature of teens’ data.³ Currently, there is only one federal law on the books that addresses children’s privacy online: the Children’s Online Privacy Protection Act (COPPA).⁴ COPPA does not pertain to teenage users or teenage data, but understanding how Facebook, Inc. has handled COPPA may shed light on Zuckerberg’s seemingly lackadaisical response to the regulation of teen data.⁵

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¹ #4 Mark Zuckerberg, FORBES (Nov. 4, 2018), <https://www.forbes.com/profile/mark-zuckerberg/#e1233153e06d>.

² Zack Whittaker, *At Hearing, Facebook’s Zuckerberg Rejects Law to Protect Privacy of Children*, ZERO DAY NET (Apr. 10, 2018), <https://www.zdnet.com/article/at-hearing-zuckerberg-rejects-law-to-protect-the-privacy-of-children/>. See also Bloomberg Government, *Transcript of Mark Zuckerberg’s Senate Hearing*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/?noredirect=on&utm_term=.0b9b3f867a4e (“I think protecting minors and protecting their privacy is extremely important . . . [but] I’m not sure we need a law [that establishes a privacy bill of rights for children under sixteen].”).

³ Whittaker, *supra* note 2.

⁴ 15 U.S.C. §§ 6501–6506 (2018); 16 CFR § 312.9 (2019).

⁵ 15 U.S.C. § 6501(1) (defining child as any individual under the age of thirteen).

Since COPPA's enactment in 1998,⁶ Instagram and Facebook (collectively "Facebook, Inc.")⁷ have effectively managed to circumvent the requirements imposed on websites under COPPA by simply banning users under the age of thirteen from their websites.⁸ This restriction does not adequately prevent children from accessing these websites.⁹ Despite this, the Federal Trade Commission (FTC)—the agency tasked with the enforcement of COPPA—has accepted this practice as an acceptable means to determinatively fall outside the scope of COPPA regulations.

Because the FTC has allowed Facebook, Inc., the largest social networking company in the world,¹⁰ to easily circumvent the only federal general data privacy law currently effective, Zuckerberg's dispassion for a teenage privacy law is, in fact, unsurprising. Facebook, Inc.'s past circuitous approach to COPPA compliance exemplifies COPPA's continued ineffectiveness.¹¹ The vast ineffectiveness of COPPA, and the failure to adequately enforce it in a manner that promotes its underlying objectives, supports Zuckerberg's opinion that a law to regulate teenage data—if bearing any resemblance to COPPA—would likely be unnecessary.

This Comment will explore how the FTC can and should enforce COPPA in a way that would hold Facebook, Inc. accountable under the law. In Part II, this Comment will lay out the history of COPPA dating back to its enactment, highlight relevant components of COPPA, and provide a brief overview of the criticisms and studied ineffectiveness of the law. Part III will then examine Facebook, Inc.'s current policies regarding child-users on its sites Facebook and Instagram. Part IV will argue that the FTC's definition of "actual knowledge" unduly restricts the enforcement of COPPA and that Facebook, Inc. should be required to comply with COPPA's mandates because it has actual knowledge that there are children under thirteen using its sites. Part IV will also examine recent FTC

⁶ See § 6502(b)(1).

⁷ *What Are the Facebook Products?*, FACEBOOK, <https://www.facebook.com/help/1561485474074139?ref=dp> (last visited Jan. 11, 2019).

⁸ *Terms of Service*, FACEBOOK (Apr. 19, 2018), <https://www.facebook.com/terms.php>.

⁹ A.R. Lauricella et al., *The Common Sense Census: Plugged-In Parents of Tweens and Teens*, COMMON SENSE MEDIA 15 (2016), https://www.commonsensemedia.org/sites/default/files/uploads/research/common-sense-parent-census_whitepaper_new-for-web.pdf (reporting that the average age when teens and tweens initially signed up for social media accounts was 12.6 years old).

¹⁰ *Most Popular Social Networks Worldwide as of October 2018, Ranked by Active Users (in Millions)*, STATISTA, <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Nov. 2, 2018).

¹¹ See 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 (2010).

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settlements with other social media site operators and examine how these settlements further support enforcement against Facebook, Inc. In Part V, this Comment will argue that the time is ripe to demand Facebook, Inc.'s compliance with COPPA by examining how Facebook Inc. is already in compliance, where it must bridge the gaps, and how complying with COPPA can help Facebook, Inc. address growing social concern about data privacy. Finally, Part VI will conclude.

II. HISTORY OF COPPA

A. Legislative History

In response to growing concerns about the dissemination of children's personal information over the internet, Congress passed COPPA in 1998.¹² In anticipation of the passing of the law, the FTC spearheaded an effort in collecting data that indicates the prevalence of children internet users, along with the potential harms they face.¹³ The report highlighted concerns about children's weakened ability to understand the harms of providing personal information to third parties through the internet, and about children being less privy to marketing techniques and so more susceptible to the tactics of online marketers and their deceptive trade practices.¹⁴ Additionally, the FTC report highlighted the importance of enabling parents to maintain control over their children's use of the internet and what information their children share on the internet.¹⁵ Specifically, the FTC argued that "it is a parent's role to have notice, access, and choice as to how their children's personal information is used and collected."¹⁶ These concerns about data control and potentially harmful internet practices ultimately motivated Congress to enact COPPA.¹⁷

To address these concerns, Congress did not create a private right of action under COPPA, but instead vested the FTC with the power to enforce any violations of the act.¹⁸ Specifically, Congress granted the FTC the authority to create a rule responding to COPPA.¹⁹ Congress outlined the specific regulations and practices that websites would be required to follow

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 375.

¹⁶ *Id.*

¹⁷ 15 U.S.C. §§ 6501–6506 (2018); 16 C.F.R. 312.1 (2019) (COPPA was enacted to "prohibit[] unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.").

¹⁸ 15 U.S.C. § 6502; 16 C.F.R. § 312.9.

¹⁹ 15 U.S.C. § 6502.

to comply with the act.²⁰ As such, the FTC has promulgated the Children's Online Privacy Protection Rule ("the Rule"), which was made effective as of April 2000.²¹ The Rule provides contextual guidelines for parents, children, and most importantly website companies who, theoretically, must conform their website functionality to comply with COPPA and the Rule.²²

In the eighteen years since the enactment of COPPA, the internet has grown and the way data is stored, collected, and disseminated over the internet has become more complex and more prominent. "[I]n light of [these] changes in online technology," the FTC amended the Rule in 2013 to "clarify the scope of the Rule and strengthen its protections for children's personal information . . ."²³ The amendment modified certain definitions, updated COPPA's requirements, and included a new provision regarding data retention and deletion.²⁴ Despite these efforts to better align COPPA with the potential harms child internet users face, the 2013 revision still falls short in meeting its stated goals of protecting children's internet privacy.²⁵ Accordingly, the need to protect child privacy online remains strong and relevant.²⁶

B. Important Aspects of COPPA

A more in-depth analysis of COPPA's text and the Rule provides insight into the scope of COPPA, its implications, and its effects. In general, COPPA prohibits any operator of a website 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 provisions of the act.²⁷ Although COPPA defines "child,"²⁸ "operator,"²⁹ and a "website directed to

²⁰ *Id.*

²¹ 16 C.F.R. § 312.

²² *Id.*

²³ Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972 (Jan. 17, 2013) (to be codified at 16 C.F.R. pt. 312).

²⁴ *Id.* Under the revision of the Rule, COPPA expanded its scope by expanding the definition of "personal information," "operator," and "website or online service directed at children." *Id.* These revisions meant that COPPA would also apply to third-party advertising networks and app and plug-in developers. *Id.*

²⁵ See Andrea M. Matwyshyn, *Of Teenagers and Tweenagers: Professor Allen's Critique of the Children's Online Privacy Protection Act in Historical Perspective*, 13 APA NEWSL. 7, 8 (2013).

²⁶ See Mary Madden et al., *Teens, Social Media, and Privacy*, PEW RES. CTR. (May 21, 2013), <http://www.pewinternet.org/2013/05/21/teens-social-media-and-privacy/> ("Teens are sharing more information about themselves on social media sites than they did in the past.").

²⁷ 16 C.F.R. § 312.3.

²⁸ COPPA defines "child" as "an individual under the age of 13." *Id.* § 312.2.

²⁹ COPPA defines "operator" as:

[A]ny person who operates a website located on the Internet or an online

children,”³⁰ it fails to explicitly define what it means to have “actual knowledge” of underage users.

COPPA seeks to accomplish its goal of ensuring safe websites for children by requiring a website operator to “[e]stablish and maintain reasonable procedures to protect the confidentiality, security, and integrity of the personal information collected from children;”³¹ and to “[p]rovide notice on [its] website of what information it collects from children, how it uses such information, and its disclosure practices for such information.”³² COPPA also addresses the FTC’s goal of enabling parental control of children’s information by requiring a website operator to obtain “verifiable parental consent before any collection, use, and/or disclosure of personal information from children.”³³ COPPA also requires website operators to provide parents with a reasonable way that they can review the personal information collected from their child.³⁴

C. Brief Overview of Criticisms of COPPA

Many critics have highlighted COPPA’s adverse effects and continued ineffectiveness since its enactment.³⁵ Most prominently, critics attack COPPA’s limited scope by highlighting the fact that the definition of child is limited to those under thirteen years of age.³⁶ In 2001, only a short time

service and who collects or maintains personal information from or about the users of or visitors to such web site or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that web site or online service, involving commerce: (a) Among the several States or with 1 or more foreign nations; (b) In any territory of the United States or in the District of Columbia, or between any such territory and (1) Another such territory, or (2) Any State or foreign nation; or (c) Between the District of Columbia and any State, territory, or foreign nation.

Id.

³⁰ A website is considered to be one directed at children when the visual content, the subject matter, and use of music, audio, or child-oriented activities and incentives give indication that the website or a portion of the website is directed towards children. *Id.*

³¹ *Id.* § 312.3(e).

³² *Id.* § 312.3(a). This notice must be prior to collecting or using the information. *Id.* § 312.4.

³³ 16 C.F.R. § 312.5(a)(1). Although COPPA outlines several exceptions in which the operator does not need to obtain parental consent, in general, any method to obtain consent must be reasonably calculated in light of available technology to ensure that the person providing consent is actually the child’s parent. *Id.* § 312.5(b)(1).

³⁴ *Id.* § 312.3(c).

³⁵ See Matwyszyn, *supra* note 25.

³⁶ See *id.* (“[A]ge thirteen appears to have been selected arbitrarily and developmentally illogically . . . using the age of thirteen . . . creates an irreconcilable conflict with the minority doctrine in contract law.”).

after COPPA's enactment, Professor Anita L. Allen authored a comprehensive article outlining its ineffectiveness, entitled *Minor Distractions: Children, Privacy, and E-Commerce*.³⁷ Allen attributed COPPA's failures to many different factors but focused her inquiries into three main questions: (1) whether websites are complying with the requirements of COPPA, (2) whether parents are adequately supervising their children, and (3) whether the FTC has been willing and able to enforce the statute.³⁸ These three questions, posed just one year after COPPA went into effect, continue to be useful inquiries when examining the effectiveness of COPPA today.

As to the first question, Allen concluded that some websites comply and some do not, but she noted that an independent study at the time indicated "that most commercial Web sites [sic] geared for children ignore children's privacy and the requirements of COPPA."³⁹ Similarly, in 2002, the FTC published a Compliance Survey in which the Commission reported that full compliance with the Rule had yet to be attained and that better compliance was needed.⁴⁰ In 2007, the FTC filed a report to Congress that noted that "[t]he FTC's substantial, ongoing, commitment to business education has facilitated voluntary compliance with the Rule within the online industry."⁴¹ This conclusion, however, may be more reflective of the FTC's flexible enforcement standards.⁴²

The second inquiry raises issues that deal with whether parents have the capacity to adequately monitor their children's behavior online. Critics have noted that COPPA presumes that parents are available during their child's internet time and that it disregards the fact that often the children's technology skills are more advanced than their respective parents.⁴³ Children's technological savviness has also proven to be problematic in the general enforcement of COPPA because children often have the capacity to implement an immediate work-around to avoid any age-control limits that a

³⁷ Anita L. Allen, *Minor Distractions: Children, Privacy, and E-Commerce*, 38 HOUSTON L. REV. 751 (2001).

³⁸ Allen, *supra* note 37, at 767.

³⁹ Allen, *supra* note 37, at 767–68.

⁴⁰ FED. TRADE COMM'N, PROTECTING CHILDREN'S PRIVACY UNDER COPPA: A SURVEY ON COMPLIANCE 1–2 (2002), <https://www.ftc.gov/sites/default/files/documents/rules/children%E2%80%99s-online-privacy-protection-rule-coppa/coppasurvey.pdf>.

⁴¹ FED. TRADE COMM'N, IMPLEMENTING THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT: A REPORT TO CONGRESS 2 (2007) https://www.ftc.gov/sites/default/files/documents/reports/implementing-childrens-online-privacy-protection-act-federal-trade-commission-report-congress/07coppa_report_to_congress.pdf.

⁴² *Id.* (indicating that "[t]he agency's approach thus far has proven effective in applying the flexible standards of the COPPA Rule to new online services, such as social networking sites.").

⁴³ Matwyshyn, *supra* note 25, at 7–8.

website operator may have in place.⁴⁴ For example, some child-users claim they are older than they actually are so they can access the website.⁴⁵

Finally, Allen's third inquiry addresses the willingness and ability of FTC enforcement. Despite some FTC enforcement actions brought against a number of websites, app developers, and third-party service providers for violating COPPA,⁴⁶ generally, FTC's COPPA enforcement remains limited.⁴⁷ "[B]ecause COPPA grants no private rights of action to parents, enforcement of COPPA is the sole province of the FTC, which is . . . understaffed and overburdened."⁴⁸ As argued in this Comment, the FTC enforcement standard should be more rigid.⁴⁹

III. HOW FACEBOOK, INC. CURRENTLY HANDLES COPPA COMPLIANCE

The criticisms of COPPA remain particularly relevant today within the context of social media websites. By looking at Facebook, Inc.—in particular its websites Facebook and Instagram—one can better understand the ease with which website operators evade COPPA's mandates.⁵⁰ Although these websites purport compliance with COPPA and have protocols in place to address children using their sites, the minimal actions taken by these sites have effectively made the existence of COPPA obsolete within the social media realm because the sites collect and unlawfully use children's data and personal information.

A. *Current Facebook, Inc. Practices*

Social media maintains popularity among adults, teens, and even children. A Common Sense Media census report in 2016 indicated that "parents reported that 56% of youth had their own social media accounts."⁵¹ Particularly, the study showed that parents reported that the

⁴⁴ *Id.*; see also Amy Iverson, *Facebook and Instagram Are Cracking Down on Underage Users*, DESERET NEWS (Jul. 26, 2018), <https://www.deseretnews.com/article/900025957/facebook-and-instagram-are-cracking-down-on-underage-users.html> (Commenting on the potential harm that a child's misrepresentation of their age may have by prematurely exposing them to mature content. "Facebook would always believe the user was older than they truly were. Facebook may think a user is 21 several years before it is actually true, meaning that user could see ads for alcohol, gambling, or graphic violence meant only for adult users.").

⁴⁵ Matwyshyn, *supra* note 25, at 7–8.

⁴⁶ Irwin Reyes et al., "Won't Somebody Think of the Children?" *Examining COPPA Compliance at Scale*, 3 PROCEEDINGS ON PRIVACY ENHANCING TECHS. 63, 65 (2018).

⁴⁷ Matwyshyn, *supra* note 25, at 8.

⁴⁸ *Id.*

⁴⁹ See *infra* Section III. C.

⁵⁰ Facebook and Instagram are both owned by Facebook, Inc. *What Are the Facebook Products?*, *supra* note 7.

⁵¹ Lauricella et al., *supra* note 9, at 15.

average age when teens and tweens initially signed up for the social media accounts was 12.6 years old.⁵² Statistics show that Facebook and Instagram are among the most popular social media sites for teens.⁵³ As of January 2019, Facebook is the leading social media site in the world with over 2.27 billion active users.⁵⁴ Instagram, a subsidiary of Facebook, Inc.,⁵⁵ as of January 2019 has one billion active users and is ranked as the sixth largest social media site in the world.⁵⁶

Because Facebook, Inc. owns and operates both Facebook and Instagram, the websites share similar practices.⁵⁷ Each website maintains separate terms and conditions, yet both say similar things.⁵⁸ Both websites' terms and conditions restrict the use of their websites to users who are at least thirteen years old.⁵⁹ This restriction is a direct, practical effect of

⁵² *Id.*

⁵³ *See Most Popular Social Networks of Teenagers in the United States from 2012 to 2019*, STATISTA, <https://www.statista.com/statistics/250172/social-network-usage-of-us-teens-and-young-adults/> (last visited Sept. 24, 2019) (showing that Snapchat is the most popular social media site amongst teenagers in the United States). *See generally* John Shinal, *Mark Zuckerberg Couldn't Buy Snapchat Years Ago, and Now He's Close to Destroying the Company*, CNBC (July 12, 2017, 1:40 PM) <https://www.cnbc.com/2017/07/12/how-mark-zuckerberg-has-used-instagram-to-crush-evan-spiegels-snap.html> (describing how in 2013, Snapchat CEO Evan Spiegel rejected Facebook, Inc.'s offer to buy Snapchat for \$3 billion). Although Snapchat remains popular amongst teens, business insiders speculate that Facebook Inc's ability to mimic Snapchat's functionality—as it has already done so by way of Instagram's Story feature—may impact Snapchat's sustainability. *Id.*

⁵⁴ *Most Popular Social Networks Worldwide as of January 2019, Ranked by Number of Active Users (in Millions)*, STATISTA, <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Jan. 5, 2019).

⁵⁵ *Terms of Use*, INSTAGRAM (Apr. 19, 2018), <https://help.instagram.com/581066165581870>. *See generally* Kurt Wagner, *Here's Why Facebook's \$1 Billion Instagram Acquisition Was Such a Great Deal*, RECODE (Apr. 9, 2017), <https://www.recode.net/2017/4/9/15235940/facebook-instagram-acquisition-anniversary> (describing how Facebook, Inc. acquired Instagram in 2012 for \$1 billion. Instagram's evident success as a subsidiary of Facebook, Inc. sent a clear message to market leaders that if they "want to play truly big" they should "come work for Facebook.").

⁵⁶ *Most Popular Social Networks Worldwide as of January 2019, Ranked by Number of Active Users (in Millions)*, *supra* note 54 (reporting that YouTube ranked second largest with 1,900 million users; WhatsApp ranked third largest with 1,500 million users; Facebook Messenger ranked fourth with 1,300 million users; and WeChat ranked fifth with 1,058 million users). Interestingly, Facebook, Inc. owns WhatsApp and Facebook Messenger, and therefore controls four out of the six largest social media websites in the world. *See WhatsApp Legal Info*, WHATSAPP (August 25, 2016), <https://www.whatsapp.com/legal/> ("We joined Facebook in 2014. WhatsApp is now part of the Facebook family of companies."); *What Are the Facebook Products?*, *supra* note 7 (indicating Messenger is a Facebook Product).

⁵⁷ *Data Policy*, FACEBOOK (Apr. 19, 2018), <https://www.facebook.com/about/privacy> (indicating that both Facebook and Instagram are governed by the same Data Policy).

⁵⁸ *Terms of Service*, *supra* note 8; *Terms of Use*, *supra* note 55.

⁵⁹ *Terms of Service*, *supra* note 8; *Terms of Use*, *supra* note 55.

COPPA.⁶⁰ In addition to this age restriction explicated in its terms and conditions, Facebook also requires, upon signing up for an account, that the user input his or her birth date.⁶¹ This is an effort to ensure that users who are under the age requirement do not create an account and to limit the company's liability if underage users do create an account.⁶² This effort falls short, however, because often kids will simply lie about their age—often with parental consent—to create an account.⁶³ The reality of age misrepresentation, therefore, undermines the suggestion that simply asking for a user's age and accepting that user's response that he or she is older than thirteen establishes sufficient COPPA compliance. Yet, despite this, the FTC has not challenged this practice and thereby has effectively accepted that simple age disclosure coupled with a minimum age requirement suggests COPPA compliance.

Instagram, however, has seemingly foregone this façade and does not require the user to indicate his or her age or birth date upon signing up for

⁶⁰ Rachel Withers, *13 Going on Old Enough to Share Your Personal Data*, SLATE (Apr. 24, 2018), <https://slate.com/technology/2018/04/why-not-apply-the-childrens-online-privacy-protection-act-to-everyone.html> (“It’s far easier, and less pricey, to ban junior users from signing up altogether than it is to set up verifiable consent options. Instead, many platforms wait until kids reach the ripe old age of 13 to gain unsupervised access to mine their personal data riches.”). See also Larry Magid, *Unintended Consequences of FTC’s New COPPA Children’s Online Privacy Rules*, HUFFPOST (Dec 6, 2017), https://www.huffpost.com/larry-magid/unintended-consequences-o_1_b_1741703.html (COPPA has “discourage[d] companies from offering services to people under 13 or even allowing preteens to use services that could benefit them.”).

⁶¹ *Create a New Account*, FACEBOOK, <https://en-gb.facebook.com/> (last visited Dec. 11, 2019).

⁶² A question arises as to the enforceability of the terms and conditions as a contract against a minor who circumvents the age requirement and agrees to the terms and conditions of the site in order to activate his or her account. In *C.M.D. v. Facebook, Inc.*, No. C 12-1216, 2014 U.S. Dist. LEXIS 41371, at *4, *8 (N.D. Cal. Mar. 26, 2014) (*aff’d C.M.D. v. Facebook, Inc.*, 2015 U.S. App LEXIS 18939 (9th Cir. Cal., Oct. 30, 2015)), the plaintiffs, a class of minors who utilized Facebook, argued the minors were not bound by the consent clauses in Facebook’s Statement of Rights and Responsibilities (“SRR”) because the SRR represented a type of contract into which a minor could not legally enter under the California Family Code § 6701. The court found that the general rule of law is that a minor may enter into a contract in the same way as an adult, but it is subject to disaffirmance. *Id.* at *8–9. Because the plaintiffs failed to show that any enumerated exceptions to this rule applied, and because the minors continued to use their Facebook sites, which preempted any argument of disaffirmance, the court found that the minors could be held to the terms of the SRR and dismissed the claim. *Id.* at *10–14.

⁶³ Magid, *supra* note 60. See also Iverson, *supra* note 44 (“Over the years, kids have lied (and many parents have lied for their kids) to get around the age requirement and create accounts anyway.”); Mary Aiken, *The Kids Who Lie About Their Age to Join Facebook*, ATLANTIC (Aug. 30, 2016), <https://www.theatlantic.com/technology/archive/2016/08/the-social-media-invisibles/497729/> (“These underage users access the site by creating a fake profile, often with the awareness and approval of their parents.”).

an account.⁶⁴ Neither COPPA nor the Rule explicitly mandates that an operator must collect age information to prove the website does *not* engage users under thirteen years old. But, without age verification, not much else prevents children under thirteen from signing up for the website.⁶⁵ Therefore, when a website fails to collect any age information but instead relies primarily on its official age restriction, common sense infers that the website has failed to take adequate measures in ensuring all of its users are over thirteen years old.

Instagram promulgates a “Guide for Parents” on its website, which was a collaborative effort between Instagram and a third-party organization called Connect Safely.⁶⁶ Although the guide highlights that the terms and conditions require users to be over thirteen, it explicitly recognizes that “there are many younger children who use the service, often with parents’ permission.”⁶⁷ So, in an effort to further comply with COPPA and demonstrate that these are not websites that are directed at children, both Instagram and Facebook have established formal procedures for how users can report accounts handled by underage users.⁶⁸

Facebook has a form in which a user can report a user that is under thirteen.⁶⁹ This form requests a URL of the account believed to be of a person that is under thirteen, and it provides a drop-down measure to choose how old the user is.⁷⁰ The form also indicates that:

If you’re reporting a child’s account registered under a false date of birth, and the child’s age is reasonably verifiable as under 13, we will promptly delete the account. You will not receive confirmation of this action, but you should no longer be able to view this child’s timeline on the site. Our ability to review and

⁶⁴ INSTAGRAM, <https://www.instagram.com/accounts/emailsignup/?hl=en> (last visited Nov. 2, 2018) (requiring only mobile number or email, full name, username, and a password to create an account). It also provides the option to connect through Facebook, which, if chosen, links the age data between the accounts. *See generally* Rezwana Manjur, *Social Media Perils: Is Simply Age Gating Adequate?*, *MARKETING-INTERACTIVE* (Dec. 1, 2016), <https://www.marketing-interactive.com/social-media-perils-is-simply-age-gating-adequate/>.

⁶⁵ Iverson, *supra* note 44.

⁶⁶ *Parent’s Guide to Instagram*, *CONNECT SAFELY 2* <https://www.connectsafely.org/wp-content/uploads/Instagram.pdf> (last visited Nov. 2, 2018). *See also* *About Us*, *CONNECT SAFELY* <https://www.connectsafely.org/about-us/> (last visited Nov. 2, 2018) (“ConnectSafely.org is a Silicon Valley, Calif.-based nonprofit organization dedicated to educating users of connected technology about safety, privacy and security.”).

⁶⁷ *Parent’s Guide to Instagram*, *supra* note 66, at 2.

⁶⁸ *Report an Underage Child*, *FACEBOOK*, <https://www.facebook.com/help/contact/209046679279097> (last visited Nov. 3, 2018); *Report an Underage User on Instagram*, *INSTAGRAM*, https://help.instagram.com/contact/723586364339719?helpref=faq_content (last visited Sept. 24, 2019).

⁶⁹ *Report an Underage Child*, *supra* note 68.

⁷⁰ *Id.* (showing drop-down menu options that include under 9, 10, 11, 12, 13+).

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take appropriate action on a report significantly improves with the completeness of the report (ex: URL of the timeline).

If the reported child's age is not reasonably verifiable as under 13, then we may not be able to take action on the account. In this case, if you are not the parent of this child, then we strongly recommend that you encourage a parent to contact us personally, using this form.⁷¹

The form does not further detail the steps and measures taken by Facebook, Inc. to “reasonably verify” the age of the reported user. Similarly, if a user had created an account while they were younger than thirteen, they can request a birthday change, “but the account may be suspended while the social network investigates.”⁷²

Likewise, Instagram has a form in which users may report underage accounts.⁷³ This form collects the name and username of the alleged underage user, the year of birth of the alleged underage user, and the reporting user's relationship to the underage user.⁷⁴ Instagram's form contains similar language to that of Facebook's form regarding the potential inability to delete an account if the user cannot be reasonably verified as under thirteen.⁷⁵ Additionally, on its help page, Instagram has a notice to parents indicating that “[i]f your child is younger than thirteen and created an account on Instagram, you can show them how to delete their account.”⁷⁶

B. Facebook, Inc.'s Public Policy

Facebook, Inc. has come under scrutiny for the lax way it handles reports of underage users. Particularly, a documentary made by an undercover reporter for the United Kingdom's Channel Four brought to light the slack measures Facebook and Instagram's content reviewers took in response to such reports.⁷⁷ During the undercover reporting, the reporter learned that reviewers “were instructed to ignore users who appeared under

⁷¹ *Id.*

⁷² Iverson, *supra* note 44.

⁷³ *Report an Underage User on Instagram*, *supra* note 68.

⁷⁴ *Id.*

⁷⁵ *Id.* (“If you're reporting a child's account that was made with a false date of birth, and the child's age can be reasonably verified as under 13, we'll delete the account If the reported child's age can't reasonably be verified as under 13, then we may not be able to take action on the account.”).

⁷⁶ *Tips for Parents*, INSTAGRAM, [https://help.instagram.com/154475974694511/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Privacy%20and%20Safety%20Center](https://help.instagram.com/154475974694511/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Privacy%20and%20Safety%20Center) (last visited Nov. 3, 2019).

⁷⁷ Josh Constine, *Facebook and Instagram Change to Crack Down on Underage Children*, TECH CRUNCH, <https://techcrunch.com/2018/07/19/facebook-under-13/> (last visited Nov. 3, 2018).

thirteen, saying “[w]e have to have an admission that the person is underage. If not, we just like pretend that we are blind and that we don’t know what underage looks like.”⁷⁸ In response to this documentary, Facebook Inc. issued a blog post in which it instituted a formal operational change for the reviewers, noting that “the account will be put on hold and the person will not be able to use Facebook until they provide proof of their age.”⁷⁹ The blog post also indicated that “[s]ince the program, [it has] been working to update the guidance for reviewers to put a hold on any account they encounter if they have a strong indication it is underage, even if the report was for something else.”⁸⁰

The discovery of these daily practices significantly undermined official statements previously made by Facebook, Inc. For example, in a statement made before the Senate on April 29, 2010, Timothy Sparapani, Facebook’s Director of Public Policy at that time,⁸¹ tactfully assured the public that Facebook, Inc. “take[s] seriously [its] responsibilities to protect children under 13 and enhance teen users’ online safety” and that “Facebook was built with COPPA’s requirements in mind.”⁸² Despite the verbal assurances that the company takes its responsibilities “seriously,” the company’s culture of turning a blind eye to users under thirteen nonetheless became an institutionalized pattern and procedure.

IV. FTC ENFORCEMENT OF COPPA AGAINST FACEBOOK, INC. AND OTHERS

Unfortunately, Facebook Inc. has failed to keep privacy promises in the past. In 2011, Facebook, Inc. settled an FTC charge for “deceiv[ing] consumers by telling them . . . [that user’s information] on Facebook [was] private, and then repeatedly allowing [that information] to be . . . made public.”⁸³ The FTC took action against Facebook, Inc. and imposed several

⁷⁸ *Id.*

⁷⁹ Monika Bickert, *Working to Keep Facebook Safe*, FACEBOOK (Jul. 17, 2018), <https://newsroom.fb.com/news/2018/07/working-to-keep-facebook-safe/>. See also Constine, *supra* note 77.

⁸⁰ Bickert, *supra* note 79.

⁸¹ Brad Stone, *Facebook Gets New Public Policy Director*, N.Y. TIMES: BITS (Mar 24, 2009, 6:39 PM) <https://bits.blogs.nytimes.com/2009/03/24/facebook-gets-new-public-policy-directo/>.

⁸² *An Examination of Children’s Privacy: New Technologies and the Children’s Online Privacy Protection Act: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the Comm. on Commerce, Sci. & Transp.*, 111th Cong. 13–14 (2010) (statement of Timothy Sparapani, Director, Public Policy, Facebook).

⁸³ *Facebook Settles FTC Charges That It Deceived Consumers by Failing to Keep Privacy Promises*, FED. TRADE COMM’N (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

standards to ensure Facebook, Inc. lived up to its promises.⁸⁴ No similar FTC enforcement action has been brought against Facebook, Inc. regarding its deceptive practices concerning users under thirteen years old on its websites.

A. The Enforcement of COPPA Against Facebook, Inc. Should be Stronger

Although Facebook, Inc. has made statements suggesting its continued effort to address the issue of users under thirteen on its sites⁸⁵ and has imposed certain practices, like age requirements,⁸⁶ to prevent these users from accessing its sites, its current practices regarding users under thirteen must be more closely scrutinized in light of the goals of COPPA. Facebook, Inc. has indicated intentions to crack-down on underage users,⁸⁷ which will likely result in more children's accounts being monitored and eventually locked, but it is unlikely that this will prevent all underage users from continuing to access the websites. First, the company's means of review is under-inclusive because it only considers accounts of those users that have been flagged in some way, allowing any unreported underage user to maintain his or her account.⁸⁸ Additionally, this protocol requires significant manpower, which makes it less than optimal.⁸⁹ Despite the significant investment needed to review content and user profiles, it is still unlikely that these manual reviewers could effectively flag each underage user because of the sheer impossibility that every user can be adequately monitored. That said, improvements can and should be made so that Facebook, Inc. actually keeps its promise of taking its responsibility to protect children under thirteen seriously.

Facebook, Inc. should spearhead this effort by acknowledging that users under thirteen years old are using its websites, despite the fact that these websites do not specifically target these users. Currently, Facebook, Inc. has purportedly complied with COPPA simply by formally not

⁸⁴ *Id.*

⁸⁵ See Bickert, *supra* note 79.

⁸⁶ *Terms of Service*, *supra* note 8; *Terms of Use*, *supra* note 55.

⁸⁷ See Bickert, *supra* note 79.

⁸⁸ *Id.* See also Phoebe Weston, *Facebook and Instagram to Crack Down on Underage Users: Social Networks Pledge to Lock Younger Users' Accounts Until They PROVE Their Age with an Official Photo ID*, DAILY MAIL (Jul. 20, 2018), <https://www.dailymail.co.uk/sciencetech/article-5974347/Facebook-Instagram-pledge-lock-younger-users-accounts.html> (noting that Facebook has indicated that when a user is reported for any reason, not just being underage, the moderator can consider the content on the page to determine whether the user is actually younger than thirteen).

⁸⁹ See Bickert, *supra* note 79 (reporting that Facebook employs over 7,500 content reviewers and that Facebook is investing heavily in new technology to help deal with problematic content on its site more effectively).

allowing users under thirteen on its site.⁹⁰ By failing to bring any enforcement action against Facebook, Inc., the FTC has effectively accepted this prohibition of child-users as a sufficient means for companies to self-identify themselves as operators outside the scope of COPPA. If Facebook, Inc. were to formally recognize the users on its sites who are under thirteen, then the company would, by definition under COPPA, have “actual knowledge” of child-users and would effectively be subject to COPPA’s regulations.⁹¹

But this self-directed, formal, operational recognition of underage users should not be required for COPPA to apply to Facebook and Instagram, and therefore to any other website purporting that underage users are not allowed on its site.⁹² Rather, the FTC should provide clearer guidance and stricter mandates as to which websites are required to comply with COPPA requirements, starting particularly with Facebook, Inc.

First, the FTC should acknowledge that Facebook and Instagram have “actual knowledge” of underage users. The Rule stipulates that any operator that has actual knowledge that it is collecting or maintaining personal information from a child must comply with the requirements under COPPA; however, it fails to define what constitutes “actual knowledge.”⁹³ The FTC, the agency tasked with the governance of COPPA, has promulgated that “an operator has actual knowledge of a user’s age if the site or service asks for—and receives—information from the user that allows it to determine the person’s age.”⁹⁴ This guideline is too restrictive. Essentially, this guideline purports that an operator may only have “actual knowledge” if they have taken affirmative steps to learn the user’s age—it requires the site to ask.⁹⁵ This guideline disregards other avenues in which an operator might come to know that it is obtaining information from children on its site. It is under this understanding of

⁹⁰ *But see* United States v. Path, Inc., No. C 13 0448 JCS, 2012 WL 7006381 (N.D. Ca. Jan. 31, 2012) (describing that although Path’s social networking service was intended for a general audience and was not directed specifically at children under thirteen, it triggered COPPA because it collected age information which indicated some users were under thirteen).

⁹¹ 16 C.F.R. § 312.3 (2019) (mandating that any operator with actual knowledge of users under thirteen must abide by the regulations set forth in COPPA).

⁹² *See Report an Underage User on Instagram*, *supra* note 68; *Report an Underage Child*, *supra* note 68.

⁹³ 16 C.F.R. § 312.3.

⁹⁴ *Children’s Online Privacy Protection Rule: Not Just for Kids’ Sites*, FED. TRADE COMM’N (Apr. 2013), <https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-not-just-kids-sites> (providing examples that the operator may have actual knowledge if the user provides an age that is lower than thirteen, or if the user answers an “age identifying question” like “What grade are you in?” or “What type of school do you go to?”).

⁹⁵ *Id.*

“actual knowledge” that Facebook, Inc. has effectively evaded the requirements under COPPA for which they would otherwise be held accountable. Specifically, Facebook has evaded having “actual knowledge” under COPPA by only allowing activation of an account after a user has self-identified as older than thirteen years old.⁹⁶ Likewise, Instagram has evaded having “actual knowledge” by simply not asking for the user’s age upon creating an account.⁹⁷

Black’s Law Dictionary defines explicit “actual knowledge” as “direct and clear knowledge, as distinguished from constructive knowledge,” providing the example that “the employer, having witnessed the accident, had actual knowledge of the worker’s injury.”⁹⁸ *Black’s Law Dictionary* defines implicit actual knowledge as “knowledge of information that would lead a reasonable person to inquire further.”⁹⁹ If the FTC uses these definitions in its own construction of “actual knowledge,” then at a minimum, Facebook, Inc. would only need to understand as true the fact that there are children under the age of thirteen using its websites and applications to the degree that it would lead a reasonable person to inquire further. But evidence that Facebook, Inc. has witnessed child-users on its websites would also, under this definition, be deemed actual knowledge. Several incidents suggest that Facebook, Inc. has this requisite understanding already, so Facebook, Inc. should be held to COPPA-mandated requirements in good faith.

For example, the measures that Facebook, Inc. have taken to create a form in which users can report children on its sites suggest that the sites understand and have witnessed that there are child-users who are accessing and utilizing their websites, despite the restriction imposed in Facebook and Instagram’s terms and conditions.¹⁰⁰ Similarly, Facebook has a system in place in which users who had signed up for its site while underage, and who have since turned thirteen, may formally request to change their fake birthdate to their real birthdate.¹⁰¹ Users who have encountered this

⁹⁶ *Create a New Account*, FACEBOOK, <https://www.facebook.com/r.php> (last visited Nov. 3, 2018).

⁹⁷ INSTAGRAM, *supra* note 64.

⁹⁸ *Knowledge*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁹⁹ *Id.*

¹⁰⁰ *See Report an Underage User on Instagram*, *supra* note 68; *Report an Underage Child*, *supra* note 68; *Terms of Service*, *supra* note 8; *Terms of Use*, *supra* note 55.

¹⁰¹ Iverson, *supra* note 44. *See also* Alex Roller, *If I Signed up for Facebook when I Was Underage, Is There a Way to Change My Year of Birth to the Correct Year Now That I Am Old Enough?*, QUORA (Mar. 18, 2013), <https://www.quora.com/If-I-signed-up-for-Facebook-when-I-was-underage-is-there-a-way-to-change-my-year-of-birth-to-the-correct-year-now-that-I-am-old-enough> (“Simply change your birthdate in the Edit Basic Info section. If you are a minor (or some other relevant condition), you may be directed to the appropriate section of the Help Center, where you can explain the situation involving your

situation have indicated that Facebook might inquire into the reason for the change or the reason for the wrong birth date initially or may require a copy of a photo ID for verification.¹⁰² Assuming even a fraction of these users are honest in their responses, it is likely that Facebook would have further information that would lead to an understanding that a significant amount of users under the age of thirteen hold Facebook accounts. Even if these birthdate-change requesters were not forthcoming, when these users provide a valid ID that shows their true birthdate and Facebook then recognizes they have had an account since before they were thirteen, this should be a clear indicator that the current operational method is not effectively restricting children under thirteen from using its site.

Although Facebook, Inc. has implemented operational protocols to limit the number of users under thirteen and to restrict their access to the sites, the protocols themselves suggest an understanding of the fact that there are children using its website, an understanding that should qualify as “actual knowledge” under COPPA. In fact, Instagram has made representations pertaining to its understanding of this fact within its Instagram Parent Guide, in which it stated “there are many younger children who use the service.”¹⁰³ Between the protocols in place and the representations that have been made, it is hard to believe that Facebook, Inc. does not actually know that users under thirteen use its websites, but rather it seems that Facebook, Inc. has willfully disregarded the facts that would suggest the users are underage.

In 2018, California passed a bill known as the California Consumer Privacy Act (CCPA).¹⁰⁴ The CCPA, which became effective January 1, 2019 and became operative January 1, 2020, grants California consumers certain rights that will enable them to gain information regarding what companies and websites are doing with the personal information that they share.¹⁰⁵ The CCPA distinguishes general consumers from consumers sixteen years old or younger.¹⁰⁶ Whereas general consumers would have the option to “opt-out” of certain data-sharing practices, consumers under the age of sixteen would have to “opt-in.”¹⁰⁷ The CCPA also requires that

incorrect birthdate, and they will most likely change your official Facebook birthdate for you within a couple of days.”).

¹⁰² See *How Can I Verify My Identity If I Create a Facebook Account with the Wrong Date of Birth? When I Log in, It Asks Me to Send My ID Card*, QUORA, <https://www.quora.com/How-can-I-verify-my-identity-if-I-create-a-Facebook-account-with-the-wrong-date-of-birth-When-I-log-in-it-asks-me-to-send-my-ID-card> (last visited Nov. 17, 2019).

¹⁰³ *Parent's Guide to Instagram*, *supra* note 66, at 2.

¹⁰⁴ California Consumer Privacy Act, CAL. CIV. CODE §§ 1798.100–99 (West 2018).

¹⁰⁵ Assem. B. 375 § 2(i) (Cal. 2018).

¹⁰⁶ Civ. § 1798.120(c)–(d).

¹⁰⁷ *Id.* § 1798.120(a), (b)–(d). Compared to COPPA, which defines “child” as anyone

this “opt-in” option be triggered “if the business has actual knowledge that the consumer is less than 16 years of age”¹⁰⁸ Although the law does not explicitly define the term “actual knowledge,” it does indicate that “a business that willfully disregards the consumer’s age shall be deemed to have had actual knowledge of the consumer’s age.”¹⁰⁹

Based on the above, it is likely that Facebook, Inc.’s current practices would qualify as willful disregard of the user’s age. Therefore, under the CCPA, Facebook, Inc. will likely need to revise its policies to better address underage Californian users. Further, just as Facebook, Inc. has disregarded its own information indicating instances of underage users, it has also disregarded information regarding the demographics of its consumer-base, which it has an interest in understanding. Specifically, several independent studies have shown that children under thirteen use Facebook, Inc.’s websites.¹¹⁰ In general, independent research groups presumably have less accessibility to user data than Facebook, Inc. has as the operator of the site—and yet researchers still unearth data on users under thirteen.¹¹¹ For the sake of discussion, if for some reason independent researchers do have access to additional information on Facebook consumers that is unavailable to Facebook, Inc., then Facebook, Inc. would likely have a sincere interest in understanding these findings. Therefore, the FTC should not disregard statistical studies when qualifying the degree to which Facebook, Inc. might be ignoring actual information proving that the company knows some users are under thirteen years old.

Nevertheless, come January 1, 2020, Facebook, Inc. will be held to the CCPA mandates, which makes it likely that its current practices will not pass muster.¹¹² Because of the FTC’s loose definition and implementation

under the age of thirteen, the CCPA treats anyone under the age of sixteen differently. *See id.*; 16 C.F.R. § 312.3 (2019). The CCPA mandates that a consumer between the ages of thirteen and sixteen may themselves “opt-in” to data-sharing practices, whereas the parents of consumers under the age of thirteen must be the ones to affirmatively authorize the sale of the minor’s data. Civ. § 1798.120(c). This mandate complies with COPPA regulation of obtaining parental consent for children under thirteen.

¹⁰⁸ Civ. § 1798.120(c).

¹⁰⁹ *Id.*

¹¹⁰ *See* Aiken, *supra* note 63 (referencing a data report in 2011 which reported 20 million minors use Facebook, and 7.5 million of those users are under the age of thirteen); Lauricella et al., *supra* note 9, at 15 (reporting the average age of children accessing social media is 12.6 years old).

¹¹¹ *See e.g.*, Lauricella et al., *supra* note 9, at 15 (reporting the average age of children accessing social media is 12.6 years old); *CR Survey: 7.5 Million Facebook Users Are Under the Age of 13, Violating the Site’s Terms*, CONSUMER REP. (May 10, 2011), <https://www.consumerreports.org/media-room/press-releases/2011/05/cr-survey-75-million-facebook-users-are-under-the-age-of-13-violating-the-sites-terms/> (finding that 7.5 million Facebook users are under the age of thirteen).

¹¹² The CCPA applies to all businesses that collect personal information from their

of the term “actual knowledge,” however, Facebook, Inc. has effectively evaded COPPA’s mandates. More concernedly, by virtue of ignoring the minor users on its sites, Facebook, Inc. has been collecting and disseminating child data, which directly contradicts the initial purpose of COPPA.¹¹³

B. Recent FTC Enforcement Actions Against Social Media Sites

Although the FTC has not brought a COPPA enforcement action against Facebook, Inc., it has recently brought enforcement actions against, and has reached settlement agreements with, the social media sites Musical.ly, now known as TikTok, and Google and its subsidiary YouTube.¹¹⁴ These settlements are the largest COPPA settlements in history, with Musical.ly agreeing to pay \$5.7 million, and YouTube agreeing to pay \$170 million.¹¹⁵ These settlements provide useful insight into how the FTC may determine that an operator has actual knowledge and provides guidance as to how a similar action could be brought against Facebook, Inc.

Musical.ly, now known as TikTok, is a free social network where users can watch, create, and share videos.¹¹⁶ The Department of Justice, on behalf of the FTC, filed a complaint against Musical.ly in February of 2019 alleging violations of COPPA.¹¹⁷ The FTC determined that Musical.ly was an operator under COPPA both because it was directed towards children and because it had actual knowledge that children under thirteen years old

customers and share the information that they have collected with third parties. Civ. § 1798.115(a). Facebook, Inc. engages in this practice, and therefore, will be held to the mandates of the California law. See *Data Policy*, *supra* note 57.

¹¹³ Matecki, *supra* note 11, at 373–75.

¹¹⁴ *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That It Violated Children’s Privacy Law*, FED. TRADE COMM’N (Feb. 27, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc>; *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law*, FED. TRADE COMM’N (Sept. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

¹¹⁵ *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That It Violated Children’s Privacy Law*, *supra* note 114; *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law*, *supra* note 114 (noting that under the terms of the settlement Google and YouTube are required to pay \$136 million to the FTC and \$34 million to New York).

¹¹⁶ *Parent’s Ultimate Guide to TikTok*, COMMON SENSE MEDIA (Aug. 27, 2018), <https://www.commonsensemedia.org/blog/parents-ultimate-guide-to-tiktok>. See generally *TikTok*, <https://www.tiktok.com/en/> (last visited Nov. 18, 2019).

¹¹⁷ *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That It Violated Children’s Privacy Law*, *supra* note 114; Complaint for Civ. Penalties, Permanent Injunction, and Other Equitable Relief at 1, U.S. v. Musical.ly, No. 2:19-cv-1439 (C.D. Cal. Feb. 27, 19) [hereinafter *Musical.ly Complaint*].

had created Musical.ly accounts.¹¹⁸

The complaint cited numerous facts that proved Musical.ly had actual knowledge of users under thirteen years old. For example, the FTC cited that there were “numerous press articles between 2016 and 2018 [that] highlight[ed] the popularity of the App among tweens and younger children.”¹¹⁹ The FTC also noted that Musical.ly’s website provided parents guidance about their child’s use of the app.¹²⁰ Next, the complaint alleged that Musical.ly had received thousands of complaints from parents that their child, who was under thirteen, had created an account without their parents’ consent.¹²¹ The complaint also reasoned that it was “easily apparent in perusing users’ profile pictures and in reviewing users’ profiles” that many were under thirteen years old.¹²²

These cited facts implicate Facebook, Inc. First, by citing press articles the FTC suggests that third party research and analyses can be taken into consideration when determining whether an operator has actual knowledge. This implicates Facebook, Inc. because of the readily-available statistics and press articles that indicate Facebook Inc.’s popularity among tweens.¹²³ Next, the complaints received by Musical.ly can be paralleled with the reports of underage users received through Facebook and Instagram’s reporting functionality.¹²⁴ Finally, this settlement suggests that simply reviewing users’ profiles that appear to be run by children is enough to suggest that the operator has actual knowledge. Therefore, changing a user’s birthdate or kicking a user off should be enough to prove that Facebook, Inc. has actual knowledge that the phenomenon of children on its platforms is occurring.¹²⁵

The settlement with YouTube also provides useful insight. Similar to Musical.ly, YouTube is a website where users can “watch, like, share,

¹¹⁸ *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That It Violated Children’s Privacy Law*, *supra* note 114.

¹¹⁹ Musical.ly Complaint, *supra* note 117, at 6.

¹²⁰ *Id.*

¹²¹ *Id.* The complaint also alleged that Musical.ly contacted forty-six of its most popular users who appeared to be under thirteen years old and told them “to edit their profile description to indicate that their accounts were being run by a parent or adult talent manager.” *Id.*

¹²² *Id.* at 8.

¹²³ See Michelle Meyers, *How Instagram Became the Social Network for Tweens*, CNET (Sept. 8, 2012), <https://www.cnet.com/news/how-instagram-became-the-social-network-for-tweens/>; Robyn Gearey, *Tween Tech: What Parents Need to Know About Instagram and Vine*, SCARY MOMMY, <https://www.scarymommy.com/tween-tech-what-parents-need-to-know-about-instagram-and-vine/> (last visited Nov. 18, 2019).

¹²⁴ See *Report an Underage User on Instagram*, *supra* note 68; *Report an Underage Child*, *supra* note 68.

¹²⁵ See Iverson, *supra* note 44; Roller, *supra* note 101.

comment and upload their own videos.”¹²⁶ The FTC brought a complaint against YouTube after examining whether YouTube had actual knowledge that many of its channels were targeted to children.¹²⁷ During this examination, the FTC viewed YouTube’s behavior in its totality to determine whether or not it was subject to COPPA’s mandates.¹²⁸ Specifically, the FTC noted how YouTube had marketed itself as a website visited by children to its advertising partners, and how its own content rating system had an option to select content as being child-directed content.¹²⁹ This suggests that all of a company’s interactions, including with the public, with its board members, and its business partners, are relevant when determining whether the operator must comply with COPPA. Therefore, all of Facebook Inc.’s practices and protocols, and interactions should be considered by the FTC when determining whether it has actual knowledge of users under thirteen on its sites.

Hopefully these settlement agreements indicate that the FTC will continue to pursue action against violators of COPPA, particularly Facebook Inc. Using these settlements as examples, it becomes even more evident that Facebook, Inc. has actual knowledge that there are users under thirteen years old on its platforms and the FTC should enforce COPPA against Facebook, Inc.

V. IMPLICATIONS OF FACEBOOK, INC.’S DATA PRACTICES

Further, COPPA should be enforced against Facebook, Inc. because the company has the functional capability to comply with COPPA. One main goal of COPPA is to ensure that website operators establish reasonable procedures for the collection, use, and dissemination of children’s information and that the operators take reasonable steps to protect the confidentiality of the information collected.¹³⁰ Under COPPA, websites that are targeted towards children or have actual knowledge that children under thirteen use their websites are required to provide notice on their websites of the information they collect and what they do with it.¹³¹ Because Facebook, Inc. has not been held to the standard of a website that has actual knowledge of underage users, it has not been required to collect,

¹²⁶ *Explained: What is YouTube?*, WEB WISE, <https://www.webwise.ie/parents/what-is-youtube/> (last visited Nov. 18, 2019). See generally YOUTUBE, <https://www.youtube.com/> (last visited Nov. 18, 2019).

¹²⁷ *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law*, *supra* note 114.

¹²⁸ Complaint for Permanent Injunction, Civ. Penalties, and Other Equitable Relief at 8-16, *FTC v. Google LLC*, No. 1:19-cv-2642 (D.C. Sept. 4, 2019).

¹²⁹ *Id.* at 8-9.

¹³⁰ Matecki, *supra* note 11, at 373-75; see also 16 C.F.R. § 312.3 (2019).

¹³¹ 16 C.F.R. § 312.3(a).

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use, or disseminate user's data in accordance with COPPA. To better understand how Facebook, Inc. currently aligns with COPPA, it is important to understand the type of data Facebook and Instagram collect, what they do with such data, and how they notify its users of these practices.

A. Facebook, Inc.'s Current Data Policy

Facebook, Inc. has a single Data Policy for Instagram and Facebook, which outlines the information they collect and how they use that information.¹³² The Data Policy indicates that Facebook and Instagram collect content, communications, and other information, such as how the users use the products, what type of content they view or engage in, and the information about transactions made on the products, when the users use the websites.¹³³ In addition to information collected based off the account holder's use of the platform, the websites also collect information from the computers, phones, and other devices used to access the websites.¹³⁴ Similarly, the Data Policy stipulates that the sites also collect and use location-related information, known as geo-tags.¹³⁵ Additionally, Facebook and Instagram receive information from business partners like advertisers, application developers, and publishers that use the sites' social plug-ins.¹³⁶ These partners provide Facebook, Inc. with information about the user's activities off Facebook such as websites the user visits, the advertisements the user sees, and how the user uses other services.¹³⁷

According to the Data Policy, Facebook, Inc. uses this vast array of information it collects through the use of its websites and the information shared with it from third-party business partners to help "[p]rovide, personalize, and improve" its products.¹³⁸ Facebook, Inc. effectively combines the data collected from each user to learn more about that particular user's "connections, preferences, interests and activities" to

¹³² *Data Policy, supra* note 57. The Data Policy also has a section in which it encourages its users to consider who they share their activity with on and off the products because different actions and activities will be visible to other users with whom the user may not be connected. *Id.* Facebook, Inc. also warns through its Data Policy that when a user engages in third-party apps, websites, or other services, those third parties can access the user's public profile. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* This information includes device attributes; device operations; identifiers; device signals; and data from device settings, network and connections information, and cookie data. *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* The data that third-party business partners share with Facebook, Inc. is not limited to only online data but could include purchases made in store. *Id.*

¹³⁸ *Data Policy, supra* note 57.

provide an even more tailored and unique experience for each user.¹³⁹ Particularly, this tailoring is helpful to the company because Facebook, Inc. analyzes the user profile created by the compilation of collected data to show advertisements that the data suggests the user will prefer and act upon, thus making its websites more marketable to advertising companies who want to have their products reach their targeted audience and consumers.¹⁴⁰

The Data Policy also states that Facebook, Inc. uses the data to provide measurement, analytics, and other business services to its third-party business partners.¹⁴¹ In essence, the company helps advertisers and other partners measure the effectiveness and distribution of their advertisements and other services to better understand the types of people that interact with their services.¹⁴² Facebook, Inc. might share the user data profile with more than just advertisers, however, including business partners who use Facebook, Inc.'s analytic services, measurement partners, partners offering goods and services within Facebook products, vendors and service providers, researchers and academics, and law enforcement or legal requests.¹⁴³ Although these sites collect a vast amount of information and potentially share that information with a variety of business partners, the Data Policy also instructs how users can manage and delete their data, and explains how Facebook Inc.'s sites provide users with the ability to access, rectify, and erase their own data.¹⁴⁴

The Data Policy examined here was revamped in April of 2018 to more explicitly notify Facebook and Instagram users of what data the sites were collecting and with whom they share it after several incidents in which Facebook's practices came under scrutiny.¹⁴⁵ Most notably, in

¹³⁹ *Id.*

¹⁴⁰ *Id.* The Data Policy notes that users can monitor their choices over the data the sites collect through the Facebook and Instagram Settings pages. *Id.* See also Richard Nieva, *At Facebook and Twitter Hearings, Congress Needs to Bring Its A-Game*, CNET (Aug. 31, 2018), <https://www.cnet.com/news/at-facebook-and-twitter-hearings-congress-needs-to-bring-its-a-game/> (reporting that when asked by a senator at a hearing how Facebook sustains a business model in which users do not pay for the services, Mark Zuckerberg responded by saying "we run ads.").

¹⁴¹ *Data Policy*, *supra* note 57.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Laura Hautala, *Facebook's New Data Policy: Answers to Your Privacy Questions*, CNET (Apr. 21, 2018, 8:32 AM), <https://www.cnet.com/news/facebook-data-policy-answers-to-your-privacy-questions-cambridge-analytica/>. See *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 940 (N.D. Cal. 2013) (describing a class action case in which about 150 million Facebook members sued the site for misappropriating their names and/or likenesses to promote products and services through Facebook's "Sponsored Stories" program.). The parties reached a settlement that gave \$15 to the class members who filed claims against

March 2018, news broke that millions of Facebook users' data had been leaked to a political consulting firm called Cambridge Analytica.¹⁴⁶ The public's concern about their data led Facebook to revise its Data Policy to better communicate exactly what the company does with its users' information.¹⁴⁷

B. Bridging Facebook's Gaps in its COPPA Compliance

This revised Data Policy brings Facebook, Inc. closer to being COPPA compliant. COPPA requires that a website provide notice on its site prior to collecting information from children of what information it collects from children, how it uses that information, and its disclosure practices for such information.¹⁴⁸ Facebook, Inc.'s new Data Policy communicates to its users—regardless of age—what data it collects from them and how it uses and discloses that data.¹⁴⁹ By signing up for a Facebook or Instagram account, one agrees to the Data Policy;¹⁵⁰ and so, the parent of a child Facebook user would have notice of such information prior to the collection of their child's data, pursuant to COPPA.¹⁵¹ In this respect, the new Data Policy has addressed several factors that are imperative for COPPA compliance.

But Facebook, Inc.'s practices currently do not comply with COPPA in regard to the parental consent and parental review requirements that COPPA mandates.¹⁵² Typically, the parental consent and parental review mandates have proven difficult for websites to effectively implement.¹⁵³ Yet, Facebook, Inc. has been able to implement this requirement through

Facebook and required Facebook to make changes to the Statement of Rights and Responsibilities that at the time "governed" the use of the site, and to provide its users with more information, and control over, how their names and likenesses are employed in connection with Sponsored Stories. *Id.*

¹⁴⁶ Hautala, *supra* note 145.

¹⁴⁷ *See id.*

¹⁴⁸ 16 C.F.R. § 312.3(a) (2019).

¹⁴⁹ *Data Policy*, *supra* note 57. The first three headings of the Policy are titled "What kinds of information do we collect?," "How do we use this information?," and "How is this information shared?." *Id.*

¹⁵⁰ *Create a New Account*, *supra* note 96 ("By clicking Sign Up, you agree to our Terms, Data Policy, and Cookies Policy."); *INSTAGRAM*, *supra* note 64 ("By signing up you agree to our Terms, Data Policy, and Cookies Policy.").

¹⁵¹ 16 C.F.R. § 312.3(b).

¹⁵² COPPA requires a website operator to "[o]btain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children" and requires websites to provide parents with a reasonable way in which they can "review the personal information collected from" children. *Id.* § 312.3(b)–(c).

¹⁵³ *See Matwyshyn*, *supra* note 25, at 8 (noting that one challenge with COPPA is that it "continues to be predicated on the idea that an adult parent's proficiency with technology necessarily surpasses that of her child, an assumption that research demonstrates to be unsustainable.").

its development of its app Messenger Kids.¹⁵⁴ Messenger Kids is a video-calling and messaging app developed and run by Facebook, Inc. that allows kids to connect with parent-approved contacts.¹⁵⁵ A child's Messenger Kids account is activated by the parent authenticating his or her child's device through the parent's own Facebook account.¹⁵⁶ Once the child is using the account, the parent is able to monitor with whom the child is communicating through the app and control the child's contact list through a "Parent Portal" on the parent's main Facebook app.¹⁵⁷ It is also through the Parent Portal that parents may manage or delete their child's information, in compliance with COPPA regulations.¹⁵⁸

Like Facebook, Inc.'s main Data Policy, the Messenger Kids's Privacy Policy also informs the user about the kinds of information Facebook collects through the app, how it uses the information, and how the information is shared.¹⁵⁹ The main difference is that Messenger Kids also addresses how parents can manage or delete their child's information.¹⁶⁰ Interestingly, Facebook, Inc.'s Data Policy also informs the users how they can manage or delete their own information that they share.¹⁶¹ Therefore, if Facebook were to allow access to users under thirteen, it would not have to create new procedures for how a parent could manage or delete their child's information because this functionality is already available to current users.¹⁶² Instead, Facebook would only need to provide parents with the accessibility to manage their child's account, which it could implement by connecting the parent's Facebook account to

¹⁵⁴ MESSENGER KIDS, <https://messengerkids.com> (last visited Nov. 3, 2018) (indicating that Messenger Kids is COPPA compliant). *But see* Caroline Spiezio, *Senators Probe Facebook on More Possible Privacy Violations, This Time Over COPPA*, LAW.COM (Aug. 6, 2019 4:53 PM) <https://www.law.com/corpcounsel/2019/08/06/senators-probe-facebook-on-more-possible-privacy-violations-this-time-over-coppa/?sreturn=20191018130159> ("Senators are pushing for 'more transparency' around an alleged security flaw in Facebook Messenger Kids that allowed unauthorized adults to communicate with children under 13, in violation of COPPA.").

¹⁵⁵ MESSENGERS KIDS, *supra* note 154.

¹⁵⁶ *Id.* Creating a Messenger Kid account does not create a Facebook account for the child but rather a separate Messenger Kid account that is linked to the parent's own Facebook account. *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Messenger Kids Privacy Policy*, FACEBOOK, <https://www.facebook.com/legal/messengerkids/privacypolicy> (last modified Dec. 4, 2017).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Data Policy*, *supra* note 57 ("We provide you with the ability to access, rectify, port and erase your data."). The Data Policy also provides a link to the Facebook Settings and Instagram Settings that will direct the account holder directly to their unique portal in which they can manage the information they share. *Id.*

¹⁶² *Id.*

their child's Facebook account, like it does with Messenger Kids.¹⁶³ Based on the functionality Facebook has exhibited through Messenger Kids, compliance with COPPA is well within its realm of capabilities.¹⁶⁴

COPPA also requires that a website “[e]stablish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.”¹⁶⁵ Facebook, Inc.’s Data Policy does not explicitly indicate what Facebook does to protect the information it collects, but it does indicate that it may use the data it collects to “[p]romote safety, integrity and security.”¹⁶⁶ COPPA does not require, however, that the procedures be formalized or disseminated, but only that they are established and maintained, so a look beyond Facebook, Inc.’s Data Policy may indicate as much.¹⁶⁷ Facebook and Instagram both promulgate “Security Tips” that better inform their users of proactive measures the users can take to better safeguard their account and the information they share, and the sites offer extra security features that users can activate to better safeguard their account.¹⁶⁸ Although these are helpful and useful tips, this seemingly puts the onus on the user and does not indicate that the company itself has established or maintained practices that ensure its data collection and dissemination measures are secure.¹⁶⁹

In fact, many are currently asking whether Facebook maintains safe data practices following the reported Cambridge Analytica data breach that affected an estimated 87 million users’ data.¹⁷⁰ Amidst social dismay, an FTC inquiry, and several federal hearings, Facebook founder Mark Zuckerberg publicly apologized for the data breach, indicating he was “sorry [Facebook] didn’t do more at the time.”¹⁷¹ Zuckerberg has also

¹⁶³ MESSENGER KIDS, *supra* note 154.

¹⁶⁴ *But see Advocates Tell FTC: Facebook Is Violating Children’s Privacy Law*, CAMPAIGN FOR COMMERCIAL-FREE CHILDHOOD (Oct. 3, 2018), <http://www.commercialfreecchildhood.org/blog/advocates-tell-ftc-facebook-violating-children%E2%80%99s-privacy-law> (describing how the Campaign for a Commercial-Free Childhood filed a complaint with the FTC that through Messenger Kids Facebook, Inc. has violated COPPA). There has been no FTC action regarding this complaint.

¹⁶⁵ 16 C.F.R. § 312.3(e) (2019).

¹⁶⁶ *Data Policy*, *supra* note 57.

¹⁶⁷ 16 C.F.R. § 312.3.

¹⁶⁸ *Security Tips*, FACEBOOK, <https://www.facebook.com/help/379220725465972?ref=dp> (last visited Nov. 3, 2018).

¹⁶⁹ *Id.* (including suggestions like being the only one who knows your password, logging out when you are away from your computer, and thinking before you click or download anything).

¹⁷⁰ Sam Meredith, *Facebook-Cambridge Analytica: A Timeline of the Data Hijacking Scandal*, CNBC (Apr. 10, 2018, 9:51 AM), <https://www.cnbc.com/2018/04/10/facebook-cambridge-analytica-a-timeline-of-the-data-hijacking-scandal.html>.

¹⁷¹ *Id.* (quoting advertisements originally appearing in *The New York Times*, *The Washington Post*, *The Wall Street Journal*, as well as in United Kingdom’s *The Observer*,

represented that Facebook is “now taking steps to ensure this [does not] happen again.”¹⁷² As Facebook, Inc. responds to this backlash it is likely that it will communicate more formalized practices representing how it will maintain the integrity and security of the personal information that it collects, which would put it even closer to COPPA compliance.

Facebook, Inc.’s revised Data Policy addressing the information it collects and uses, its ability to maintain parental controls, and its current reexamination of its data practices proves the time is ripe for Facebook, Inc. to officially allow users under thirteen on its websites and fully conform its sites to comply with COPPA. Furthermore, the European Union’s General Data Privacy Regulation (GDPR)¹⁷³ has imposed certain regulations on children’s data,¹⁷⁴ with which Facebook, Inc. must necessarily comply.¹⁷⁵ The GDPR requires that any data collection of a user under sixteen must be with parental consent or authorization.¹⁷⁶ Facebook, Inc. currently allows users between thirteen and sixteen on its websites.¹⁷⁷ Therefore, unless Facebook, Inc. effectively locks all European accounts of users under sixteen, it must necessarily implement protocols that would be COPPA compliant in an effort to comply with the GDPR, as this mandate is more inclusive than the mandates in COPPA.¹⁷⁸ As Facebook, Inc. is tailoring its practices to conform with the GDPR, there is no reason why it should not simultaneously address the gaps in its COPPA compliance.

Although the United States does not have an equivalent law on the books to that of Europe’s GDPR, some federal legislative action has been

The Sunday Times, The Mail on Sunday, Sunday Mirror, Sunday Express, and The Sunday Telegraph).

¹⁷² *Id.*

¹⁷³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 11.

¹⁷⁴ *Id.* (making it illegal to process personal data of a child under sixteen years old without parental consent or authorization).

¹⁷⁵ The GDPR applies to the processing of personal data of subjects who are in the European Union, regardless of whether the processing or processor takes place or is located in the European Union. *Id.* at art. 3. As of the second quarter of 2019, about 385 million Facebook users were located in Europe. *Facebook’s Monthly Active Users (MAU) in Europe from 4th Quarter 2012 to 2nd Quarter 2019*, STATISTA, <https://www.statista.com/statistics/745400/facebook-europe-mau-by-quarter/> (last visited Nov. 17, 2019).

¹⁷⁶ Regulation (EU) 2016/679, *supra* note 173, at art. 8 (1–2) (making it illegal to process personal data of a child under 16 years old without parental consent or authorization).

¹⁷⁷ See *Terms of Service*, *supra* note 8; *Terms of Use*, *supra* note 55.

¹⁷⁸ 16 C.F.R. § 312.2 (2019) (defining “child” as anyone an individual under the age of thirteen).

taken in an effort to match the GDPR's objectives. Although no bills have yet passed into law,¹⁷⁹ examining recent proposals further demonstrate how the American public has become increasingly concerned with data privacy. For example, in May 2018, a federal bill known as the "Do Not Track Kids Act of 2018" was introduced in the House of Representatives "[t]o strengthen protections relating to the online collection, use, and disclosure of personal information of children and minors."¹⁸⁰ This bill would have significantly broadened the scope of COPPA and would have imposed much more stringent requirements on websites regarding the collection, use, and disclosure of personal information.¹⁸¹ Similarly, in April 2018, two senators introduced an act to the Senate known as the Consent Act.¹⁸² This proposed law would have required Facebook and other sites to obtain "opt-in" consent from their users before they shared the users' information.¹⁸³ Although there is agreement in Washington that there is a need for a general American data privacy law, these proposals died and there is no indication that a law will be forthcoming particularly soon.¹⁸⁴ But if the FTC were to hold Facebook, Inc. more accountable under the COPPA definition of an operator with actual knowledge of child-users, and if Facebook, Inc. were to revise its practices to ensure that all data collection is in compliance with COPPA, these actions would establish a clearer expectation of data privacy law compliance when a new American privacy law does eventually pass.

VI. CONCLUSION

COPPA is a valid law that has the capability of ensuring safe data-sharing for children on the internet. The loose enforcement of COPPA, as evidenced by Facebook, Inc.'s handling of COPPA, has made it so that the law itself is ineffective. The landscape of the internet is always evolving, but at a moment where internet users are taking a more particularized interest in the security of the data they share and a more active role in demanding answers about who sees their data and how their information is used, it is a pertinent time to reevaluate how Facebook, Inc., operates. Facebook, Inc. should take the initiative to comply with COPPA as it is

¹⁷⁹ See David McCabe, *Congress and Trump Agreed They Want a National Privacy Law. It Is Nowhere in Sight.*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/technology/national-privacy-law.html>.

¹⁸⁰ H.R. Res 5930, 115th Cong. (2018).

¹⁸¹ See generally *id.*

¹⁸² Richard Lawler, *Senators Introduce Bill Creating A 'Privacy Bill of Rights'*, ENGADGET (Apr. 10, 2018), <https://www.engadget.com/2018/04/10/senators-introduce-bill-creating-a-privacy-bill-of-rights/>.

¹⁸³ *Id.*

¹⁸⁴ McCabe, *supra* note 179.

well situated to help realize COPPA's initial goals of creating a safe internet for children and empowering parental control of the personal information children share on the web. Further, the FTC should hold Facebook, Inc. accountable under the "actual knowledge" prong of COPPA and bring an action against Facebook, Inc. for the years they have knowingly collected child data.