

SCRUTINIZING COPPA: THE PRIVACY OF OUR PAST, PRESENT, AND FUTURE

By

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ABSTRACT

As the Internet has grown, children's lives have become increasingly intertwined with online goods and services, which has raised concerns about their digital privacy and safety. This thesis scrutinizes the economic and legal implications of Children's Online Privacy Protection Act (COPPA, "the Rule"), which regulates the data collection and retention policies of online services to protect the privacy and safety of children. It examines selected enforcement actions, proposed amendments, privacy policies and practices of platforms used as education technology ("EdTech"), incorporating the concerns and opinions of industry experts. In doing so, this thesis finds that COPPA has shortcomings in its methods of enforcement, compliance efforts, and the legislation itself. This thesis concludes after an evaluation of the legislation and proposals to update the Rule.

INTRODUCTION

The Federal Trade Commission and the Development of COPPA

The Federal Trade Commission (FTC, “the Commission”) was established in 1914 to protect consumers and promote competition with the enactment of the Federal Trade Commission Act (FTC n.d.). In addition to establishing the Commission itself, the FTC Act empowers the Commission to prescribe rules “which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within a defined scope of domestic business (15 U.S.C. 57a(a)(1)(B)).

In June 1998, the Federal Trade Commission issued *Privacy Online: A Report to Congress*, which assessed the effectiveness of self-regulation as a means of protecting consumer and children’s privacy on the World Wide Web. In addition to providing an overview of the topic, the report included a description of fair information practice principles, analysis of industry association guidelines, and results from a survey of commercial websites.

While the Commission defined “widely-accepted” principles of fair information practices, it stated that children have a “special status... accorded under the law” that was premised on “the belief that children lack the analytical abilities and judgments of adults” (FTC 1998, p. 12). The FTC claims that this status is exemplified in federal and state laws that protect children, including those that ban sales of tobacco and alcohol to minors or require parental consent for medical procedures (Id, p. 12). The Commission concluded that the fair information practice codes do not address personal information collected from children; rather, they are applicable to parents (Id, p. 12).

Using the fair information practice codes, the Commission analyzed two sets of industry association guidelines regarding collection and use of information from children (Id, p. 17-18).

The Commission found that there was inconsistency between the guidelines in their requirements to provide notice to parents or obtain prior parental consent.

In its report, the FTC detailed results of a survey conducted in March 1998 of over 1,400 websites, of which 212 sites were directed to children (Id, p. 19). The FTC staff found that the vast majority (eighty-nine percent) of the sites directed to children collected at least one type of personal information, including name, e-mail address, postal address, telephone number, Social Security Number, age, date of birth, gender, education, interests, hobbies, etc (Id, p. 31-32). The Commission found that fewer than a quarter of the sites directed to children posted privacy policies (Id, p. 35).

At the conclusion of the report, the Commission concluded that self-regulation was not effective as a means of protecting children's privacy and FTC found that it lacks authority to require firms to adopt information practice policies (Id, p. 41). The Commission recommended to Congress to develop legislation placing parents in control of the online collection and use of personal information from their children (Id, p. 41-42). Thus, according to the Congressional Bill introduced in the 105th Congress, COPPA directs the Federal Trade Commission to prescribe regulations and require operators to follow fair information practices regarding the collection and use of personal information from children. The FTC aimed to protect the privacy of children online by putting parents in control of information collected online from children under 13 (FTC 1999). COPPA was signed into law in 1998 and took effect in 2000 (FTC 1999).

COPPA

COPPA applies to websites and online services, including apps, to protect kids' personal information (FTC 2019). The Rule applies to sites directed to children under 13 as well as general audience sites that have actual knowledge that they are collecting personal information from kids that age (15 U.S.C. 6501–6505 2013).

Below are the provisions set forth in COPPA categorized by the fair information practice codes as defined in *Privacy Online*.

Notice/Awareness

According to the Commission, without notice, a consumer cannot make informed decisions as to whether and to what extent to disclose personal information (FTC 1998, p. 7). In addition, the Commission's report states that notice is the most fundamental principle, and three of the other principles (choice/consent, access/participation, and enforcement/redress) are only meaningful when a consumer has notice of an entity's policies and their rights (Id, p. 7). Moreover, the Commission argues that notice should be unavoidable and understandable to be meaningful and effective (Id, p. 8), though this is not a requirement of the Rule.

Section 312.4 of COPPA delineates the obligations of the operator to provide notice prior to collecting, using, or disclosing personal information from children: "Such notice must be clearly and understandably written, complete, and must contain no unrelated, confusing, or contradictory materials" (2013). According to Part (b), "[a]n operator must make reasonable efforts, taking into account available technology, to ensure that a parent of a child receives direct notice... including

notice of any material change in the collection, use, or disclosure practices to which the parent has previously consented.”

Section 312.4(c) then specifies the requirements of content of the notice for each of the following scenarios: (1) Notice to Obtain Parent’s Affirmative Consent to the Collection, Use, or Disclosure of a Child’s Personal Information, (2) Voluntary Notice to Parent of a Child’s Online Activities Not Involving the Collection, Use, or Disclosure of Personal Information, (3) Notice to a Parent of Operator’s Intent to Communicate with the Child Multiple Times, and (4) Notice to a Parent In Order to Protect a Child’s Safety.

Choice/Consent

The FTC defines the second core principle, choice, as giving consumers options (such as opt-in and opt-out) as to how personal information collected from them may be used, specifically related to “secondary uses of information” (FTC 1998, p. 8). Secondary uses are uses beyond those necessary to complete the contemplated transaction (Id, p. 8). Examples of secondary uses include placing the consumer on the company’s mailing list to market additional products or transferring information to third parties (Id, p. 8).

Section 312.5 of COPPA specifies the obligations of the operator to obtain verifiable parental consent prior to collection, use, or disclosure of personal information from children. While Section 312.5(b) specifies existing methods of obtaining verifiable parental consent, Section 312.12 allows interested parties to file a request for Commission approval of parental consent methods not currently enumerated in Part (b) and Section 312.5(a)(3) allows safe harbor programs approved by the Commission to use a parental consent method if the program determines that the consent method meets the requirements of § 312.5(b)(1).

In addition, COPPA specifies that an operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to the disclosure of his or her personal information to third parties (§ 312.5(b)), with a few exceptions (§ 312.5(c)). Such exceptions include the cases in which an operator collects a persistent identifier and no other personal information and either such identifier is used for the sole purpose of providing support for the internal operations of the Web site or online service (§ 312.5(c)(7)) or the identifier is collected from a user who affirmatively interacts with the operator and whose previous registration with that operator indicates that such user is not a child (§ 312.5(c)(8)), both of which also exempt operators from providing notice under § 312.4.

Section 312.7 prohibits operators from conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity.

Access/Participation

To provide informed consent to the retention and/or use of information collected from their children, the FTC argues that parents need to be given access to the information collected from their children, particularly if any of the information is collected prior to providing notice to the parent (FTC 1998, p. 13).

In addition to requiring the operator to obtain verifiable parental consent, COPPA also specifies the rights of a parent to review personal information provided by a child (§ 312.6). These rights also include the opportunity at any time to refuse to permit the operator's further use or future online collection of personal information from that child, and to direct the operator to delete the child's personal information (§ 312.6(a)(2)).

Integrity/Security

In 1998, the Commission defined integrity as addressing the accuracy of data, especially in the contexts “involving decisions that impact on the child or family” (p. 13-14). However, in the text of COPPA itself, integrity is mentioned in the context of protecting information from being exposed more and longer than is necessary (§ 312.8).

Section 312.8 of COPPA requires operators to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children. Section 312.8 also requires operators to take reasonable steps to release children’s personal information only to service providers and third parties who are capable of maintaining the confidentiality, security, and integrity of such information. Moreover, Section 312.10 prohibits operators from retaining personal information from a child for longer than is reasonably necessary to fulfill the purpose for which the information was collected. Additionally, operators must delete such information using reasonable measures to protect against unauthorized access to, or use of, the information in connection with its deletion (§ 312.10).

Enforcement/Redress

In 1998, the Commission requested that trade associations and industry groups voluntarily submit copies of their online information practice guidelines and principles to assess the status and effectiveness of self-regulatory efforts of the time (p. 15). The FTC found in evaluating the guidelines that the industry had not achieved widespread adherence (Id, p. 17). Moreover, the Commission declared that an absence of enforcement mechanisms significantly weakens the effectiveness of industry-promulgated guidelines as a self-regulatory tool, and it is especially

true if member companies fail to voluntarily adhere to suggested policies (Id, p. 16). Again, at the time, the Commission concluded that self-regulation was not effective as a means of protecting children's privacy and FTC found that it lacks authority to require firms to adopt information practice policies (Id, p. 41).

The text of the federal legislation states that violations of COPPA are treated as a violation of a rule defining an unfair or deceptive act or practice prescribed by the Federal Trade Act (§ 312.10).

Section 312.11 creates the safe harbor program, which allows operators to apply to the Commission for approval of self-regulatory program guidelines. Section 312.11 specifies the criteria for approval of self-regulatory program guidelines; proposed safe harbor programs are required to demonstrate that they (1) ensure operators provide substantially the same or greater protections for children, (2) create an effective, mandatory mechanism for the independent mechanism of subject operators' compliance with the program guidelines, (3) enforce disciplinary actions for subject operators' non-compliance with self-regulatory program guidelines.

The Pace of Technological Innovation and Integration

COPPA was initially enacted in 1998; however, the world has seen many changes since then, such as substantial growth in Internet connected devices and online platforms. The first iPhone, which combined the mobile phone with an Internet communications device and a multi-touch display, was launched in January 2007 (Dowling, Kerris 2007). Following three years later, the first iPad was launched in January 2010 (Evans, Smith 2010). "The facebook" (also known as

Facebook, Meta) was launched in February 2004, within three years had over 30 million registered users (Phillips 2007). At the time of its official release in December 2005, YouTube was serving more than two million video views each day (Hosch 2022). Instagram was launched in 2010 and within two years, it had 27 million users and was acquired by Facebook (aka Meta) for one billion dollars in cash and stock (Blystone, Schmitt 2022). TikTok (a combination of Musical.ly and Douyin) was launched initially in 2014 and within five years, it had amassed one billion downloads worldwide and a year later, two billion downloads (Galer, Tidy 2020).

Additionally, TikTok, YouTube, and Meta (which encompasses both Facebook and Instagram) all offer a “free” version of their service and their revenue-generating advertising is driven by their data collected on their users, according to their data and privacy policies (TikTok 2021, Google 2022, Facebook 2022, Instagram 2018). TikTok’s net US advertising revenue has been forecasted to have grown over 184% in 2021 to \$5.96 billion (Lukovitz 2022). In 2021, Meta reported a net income of over \$39 billion (Meta 2021), and as of 2022, Meta has a twenty-two percent share of the nearly \$250 billion US digital ad market (Lukovitz 2022). In 2020, YouTube was reported to have made \$15 billion solely from ad revenue (Alphabet 2020).

Given the development of business models that involve data collection, the rise of social media platforms, the proliferation of smartphone technology with precise geolocation information, and the use of behavioral advertising for children, the Rule was amended in 2013. According to former FTC attorney Phyllis Marcus, “...the basic handy four-word summary... is that behavioral advertising is covered under the revised rule from 2013” (FTC 2019). More specifically, the Commission’s 2013 Statement of Basis and Purpose states that the amendments clarify definitions of “operator”, “Web site or online service directed to children”, “personal

information”, and “support for internal operations” (p. 3972). The statement specifically clarifies that advertising networks that collect personal information from its visitors are included in its definitions (Id, p. 3972). Additionally, personal information was clarified to include geolocation information and persistent identifiers—such as cookies—that can be used to recognize a user over time and across different websites or online services (Id, p. 3972). The amendment also expanded the exceptions to the Rule’s notice and consent requirements in § 312.5(c), such as that the Rule’s notice and parental consent requirements does not apply when an operator collects only a personal identifier only to support the operator’s internal operations (Id, p. 3977). Moreover, the term “internal operations” was redefined to make clear that none of the information collected may be used or disclosed for behavioral advertising, though it also now specifically includes many types of other activities, such as serving contextual advertising (Id, p. 3979).

Meanwhile, children’s lives have become increasingly integrated with mobile devices and social media. According to a 2017 study by Common Sense Media, the percentage of 0- to 8-year-olds with their own tablets has grown from less than one percent in 2011 to over forty percent in 2017. Not only have children become owners of their own mobile devices but they have also established a presence on social media platforms. According to the 2019 FTC press release regarding the Google and YouTube settlement, Google touted to companies such as Mattel and Hasbro that YouTube was unanimously voted as the favorite website of kids 2-12, and over ninety percent of tweens visit YouTube to watch videos.

In addition to being on social media platforms, a substantial number of children have been using online educational resources. The COVID-19 pandemic, which reached the United States in

January 2020 (CDC 2022), dramatically shifted children's education to distance learning (Mcelrath 2020). The vast majority of households (ninety-three percent) of households with school-age children reported some form of distance learning during the pandemic (Mcelrath 2020). According to the United States Census Bureau's Household Pulse Survey, about three-quarters of people living with children (43 of 57 million) reported their kids using online resources in May 2020 (US Census Bureau 2020).

The persistent growth of technology and online educational resources and young children's vast adoption of these tools continues to raise questions about the privacy policies and protections currently in place.

RESEARCH QUESTIONS AND METHODOLOGY

Motivated by the persistent growth of technology such as online educational resources and their vast adoption by young children, this thesis answers one primary research question:

What are the implications and limitations of COPPA's enforcement actions, compliance efforts by education technology platforms, and the legislation itself?

To answer this question, this thesis uses two methods—interviews with industry experts and legal analysis. Informed by the 2019 FTC workshop on COPPA, interview questions serve as investigative efforts focused on learning more about additional concerns regarding COPPA, its amendments, its effects, and its future. Interview responses have been incorporated within the legal analysis. The legal analysis examines enforcement actions, privacy policies of online platforms used as educational resources, and proposed amendments.

Enforcement Actions

Background

To ensure COPPA compliance, the FTC and Attorneys General bring forth complaints. As of March 2022, there have been at least 39 COPPA enforcement actions. As of March 2022, at least half (22 of 39) COPPA complaints include a count of failing to obtain verifiable parental consent for collecting children's data (§ 312.5(a)). Almost 1 in 3 complaints (12 of 39) involve children's data and advertising, with the majority of those being directed at companies who disclosed children's personal information to third-party advertising platforms or allowed personal information to be collected from their users under the age of 13.

Settlements typically involve a combination of civil penalties, enjoinder from future violations, and reports on how the defendant will improve their practices. As of February 2022, the vast majority (almost 90%) of COPPA cases have resulted in civil penalties, totaling almost \$200 million. Of the \$200 million, \$170 million came from the 2019 settlement with YouTube, which totals to a mere 1.133% of YouTube's \$15 billion ad revenue (Alphabet 2020).

This thesis analyzes *Federal Trade Commission and the People of the State of New York v. Google, LLC and YouTube, LLC* (2019) and *In the Matter of Miniclip S.A.* (2020) by exploring the statements and opinions issued by the Commission to determine the limitations of the settlement action. Two additional cases (*The State of New Mexico v. Google, LLC* (2020) and *United States of America v. OpenX Technologies* (2021)) are analyzed in later sections of this thesis to supplement the remaining analysis.

Federal Trade Commission and People of the State of New York v. Google, LLC and YouTube, LLC (2019)

In 2019, Google, LLC and its subsidiary YouTube, LLC agreed to pay \$170 million to settle allegations by the FTC and the NY Attorney General for violations of COPPA (Case 1:19-cv-02642). COPPA requires that certain websites and apps obtain parental consent prior to collecting personal information from children, including cookies used for behavioral advertising. These websites and apps include third parties serving behavioral ads if they have actual knowledge that the content on the website with their advertisements is child-directed. The complaint alleges multiple instances in which YouTube and Google had actual knowledge of child-directed content and failed to obtain parental consent prior to collecting personal information.

The FTC imposed a tripartite order in its 2019 settlement, requiring: 1) the companies pay \$136 million and \$34 million in civil penalties to the FTC and New York State, respectively, 2) the companies to refrain from using or benefitting from the data previously collected from child-directed videos or channels, and 3) additional restrictions beyond COPPA, such as requiring the companies to notify content creators of COPPA obligations.

According to its press release, the Commission voted 3-2 to authorize the complaint and the final order (FTC 2019); former Chairman Joseph J. Simons and Commissioner Christine S. Wilson issued a statement, while Commissioners Noah Joshua Phillips, Rohit Chopra, and Rebecca Kelly Slaughter issued separate statements.

The YouTube settlement and Commission statements reveal two primary issues with the Commission's method of enforcement actions: a) Enforcement actions of the Commission further reinforce disparities between small and big businesses and b) The Commission is limited by the settlement route.

Disparities between small and big businesses

According to Matecki, soon after the Rule was enacted, smaller websites began to feel the increased costs of COPPA compliance, as they needed to hire legal teams to write expansionary privacy policies and to enforce privacy requirements (2010, p. 382). Moreover, Dona Fraser, Vice President of the Children's Advertising Review Unit (CARU), brought up similar concerns during the 2019 FTC workshop, stating that many small app developers lack the infrastructure and money to comply with COPPA (p. 54).

The disparities between small and big businesses have been felt for years; however, the enforcement action further reinforces this disparity. While the statement frames the enforcement action as one that goes above and beyond ("borne by no other company", "significant judgment", "far-reaching conduct relief", etc.), the dissenting opinion of Commissioner Chopra serves as a reminder of the disparities between smaller and bigger companies. Commissioner Chopra argues that the enforcement action does not hold YouTube and Google accountable to the same degree that small businesses are (7). Commissioner Chopra states, "When small players and upstarts violate COPPA, the companies pay dearly and the executives are investigated and, if liable, held personally accountable" (7). For example, in the case of *United States of America vs. Unixiz, Inc., Zhijun Liu, and Xichen Zhang* (2019), these disparities are apparent. In 2019, Unixiz's

2.1 million users of its website (Id, p. 6) pales in comparison to the 1.9 billion users of YouTube (Degenhard 2021). Moreover, Zhijun Liu and Xichen Zhang were listed as Defendants both individually and as officers of UNIXIZ, Inc. (Case 5:19-cv-02222, p. 1) while Commissioner Chopra stated that it was unclear whether YouTube and Google CEOs or other senior executives had knowledge of or involvement in the company's COPPA violations. "Here, where a dominant incumbent engaged in widespread violations, the company is paying a slice of their profits from wrongdoing and executives avoid scrutiny" (7). The \$170 million is a mere 1.133% of YouTube's \$15 billion ad revenue (Alphabet 2020). As Commissioner Chopra suggests, this signals to the marketplace that smaller businesses face disproportionate scrutiny.

The Limitation of Settlement

100% of the enforcement actions brought forth by the Commission have been settled (Slaughter 2019, p. 3). However, given the complete absence of litigation, the Commission is limited by and uninformed about its potential outcomes. According to the statement of former Chairman Simons and Commissioner Wilson, the Commission must consider whether the relief they are obtaining is equal to or better than what they could reasonably obtain through litigation (2019, p. 4). Commissioner Wilson stated in the 2019 FTC Workshop that the FTC's prosecutorial resources were "scarce" (2019). The Commission believes the monetary penalty is better than what they would achieve after litigation (Simons and Wilson, p. 4). However, as Commissioner Slaughter argued in her dissenting opinion, the Commission has never litigated a COPPA enforcement action and therefore has no informed basis on which to assess how a court would assess a civil

penalty amount” (Id, p. 3). Hockey Hall of Famer Wayne Gretzky once said, “You miss 100% of the shots you don’t take.” As Gretzky insinuates, there are missed opportunities in not trying. Without a single litigated enforcement action, the Commission lacks an informed understanding of how a court might determine penalties.

In analyzing the YouTube settlement and related statements, this thesis finds two primary issues with the Commission’s method of enforcement actions: a) Enforcement actions of the Commission further reinforce disparities between small and big businesses and b) The Commission is limited by the settlement route. The disparities between small and big businesses may discourage smaller businesses from serving children, given the impact of both compliance costs and more stringent enforcement actions. According to Harry Jho, founder of the Mother Goose Club YouTube channel, small businesses may not be able to adapt to legislation and enforcement action easily, resulting in fewer content creators and an overall loss of quality content for kids. Moreover, until the Commission attempts to litigate an enforcement action, it will continue to lack an informed basis upon which it can assess how a court would determine a civil penalty.

COPPA Compliance in EdTech

Background

Education technology (EdTech) is a massive market. According to the United States Department of Commerce, the global market in 2020 was estimated to be worth nearly \$90 billion and is projected to grow at an annual compound rate of 19.9% from 2021 to 2028. Of the continents in the global market, North America is the largest, which the Department attributes directly to the size of the U.S. education sector. Moreover, education technology software has become thoroughly integrated into children's classrooms. According to PowerSchool and Discovery Education, two providers of K-12 education technology platforms, they each serve approximately 45 million students; similarly, EdTech provider Seesaw claims to be used by over 75% of schools in the US.

The sheer size and extent to which education technology has been integrated into the lives of children raises additional privacy and safety concerns. According to a 2021 whitepaper published by British security software company Sophos, independent researchers found that across 5,400 IT decision makers across 30 countries, the education sector experienced the highest level of ransomware attacks, with 44% of respondents in these sectors reportedly being hit, notably higher than the global average of 37%. Moreover, in 2018, the Federal Bureau of Investigation (FBI) issued a public service announcement to raise public awareness of cyber threat concerns. According to the FBI, "[t]he US school systems' rapid growth of education technologies (EdTech) and widespread collection of student data could have privacy and safety implications if compromised or exploited." Additionally, the announcement states that malicious use of

sensitive personal information could be used in social engineering, bullying, tracking, identity theft, or other means for targeting children.

Given the sensitive nature and risks inherent in collecting and distributing children's data, this study investigates privacy policies, customer success stories, app store listings, and other information to learn more about each platform's COPPA compliance. In addition to summarizing the personal information collected or accessed by each platform (Table 1), this study identifies the methods by which different platforms used as education technology handle COPPA compliance (Table 2, Figure 1). The platforms include communication tools, storage solutions, education content providers, and learning management systems used by students and schools. This study investigated the provided by the following platforms: Blackboard (first CourseInfo, acquired by Blackboard LLC, acquired by Anthology), Box, BrainPOP, Discovery Education, Dropbox, Duolingo, Eduphoria, Google Workspace for Education Fundamentals (formerly G Suite for Education), ImagineLearning, Instructure, Kahoot, Khan Academy, Microsoft, PowerSchool, Quizlet, Savvas, Seesaw, Writable, and Zoom. Eduphoria's privacy policy was not found on its website. All other references to privacy policies can be found in the References section.

Table 1: Personal Information Accessed or Collected by EdTech Platforms

Information category	Definition or examples of information	Collected by
Account and contact information	Name, email address, account credentials, course enrollment information, phone number, graduation date, gender, native language	Blackboard, Box, BrainPOP, Discovery Education, Dropbox, Duolingo, Google Workspace, ImagineLearning, Instructure, Khan Academy, Microsoft, PowerSchool, Quizlet, Savvas, Seesaw, Writable, Zoom
Application, enrollment, and financial aid information	Student ID, enrollment status, financial aid information	Blackboard, ImagineLearning, Instructure, PowerSchool
Biometric signals	Collected from webcams	Duolingo
Chat and audio recordings	Virtual classroom sessions	Blackboard, Google Workspace, ImagineLearning, Microsoft, PowerSchool, Seesaw, Zoom
Contacts	Address book contact information	Dropbox, Google Workspace, Microsoft, Quizlet, Zoom

Content and activity	Coursework, comments, grades, feedback, audio recordings, video recordings, recording metadata	Blackboard, Box, BrainPOP, Discovery Education, Dropbox, Duolingo, Google Workspace, ImagineLearning, Instructure, Kahoot, Khan Academy, Microsoft, PowerSchool, Savvas, Seesaw, Writable
Cookies	Limited personal information, IP address, usage data	Blackboard, Box, BrainPOP, Discovery Education, Dropbox, Duolingo, Google Workspace, Instructure, Microsoft, Quizlet, Savvas, Seesaw, Writable
Device information	Hardware model, operating system and version, unique device identifiers, network information, platform information, system configuration information, browser type, internet service provider, language preferences, screen resolution, and screen color processing ability, viewfinder size, script errors	Blackboard, Box, Discovery Education, Dropbox, Duolingo, Google Workspace, Instructure, Khan Academy, Microsoft, PowerSchool, Quizlet, Seesaw, Zoom

Information from third-parties	Name, email address, age, gender, position, profile picture, public social media posts with matching keywords and hashtags	Blackboard, Discovery Education, Google Workspace, Microsoft, Quizlet, Seesaw, Writable
Location data	Precise geolocation data, IP address	Blackboard, Box, BrainPOP, Discovery Education, Dropbox, Google Workspace, Instructure, Khan Academy, Microsoft, PowerSchool, Quizlet, Savvas, Seesaw, Zoom
Lookalike audience identity	Identities of prospective customers collected via advertising networks, revealed when they click on ads	BrainPOP
Network information	Network usage statistics, volume of network traffic	Duolingo
Notification reactions	Whether calls were answered, whether voicemails were left	Blackboard
Payment, transactional information	Credit card number, security code, services purchased or subscribed to, billing address	Blackboard, Box, Google Workspace, PowerSchool, Quizlet, Savvas

Peripherals attached	Whether any external devices are connected to the device accessing the software	Duolingo
Pixel tags or web beacons	One pixel image used in promotional content to track the effectiveness of marketing campaigns	BrainPOP, Discovery Education, Dropbox, Google Workspace, Quizlet, Savvas, Writable
Support information	Phone conversations, chat sessions, device information, product information, institution information	Blackboard, Microsoft, Seesaw
User journey information	Pages visited, content used, URL of the web page visited prior to navigating to the site, scroll depth, user clicks, user journey, mouse movements, scrolling, typing	Box, BrainPOP, Discovery Education, Duolingo, Google Workspace, Instructure, Kahoot, Khan Academy, PowerSchool, Quizlet, Savvas, Zoom

Compliance Methods

In investigating the 19 platforms, this study finds that for the 18 platforms with privacy policies publicly available, there are eight recurring methods used in attempt to comply with COPPA (Table 2, Figure 1). Listed in order of most popular to least popular, the methods are as follows:

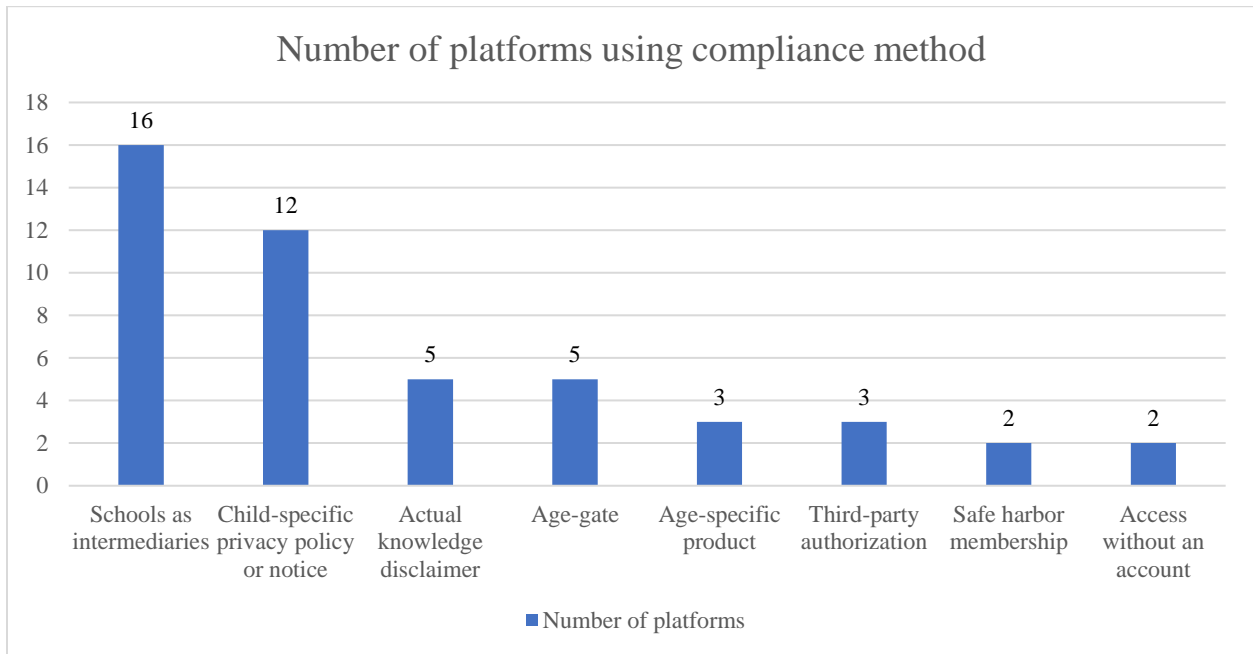
1) Schools as intermediaries, 2) Child-specific privacy policy or notice, 3) Actual knowledge disclaimer, 4) Age-gate, 5) Age-specific product, 6) Third-party authorization, 7) Safe harbor membership, 8) Access without an account.

In investigating the three most popular compliance methods, this thesis finds two additional issues with COPPA: c) COPPA fails to empower minors as future decision-makers and d) COPPA fails to meet its legislative intent in empowering parents.

Table 2: Compliance Methods Used by EdTech Platforms

Compliance Method	Used by
Access without accounts	Discovery Education, Kahoot
Actual knowledge disclaimer	Blackboard, Box, Instructure, Khan Academy, PowerSchool
Age-gate	Box, Discovery Education, ImagineLearning, Savvas, Zoom
Age-specific product or experience	Duolingo, Khan Academy, Quizlet
Child-specific privacy policy or notice	Blackboard, Duolingo, Instructure, Kahoot, Google Workspace, Khan Academy, Microsoft, PowerSchool, Quizlet, Seesaw, Writable, Zoom
Schools as intermediaries or agents	Blackboard, Box, BrainPOP, Discovery Education, Dropbox, Google Workspace, ImagineLearning, Instructure, Kahoot, Khan Academy, Microsoft, PowerSchool, Savvas, Seesaw, Writable
Safe harbor membership	PowerSchool, Quizlet
Third- party sign-in or authentication	BrainPOP, ImagineLearning, Instructure

Figure 1: Popularity of Compliance Method



Schools as Intermediaries

16 of 18 platforms require schools to serve as intermediaries. Learning management system and communications technology companies such as Blackboard, Google Workspace, and Zoom contract with schools to provide education technologies. COPPA requires that operators obtain verifiable parental consent prior to collecting data from children under 13 years of age for educational and commercial purposes. On one hand, in its compliance FAQ, the FTC stated that a school can serve as an agent and provide consent for the students on behalf of the parents in an educational and non-commercial context (2020). On the other hand, the District Court ruled in *State of New Mexico v. Google LLC* (2020) that a school can serve as an intermediary between a parent and the operator when providing consent for data collection for commercial purposes.

The State of New Mexico v. Google, LLC (2020)

In February 2020, the Attorney General of New Mexico announced a lawsuit against Google, LLC alleging Google's conduct violates 1) COPPA, 2) the New Mexico Unfair Practices Act, and 3) New Mexico common law (Case 1:20-cv-00143). In regards to the COPPA violations, the plaintiff alleged that Google (1) failed to provide notice to parents in stating the types of personal information it seeks to collect from the child, (2) any notice provided by Google is not intended for the child's parent and would not be understood by a child under the age of 13, and (3) failed to obtain parental consent authorizing it to collect and use minors' personal sensitive information. The District Judge ruled that the plaintiff did not demonstrate the plausibility of its claims, rather than describing the case in detail, such that the plaintiff's allegation of (1) inadequate notice

failed to satisfy the *Iqbal/Twombly* requirement to allege sufficient factual matter. In response to (2), the Judge noted that COPPA does not require that the notice be drafted for the understanding of children under 13. The Judge rejected (3), as the Court agreed with Google in that the State's complaint does not allege that Google fails to provide notice to schools, or that Google fails to obtain consent from schools, or that schools fail to obtain consent from parents where required. Instead, the Judge sided with Google's claims that there was a distinction between agent and intermediary. While the COPPA claims were dismissed with prejudice by the District Court Judge, the New Mexico Attorney General filed an appeal and ultimately settled the aforementioned suit and another with Google. The settlement resulted in the creation and funding of the Google New Mexico Kids Initiative, which sets aside \$3.8 million dollars to fund efforts to promote education, privacy, and safety for New Mexico children.

COPPA's Failure to Empower Young Children as Future Decision-Makers

In rejecting (2), the Judge noted the COPPA does not require that the notice be drafted for the understanding of children under 13, which is true. However, in lacking this requirement, COPPA fails to empower minors as future decision-makers. While the Commission recognizes in *Privacy Online* that children deserve special protections, these protections end at age 13 without any preparation when they are no longer included in the Rule's definition of "child" (Section 312.2).

Moreover, children under age 13 are using devices independently. Kabali et al. concluded in their research that 350 young children in an urban, low-income, minority community had almost universal exposure to mobile devices, and most had their own device by age 4

(2015). According to Kabali et al., most 3- and 4-year olds used devices without help, suggesting independent use.

If young children are not given preparation but are given devices without supervision, then it is important that children are empowered to make decisions. As *Privacy Online* suggests, effective notice enables individuals to make informed decisions (FTC 1998, p. 7). Although it is not currently a requirement that notice be drafted for the understanding of children under 13, doing so will empower children with a better understanding of how their data is being used, even after they are no longer under COPPA's protections.

Operators are Excluding Parents From the Decision-Making Process

According to the FTC FAQ on COPPA compliance, “the school’s ability to consent for the parent is limited to the educational context – where an operator collects personal information from students for the use and benefit of the school, and for no other commercial purpose” (FTC 2020). However, the District Judge sided with Google, finding that FTC guidance does not prohibit schools from serving as an intermediary between parents and online operators. On the Google Cloud COPPA Compliance page, Google states, “Google contractually requires that schools using Google Workspace for Education meet the parental consent requirements under COPPA. Our services can be used in compliance with COPPA as long as a school has parental consent” (Google 2022).

While the 2020 District Court Order stated that the FTC does not prohibit schools from serving as intermediaries, it is unclear whether Google’s policy follows the guidance set

forth in the FTC's compliance FAQ. In the same response that limits the school's ability to consent for the parent, the FTC states, "...operators should not state in Terms of Service or anywhere else that the school is responsible for complying with COPPA, as it is the responsibility of the operator to comply with the Rule" (FTC 2020). Google's policy states that it "contractually requires schools... to meet the parental consent requirements under COPPA", implying that schools are responsible for obtaining parental consent.

In addition to shifting the responsibility of collecting verifiable parental consent onto the schools, some privacy policies also state that schools are responsible for deciding how personal data is used. According to Blackboard's Privacy Statement, "This means that the main responsibility for data privacy compliance lies with your institution as the 'data controller.' It also means that your institution's privacy statement governs the use of your personal information (instead of ours)" (2021). By shifting the responsibility for data privacy compliance onto institutions and indirectly obtaining verifiable parental consent, operators are excluding parents from the decision-making process.

COPPA's Failure to Meet Legislative Intent

By using schools as intermediaries, operators are displacing the responsibilities of COPPA compliance, especially when 16 of 17 operators use schools as an intermediary. According to the FTC's 2017 workshop on EdTech and privacy, COPPA was enacted with two goals in mind: "Allow parents to make informed choices about when children's personal information is collected, used, and disclosed online" and "Enable parents to monitor their children's interactions and help prevent them from risks of inappropriate

online disclosures.” However, if schools are not required to give notice to parents regarding data disclosure and consent that has been given, then COPPA fails to meet these two goals.

Although parents can request to review and request the deletion of their children’s personal information, operators are further displacing responsibilities by requiring that parents contact their schools’ administrators. For example, Zoom’s Educational Privacy Statement reads, “If you are a parent or student, please contact your school or other educational organization to access any personal information, limit a student’s access to Zoom Products features or services, or delete personal information or the student’s entire profile” (2021). While parents are then able to contact the schools, the FTC recommends, but does not require, schools to provide parents with a notice of the websites and online services whose collection it has consented to on behalf of the parent under COPPA (FTC 2020). This is likely due to the fact that the Commission does not have jurisdiction over non-profits, including public schools (FTC 2017).

That said, the FTC does have options that it can use to fulfill its originally intended goals. Firstly, it can clarify that it is the responsibility of the operator to comply with COPPA, rather than the responsibility of the school, as the Commission clearly states in its FAQ (FTC 2020). For example, Blackboard’s Privacy Statement states, “...the main responsibility for data privacy compliance lies with your institution...” (2021), which implies that Blackboard is not responsible for data privacy compliance violates the standards set by the FTC. Given that Blackboard is an EdTech company, rather than a

non-profit, the FTC does have jurisdiction over the actions of the company and can pursue an investigation under Section 6 of the FTC Act.

Secondly, the FTC can either recommend that Congress revise legislation to ensure that operators are obtaining verifiable parental consent from parents to use their children's data for commercial purposes or prescribe rules under its own Section 57a authority (15 U.S.C. 57a(a)(1)(B)). The Commission published its *Privacy Online* report in 1998 to encourage Congress to develop legislation placing parents in control of the online collection and use of personal information from their children (41-42), finding that it lacks authority to require firms to adopt information practice policies (41). Similarly, the Commission can encourage Congress to revise legislation to reaffirm the original legislative intent of protecting children's privacy online and giving parents the power to make informed decisions. Moreover, the Commission can prescribe its own rules "which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce"(15 U.S.C. 57a(a)(1)(B)).

Child-specific Privacy Policies and Actual Knowledge Disclaimers

COPPA requires that certain websites and apps obtain parental consent prior to collecting personal information from children, including cookies used for behavioral advertising.

These websites and apps include third parties serving behavioral ads if they have "actual knowledge" that the content on the website with their advertisements is child-directed.

12 of 18 EdTech platforms have a separate privacy policy or notice specifically addressing their practices regarding children’s data. For example, PowerSchool, a provider of cloud-based software for K-12 education, has a separate section on its Privacy Policy page (2022).

The Shortcomings of Actual Knowledge

Allowing sites to disclaim “actual knowledge” means the legislation fails to capture a portion of sites used by children. As Finnegan notes, COPPA fails to explicitly define what it means to have “actual knowledge” of underage users (2020, p. 831). However, the Commission has promulgated that “an operator has actual knowledge of the 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” (Id, p. 840). Moreover, according to its 2019 FAQ, the Commission does not require operators to ask the age of visitors. However, according to Finnegan, given that “actual knowledge” is only determined once the operator actually asks for the user’s age, the lack of requirement has allowed Meta to evade having “actual knowledge” of underage users (Id, p. 841).

Allowing sites to disclaim “actual knowledge” is especially problematic when operators are misrepresenting their “actual knowledge.” While providing a separate privacy policy is not inherently problematic, operators have provided contradictory information. For example, PowerSchool’s Section F: “Children’s Privacy”, states in its second point, “Children’s Online Privacy Protection Act (COPPA). PowerSchool Products are not directed to children under 13, and PowerSchool does not knowingly collect any information from children under the age of 13.”

While PowerSchool does provide additional notice and information regarding its data collection, retention, and security protocols, PowerSchool should be careful not to misrepresent its practices, as the FTC has taken enforcement action against OpenX Technologies and YouTube LLC in relation to their disclaimer of COPPA and their actual knowledge of collecting data from children. Moreover, according to Section 312.4, the notice which is the obligation of the operator, “must contain no unrelated, confusing, or contradictory materials.”

United States of America v. OpenX Technologies (2021)

In December 2021, advertising platform OpenX and the FTC entered a settlement agreement for the platform’s violations of the FTC Act and COPPA (Case 2:21-cv-09693). OpenX operates an advertising exchange that allows publishers of Web sites and apps monetize their platforms by automating the auctioning of ad space on apps in real-time.

In paragraph 54 of the filed complaint, the case includes OpenX’s disclaimer in its COPPA Notice: “OpenX does not engage in activities that require parental notice or consent under the Children’s Online Privacy Protection Act (COPPA). If you believe that OpenX has inadvertently collected information from a child under 13 that is subject to parental notice and consent under COPPA, please contact OpenX using the contact information below to request deletion of the information” (2021, 11). Although the notice attempts to disclaim liability under COPPA, OpenX had actual knowledge that it had collected personal data (including location information and persistent identifiers) from children (10). Thus, OpenX was liable to comply with COPPA as an “operator.” In *Count*

II: Deception of the complaint, OpenX was found to have misrepresented its COPPA activities and practices, as it falsely represented that it does not engage in activities that require parental notice or consent under COPPA. Apparently, it is not enough to simply disclaim COPPA and offer the ability to request deletion in the case of accidental data collection.

In § 312.2, COPPA defines “directed to children” as being “a commercial Web site or online service, or portion thereof, that is targeted to children” (2013). While PowerSchool claims that it does not knowingly collect any information from children under the age of 13, it offers PowerSchool Unified Classroom as “the leading K-12 learning management system” (PowerSchool 2022). Moreover, it advertises that student “Ben” gets a unified learning experience and that he can take assessments in the same place where he does most of his other assignments, as well as get support from his teacher (PowerSchool 2022). Given that PowerSchool Unified Classroom is a K-12 learning management system designed to be used by students to do their assignments and communicate with their teachers, it is unclear how PowerSchool could not knowingly collect any information from children under the age of 13. While OpenX was a general audience app that misrepresented its liability under COPPA, PowerSchool is clearly an application directed towards children if it is a K-12 management system, despite their disclaiming liability under COPPA.

In addition to false claims that users could opt out of geolocation tracking and its misrepresentation of its activities and practices related to children/COPPA, OpenX was found to have collected personal information from children without consent and proper

notice. More specifically, OpenX 1) failed to provide sufficient notice regarding its data collected from children, 2) failed to provide direct notice to parents on the information it collects from children, and 3) failed to obtain verifiable parental consent before any collection or usage of personal information. In addition to being enjoined from violating the FTC Act, OpenX will 1) pay a \$2 million civil penalty (revised from \$7.5 million due to an inability to pay), 2) delete all ad request data it collected to serve targeted advertisements, 3) implement a comprehensive privacy program to prevent future COPPA violations, including re-reviewing apps periodically and tracking banned apps and websites.

Operators should exhibit greater consistency between its privacy policy and promotional content and exercise greater care before making disclaimers about “actual knowledge”, especially given that 14 of 18 platforms advertised their products as being suitable for K-12 audiences. While not all 14 platforms disclaim COPPA compliance and not all operators who disclaim COPPA compliance are in violation of COPPA, operators should be cautious to ensure that their disclaimers and their practices align in accordance with the Rule. If the Commission allows operators to simply disclaim “actual knowledge” and evade COPPA compliance as Instagram did for years (Finnegan 2020), then COPPA will continue to fail to capture a portion of sites used by children. If COPPA fails to capture a substantial portion of sites used by children, then it is no better than self-regulation.

By investigating the three most popular compliance methods, this thesis that c) COPPA fails to empower minors as future decision-makers and d) COPPA fails to meet its legislative intent in empowering parents.

COPPA and Amendments

To further determine the implications and limitations of COPPA, especially in the legislation itself, this thesis explores whether the legislation and its 2013 amendment addressed concerns of past academic research. In addition, this thesis identifies the extent to which recently proposed amendments address COPPA's issues.

Pre-Amendment Legal Research Concerns

Prior to the Rule's 2013 amendment, legal scholars criticized COPPA for the following reasons:

1) legal scholars considered it to be at odds with the First Amendment, 2) verification technology was ineffective, and 3) COPPA compliance was too costly.

The Constitutionality of COPPA

Shortly after COPPA was enacted in 1998 and it came into effect in 2000, legal scholars Warmund (2000, p. 212) and Hersh (2001, p. 1850) claimed that placing burdens upon the constitutional right to commercial free speech can be problematic, both citing the ruling of *Reno v. American Civil Liberties Union et al.* (1997).

Reno v. American Civil Liberties Union et al (1997)

Two provisions of the Communications Decency Act (CDA) of 1996 sought to "protect minors from harmful material on the Internet. Section 223(a)(1)(B)(ii) criminalized the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Section 223(d) prohibited the "knowing" sending of displaying to a person under 18 years of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory

activities, or organs.” Sections 223(e)(5)(A) and 223(e)(5)(B) created affirmative defenses to those who take in “good faith” actions to restrict access by minors to the prohibited communications or access by requiring age proof. A number of plaintiffs filed suit, challenging the constitutionality of Sections 223(a)(1) and (223)(d) (521 U. S. 844 1997). The District Court found entered a preliminary injunction against enforcement of both challenged provisions, but Reno, the Attorney General of the United States (referred to as “the Government” in the case), appealed the decision (Id, p. 844).

The court held that the CDA’s “indecent transmission” and “patently offensive display” provisions abridge the freedom of speech protected by the First Amendment because the CDA was vague (Id, p. 844-845). Moreover, the court stated that its breadth was unprecedented and that its “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act’s legitimate purpose”, and the Government failed to demonstrate otherwise (Id, p. 846).

Warmund and Hersh both draw parallels with *Reno*, stating that COPPA may be at odds with the First Amendment because the burdens it places on free commercial speech. However, it is important to note that the *Reno* court weighs the Act’s means of achieving legitimate purposes with its burden on free commercial speech. A law that places burdens on free commercial speech can pass strict scrutiny if it is narrowly tailored to achieve a compelling governmental interest and is the least restrictive means of achieving that objective (Legal Information Institute n.d.). According to Jim Dunstan, General Counsel at TechFreedom, COPPA has never been challenged on First Amendment grounds. Thus,

it remains unknown whether COPPA would withstand strict scrutiny; nevertheless, COPPA is not unconstitutional simply due to any burden on free commercial speech.

In addition, the *Reno* court found that the precedents cited by the Government raised doubts about the CDA's constitutionality due to the differences in the laws and orders upheld in those cases. These differences include that the CDA does not allow parents to consent to their children's use of restricted materials, is not limited to commercial transactions, fails to provide any definition of "indecent", neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics. However, in the case of COPPA, many of these issues do not apply. The Rule allows parents to provide consent to data collection (Section 312.5); the Commission has jurisdiction over commercial entities but not non-profits (Section 312.2); the Rule defines specific scenarios in which it applies (Section 312.2); and it is enforced by the Federal Trade Commission, which has demonstrated its familiarity with consumer issues in publishing its *Privacy Online* report. Therefore, many of the issues in precedents that made the CDA constitutionality suspect do not apply to COPPA.

Lack of Effective Verification Technology

Legal researchers (Warmund 2000, Hersh 2001, and Matecki 2010) find that verification technology is ineffective. According to Warmund, it is difficult to ensure that the person who e-mails consent is the parent and not the child (2000, p. 208). Similarly, Hersh states that asking a user to check a box stating that they are thirteen will not stop astute children from accessing a Web page (2001, p. 1869). Matecki (2010) cites a 2007 report in which

the FTC concluded that the Act and Rule acknowledged the lack of technology providing a plausible means of age verification (p. 385). Moreover, the Commission stated in its 2019 FAQ that the Rule will not prevent children from misrepresenting their age to register for general audience sites or online services whose terms of service prohibit their participation.

Nevertheless, there have been new verification technologies that have been adopted since COPPA's enactment (Veratad 2022, FTC 2019). According to Don McGown, former Chief Legal Officer in Business Affairs of the Pokemon Company International, the company uses a verification technology provided by Veratad (FTC 2019). The solution authenticates the age of a user based on the last four digits of an individual's Social Security Number, which costs about \$0.35 per Application Programmable Interface (API) call (FTC 2019). This solution is likely more effective in ensuring that consent is coming from the parent themselves, rather than a child. However, Morgan Reed—the president of the App Association—notes that these costs are felt for small developers (FTC 2019), which contributes further to the difficulties of COPPA compliance costs.

Cost of COPPA Compliance

The same legal researchers believe that COPPA compliance is too expensive due to the costs of obtaining parental consent and costs of hiring legal teams (Warmund 2000, Hersh 2001, and Matecki 2010). Warmund cites issues with the methods of obtaining parental consent stated in Section 312.5(b), such as the print-and-send method, which was estimated to cost \$2.81 per child (2000, p. 208). Matecki similarly cites the monetary costs of complying with COPPA, stating that some estimate the total cost of COPPA

compliance could reach upwards of \$200,000 per year (2010, p. 382). Warmund (2000, p. 210-211) and Hersh (2001, p. 1866) both reason that the cost of compliance discourages websites from offering their services to children. As mentioned previously in the context of the YouTube settlement, these costs have been felt by smaller businesses, who struggle to keep up with the legislation due to a lack of infrastructure and money.

That said, in the 2013 amendment, the Commission expanded the exceptions to the Rule's notice and consent requirements in § 312.5(c), such as that the Rule's notice and parental consent requirements does not apply when an operator collects only a personal identifier only to support the operator's internal operations (FTC 2013, p. 3977).

Moreover, the 2013 amendment also expanded the "non-exhaustive list" of acceptable methods for obtaining prior verifiable parental consent, giving companies more options (Id, p. 3972). While these updated definitions to the Rule relax some definitions for companies in cases of internal operations and other exceptions and provide alternatives methods of obtaining parental consent, the 2013 amendment fails to comprehensively address the issue that small businesses may struggle more with compliance.

This thesis determines that the Rule's first criticisms hold in some areas, though other issues with the Rule have been addressed. In response to the criticism that COPPA is constitutionally suspect, this thesis concludes that COPPA has not been challenged on First Amendment grounds, so it is undetermined whether it would withstand strict scrutiny. Moreover, many of the issues in precedents that made the CDA constitutionality suspect do not apply to COPPA. In addition, this thesis finds that while verification technology has seen updates, COPPA compliance is still difficult for smaller businesses.

To What Extent Do Proposed Amendments Address COPPA's Issues?

In investigating the enforcement actions and COPPA compliance in EdTech platforms, this thesis has identified six additional issues of COPPA: a) reinforcement of disparities between small and big businesses, b) the limitation of settlement, c) failing to empower minors as future decision-makers, d) failing to meet legislative intent in empowering parents, and e) limitations of “actual knowledge.” This thesis analyzes the proposed amendments to determine the extent to which proposals will solve these issues.

Markey-Hawley (2019) and Markey-Cassidy (2021)

Originally introduced as the Markey-Hawley Bill in 2019, the amendment was introduced by Sen. Edward J. Markey (D-Mass.) and Sen. Josh Hawley (R-Mo.). The Markey-Hawley Bill includes minors up to 15 years old, bans targeted marketing directed at children, and allows parents and children to delete personal information posted online. Moreover, it requires manufacturers of connected devices directed towards children to create standardized and easy-to-understand privacy dashboards to inform the user of data usage, transmission, retention, and protection practices. Additionally, it revises the “actual knowledge” standard to be the “constructive knowledge” standard for operators covered under COPPA, such that operators include those who would by reason of care and due diligence should have known that they were collecting or maintaining personal information from a child or minor. In the administration of COPPA, the Bill would require the publishing of a report on the effectiveness of the safe harbor program and establish a Youth Privacy and Marketing Division which would be responsible for addressing COPPA and its amendments. Since its first introduction in 2019, the

bipartisan bill died in committee. However, it was reintroduced in 2021 by Sen. Edward J. Markey (D-Mass.) and Sen. Bill Cassidy (R-La.) and would rename the Rule to be the “Children and Teens’ Online Privacy Protection Act.”

While COPPA currently requires operators to obtain verifiable parental consent prior to utilizing children’s data in a commercial context, the Markey-Cassidy amendment would completely ban targeted marketing directed at children, no matter whether verifiable parental consent can be obtained. According to panelists at the 2019 FTC workshop, behavioral or “targeted” advertising is a popular method of generating revenue.

Completely banning targeted marketing directed at children would reduce the number of scenarios in which companies would have to obtain verifiable parental consent. By doing so, the Bill may be implicitly addressing COPPA’s earlier criticisms about the difficulty of obtaining effective meaningful parental consent.

The Markey-Cassidy Bill would add the ability for children to delete personal information posted online, like the GDPR’s “right to be forgotten”. Currently, COPPA’s data retention policy that states in § 312.10 Data retention and deletion requirements that “An operator of a Web site or online service shall retain personal information collected online from a child for only as long as is reasonably necessary to fulfill the purpose for which the information was collected” (2013). By extending this requirement and giving individuals the ability to delete personal information posted online, it would give children greater control over their privacy and safety, which would address c) COPPA’s failure to empower minors as future decision makers.

Although the Markey-Cassidy Bill would require manufacturers of connected devices directed towards children to create privacy dashboards, the Bill could further push for improved readability and standardization of privacy statements for all online services. Expanding the requirement to include all online services would be beneficial, as it would also address c) COPPA's failure to empower minors as future decision makers.

The constructive knowledge standard would expand the definition of operator to include more companies who collect information from children, which may be thought to address e) the limitations of the "actual knowledge" standard. The Bill defines seven scenarios in which the operator would have constructive knowledge, though many of these are implicit in COPPA's definitions or enforcement actions. For example, Section 2(a)(2)(A)(v) of the Bill states, "the operator has or receives data or reporting or information from the operator's internal communications, including documentation about its advertising practices... that indicates that data is being collected from users of a particular age range that are using the product or service." However, this is the exact scenario that was used in the YouTube settlement case to determine that YouTube had "actual knowledge", as referenced as Exhibit A in the case (Case 1:19-cv-02642). While the definitions make explicit the scenarios in which an operator would have actual knowledge, it is unclear how the constructive knowledge standards will address the limitations of actual knowledge.

Kids Online Safety Act (2022)

The Kids Online Safety Act (KOSA) was introduced in February 2022 by Sens. Richard Blumenthal (D-Conn.) and Marsha Blackburn (R-Tenn.) after calls to require social

media companies to increase transparency. KOSA was drafted to include any online service of any size that is “reasonably likely to be used” by a child younger than 16. It establishes a “duty of care” such that covered platforms have a duty to act in the best interests of users who are minors, including a prevention of harm to minors. This would include a duty to prevent and mitigate issues such as promotion of self-harm, suicide, eating disorders, substance abuse, sexual exploitation, unlawful products and prevention of stalking, exploitation, addiction, and rabbit holes of dangerous materials. These safeguards would default to the strongest option by default and require parental tools to be enabled by default. Additionally, KOSA would require disclosures for algorithmic recommendation systems, advertising, and marketing, in addition to requiring resources for parents and minors, annual audits by an independent third-party, a public report that identifies risks of harm to minors, and access to data on harms to minors for research purposes. In terms of administration, KOSA would require the FTC to establish guidelines for covered platforms seeking to conduct market and product focused research on minors, the National Institute of Standards and Technology to conduct a study evaluating age verification technology, the FTC and Attorneys General to enforce the act, and the Secretary of Commerce to establish and convene a Kids Online Safety Council to provide advice on the act’s implementation.

KOSA includes any online service of any size that is “reasonably likely to be used” by a child younger than 16, which would expand the age range covered by privacy and safety protections. By expanding its definition to include such online services, it would likely address e) the limitations of the actual knowledge standard. KOSA includes more

websites used by children due to the absence of the “actual knowledge” standard, especially those that have misrepresented their “actual knowledge.”

Some claim that increasing the age range of COPPA would raise issues with the First Amendment. James Dunstan, General Counsel at TechFreedom, stated concerns regarding COPPA expansion. Drawing parallels with *Reno v. ACLU* (1997), Dunstan implied that expanding the age range for COPPA’s definition of children may similarly restrict the legitimate right of adults to access legal content online and may be challenged under the First Amendment. However, as noted in analysis of earlier criticisms, if the legislation is challenged under the First Amendment, it can still withstand strict scrutiny. As long as the government can demonstrate that the law is narrowly tailored to achieve a compelling governmental interest and that it is the least restrictive means of achieving that objective, the legislation will withstand strict scrutiny (Legal Information Institute n.d.).

Nevertheless, KOSA would address c) failure to empower minors as future decision-makers and d) COPPA’s failure to meet legislative intent in empowering parents. By requiring resources for parents and minors, KOSA is effectively empowering parents and minors with more tools. For example, Section 4(b) would provide parental tools that allow them to supervise their children’s use of platforms and Section 4(c) would give minors and parents a dedicated reporting channel to alert the platform about harms and requires them to respond in a timely manner.

The Markey-Cassidy Bill would address some of COPPA’s issues, including the difficulties of obtaining verifiable parental consent, c) COPPA’s failure to empower minors as future decision-

makers, though it does not address e) limitations of actual knowledge. On the other hand, the Kids Online Safety Act would address the c) failing to empower minors as future decision-makers, d) COPPA's failure to meet legislative intent in empowering parents, e) limitations of actual knowledge. However, as of March 2022, these are only bills, neither of which have gone into effect. Moreover, neither of the proposals can effectively solve all COPPA's issues, especially those that originate from enforcement actions. The Commission should 1) consider litigation and 2) ensure that they are holding small and big businesses accountable to the same degree.

CONCLUSION

In an effort to empower parents, the Federal Trade Commission enacted and adopted COPPA more than 20 years ago. However, much of technology has changed since then and will continue to change. Children's lives have become increasingly intertwined with online goods and services, such as Education Technology, and many concerns about their digital privacy and safety remain.

This thesis has determined that the Rule's first criticisms hold in some areas, though other issues with the Rule have been addressed. In response to the criticism that COPPA is constitutionally suspect, this thesis concludes that COPPA has not been challenged on First Amendment grounds, so it is undetermined whether it would withstand strict scrutiny. Moreover, many of the issues in precedents that made the CDA constitutionality suspect do not apply to COPPA. In addition, this thesis finds that while verification technology has seen updates, COPPA compliance is still difficult for smaller businesses.

This thesis has also identified six additional issues in COPPA, enforcement actions, and compliance: a) reinforcement of disparities between small and big businesses, b) the limitation of settlement, c) failing to empower minors as future decision-makers, d) failing to meet legislative intent in empowering parents, and e) limitations of "actual knowledge."

In analyzing the Markey-Cassidy Bill (2021) and the Kids Online Safety Act, this thesis concludes that neither bill can effectively solve all COPPA's issues, especially those that originate from enforcement actions. The Commission should 1) consider litigation and 2) ensure that they are holding small and big businesses accountable to the same degree. However, this thesis notes that both proposals make substantial improvements to the limitations of COPPA.

These findings indicate that COPPA still falls short of the legislation's intentions and fails to meet the needs of various stakeholders. Technological development does not seem to slow, and children are adopting technology at growing rates. However, operators, legislators, and the Commission need to continue to work together to ensure that the online privacy needs of parents and children are being met.

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