



Comment of



J House Vlogs¹

By

Jeremy Johnston

In the Matter of

COPPA Rule Review
Request for Comment
Project No. P195404
Docket ID: FTC-2019-0054

December 11, 2019

Dear Chairman Simons, Commissioner Wilson, Commissioner Phillips, Commissioner Chopra, and Commissioner Slaughter:

I request the Federal Trade Commission (FTC) reconsider, or at least significantly clarify, the new Children’s Online Privacy Protection (COPPA Rule) regulations on YouTube creators. On September 4, 2019, the FTC notified YouTube creators that as a “first impression application of COPPA,” the FTC would now “consider them to be standalone ‘operators’ under COPPA, subject to strict liability for COPPA violations.” (“New Application”)²

¹ Access this Comment with hyperlinks here: <https://bit.ly/35dGEh7>

² Statement of Joseph J. Simons & Christine S. Wilson, *Regarding FTC and People of the State of New York v. Google LLC and YouTube, LLC*,

Many creators and viewers are concerned how this New Application will harm children and family-friendly creators on YouTube. My [Petition](#) calling for an enforcement statement from the FTC has over **850,000 signatures** to date.³ Rather than putting parents in control, this New Application tries to protect children from parents' choice to allow their children to watch YouTube. The New Application's unreasonable vagueness leaves creators guessing where the lines fall between child-directed, mixed-audience, and general audience content. This New Application also goes beyond the legislative intent of COPPA and prevents millions of teen and adult YouTube viewers from enjoying the content and features they previously enjoyed.

Creators request an emergency enforcement statement from the FTC providing clarity, delay, and a specific acknowledgement that will help ensure that creators have access to the mixed-audience exception before January 1, 2020.

Shutting Down Our Kids Channel

I'm a lawyer and family YouTuber at [J House Vlogs](#) with 2 million subscribers and 2 billion views.⁴ We started on YouTube because we wanted to highlight goodness in family life. We saw so much traditional media content mocking family life and showing disrespectful family relationships. We wanted to inspire viewers by sharing how our imperfect family loves, learns, plays, and serves together.

We also shared on YouTube because we could make a living from producing uplifting content, while viewers could watch for free. This was only possible because YouTube included short ads before our videos, and YouTube suggested our videos to users likely interested in our content. J House Vlogs could not have become what it is today had we started a website on our own. We also could not currently replicate the viewership and ad revenue on our own website.

In 2019 we started producing a new YouTube channel specifically for kids called J House Jr. However, after the FTC announced the New Application, [we decided to shut down production](#). Quality production is expensive and time consuming, and the New Application created significant risk and uncertainty. As a business, it made more sense to just produce general audience content. I know many creators who are shutting down or drastically changing their content because of the New Application.

https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_youtube_statement.pdf (September 4, 2019).

³ SAVE Family-Friendly YouTube Content, Jeremy Johnston <http://chnng.it/kLnwsSJzFv>

⁴ A couple years ago, my wife Kendra recorded her story of starting our YouTube channel <https://www.jhousevlogs.com/our-story>

More Harm Than Good For Kids

Little Good For Kids

The New Application is trying to protect children from personalized ads on YouTube, but any privacy protection from the New Application is incomplete. We support reasonable privacy protection for kids, but the New Application falls short. Kids, especially as they become tweens, will still view a lot of general audience content, exposing them to the privacy concerns the FTC is trying to prevent. Even when kids watch child-directed videos, the advertising experience will feel the same to kids. Contextual ads are still targeted towards specific kid audiences with the intent of enticing kids to buy products. Kids will get advertisements from the same or similar brands as they did with personalized ads. The New Application provides little good for kids.

Significant Harm to Kids

The biggest change for kids will come when their favorite creators start to shut down channels or stop making child-directed content. Kids will also see YouTube content get more mature, intense, and extreme as creators try to avoid COPPA liability. The New Application incentivises creators to make more mature content and deters creators from making content that is too family-friendly.

Parents are more concerned about children's exposure to inappropriate content, than they are concerned about the privacy issues surrounding personalized ads. The New Application will cause more inappropriate content for kids, while not even protecting kids from personalized ads.

These negative consequences feel particularly unnecessary when Parents are primarily responsible for children watching on YouTube, and YouTube Kids already provides a free option for parents to let their kids watch content without personalize ads.

The Harm to Creators

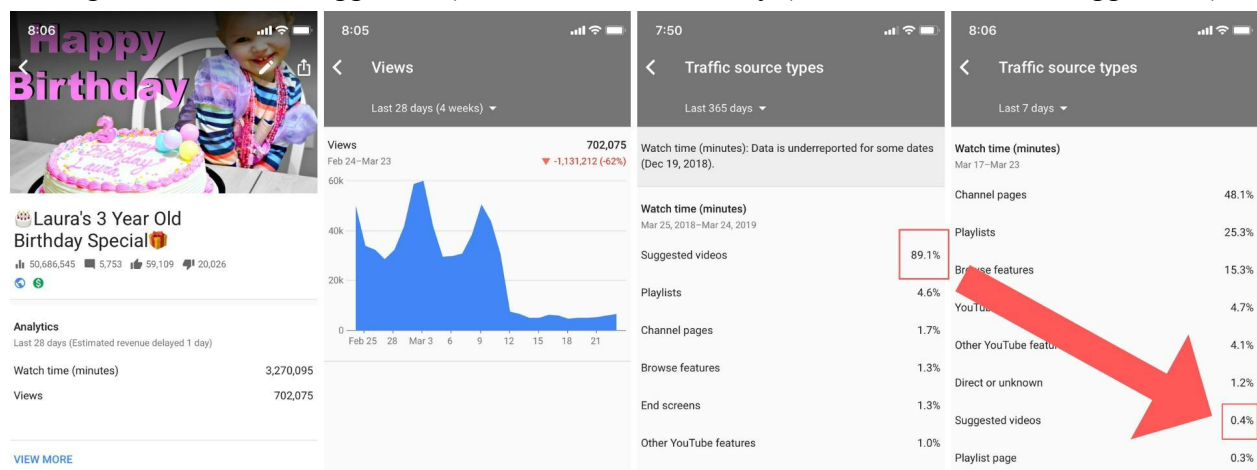
Privacy advocates try to dismiss or minimize the negative consequences of the New Application by claiming contextual ads will provide similar revenue to YouTube creators. As I met with FTC commissioners and lawyers, it was evident that many at the FTC were also adopting this false assumption.⁵ They were surprised and confused why I would shut down production on J House

⁵ Obviously, not everyone at the FTC adopted this false assumption. But, there was an outcry from privacy advocates when an FTC Director expressed concern that revenue losses for creators threatened quality family-friendly content, turning YouTube into a "desert of crap." FTC May Loosen Children's Privacy rules, Digital News Daily, Wendy Davis, Sept. 23, 2019

Jr. I explained that creators are considering the “made for kids” designation as the “self-destruct button.”

This sentiment is justified when you consider that creators who turned off personalized ads saw a [60% to 90% drop](#) in revenue.⁶ The New Application also directly impacts many features on YouTube, and videos designated as “made for kids” will lose comments, notifications, playlists, and other important engagement features which are at the heart of the YouTube experience.⁷

Child-directed videos will lose views and revenue as a result of losing these engagement features. Below is an example of what happened to one of my videos when YouTube stopped suggesting it to viewers. The video went from almost 40,000 views a day (89.1% of views coming from YouTube suggestions) to almost 0 views a day (0.4% from YouTube suggestions).



Verify Creators' Harm With 6(b) Authority

If the FTC disagrees that creators face significant revenue losses caused by this New Application, the FTC should use its 6(b) authority to measure the actual impact. The FTC can compare revenue for a month of specific child-directed channels in 2019 (when creators had personalized ads and engagement features) to 2020 (when personalized ads and engagement features are shut-off). Creators will help you gather this info if you involve us in the process.

<https://www.mediapost.com/publications/article/341089/ftc-may-loosen-childrens-privacy-rules.html>

⁶ Is A YouTube COPPAcalypses Coming? FTC Rules Could Start Demonetizing Creators in 2020, Jonathan Katz and Victoria Fener, Tubefilter, Nov. 5, 2019

<https://www.tubefilter.com/2019/11/05/youtube-coppa-adpocalypse-ftc-rules-demonetizing-child-directed/>

⁷ Creators feel tremendous sadness about losing these features. See [this example](#) of how a creator felt when comments were removed: <https://youtu.be/Wy7Tvo-q63o>

Privacy advocates say the FTC should not consider how the New Application harms businesses, but this ignores the reality that harming businesses also harms the children the businesses are trying to serve. The FTC obviously should strongly consider how the New Application harms children, even if those harms are coming to children because of overregulation on businesses.

As Commissioner Phillips said at the COPPA Workshop, “any rulemaking must be grounded in facts, and supported by data and empirical evidence, rather than predicated on unsupported fear or speculation.” The FTC failed to follow this advice with the New Application. The FTC did not meet with creators or review reliable evidence from creators. Commissioners cause more harm than good, when they base rulemaking on false assumptions.⁸

While YouTube is investing \$100 million into child-directed content over the next 3 years, this is a small amount compared to the revenue generated by child-directed content over the last 3 years. The FTC can verify this with its 6(b) authority to compare all revenue earned over the last three years from all videos now designated as made for kids. That figure is likely many times higher than \$100 million. Only a small number of creators will benefit from YouTube’s \$100 million, which is close to half the amount YouTube paid to settle with the FTC and New York.

Honoring Parents’ Choice

COPPA Should Not Be Used To Protect Kids From Parents’ Choice To Use YouTube

[81% of parents knowingly allow their young children to watch YouTube.](#)⁹ The purpose of COPPA is to put parents in control of protecting their children’s personal information online. The FTC reiterated this in its recent [blog post](#) for YouTube channel owners:

⁸ Commissioner Slaughter vocalized another false assumption that causes the FTC to minimize the harm of the 2013 amendments to COPPA. She said some feared the 2013 amendments would cause kids to “get fewer and lamer apps” but “these fears have not been realized.” https://www.ftc.gov/system/files/documents/public_statements/1417811/opening_remarks_of_commissioner_slaughter_georgetown_law_coppa_at_20_event.pdf

While it is true that kids spend a lot of time on apps, kids are predominantly using general audience apps which deliberately avoid COPPA restrictions. Morgan Reed at the COPPA Workshop represented the harm caused by the 2013 amendments to kids app developers. We hope the FTC will not dismiss the evidence presented by app developers and creators when we vocalize the harm overregulation is causing our businesses.

⁹ Pew Research Center, Many Turn to YouTube for Children’s Content, November 7, 2018 <https://www.pewresearch.org/internet/2018/11/07/many-turn-to-youtube-for-childrens-content-news-how-to-lessons/>

COPPA's foundational principle is one that most people can agree on: Parents – not kids, companies, platforms, or content creators¹⁰ – should be in control when it comes to information collected from children online.¹¹

The FTC should not use COPPA to protect children from their parents' choice to knowingly allow their children to watch YouTube. By doing so, the FTC is inappropriately taking over the reins, rather than letting parents "be in control when it comes to information" parents knowingly allow YouTube to "collect from their children online." Furthermore, the strict liability mechanism against creators, completely removes parents from the process.

When I raised these issues to the FTC, some responded that parents do not understand the privacy harms their children face on YouTube. While it is true that parents rarely understand all the legalese of most terms of service agreements they enter, the FTC must remember that COPPA is about putting parents in control, not the FTC controlling or bypassing parents.

YouTube's Personalized Ads Are Not So Harmful That The FTC Should Take Over For Parents

In speaking about COPPA rulemaking, Commissioner Phillips said, "we should focus on the impact" of what we are regulating and "whether it causes harm." He continued:

[N]ot all harms are the same. The ability of a strange person to contact a child is not the same as an advertisement appearing when the child is watching a show.

...

Just because we are talking about privacy – or kids – more regulation is not necessarily better, including for kids.

Some Parents choose a family environment where children use devices without regular parental participation, and children may set up a YouTube account without their parents' knowledge. While some parents are ignorant about privacy concerns, too busy, or neglectful; COPPA was not created to protect children from parents, even when parents are not making choices consistent with American Academy of Pediatrics recommendations.

¹⁰ It is concerning that the FTC did not include themselves in the list of entities that should not be in control.

¹¹ YouTube channel owners: Is your content directed to children?

<https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children?page=1>

Government regulations typically give quite a bit of deference to parents, depending on the degree of harm children face. Parents are legally allowed to take children into rated “R” movies. When children face more extreme harms (drinking alcohol, driving without a car seat, etc.), laws override parents’ preferences. The New Application is not addressing a harm so extreme that the government should override parents’ choice. Rather, many parents prefer personalized ads, and the benefits they provide.

Parents Knowingly Exchange Privacy for Free and Better Products

While parents think privacy is important, the true measure of how important privacy is to parents is best understood by what parents are willing to exchange for privacy.¹² Most parents would rather give up some privacy (even their children’s privacy) in exchange for free content. For example, most parents choose the free ad-supported version of YouTube, over YouTube Premium which removes personalized ads but requires a small monthly subscription fee.

Most parents would even give up some of their children’s privacy in exchange for better or more convenient products. For example, only a small amount of parents use YouTube Kids over YouTube Main, even though YouTube Kids removes privacy concerns for free. While many parents are still learning about YouTube Kids,¹³ YouTube Kids will always be inferior to YouTube Main because of the burdens of COPPA compliance. YouTube will always be easier for parents to use and have more content and better features.

Until the FTC confronts this modern reality about parents’ willingness to exchange privacy, the FTC will continue to make unreasonable and outdated policy decisions around privacy, like the New Application.

Treat Parents as Parents on YouTube

YouTube has asked the FTC to “[Treat Adults as Adults](#)” on YouTube, but the FTC should also treat parents as parents on YouTube. When parents want to watch or let their children watch

¹² The Program on Economics & Privacy at George Mason University’s Law School, Comment for the FTC’s Informational Injury Workshop

https://www.ftc.gov/system/files/documents/public_comments/2017/10/00019-141547.pdf

¹³ Some at the FTC ironically blame YouTube for YouTube Kids lack of appeal to parents (claiming YouTube has neglected to invest in YouTube Kids or failed to promote it sufficiently), but FTC overregulation is the more likely cause for parents’ ongoing preference to use YouTube.

child-directed or mixed-audience content on YouTube, they should be able to do so without the FTC assuming parents are children or their children are viewing without consent.

The New Application disregards YouTube's age screen where parents and users contractually claim they are 13 or older. While device sharing is a new norm,¹⁴ the FTC is beginning down a dangerous slippery slope to ignore YouTube's age screen and parents choice to share their devices. This creates significant uncertainty for all general audience platforms, and this uncertainty leads to even more restrictive policies that unnecessarily harm creators on those platforms.

YouTube's uncertainty about its age screen may be the biggest reason YouTube has withheld the mixed-audience exception for creators, which requires an age screen the FTC finds acceptable. To bring more clarity, the FTC should acknowledge that the YouTube age screen is sufficient, at least for creators with mix-audience or general audience content, to allow for personalized ads on users self-identifying as 13 and older, many of which are parents.

Beyond Original Intent

Commissioner Phillips warned that the "[FTC] must keep in mind the original congressional intent," because "[i]t would be easy to stray from that mandate, and to substitute our own preferences"¹⁵ This is particularly concerning when the FTC only needs the vote of three unelected officials to amend, interpret, and enforce COPPA without the traditional checks and balances of the three branches of government.

The original intent of COPPA was:

(1) to **enhance parental involvement** in a child's online activities in order to protect the privacy of children in the online environment; (2) to **enhance parental**

¹⁴ Although "tv sharing" was not that different 10 years ago, when 71% of children had a tv in their own rooms. <http://www.med.umich.edu/yourchild/topics/tv> (citing Rideout VJ, Foehr UG, Roberts DF. Generation M²: media in the lives of 8-18 year-olds. Kaiser Family Foundation. January 2010. Available at: <http://www.kff.org/entmedia/upload/8010.pdf>. Accessed 30 June 2010.).

¹⁵ The Future of the COPPA Rule FTC Staff Workshop (Oct. 7, 2019) (Statement of Commissioner Phillips) <https://www.ftc.gov/public-statements/2019/10/remarks-commissioner-noah-joshua-phillips-ftc-workshop-future-coppa-rule>

involvement to help protect the safety of children in online form such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without **parental consent**.¹⁶

Part of the reason COPPA originally passed with bipartisan support was because the language of the Act was “worked out carefully with the participation of the marketing and online industries, the Federal Trade Commission, privacy groups, and first amendment organizations.”¹⁷ This is the kind of compromise and care that occurs when laws are passed with consensus, rather than unduly expanded by a few unelected commissioners, like what happened in 2013.

COPPA also originally intended to “preserve[] the interactivity of children's experience on the Internet”¹⁸ Parents are still fighting for this goal, despite overregulation from the FTC. The FTC should work to support parents in their decisions, rather than removing them from the process.

While the rule review specifically calls for feedback on the 2013 amendments, FTC Commissioners have claimed they are not reconsidering the 2013 amendments.¹⁹ This is unfortunate, when even one of the commissioners in 2013 argued the amendments went “beyond the statutory parameters set by Congress in COPPA.”²⁰

Regardless, the FTC should at least reconsider the New Application of the 2013 amendments. Even the commissioners who passed the 2013 amendments did not apply COPPA in this way, and that was before YouTube had YouTube Kids, which provides a sandbox for kids.

The FTC should pull back its regulation to its primary purpose, which was to put parents in control of protecting children's personal information. The FTC has called on legislators to update privacy laws, but the FTC should also call on legislators to make laws to specifically regulate online advertising, rather than pushing this over 20 year-old law beyond its bounds.

¹⁶ 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan) (emphasis added).

¹⁷ *id.*

¹⁸ 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan)

¹⁹ The Future of the COPPA Rule FTC Staff Workshop (Oct. 7, 2019) (Statement of Commissioner Wilson) (Saying, “I would like to emphasize that this Rule review is not an attempt to roll back any of the 2013 changes”) https://www.ftc.gov/system/files/documents/public_statements/1547693/wilson_-_ftc_coppa_workshop_opening_remarks_10-7-19.pdf

²⁰ 4014 Federal Register/Vol. 78, No. 12/Thursday, January 17, 2013/Rules and Regulations

Unreasonably Vague

The Constitution requires the government provide clear regulations so citizens know whether the regulations apply to them or not.²¹ The FTC must clearly define the lines between child-directed, mixed-audience, and general audience content; otherwise, creators lack enough direction to know if COPPA applies to them. Without clear lines, this regulation may be unconstitutionally vague, and raises legitimate concerns about arbitrary enforcement (like shooting fish in a barrel).

Extreme Examples Fail To Provide Clarity About The Lines Between The Categories

Currently the FTC is providing examples on the extreme ends of the spectrum, but this is not very helpful when so much of YouTube content falls somewhere in the middle. Creators understand the difference between content that is primarily targeting a 3 year old as compared to targeting a 33 year old. But, nobody understands the difference between content that is appealing to a 12 year-old and 13 year-old.

The FTC's vagueness about the lines between these three categories is like a speed limit sign that says: "don't go too fast." Instead of providing a specific number, like 65 mph, the FTC is only providing creators vague guidelines that leave creators guessing. Then when creators come to the FTC for clarification, the FTC provides extreme examples like a car driving 5 mph is not going too fast, but a car driving 125 mph is going too fast. The FTC also provides "factors" that could equally apply to going too fast or not too fast depending on context, but it is unclear what context the FTC will use to define or weigh the factors. Creators are especially concerned because if the FTC decides creators are going "too fast" they face tickets up to \$42,530 for each violation.

The FTC's recent [post](#) attempting to clarify these issues, failed to offer new clarity. It primarily restated what the FTC had already provided previously. When the blog post did get more specific, it used extreme examples that are "*probably*" not covered:

[I]f your videos are about traditionally adult activities like employment, finances, politics, home ownership, home improvement, or travel, you're probably not covered unless your content is geared towards kids.

On the other end of the spectrum the [Complaint](#) shows "some examples of channels the FTC considered to be directed to children." Besides Bratayley (discussed more below), the channels in the Complaint are predominantly targeting very young children, rather than tweens. Thus, the examples do little to show creators how to designate content in the gray areas.

²¹ *FCC v. Fox Television Stations, Inc.* 567 U.S. 239 (2012).

The blog post also offered several vague and confusing statements like: “if your content includes traditional children’s pastimes or activities, it may be child-directed.” This statement completely depends on what the FTC considers as “traditional children’s pastimes and activities,” and even then, your content only “*may be*” child-directed.

It would be more helpful for the FTC to provide analysis on how it would designate specific videos that feature traditional children’s pastimes and activities, but may or may not target children as the primary audience. For example, how would the FTC designate [these videos](#).²² If the FTC Commissioners are unable to individually designate these few videos into the same category, How can the FTC expect creators to properly designate thousands of videos?

The FTC Should Address The Confusing 2002 Survey on Compliance

As creators seek clarity, they are turning to an older FTC publication that gives more specific examples of what the FTC considers child-directed under the factors:

subject matter that is appealing to children (e.g. ... video/computer games, ... sports, stories, ... fantasy, ... pets, ... snack food or cereal)

language of the Web site such as language that is simple enough to be understandable to children 12 and under; short, colorful descriptions; slang and pop culture phrases (e.g., a kids’ site may be identified by such language as ... “fun,” “free stuff,” “whatever,” “cool,” “duh,” “games,”... etc.)

whether the Web site uses visual content appealing to children (animated characters, bold or fast-moving graphics, or bright and vibrant colors)

use of host characters (often a character property used offline, on television, in movies, or comics or books)²³

Unfortunately, these specific examples highlight how ridiculous and impossible it is to determine what is appealing to a 12 year old as compared to a 13 year old, or general audience. Most of these specific examples also describe characteristics of general audience content. Sports, pets, snack food, video games, characters from movies are the subject matter of many general

²² The Video Designation Challenge by Jeremy Johnston: <https://bit.ly/36xEERr>

²³ FTC April 2002 “Protecting Children’s Privacy Under COPPA: A Survey on Compliance” <https://www.ftc.gov/sites/default/files/documents/reports/protecting-childrens-privacy-under-coppa-survey-compliance/coppasurvey.pdf>

audience videos on YouTube. Most content uses language understandable to a 12 year old. The FTC should address this 2002 document and then provide specific examples in the gray areas that are relevant to 2020.

Correct Bratayley Channel Designation

Labeling Bratayley, a family vlog, as a child-directed **channel** is inaccurate, and the FTC should address this mis-designation to avoid further confusion for family creators. Some Bratayley videos cover very mature subjects, like the death of one of their children, or primarily focus on the parents or their teenage daughter. While some Bratayley videos may be considered child-directed, certainly not every video on the channel is child-directed. Bratayley has over 2,600 videos and the Complaint only highlighted these 2 videos:



It is confusing that the FTC focused on a video about a teenager dying her hair as an example of a child-directed video. The Mom or teenage daughter are the primary voice of the Epic Pillow Fight video.

The FTC justifies its designation by pointing out that Bratayley admitted in their “About” section that they make “family-friendly content.” This label by no means represents an admission to intending to target children as their primary audience; rather, Bratayley is likely informing viewers that their content is appropriate for an entire family. Family-friendly content, even about children, can be general audience or mixed-audience content.²⁴

The FTC then highlighted that Bratayley “regularly appears on YouTube Kids” and “at least one video appearing on this channel was one of the most popular videos on YouTube Kids during a

²⁴ Consider Jon and Kate Plus 8, 19 Kids and Counting, The Cosby Show, or Full House, which were general audience shows that highlighted families with young children. These shows were intentionally family-friendly and intended to make content that was attractive to everyone. They even had episodes about pillow fights and funny things teenagers did with their hair. Just because an episode primarily focused on Michelle Tanner, this should not mean it was necessarily child-directed, when you consider the show as a whole. The same should hold true for family vlogs, the modern version of a clean show about families that is intended for everyone.

90-day period in 2016.” Bratayley has no control over whether their content appears on YouTube Kids and how YouTube recommends videos to kids. Furthermore, just because videos are on YouTube Kids does not mean children are the primary targeted audience. Mixed-audience and general audience content are popular on YouTube Kids; Ellen, Jimmy Fallon, and Taylor Swift all have extremely popular videos featured on YouTube Kids.²⁵

The FTC also used evidence from YouTube emails and an old YouTube rating system that categorized Bratayley’s audience as under 13. Again, Bratayley has no control over these issues, and this is not dispositive of Bratayley’s intended audience. Especially when YouTube’s machine learning is still in its infancy, struggles to make complex designations, and often makes mistakes.

It is concerning that most of the evidence against Bratayley came from YouTube designations or suggestions. The FTC should remember that in the 2013 Amendments, the FTC “noted that the primary-content provider is in the best position to know that its site or service is directed to children,” or not.²⁶

Consider the message the FTC is sending to creators if it upholds the Bratayley channel designation, and the evidence it used to support it. This tells creators that “family-friendly” is synonymous with “child-directed,” and creators should remove their content from YouTube Kids (a request that YouTube may or may not provide creators). This is bad policy. The FTC should reject enforcement mechanisms that discourage creators from making “family-friendly” content or labeling their content as such. The FTC should reconsider using views on YouTube Kids as a weapon against creators. This ultimately harms children and threatens to turn YouTube Kids into a “desert of [baby] crap,”²⁷ by discouraging creators with quality content to allow their content on YouTube Kids.

²⁵ Perhaps the FTC would consider these videos child-directed even though they are created by general audience stars. Taylor Swift’s [ME!](#) music video is featured on YouTube Kids, and even though this video has been labeled as “[Tween Bait](#)” for using colorful animations, unicorns, Marry Poppins type settings, etc. Similarly, YouTube Kids features [Ellen](#) inviting a 4 year-old to sing a Disney song or [Jimmy Fallon](#) singing with Sesame Street using classroom instruments. How would the FTC designate these videos?

²⁶ 3975 Federal Register/Vol. 78, No. 12/Thursday, January 17, 2013/Rules and Regulations

²⁷ See footnote 5.

Overemphasizing The Number of Child Users

The Bratayley mis-designation is a symptom of a bigger problem. The FTC is starting to put undue emphasis on the number of child users. Simultaneously, the FTC is de-emphasizing perhaps the most important factor – evidence of intended audience.²⁸ The whole purpose of the factors is to help determine whether the content is “directed” to children.” The fact that a large number of children may watch certain content, does not mean the content is “*directed*” to children. A large number of children watch a lot of general audience content. The FTC risks unnecessarily transforming a huge chunk of content about sports, music, movies, etc. from general audience content into the child-directed category. This increases uncertainty, especially when no specific percentage represents the line between what is or is not a *large* number of kids. This also increases the chances for arbitrary enforcement.

Commenters to the proposed 2013 amendments, raised similar concerns that the FTC would capture general audience as child-directed content. The FTC claimed those “concerns [were] unfounded,” and it sought to appease the commenters by reiterating “that no single factor will predominate over another in this assessment.”²⁹ As the FTC strays and allows this one factor to predominate over the others, these concerns become very founded.

Creators Have No Control

When the 2013 Amendments expanded the definition of “Operator,” the FTC claimed the “primary-content provider . . . is appropriately positioned to give notice and obtain consent.”³⁰ The New Application calls creators “operators,” but creators have no controls over the operation. Creators have no power to give adequate notice or obtain consent compliant with COPPA, unless YouTube makes this possible.

Creators with [mixed-audience](#) content, which is a large number of creators,³¹ have no ability to comply and take advantage of the mixed-audience exception.

²⁸ The [blog post](#) removed this factor from its list of factors. The blog post does state that “if your intended audience is kids under 13, you’re covered by COPPA and have to honor the Rule’s requirements.” But, it is concerning that they removed “evidence of intent” as a considered factor because it may signal that the FTC will not give much if any weight to evidence that creators intended for a general audience or only intended children as a lessor or secondary audience. I’m concerned the FTC will only consider intent when it makes creators liable under COPPA, but ignore that factor when it could save creators from or limit their COPPA liability.

²⁹ 3984 Federal Register/Vol. 78, No. 12/Thursday, January 17, 2013/Rules and Regulations

³⁰ Id. at 3976

³¹ The FTC and YouTube Should Allow for a Mixed-Audience Exception, Jeremy Johnston <https://bit.ly/2sfdgc3>

The FTC settled with YouTube in a way that placed crushing burdens on creators, and creators had no representation at the negotiating table.

The New Application was a mistake, and while YouTube and FTC point fingers at each other, creators are paying the price.

Conclusion

The FTC should provide some reprieve for creators, because the New Application leaves creators in a worse position than any website or online service that falls under COPPA. Unlike other “operators,” creators face uniquely burdensome and unreasonable requirements and circumstances. For example:

1. Creators must designate hundreds or thousands of videos in a short time period, when many creators are busy trying to find new business opportunities because of the revenue losses coming directly from this New Application;
2. Creators face making many confusing legal decisions on their own, or paying significant legal fees to get an attorney to help them designate many videos;
3. Creators making content for children as a secondary audience, lose fundamental features of their business for all users who view their content, even if the users self-identified as 13 and older;
4. Creators are policed by YouTube’s imperfect machine learning, and creators have limited, or zero, due process from YouTube’s decisions, which are overly-protective because of the lack of clarity from the FTC;
5. Creators are told they can not rely on YouTube analytics regarding their audience;
6. Creators lack the privilege of the mixed-audience exception; and
7. Creators lack the controls to comply with COPPA, the way they want to comply.

For these reasons, we request:

1. An Emergency³² Enforcement Statement from the FTC providing:
 - a. Clarity on the lines between child-directed, mixed-audience, and general audience content;
 - b. Delay in enforcement for at least 6 months, or until the COPPA rule review is completed; and
 - c. Acknowledgment that the YouTube age screen is sufficient for creators with mixed-audience content to allow for personalized ads on users self-identifying as 13 and older.
2. The FTC Avoid broadening the COPPA regulation in a way that will cover even more creators and further ignore parents choices related to content they allow their children to watch.
3. The FTC Pull back on 2013 amendments that go beyond the original intent of COPPA.

Please let me know if you have any further questions or concerns. I would like to be involved, and I am happy to assist in anyway I can to help the FTC make this right.

Sincerely,



Jeremy Johnston
J House Vlogs

³²Clarity is needed immediately because of the January 1, 2020, deadline creators face from the YouTube settlement. Creators are already shutting down or dramatically altering their businesses based on the settlement and New Application. Creators are currently sifting through their hundreds or thousands of videos and trying to designate videos accurately. The FTC and YouTube invite creators to get legal advice, but attorneys are also unsure where the lines fall between the categories and what more creators can do to comply with the “mixed-audience” category.