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Ignoring COPPA: An Industry Standard

Dercem Kaya

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I. Introduction

Social media is the new but not improved playground for children, tweens, and teens. The presence of children throughout online social media platforms has become an undeniable norm in recent years. Our attention to children's safety in schools, on playgrounds, and at home must be extended to children's use of the internet. The growing influence of social media trends coupled with children's innate vulnerability to online predatory schemes render the online playground to be just as dangerous. The circumstances involving the COVID-19 lockdown and the use of virtual schooling has only amplified the use social media websites and apps as sources of entertainment for children. The Children's Online Privacy Protection Act ("COPPA") is the only federal law aimed at empowering parents by imposing limits to the collection of personally identifiable information from children without their parents' consent. Although COPPA took effect in 2000 in response to the growing awareness of predatory internet marketing techniques directed at children, these predatory techniques have only continued to evolve alongside technological advances.¹

Many critics point out to the limited language of COPPA to be its downfall whereas others point to the lack of enforcement actions brought by its regulator, the Federal Trade Commission, ("FTC"). Despite the Act going into effect in 2000, it was nearly two decades later that the FTC brought an enforcement action against a prominent online actor when the Commission levied fines against YouTube in 2019.² That became the same year the FTC received over 175,000 comments

¹ Fed. Trade Comm'n, *Privacy Online: A Report to Congress*, (1998), <http://www.ftc.gov/reports/privacy3/toc.shtml>

² Fed. Trade Comm'n, *\$170 Million FTC-NY YouTube Settlement Offers COPPA Compliance Tips for Platforms and Providers*, Press Release, (2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/09/170-million-ftc-ny-youtube-settlement-offers-coppa>

on possible reversions to the COPPA rule.³ Since then, there has been continued divergence between interested parties. Where trade groups and content creators often find COPPA to be overly inclusive and damaging to their revenue making abilities, parents and privacy advocates argue for more rigorous protections for children and increased accountability by social media giants. The lack of more stringent and effective COPPA enforcement against social media websites have evidently enabled the continuation of cyberbullying, predatory practices, and increased mental health problems amongst children.⁴ Although COPPA was a necessary step in the right direction in 1998, its effectiveness has since diminished by the lack of accountability by social media giants that escape liability through several compliance loopholes. Therefore, the COPPA rule should be strengthened to increase its effectiveness to disallow social media platforms from curtailing compliance to the federal law.

This paper will begin by first explaining the motivations behind COPPA, its legislative history, and its empowerment of the FTC to effectuate the law. The second part of this paper will explore the enforcements that have taken place against social media platforms, such as YouTube, Facebook, and TikTok, as well as how these platforms curtailed their obligations under COPPA. The third part of this paper will explore a new approach to children's online privacy as attempted by California through the state's passage of the Age-Appropriate Design Code Act, the differences between the California law and the federal law, and critics' reactions.

³ Stuart Cobb, *It's COPPA-Cated: Protecting Children's Privacy in the Age of YouTube*, 58 Hous. L. Rev. (2021) (noting that politicians, privacy advocates, industry and trade associations, YouTubers, online businesses, and others participated in the process).

⁴ See Yolanda Reid Chassiakos, et al, *Children and Adolescents and Digital Media. Pediatrics*, (2016), <https://doi.org/10.1542/peds.2016-2593> (noting that social media use patterns and rates among older children and adolescents have continued to grow over the past decade, aided in part by the recent rise in mobile phone use among children and teenagers); See also Odgers CL, Jensen MR. Annual Research Review: *Adolescent mental health in the digital age: facts, fears, and future directions*, (2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8221420/> (noting that mobile device ownership and social media usage have reached unprecedented levels, and concerns have been raised that this constant connectivity is harming adolescents' mental health).

II. Background

COPPA is a United States federal regulation governing the online collection, use, and disclosure of personal information from children under the age of thirteen.⁵ The enactment of COPPA came shortly after the Federal Trade Commission directed their *Privacy Online* report to Congress in June 1998.⁶ The report highlighted the significant consumer concerns over children's online privacy and children's weak ability to understand the harms of their online activities.⁷ The FTC found that eighty nine percent of the sampled children's websites collected personal information from children, with only one percent of these websites requiring parental consent for the collection and use of the data.⁸ Only eight percent of these websites provided parental notification of their information collection practices.⁹ The report further urged the importance of parents' role in having notice, access, and choice as to how their children's personal information is used and collected.¹⁰ In its report, the FTC recommended Congress recognizes the important role of parents by developing legislation "placing parents in control of the online collection and use of personal information from their children."¹¹

Four months after being directed the *Privacy Online* report, Congress passed the Children's Online Privacy Protection Act ("COPPA") in October 1998.¹² The primary goal of COPPA is to empower parents to protect the privacy of their children online as well as the overall protection of

⁵ 16 C.F.R. §§ 312.1- 312.2 (noting how the U.S. federal regulation protects the control and processing of data for children under the age of 13).

⁶ Fed. Trade Comm'n, *Privacy Online: A Report to Congress*, 4-5 (1998),

<https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf>

⁷ *Id.*

⁸ *Id.* at 31.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Fed. Trade Comm'n, *Complying with COPPA: Frequently Asked Questions*, (2020),

<https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions>

the privacy and safety of children’s personal information.¹³ The Act outlined regulations and practices for websites subject to COPPA and vested the Federal Trade Commission with enforcement authority of carrying out COPPA through a rule-making function.¹⁴ COPPA does not afford a private right of action and instead directs the FTC to promulgate a COPPA Rule (the “Rule”) that requires website and online service operators to obtain verifiable parental consent when the website has actual knowledge that the user is a child.¹⁵

The FTC’s “COPPA Rule” took effect in 2000 and provides contextual guidelines for parents and website operators who must comply with COPPA.¹⁶ Following technological advances that occurred after 2000, the Rule was amended in 2013 to modify certain definitions, update requirements, and add a new provision for data retention and deletion.¹⁷ The amendments to the Rule addressed the increased use of internet by kids from 1998 to 2012 by expanding both the categories of data that are rendered as “personal information” and the types of websites that are subject to the Rule.¹⁸ Although the FTC has not amended the Rule since 2013, it did accept public comments for COPPA revisions in 2019.¹⁹ The request for comments by the FTC asked commentators “whether the 2013 revisions to the Rule have resulted in stronger protections for children and more meaningful parental control over the collection of personal information from children,” “whether the revisions have had any negative consequences,” and specific questions

¹³ *Id.*

¹⁴ 15 U.S.C. § 6502.

¹⁵ 15 U.S.C. § 6502(b)(1)(A).

¹⁶ 16 C.F.R. § 312.

¹⁷ *Id.*

¹⁸ Fed. Trade Comm’n, *FTC Strengthens Kids’ Privacy, Gives Parents Greater Control Over Their Information by Amending Childrens Online Privacy Protection Rule*, Press Release (2012) <https://www.ftc.gov/news-events/news/press-releases/2012/12/ftc-strengthens-kids-privacy-gives-parents-greater-control-over-their-information-amending-childrens>

¹⁹ The Federal Register, *Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule*, (2019) <https://www.federalregister.gov/d/2019-15754>

about definitions, requirements of notices posted by operators, methods of obtaining parental consent, and more.²⁰

The COPPA Rule

The COPPA Rule has recognized the scope of COPPA to encompass specific categories of website operators and data collected as well as a limited range of age for children protected. The COPPA Rule prohibits website operators and online service providers from collecting personal information of children under thirteen years old if their website is either (1) directed to children or (2) the website operator has actual knowledge of a child using the site or service.²¹ However, an exception under COPPA allows for an operator to collect personal information of children if the operator has obtained verifiable parental consent.²² When a child's personal information *is* shared with third parties, operators must take "reasonable steps" in ensuring those third parties are COPPA-compliant.²³ Under COPPA, an "operator" is any commercial website or online service provider, including mobile apps and IoT devices, directed to children that collect, use, or disclose personal information from children.²⁴ A child is defined as anyone under the age of thirteen.²⁵ Collection is defined as gathering personal information by any means, including passive tracking through cookies.²⁶ Personal information includes first and last name, a home or other physical address, online contact information, a telephone number, a social security number, a screen or username, a photo, video, or audio file including a child's image or voice, some geolocation information, and other forms of identifiers.²⁷

²⁰ *Id.*

²¹ 16 C.F.R. § 312.5(b).

²² *Id.*; See Fed. Trade Comm'n, *Verifiable Parental Consent and the Children's Online Privacy Rule*, <https://www.ftc.gov/business-guidance/privacy-security/verifiable-parental-consent-childrens-online-privacy-rule>

²³ 16 C.F.R. § 312.8.

²⁴ 16 C.F.R. § 312.2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

The FTC has specified three types of websites that may be subject to COPPA: (1) “child-directed” websites, (2) “general audience” websites, and (3) “mixed audience” websites.²⁸ Child-directed websites, in addition to being subject to the COPPA restrictions on collecting children’s information, must presume all users of its website to be children.²⁹ Factors that help determine whether a website is “child-directed” include the subject matter of its content, its visual appearance, its marketing practices, and data regarding the users of the site.³⁰ Websites with a primary audience over the age of thirteen may still be deemed child-directed if the factors weigh in such a way that qualifies it to be child-directed.³¹ No similar definitions were given to either “general audience” or “mixed audience” websites. In 2019, the FTC clarified non-child-directed websites to be those that host “traditionally adult activities like employment, politics” that are content not “geared towards kids.”³² COPPA will apply to general audience websites if the operators have actual knowledge that children are using their website.³³ The FTC designated mixed audience websites to be websites intended for a primary audience other than children that may still qualify as child-directed if it has content that is attracting children under thirteen and the factors weigh in the favor of subjecting them to COPPA.³⁴ For example, websites directed towards teens is not subject to COPPA unless the factors balance in favor of COPPA restrictions. Websites that are concerned about children seeing inappropriate materials online are advised to consider a

²⁸ Fed. Trade Comm’n. *supra* note 12.

²⁹ 16 C.F.R. § 312.

³⁰ *See* 16 C.F.R. § 312.2.

³¹ Fed. Trade Comm’n. *supra* note 12, (noting that mixed-audience website operators should consider the factors when making decisions about the content).

³² *See* Kristin Cohen, *YouTube Channel Owners: Is Your Content Directed to Children?*, FTC Bus. BLOG (2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directedchildren>

³³ 16 C.F.R. § 312.3.

³⁴ Fed. Trade Comm’n. *supra* note 12. (noting that a website that has many users under the age of thirteen is a child-directed website).

filtering program to help them screen out children.³⁵ Mixed and general audience websites are thus permitted to age-gate their sites by implementing screening procedures to identify a child that may be using it to prevent the collection of personal information from children or do so in a manner that is compliant with COPPA.³⁶

Websites that are either directed at children or have actual knowledge of a child using the site or service are subject to obligations imposed by COPPA and the Rule to achieve the law's goal of empowering parents to protect the privacy of their children online. Among the steps needed to be taken to ensure COPPA reliance, a website operator must post a clear and comprehensive online privacy policy describing their information practices for personal information collected.³⁷ This notice will have to explain how the personal information collected from children under 13 will be used and must include a list of operators that collect personal information from children on the website.³⁸ This requirement is often easily met by businesses who are already subject to national and international privacy laws requiring comprehensive privacy policies. Furthermore, many businesses include a "Children's Privacy" provision in their notices in which they note that their website is not directed to children under thirteen. Operators must also provide direct notice to parents and obtain verifiable parental consent, with limited exceptions, before collecting personal information online from children.³⁹ Operators must also give parents the choice of consenting to the operator's collection and internal use of a child's information but prohibits the operator from disclosing that information to third parties unless disclosure is integral to the site or service, in which case, it must make clear to parents.⁴⁰ The Commission has recognized several methods that

³⁵ *Id.*

³⁶ *Id.*

³⁷ 16 C.F.R. § 312.4.

³⁸ *Id.*

³⁹ 16 C.F.R. § 312.5(a)(1).

⁴⁰ *Id.*

are acceptable ways in which parents may provide consent but has also recognize that operators of general audience websites may not be responsible if children lie about their age during the registration process, as long as they do not learn of a child's age or grade later.⁴¹ However, operators who later learn of a child's age or grade will be held to have actual knowledge and therefore held subject to COPPA.⁴² Operators must provide parents with access to their child's personal information to review or have the information deleted and give parents the opportunity to prevent further use or online collection of a child's personal information.⁴³ Websites must retain personal information collected online from a child for only as long as is necessary to fulfill the purpose for which it was collected and delete the information using reasonable measures to protect against its unauthorized access or use. Any violation of the Rule or the Act will be treated as an "unfair or deceptive act or practice" and open to FTC enforcement actions.⁴⁴

FTC Enforcement Power

Although there is no private right to action by individuals against operators for COPPA violations, Congress has granted the FTC enforcement authority in dealing with these violations along with other agencies that still retain authority over their respective entities.⁴⁵ State attorney generals may also bring a civil action against a website or service provider for a violation of COPPA.⁴⁶ Inconsistencies among state laws are preempted by COPPA, therefore limiting recourse to any applicable state tort laws.⁴⁷ Plaintiffs seeking enforcement of child privacy claims may be

⁴¹ Fed. Trade Comm'n. *supra* note 12, (noting that COPPA does not require operators of general audience sites to investigate the ages of visitors to their sites or services).

⁴² Fed. Trade Comm'n. *supra* note 12

⁴³ Fed. Trade Comm'n. *supra* note 12

⁴⁴ 16 C.F.R. § 312.9.

⁴⁵ 15 U.S.C. §§ 6505(a), (c), & (d).

⁴⁶ *See* 16 C.F.R. § 312.4.

⁴⁷ 15 U.S.C. §§ 6505(a), (c), & (d); 6504(a).

precluded from doing so due to the lack of a private right of action under COPPA.⁴⁸ Relief under state tort law turns on the varying jurisdictional approaches to preemption, as some circuits require private litigants to allege actual tort violations for conduct outside COPPA’s scope to survive preemption while other circuits permit tort claims based on conduct regulated by COPPA to proceed to trial.⁴⁹

Any violation of COPPA is viewed as an “unfair or deceptive act or practice” and may become subject to civil penalties, injunctions, and compliance monitoring by the FTC.⁵⁰ A safe harbor program within COPPA allows for industry groups to administer a self-regulatory compliance program, allowing them to meet a minimum standard amounting to “substantially the same or greater” protections outlined in COPPA.⁵¹ This safe harbor allows for website developers and content creators to receive regulatory guidance without being subject to enforcement action regarding their child-directed content.⁵² Companies that have demonstrated their compliance with the safe harbor are able to display a seal of approval to signify to consumers that their website or application is COPPA compliant.⁵³ A company’s failure to comply with the standards of the safe harbor constitutes an “unfair and deceptive trade practice,” and become subject to enforcement by the FTC.⁵⁴ Penalties for COPPA violations include civil penalties of up to \$42,530 per violation, factoring in company’s financial condition.⁵⁵

⁴⁸ See *Hubbard v. Google LLC*, F. Supp.3d (N.D. Cal. 2020) (Precluding plaintiffs’ state law claims against Google for violating children’s privacy rights and declining to apply the presumption against preemption because state laws premised on COPPA violations were preempted).

⁴⁹ *In re Nickolodean Consumer Priv. Litig.*, 827 F.3d at 291-93; Compared to *N.M. ex rel. Balderas*, 457 F. Supp. 3d at 1121.

⁵⁰ 15 U.S.C. § 45.

⁵¹ 16 C.F.R. § 312.10(b)(1)-(3).

⁵² *See Id.*

⁵³ See PRIVO, *COPPA Safe Harbor Program*, <https://www.privo.com/coppa-safe-harbor-program>

⁵⁴ 16 C.F.R. § 312.9.

⁵⁵ See Fed. Trade Comm’n: Bus. Blog by Kristin Cohen, *YouTube Channel Owners: Is Your Content Directed to Children?*, (2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children>

III. COPPA as Applied to Media Giants

Two years after the enactment of COPPA in 2000, the FTC found that the percentage of collection of personal information by children's website had only decreased to seventy-two percent, compared to the eighty-nine percent in 1998.⁵⁶ The FTC has historically brought few cases in its efforts to enforce COPPA and many being against small players. In 2001, shortly after COPPA came into effect, three companies were faced with COPPA violations.⁵⁷ These three companies, Girls Life Inc., LookSmart Ltd., and Monarch Services Inc. had collected personal information from children under thirteen without obtaining verifiable parental consent and did not have COPPA-compliant privacy policies posted on their websites.⁵⁸ A combined civil penalty of \$100,000 was imposed on the companies as well as deletion of all data that was collected in violation of COPPA since its enactment.⁵⁹ A written testimony to the Senate Committee on Commerce, Science, and Transportation's Subcommittee on Consumer Protection, Product Safety, and Data Security by the Chair of the Board of the Campaign for a Commercial-Free Childhood, Angela Campbell, noted that in the 21 years since the COPPA Rule has been in effect, the FTC brought only thirty-four enforcement actions, mostly against smaller companies.⁶⁰ All thirty-four actions were settled "without litigation by consent decrees" and often, "settlements merely required the defendants to comply with the law and file periodic reports with the FTC."⁶¹ Campbell went on further to note that when the FTC has assessed civil penalties, "they have been

⁵⁶ Fed. Trade Comm'n, *Protecting Children's Privacy Under COPPA: A Survey on Compliance*, Staff Report (2002), <https://www.ftc.gov/sites/default/files/documents/reports/protecting-childrens-privacy-under-coppa-survey-compliance/coppasurvey.pdf>

⁵⁷ Fed. Trade Comm'n, *FTC Announces Settlements with Web Sites that Collected Children's Personal Data Without Parental Permission*, (2001), <https://www.ftc.gov/news-events/press-releases/2001/04/ftcannounces-settlements-web-sites-collected-childrens-personal>

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Written Testimony of Angela J. Campbell, (2021), <https://www.commerce.senate.gov/services/files/9935A07E-AC61-4CFD-A422-865D89C54EA3>

⁶¹ *Id.*

woefully insufficient to incentivize compliance with COPPA.”⁶² It was not until September 2019 that the FTC brought its first action against a prominent big tech company operating as a general audience website.⁶³

YouTube and Google

Google LLC and its subsidiary, YouTube, LLC were subject to the FTC’s enforcement action for COPPA violations in September 2019 for their collection of personal information from viewers of child-directed channels without obtaining parental consent or notifying parents.⁶⁴ The personal information being collected was in the form of cookies, or persistent identifiers that are used to track users across the Internet.⁶⁵ YouTube was able to earn millions of dollars using these cookies by delivering targeted ads to viewers of those channels.⁶⁶ Although YouTube claimed to be a general-audience website, some of the individual channels within its platform are child-directed and require compliance with COPPA.⁶⁷ When the FTC sought enforcement against the media giant, FTC Chairman Joe Simons stated that “YouTube touted its popularity with children to prospective corporate clients,” and “yet when it came to complying with COPPA, the company refused to acknowledge that portions of its platform were clearly directed to kids,” noting that there is no excuse for YouTube’s violations.⁶⁸

⁶² *Id.*

⁶³ Fed. Trade Comm’n, *Google and YouTube Will Pay Record \$ 170 Million for Alleged Violations of Children’s Privacy Law* (Sep. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>

⁶⁴ See 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).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Statement of Joseph J. Simons & Christine S. Wilson *Regarding FTC and People of the State of New York v. Google LLC and YouTube, LLC* (2019), https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_youtube_statement.pdf

The complaint against YouTube and Google reports that the company knew YouTube platform to have numerous child-directed channels and that it intentionally marketed itself to be a top destination for kids throughout presentations made to popular children's companies.⁶⁹ Specifically, the complaint references to a presentation made to Mattel, the maker of Barbie and Monster High, during which the company stated, "YouTube is today's leader in reaching children aged 6-11 against top TV channels."⁷⁰ In another presentation to toy brand Hasbro, maker of My Little Pony and Play-Doh, defendants claimed that "YouTube was unanimously voted as the favorite website for kids 2-12," and that "93% of tweens visit YouTube to watch videos."⁷¹ Despite marketing their platform as a favorite online destination for kids, YouTube instead asserted to partner companies that they were not subject to any COPPA requirements under the law.⁷²

The settlement between the FTC, YouTube and Google was filed on September 4, 2019 and required the company to pay \$136 million to the FTC and \$34 million to New York state for its COPPA violations, becoming the largest amount the FTC had obtained in a COPPA enforcement action since its enactment.⁷³ The settlement also required Google to (1) develop, implement, and maintain a system that permits YouTube channel owners to identify their content as child-directed, and that informs channel owners that child-directed content may be subject to COPPA, (2) provide annual COPPA compliance training to Google personnel responsible for managing the company's relationships with YouTube channel owners, (3) provide notice of its practices with respect to the

⁶⁹ See 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).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Fed. Trade Comm'n, *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law*, (2019), <https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law>

collection, use, and disclosure of personal information from children, in compliance with the COPPA Rule, and (4) obtain verifiable parental consent before collecting personal information from children.⁷⁴

After the settlement, Google announced it would end behavioral advertising on content identified as child-directed starting around January 1, 2020 and would disable certain features on child-directed channels on YouTube.⁷⁵ The settlement resulted in individual YouTube content creators to have the responsibility of ensuring their channels are compliant with the COPPA Rule COPPA and determining whether their channels and videos are directed at children.⁷⁶ Though Google voluntarily committed to applying machine learning to detect content that may be directed to children that are otherwise not identified as such by its creators, the fear of a maximum \$42,540 fine per each violation quickly spread chaos among creators of child-directed videos on YouTube.⁷⁷ The end of behaviorally targeted advertising on children's videos also cut down creators' advertising revenue along with the elimination of key features that require user login or user data, such as commenting, live chatting, and saving videos to watch later.⁷⁸ Josh Golin, the executive director of Fairplay, a nonprofit that strives to protect kids from marketing, noted that creators "have an incentive to lie" because they "make more money if Google sells behavioral ad compared to contextual ads."⁷⁹ Golin further noted that creators may have been given "strict

⁷⁴ *Id.*

⁷⁵ Wojcicki, Susan. *An Update on Kids and Data Protection on YouTube*, YouTube Official Blog (2019), <https://blog.youtube/news-and-events/an-update-on-kids/>

⁷⁶ *Id.*; See also Stephen Beemsterboer, *COPPA Killed the Video Star: How the YouTube settlement shows that COPPA does more harm than good*, Illinois Business Law Journal, (2020), <http://publish.illinois.edu/illinoisblj/files/2020/06/12-Stephen-COPPA.pdf>

⁷⁷ See Fed. Trade Comm'n, *YouTube Channel Owners: Is Your Content Directed to Children?* (2022), <https://www.ftc.gov/business-guidance/blog/2019/11/youtube-channel-owners-your-content-directed-children>

⁷⁸ *Id.*

⁷⁹ See Open Markets Institute, *How to Stop Big Tech Surveil Kids: Activist Josh Golin on Child Privacy*, (2022), <https://www.openmarketsinstitute.org/publications/how-to-stop-big-tech-surveil-kids-activist-josh-golin-on-child-privacy>

instructions to say they are not a children’s channel” and instead are a “family channel” instead, in order to benefit from behavioral advertising and key features that would otherwise be limited on child-directed channels.⁸⁰ As YouTube content creators have the ability to change the target audience of their videos, it may also be common for child-directed channels to make the switch to identifying as a “family channel” as an effort to gain more revenue through advertising behavioral ads while evading COPPA compliance.⁸¹

Meta, Facebook, and Instagram

Companies often ban users under thirteen years of age altogether as a method of avoiding COPPA compliance. Although Instagram and Facebook, along with Snapchat and TikTok, are among some of the most popular social media platforms used by tweens and teens, they have evaded COPPA enforcement action by simply dispelling any individual under thirteen from using their services.⁸² As of January 2022, Facebook was the most popular social network in the world, with 2.9 billion monthly active users.⁸³ Its subsidiary, Instagram, was the fourth most popular since January 2022 with 1.47 billion monthly active users.⁸⁴ As both Facebook and Instagram are owned and operated by Meta Platforms, Inc., they both share similar practices and have the same data privacy policy with minimal efforts of COPPA compliance.⁸⁵ Both websites’ terms and conditions

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Statista, *Most Popular Social Networks of Teenagers in the United States from 2012 to 2021*, <https://www.statista.com/statistics/250172/social-network-usage-of-us-teens-and-young-adults/>

⁸³ See Statista, *Most Popular Social Networks Worldwide as of January 2022, ranked by number of monthly active users*, (2022), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>

⁸⁴ *Id.*

⁸⁵ Meta Platforms, Inc., *The Facebook Company Is Now Meta*, (2021), <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/>; See Instagram, *Meta Privacy Policy - How Meta Collects and Uses User Data*, (2022), https://privacycenter.instagram.com/policy/?entry_point=ig_help_center_data_policy_redirect (indicating that both Facebook and Instagram are governed by the same Data Privacy Policy).

restrict the use of their platforms by individuals who are under the age of thirteen.⁸⁶ Meta’s use of age restriction on Facebook and Instagram is a direct reaction to the implementation of COPPA and its protections to children under thirteen.⁸⁷ Neither the COPPA Rule nor the Act itself requires that an operator collect age information. Although Facebook itself requires a user signing up for an account to provide their date of birth, this practice has proven to be insufficient in precluding children from accessing the website due to age falsification.⁸⁸ It has been found that 39% of teens falsify their age descriptions to gain access Facebook.⁸⁹ It is also prevalent that parents knowingly help their underage children create Facebook accounts, ultimately circumventing the parental compliance under COPPA.⁹⁰ The reality of age falsification on social media platforms has not been challenged by the FTC. Instagram, unlike Facebook, does not require users to input their birth dates upon registering for the platform.⁹¹ This website simply relies on its official age restriction within its terms of use to be its primary source of COPPA compliance.⁹² Instagram has published a “Guide for Parents” on its platform that is specifically targeted to provide parents with helping their “teen navigate Instagram safely.”⁹³ However, since teens are either thirteen years old or above, this guide is a minimal effort to comply with COPPA but a further demonstration that the application is not directed towards children.

⁸⁶ Instagram, *Terms of Service*, (2022), https://help.instagram.com/581066165581870/?helpref=uf_share; Compare to Facebook, *Terms of Service*, (2022), <https://www.facebook.com/terms.php>

⁸⁷ See Larry Magid, *Unintended Consequences of FTC's New COPPA Children's Online Privacy Rules*, HuffPost (2017), https://www.huffingtonpost.com/larry-magid/unintended-consequences-o_i_b_1741703.html

⁸⁸ *Id.*

⁸⁹ Mary Madden, et al., Pew Research Center, *Teens, Social Media, and Privacy*, (2013), <https://www.pewresearch.org/internet/2013/05/21/teens-social-media-and-privacy/>

⁹⁰ Magid, *supra* note 69.

⁹¹ See Instagram, <https://www.instagram.com/accounts/emailsignup/?hl=en> (requiring only mobile number or email, full name, username, and a password to create an account).

⁹² *Id.*

⁹³ See generally Instagram, *Parental Guide for Teens on Instagram*, <https://about.instagram.com/community/parents>

A positive step taken by Facebook and Instagram to provide a mechanism for detecting children users is the initiation of a process that allows other users to report underage accounts belonging to children to the operator, which eventually prompts the deletion of the account.⁹⁴ Although such a mechanism would provide the operators of these social media giants with the “actual knowledge” that a child is using their website, critics have raised concerns with the handling of submissions.⁹⁵ Specifically, Facebook has received considerable criticism for its handling of underage users following an undercover reporting for UK’s Channel Four, during which the reporter found that Facebook reviewers of the underage submissions were told to ignore users who appeared under the age of thirteen as they would need “an admission that the person is underage” and if not, they were to “pretend that we are blind and that we don’t know what underage looks like.”⁹⁶ Following this undercover reporting, Facebook published a blog post and provided a formal change in the process to review underage user submissions.⁹⁷ Facebook reviewers must now follow a process that includes putting the reported account on hold until the user provides proof of their age as well as flagging any account that has a strong indication of being underage.⁹⁸ Despite the prominence of underage users on Facebook, the platform still presses that it was “built with COPPA requirements in mind.”⁹⁹

Despite Meta’s indication that it will review underage users more rigorously, critics are not convinced their pledge is not enough.¹⁰⁰ One point raised by privacy advocates is Meta’s

⁹⁴ Facebook, *Report an Underage Child*, <https://www.facebook.com/help/contact/209046679279097>

⁹⁵ Josh Constine, *Facebook and Instagram Change to Crack Down on Underage Children*, Tech Crunch, (2018), <https://techcrunch.com/2018/07/19/facebook-under-13/>

⁹⁶ *Id.*

⁹⁷ Monika Bickert, *Working to Keep Facebook Safe*, Facebook, (2018), <https://about.fb.com/news/2018/07/working-to-keep-facebook-safe/>

⁹⁸ *Id.*

⁹⁹ *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).

¹⁰⁰ Bickert, *supra* note 75.

consideration of only accounts that have been flagged to them rather than the company taking an initiative to review accounts is one point of criticism.¹⁰¹ Other critics point to Facebook and Instagram’s reluctance to acknowledge the fact that users under thirteen are present among their platforms, coupled with the FTC’s lack of effort to target these practices.¹⁰² Despite lacking a definition under COPPA, the “actual knowledge” component of the law is a fundamental analysis in determining whether an operator of a general or mixed audience website will have to comply with the COPPA Rule.¹⁰³ The FTC has ultimately declared 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.”¹⁰⁴ This presents website with the option to question their users’ ages, therefore opening itself to obtaining the actual knowledge that underage users are present and their information is being collected. Without anything further, a mere option for a website operator to ask users for their age undermines the goals of COPPA without requiring anything further. This has allowed major media giants like Facebook and Instagram to wholly evade any COPPA requirements by simply denying any knowledge of underage users and adding terms to their policies that users be thirteen and over.

Scholars argue that Facebook and Instagram have at least constructive knowledge that underage users are on their websites, and this should be considered as a factor in determining whether children are on the website.¹⁰⁵ It is contradicting for platforms to simply deny the existence of children on their website yet continue to provide for mechanisms where underage

¹⁰¹ Bickert, *supra* note 75.

¹⁰² Shannon Finnegan, *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 (2020).

¹⁰³ 16 C.F.R. § 312.3.

¹⁰⁴ Fed. Trade Comm’n, *Children's Online Privacy Protection Rule: Not Just for Kids' Sites*, (2013), <https://www.ftc.gov/tips-advice/business-center/guidance/childrenonline-privacy-protection-rule-not-just-kids-sites>

¹⁰⁵ Finnegan, *supra* note 102.

children are able to be reported, just to ignore their existence yet again.¹⁰⁶ A standard of constructive knowledge rather than actual knowledge will incentivize careful user-creation restrictions on widely used social media platforms and ensure more stringent compliance with COPPA.

Musical.ly and TikTok

TikTok experienced growth at breakthrough speed and quickly became the most-downloaded app in the world in 2022.¹⁰⁷ The ByteDance-owned app is forecasted to surpass YouTube in the United States, with over 40% of Gen-Z spending more than 3 hours a day on TikTok.¹⁰⁸ Before it took the name “TikTok,” the app had origins in two Chinese platforms, Musical.ly and Douyin, and was acquired by Chinese internet technology company ByteDance.¹⁰⁹ The app’s ties to China quickly spread concern through the Trump Administration over concerns that data collected on the app may help the Chinese Communist Party obtain Americans’ private information.¹¹⁰ Before it officially became “TikTok,” Musical.ly was faced with a COPPA complaint filed by the U.S. Department of Justice on behalf of the FTC on allegations that it illegally collected personal information from children under thirteen.¹¹¹

¹⁰⁶ *Id.*

¹⁰⁷ The Guardian, *From Dance Videos to Global Sensation: What You Need to Know about TikTok's Rise*, (2022), <https://www.theguardian.com/technology/2022/oct/22/tiktok-history-rise-algorithm-misinformation>

¹⁰⁸ Lebow, Sara, *TikTok to Surpass YouTube in US.* *Insider Intelligence*, (2022), <https://www.insiderintelligence.com/content/tiktok-surpass-youtube>

¹⁰⁹ *Id. supra* note 107.

¹¹⁰ Swanson, Ana, Mike Isaac, and Paul Mozur, *Trump Targets WeChat and TikTok, in Sharp Escalation with China*, The New York Times, (2020), <https://www.nytimes.com/2020/08/06/technology/trump-wechat-tiktok-china.html>

¹¹¹ See Complaint for Permanent Injunction, Civ. Penalties, and Other Equitable Relief at 4-9, *United States v. Musical.ly, Inc.*, No. 2:19-cv-01439 (D.C. Feb. 27, 2019), https://www.ftc.gov/system/files/documents/cases/musical.ly_complaint_ecf_2-27-19.pdf

The FTC complaint against Musical.ly found that TikTok met the definition of an application subject to COPPA because it is directed to children.¹¹² The complaint alleged that the application failed to notify parents about the app’s collection and use of personal information from users under thirteen and that the app failed to respond to the thousands of complaints from parents.¹¹³ The FTC noted that TikTok was aware of its young users and took advantage of the users through its request of expansive personal data including their names, email addresses, dates of birth, pictures, and grades in school.¹¹⁴ The complaint also stated that despite receiving more than 300 complaints from parents to close their child’s accounts, Musical.ly failed to delete the users’ videos or profile information from their servers.¹¹⁵ The case between the FTC and Musical.ly settled at \$5.7 million with the agreement that Musical.ly remove all videos made by children under thirteen years old and comply with COPPA going forward.¹¹⁶ Following this enforcement action, users are prompted to verify their birth date to determine whether they are eligible to use its services upon downloading the TikTok application in order to determine whether they are eligible to use its services.¹¹⁷ Upon indication that a user is thirteen or younger, the user is only permitted to use a “walled off” version of the app where they may not share personal information or videos.¹¹⁸ This age-restricted version of the app was created by TikTok’s trust and safety team

¹¹² Fed. Trade Comm’n, *Largest FTC COPPA settlement requires Musical.ly to change its tune*, (2019), <https://www.ftc.gov/business-guidance/blog/2019/02/largest-ftc-coppa-settlement-requires-musically-change-its-tune>

¹¹³ *United States v. Musical.ly, Inc.*, *supra* note 111.

¹¹⁴ *United States v. Musical.ly, Inc.*, *supra* note 111.

¹¹⁵ *United States v. Musical.ly, Inc.*, *supra* note 111.

¹¹⁶ Fed. Trade Comm’n, *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violates Children’s Privacy Law*, (2019), <https://www.ftc.gov/news-events/news/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc-allegations-it-violated-childrens-privacy>

¹¹⁷ TikTok, *Terms of Service*, (2019), <https://www.tiktok.com/legal/page/us/terms-of-service/en>.

¹¹⁸ See Raymond Zhong & Sheera Frenkel, *A Third of TikTok’s U.S. Users May Be 14 or Under, Raising Safety Questions*, The N.Y. Times (2020), <https://www.nytimes.com/2020/08/14/technology/tiktok-underage-users-ftc.html>

in response to \$5.7 million settlement following the 2019 enforcement by the FTC and Department of Justice.¹¹⁹

TikTok's rapid rise to fame among the various social media platforms and reshaping of American culture took online users by storm, specifically the younger demographics. The distribution of TikTok users in the United States as of September 2021 by age group is 32.5% between the ages of 10 and 19, 29.5% between the ages of 20 and 29, 16.4% between the ages of 30 and 39, 13.9% between the ages of 40 and 49, and 7.1% for people over the age of 50.¹²⁰ In July 2020, TikTok classified more than a third of its 49 million daily United States users to be 14 years or younger.¹²¹ A former TikTok employee shared with the New York Times that its workers had previously "pointed out videos from children who appeared to be even younger that were allowed to remain online for weeks."¹²² There are also similar concerns of age falsification that exist among all other social media platforms, which result in a lack of parental consent for the underage user to access the application.¹²³ TikTok's AI curated "For You" page is especially controversial due to the technology's ability to create algorithms and display underage users' content to predators that are able to then message, follow, and interact with the underage user.¹²⁴ Moreover, the app put children at risk for predators through its prior feature that had allowed for users to find other users within a 50-mile radius.¹²⁵

¹¹⁹ See Julia Alexander, *TikTok will pay \$5.7 million over alleged children's privacy law violations*, The Verge, (2019), <https://www.theverge.com/2019/2/27/18243312/tiktok-ftc-fine-musically-children-coppa-age-gate>

¹²⁰ See *Distribution of TikTok Users in the United States as of September 2021, by age group*, Statista, (2022), <https://www.statista.com/statistics/1095186/tiktok-us-users-age/>

¹²¹ Zhong & Frenkel, *supra* note 116.

¹²² Zhong & Frenkel, *supra* note 116.

¹²³ Zhong & Frenkel, *supra* note 116.

¹²⁴ Zhong & Frenkel, *supra* note 116.

¹²⁵ See Crystal Lowery, *Exploring COPPA through the FTC's Complaint against TikTok*, Loyola University Chicago School of Law, (2020), <http://blogs.luc.edu/compliance/?p=2479>

TikTok’s remedial measures for safety concerns of its underage users led to its unveiling of the “Family Safety Mode” that allows parents to manage screen time, type of content, and limit or shut down messages to their children.¹²⁶ In January of 2021, TikTok’s head of privacy, Elaine Fox, shared TikTok’s updates to children’s safety, including changing the default TikTok privacy setting for all registered accounts under the age of sixteen to be private accounts.¹²⁷ The updates also included changes to commenting on videos to “friends only,” allowing only allowing videos to be downloaded if they were created by users over the age of sixteen, and other features aimed at protecting children under sixteen.¹²⁸ While these remedial steps were helpful in putting some power in the hands of parents, TikTok still remains under the watch of FTC and weary parents who continue to send complaints against TikTok for predatory practices.

All social media companies participate in the collection of personal information by their design. Social media giants account for vast personal data collection that provide for their storing, processing, and selling of data to third parties for profit.¹²⁹ It was estimated that by 2020, companies would be able to earn more profits by the transferring and disclosing of data than by actually selling Internet of Things devices to consumers.¹³⁰ As the number of people using social media worldwide continue to grow, so does the source of data from users, allowing for more profits to be made by social media giants who rely on continuous growth in the number of people who have access to internet and smartphones.¹³¹ Failure to hold TikTok and the other online media

¹²⁶ Carmen Keenan, *Introducing Family Safety Mode and Screentime Management in Feed*, TikTok, (2020)

<https://newsroom.tiktok.com/en-gb/family-safety-mode-and-screentime-management-in-feed>

¹²⁷ Elaine Fox, *Strengthening privacy and safety for youth on TikTok*, TikTok, (2021),

<https://newsroom.tiktok.com/en-ie/strengthening-privacy-safety-youth-tiktok>

¹²⁸ *Id.*

¹²⁹ See Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. Rev. 423, 424-25 (2018), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2086&context=fac_articles_chapters

¹³⁰ *Id.* at 435.

¹³¹ See Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2020?*, Backlinko, (2020), <https://backlinko.com/social-media-users>

giants falls on the ineffectiveness of COPPA coupled with FTC's limited enforcement actions.¹³² Critics call for a proper investigation of TikTok in order to "shift the U.S.'s focus away from the Trump Administration's fixation on the company's Chinese ties and hone in on TikTok's domestic data processing methods."¹³³ TikTok's lack of transparency for their data collection is also urged to be a bigger threat than its supposed loyalty to China or "presumed obligation to transfer U.S. citizens' data to a foreign government."¹³⁴

COPPA and FTC Criticism

COPPA has been criticized for a multitude of reasons following the minimal enforcement actions taken against social media giants. One of the more common complaints that privacy advocates emphasize is COPPA's affording of protection to only children under thirteen, making it too limited to be effective legislation.¹³⁵ Critics note this age range to be one that "appears to have been selected arbitrarily," "creates an irreconcilable conflict with the minority doctrine in contract law" and leaves out children over the age restrictions who all face the same risks associated with social networks.¹³⁶ The limited enforcement by the FTC itself is another critique of COPPA's ineffectiveness, with critics pointing to the overburdened and underfunded nature of the Federal Trade Commission.¹³⁷ The knowledge that the FTC will pick and choose actors to go target allows companies to run a "risk-benefit calculus regarding the likelihood of prosecution and

¹³² See Finnegan, *supra* note 102, at 833; See also Samuel M. Roth, *Data Snatchers: Analyzing TikTok's Collection of Children's Data and Its Compliance with Modern Data Privacy Regulations*, 22 J. High Tech. L. 1 (2021).

¹³³ See Tali Arbel, Matt O'Brien & Matt Ott, *US bans WeChat, TikTok from app stores, threatens shutdowns*, AP News (2020), <https://apnews.com/article/donald-trump-us-news-ap-top-news-international-news-technology-a439ead01b75fc958c722daf40f9307c>

¹³⁴ See generally Adi Robertson, *Social media bias lawsuits keep failing in court*, The Verge (2020).

¹³⁵ 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).

¹³⁶ *Id.*

¹³⁷ Andrea M. Matwyshyn, *Technology, Commerce, Development, Identity*, 8 Minn. J.L. SCI. & TECH. 515 (2007), <https://scholarship.law.umn.edu/mjlst/vol8/iss2/9>

decide to risk regulatory action rather than invest in compliance structure.”¹³⁸ Furthermore, since COPPA follows a website-centric approach, it undercuts its ability to be a promising regulatory design as technology evolves.¹³⁹ Companies can easily avoid COPPA actions by either claiming they are not directed to children under thirteen or do not have any knowledge that they collect information from children under thirteen. Lastly, the penalties surrounding COPPA are minimal payment settlements that social media giants can easily overlook while continuing to make the same violations that posed those minuscule penalties.

IV. California’s Approach to Children’s Privacy

California has long modeled its privacy policies after European privacy laws and continued to do so when it came to children’s online privacy.¹⁴⁰ California’s Governor signed the California Age-Appropriate Design Code Act (the “Act” or “AADCA”), modeled after UK’s Age-Appropriate Design Code, into law in September 2022 to take effect July 1, 2024.¹⁴¹ The Act places new legal obligations on “covered businesses” with respect to their online products and services. These covered businesses are those that provide an online service, product, or feature that is “likely to be accessed by children under the age of 18.”¹⁴² The Act looks at certain indicators, including whether the business is “directed to children” as defined by COPPA, it is determined to be routinely accessed by a significant number of children based on reliable evidence regarding audience composition, or whether it has advertisements marketed to children.¹⁴³ The Act also

¹³⁸ Andrea M. Matwyshyn, *Technology, Commerce, Development, Identity*, 8 Minn. J.L. SCI. & TECH. 515 (2007), <https://scholarship.law.umn.edu/mjlst/vol8/iss2/9>

¹³⁹ *Id.* <https://cookie-script.com/blog/ccpa-vs-gdpr>

¹⁴⁰ See Cal. Civ. Code § 1798.100 et seq.; See also Cookie Script, *Differences between GDPR vs CCPA*, (2022), <https://cookie-script.com/blog/ccpa-vs-gdpr>

¹⁴¹ AB-2273 The California Age-Appropriate Design Code Act.

¹⁴² *Id.*

¹⁴³ *Id.*

considers whether the business is substantially similar to, or the same as, an online service, product, or feature routinely accessed by a significant number of children, whether it has design elements that are known to be of interest to children, or whether a significant amount of the audience of the online service, product, or feature is determined to be children based on the internal company research.¹⁴⁴ The AADC tasks the California Attorney General with enforcement authority and allows them to seek an injunction or civil penalty against any business that violates its provisions.¹⁴⁵ Any violator may become subject to a penalty of up to \$2,500 per affected child for each negligent violation and up to \$7,500 per affected child for each intentional violation.¹⁴⁶ Covered businesses that substantially comply with the Act are given a 90-day cure period.¹⁴⁷

There are substantial differences between the California Age-Appropriate Design Code Act and COPPA. First, AADCA’s “likely to be accessed by children” standard is much broader than COPPA’s “actual knowledge” standard of applying to operators of general audience or mixed audience websites.¹⁴⁸ Second, the California Act provides a broader definition of “children” being consumers under the age of eighteen while COPPA defines children more narrowly to be an individual under thirteen.¹⁴⁹ The AADCA poses prohibitions on covered businesses from using a child’s personal information for any reason other than a reason for which the personal information was collected, unless the business can demonstrate a compelling reason that use of the personal information is in the “best interests of children.”¹⁵⁰ Furthermore, the AADC imposes additional requirements on covered businesses that are not listed under COPPA.¹⁵¹

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Compare AB-2273 The California Age-Appropriate Design Code Act; to 16 C.F.R. § 312.5(b).

¹⁴⁹ Compare AB-2273 The California Age-Appropriate Design Code Act; to 16 C.F.R. §§ 312.1- 312.2

¹⁵⁰ AB-2273, *supra* note 141.

¹⁵¹ AB-2273, *supra* note 141.

The requirements for covered businesses under the AADC include (1) configuring all default privacy settings to those that offer a high level of privacy, unless the business can demonstrate a compelling reason that a different setting is in the best interests of children; (2) using clear language suited to the age of the children likely to access the online service, product or feature in their concisely and prominently privacy policies, terms of service, and other policies; (3) completing a Data Protection Impact Assessment (“DPIA”) before any new online service, product or feature that is likely to be accessed by children is offered to the public; (4) either estimating the age of child users with a reasonable level of certainty appropriate to the risks that arise from the business’s data management practices, or simply applying the privacy and data protections afforded to children to all consumers; (5) providing an obvious signal to the child that they are being monitored if the service allows the parent to monitor the child’s location; (6) enforcing published terms, policies and community standards established by the business; and (7) providing prominent, accessible and responsive tools to help children or their parents to exercise their privacy rights and report concerns.¹⁵²

The new privacy rules under AADC will apply to all media giants, including Facebook, Instagram, YouTube, and TikTok along with other platforms criticized for their mishandling of young users’ safety and mental health.¹⁵³ The broadening of the definition of children under the AADC to include individuals under the age of eighteen aligns with criticisms of COPPA seemingly considering a thirteen-year-old to be an adult and not qualified of protections afforded to younger children. The upcoming law could ultimately force technology companies that have long profited from explosive user growth and monetization of its users’ data to verify the age of its users and

¹⁵² *Id.*

¹⁵³ See Hatmaker, Taylor, *California Pushes Ahead with Its Own Children's Online Privacy Protections*, TechCrunch, (2022), <https://tcrn.ch/3KzUyzD>

protect the young population from online threats.¹⁵⁴ While the AADC seems to account for some deficiencies within COPPA, it is certainly not without critics itself. The vague language of the AADC leaves unclear the kinds of businesses that may be subject to the law's rules and the specific actions that would be needed for companies to ensure compliance with the new law.¹⁵⁵ The AADC applies to "any business that provides an online service, product, or feature likely to be accessed by children" and such businesses are mandated to act in the best interests of children will require "rigorous Data Protection Impact Assessment" in order to decide if their products may harm children.¹⁵⁶ Critics argue the scope of the AADC is overinclusive with its ambiguous "likelihood" standard, pointing to sites that "routinely accessed by a significant number of children," with no further explanation.¹⁵⁷

Critics also point out that the law inadvertently may be imposing more privacy issues by having to verify the age requirements for its online users, such as facing the need to collect face-scanning data or official identification material in order to confirm ages.¹⁵⁸ Professor Eric Goldman at the Santa Clara University Law School wrote that "Post-AADC, users will first be required to prove their age before they can visit any new site—even if they just plan to visit for a second, and even if they never plan to return."¹⁵⁹ The process of age authentication may involve either an interrogation of personal details or the evaluation of the user's face so that software can estimate

¹⁵⁴ *Id.*

¹⁵⁵ See Emma Camp, *A California Law Designed to Protect Children's Digital Privacy Could Lead to Invasive Age Verification*, Reason.com, (2022), <https://reason.com/2022/10/06/a-california-law-designed-to-protect-childrens-digital-privacy-could-lead-to-invasive-age-verification/>

¹⁵⁶ *Id.*

¹⁵⁷ P. Ceres, *The US may soon learn what a 'kid-friendly' internet looks like*, Wired, (2022), <https://www.wired.com/story/california-aadc-kids-privacy-age-checks/>

¹⁵⁸ Camp, *supra* note 155.

¹⁵⁹ John Howard, *The Plan to Blow up the Internet, Ostensibly to Protect Kids Online*, Capitol Weekly, (2022), <https://capitolweekly.net/the-plan-to-blow-up-the-internet-ostensibly-to-protect-kids-online/>.

the age.¹⁶⁰ While this may be an easier ask for bigger companies that can afford to conduct such investigations, smaller companies may not be able to afford such processes. More importantly, the authentication process is highly invasive.”¹⁶¹ Instagram implemented similar authentication processes on June 23, 2022. The Meta subsidiary announced that attempts by a user to change their birthdate from under 18 to over 18 will require proof of age with a government ID, having three adult mutual followers to vouch that the user is over 18, or a video “selfie.”¹⁶² This is being used as a test run only for Instagram users attempting to edit their birthdate to make themselves older than 18.¹⁶³ Meta’s director of data governance noted that they are “focused on really providing age-appropriate experiences and so that's why we're starting with this as a test.”¹⁶⁴ As the California Age-Appropriate Design Code has commenced conversations among technology companies regarding different methods that may ensure protection of young consumers, the experimental nature of the AADC will cast light on different results that arise out of a rigid framework.

It is likely that many companies may turn back to implementing more stringent privacy by design approaches to their business models and website engineering. These privacy by design implementations may provide a dependable solution for social media giants gathering large amounts of data from its online users, including children. Privacy by design is a concept in which privacy is proactively embedded into the creation and operation of the information technology

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Instagram, *New Ways to Verify Your Age on Instagram: Instagram Blog*, Instagram. (2022), <https://about.instagram.com/blog/announcements/new-ways-to-verify-age-on-instagram>

¹⁶³ *Id.*

¹⁶⁴ Margaret Harding McGill, *Instagram to Crack down on Young Users Who Lie about Their Age*, Axios, (2022). <https://www.axios.com/2022/06/23/instagram-age-verification-social-media-children>

systems and business practices.¹⁶⁵ The concept was established by Dr. Ann Cavoukian in 1995 after she recognized that privacy solutions were often applied after a data breach had already taken place.¹⁶⁶ To remedy this issue, she created the privacy by design framework that prevents the breaches from happening and codified it in “The 7 Foundational Principles of Privacy by Design.”¹⁶⁷ The privacy by design concept was adopted by leading institutions worldwide, including both governments and businesses, as well as recognition by the FTC to be a core practice for protecting online privacy.¹⁶⁸ While privacy by design is implemented by many companies for the transfer and sale of data, social media networks may look to embed these same features more stringently when it comes to children’s use of their platforms while also offering the same features to all consumers. The proactive embedding of platforms or the use of privacy enhancing technologies (PETs) at the design or update phase of a social media platform can allow the website operators to give its users more control over their content and ownership of their data.¹⁶⁹ By doing this, the social media may withhold its system from creating data packets for children’s’ accounts and allow for easy features that can be used by parents to access or delete their childrens content. As different privacy enhancing technologies may provide answers to business’ need to protect their young users more stringently, the new law seemingly provides an excellent opportunity for the federal government to ascertain new understandings of online privacy.

¹⁶⁵ See Ann Caoukian, *Privacy by Design: The 7 Foundational Principles*, https://iapp.org/media/pdf/resource_center/Privacy%20by%20Design%20-%207%20Foundational%20Principles.pdf

¹⁶⁶ Wikipedia, *Ann Cavoukian*, https://en.wikipedia.org/wiki/Ann_Cavoukian

¹⁶⁷ Caoukian, *supra* note 165.

¹⁶⁸ Mark Weinstein, *Mewe-the first social network with privacy by design*, Medium, (2019), <https://markweinstein.medium.com/mewe-the-first-social-network-with-privacy-by-design-b55b09e2922f>.

¹⁶⁹ Sharon Goldman, *Why privacy-enhancing technologies may be the future of Adtech*, VentureBeat, (2022), <https://venturebeat.com/data-infrastructure/how-privacy-enhancing-technology-is-securing-first-party-data/>, (noting that PETs “PETs” is a broad umbrella term that covers a range of technologies focusing on protecting personal information, born out of the disciplines of encryption, machine learning, de-identification and cryptography).#

V. Conclusion

While Congress certainly made great strides in the realm of children's online privacy by enacting COPPA in 1998, there are many leaps to be made to effectuate the law in an ever-changing technological world. The use of the web as a means of connecting and socializing with the world at large has led to the enabling of social media giants to monetize on user's data and personal information, even those belonging to vulnerable children. Although the FTC has been open to public comment regarding possible changes to COPPA, it has done little to acknowledge certain predacious practices by prominent platforms that go disregarded. The lack of accountability by media giants will not be rehabilitated by marginal monetary fines and the loopholes found within the law's language will continue to be abused for companies' personal gains. The federal government may look to states' laws in addressing these concerns to promulgate new and improved practices for website operators or chose to lead a more proactive role by acknowledging the constructive knowledge held by website operators. As technology continues to develop, so do privacy enhancing technologies that can provide solutions that balance children's online privacy with unintrusive use of online services.