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Why the VPPA and COPPA Are Outdated: How Netflix, YouTube, and Disney+ Can Monitor Your Family at No Real Cost

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WHY THE VPPA AND COPPA ARE OUTDATED: HOW NETFLIX, YOUTUBE, AND DISNEY+ CAN MONITOR YOUR FAMILY AT NO REAL COST

*Anna O'Donnell**

Video-streaming services like Netflix, YouTube, and Disney+ dominate the current media landscape. This Note explains why current laws likely cannot effectively prevent these streaming services from collecting and sharing users' private information. The Video Privacy Protection Act (the VPPA) contains language that has baffled courts when applying its text to streaming services, resulting in multiple circuit splits. The Children's Online Privacy Protection Act (COPPA) has a clearer application to streaming services, yet its enforcement has resulted in small settlements with companies that have been charged with collecting children's private information. Both the VPPA and COPPA need to be updated to address modern privacy concerns.

This Note analyzes the historic 2019 settlement between YouTube and the Federal Trade Commission over YouTube's alleged COPPA violations. When placed in context, this settlement, while historic, remains paltry due to YouTube's revenue and the extent of the alleged wrongdoing. This illustrates the problems with COPPA enforcement generally. While the VPPA could potentially restrict streaming services' behavior, case law interpreting that legislation severely limits its applicability. This Note concludes by suggesting changes to be made to the VPPA for effective use against streaming services and how COPPA settlement guidelines could be updated to result in more reasonable settlements for any future issues with streaming services.

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I. INTRODUCTION

It's a common story: After a long day, you're glad to be home. Looking for something to do, you flip on Hulu, Netflix, or YouTube and finally start to decompress. If you're unlucky, you might have to sit through some ads before the video starts. Maybe you notice the ads, maybe not—but have you wondered how those ads are picked for your video-watching experience? Or what information the video provider has collected from you and sold to those advertisers?

Whether you've thought about it or not, laws exist to regulate what personal information video providers are allowed to collect and share with the world: the Video Privacy Protection Act (the VPPA) protects consumers from the video provider disclosing their personal information,¹ and the Children's Online Privacy Protection Act (COPPA) punishes online providers who collect and disclose the personal information of children under thirteen.² However, both the VPPA and COPPA (collectively, the Acts) are increasingly incapable of responding to today's online privacy concerns and evolving technology.

The VPPA, originally enacted in 1988, was drafted to protect the disclosure of rental and sales records from brick-and-mortar video rental stores.³ Applying a law that was intended for physical video tape providers to modern streaming services⁴ has proved to be confusing: two separate circuit splits exist concerning definitions within the VPPA and how to apply them to current technology.⁵

¹ 18 U.S.C. § 2710 (2018) (codifying the VPPA).

² 15 U.S.C. §§ 6501–6506 (2018) (codifying COPPA).

³ See, e.g., S. REP. NO. 100-599, at 6 (1988) (stating that the bill “prohibit[s] unauthorized disclosure of personal information held by video tape providers”).

⁴ Throughout this Note, “streaming services” will refer to Internet-based entertainment sources for TV shows, movies, and other streaming media. These services can generally be accessed through any device that can connect to the Internet. See Margaret Rouse, *Video Streaming Service*, TECHTARGET, <https://whatis.techtarget.com/definition/video-streaming-service> (last updated Dec. 2013) (defining a video streaming service as “an on demand online entertainment source for TV shows, movies and other streaming media”).

⁵ Compare *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 281–90 (3d Cir. 2016) (defining “personally identifiable information” narrowly under 18 U.S.C. § 2710(a)(3)), and *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1254–58 (11th Cir. 2015) (defining “consumer” narrowly under 18 U.S.C. § 2710(a)(1)), with *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486–90 (1st Cir. 2016) (interpreting “consumer” and “personally identifiable information” narrowly under 18 U.S.C. § 2710(a)).

Congress must amend the VPPA to resolve these circuit splits. This amendment must come soon, as the streaming market is rapidly expanding.⁶ The video-streaming marketplace needs to be properly monitored, and the VPPA must be updated to protect consumers' online privacy from new video-watching technology.

COPPA, originally enacted in 1998 to protect children's privacy on the new world wide web,⁷ is in a similarly dismal situation, although for very different reasons. The Federal Trade Commission (FTC) has updated COPPA for modern technology and privacy concerns, but its enforcement procedures are lacking.⁸ For example, based on the 2019 FTC settlement with YouTube and its parent company, Google, it is apparent that the FTC's shockingly small settlements ineffectively address alleged COPPA violations.⁹ This futile enforcement must also be addressed quickly if COPPA is to protect children in the growing video-streaming marketplace.¹⁰

Both the VPPA and COPPA are critical weapons in the arsenal to combat the incoming barrage of video-streaming services and other media providers. Both Acts must be modernized to effectively protect Americans' privacy going forward. Part II of this Note

⁶ See, e.g., Steven Zeitchik, *Everything You Need to Know About Upcoming Streaming Services*, in *One Handy Rundown*, WASH. POST (Sept. 20, 2019, 9:41 AM), <https://www.washingtonpost.com/business/2019/09/20/everything-you-need-know-about-upcoming-streaming-services-one-handy-rundown/> (describing "streaming wars" between services like Peacock from Comcast's NBC Universal, Disney+, Apple TV+, HBO Max, etc.).

⁷ *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0> ("The primary goal of COPPA is to place parents in control over what information is collected from their young children online.").

⁸ See *infra* Part IV.

⁹ Lesley Fair, *\$170 Million FTC-NY YouTube Settlement Offers COPPA Compliance Tips for Platforms and Providers*, FED. TRADE COMM'N: BUS. BLOG (Sept. 4, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/09/170-million-ftc-ny-youtube-settlement-offers-coppa> (describing the FTC settlement in more detail).

¹⁰ While this Note was largely written before the COVID-19 pandemic, COPPA has only become more critical as children rely on telecommunication services, like Zoom, for school and on recreational streaming services, like TikTok and YouTube, for entertainment while in isolation. Cf. Sarah Perez, *Nielsen Explains How COVID-19 Could Impact Media Usage Across the US*, TECH CRUNCH (Mar. 17, 2020, 11:46 AM), <https://techcrunch.com/2020/03/17/nielsen-explains-how-covid-19-could-impact-media-usage-across-the-u-s/> ("Based on Nielsen data from prior major crises in recent U.S. history that forced consumers to stay home, total TV usage increased by nearly 60%. . . . [C]onsumption is starting to climb in the most impacted markets, the firm found.").

describes the case law interpreting the VPPA and the story behind the circuit splits. Part III introduces COPPA and its enforcement history. Part IV focuses on YouTube by breaking down the numbers behind the settlement with the FTC, by discussing the confusion of applying the VPPA in its current state to YouTube, and by analyzing needed improvements to the VPPA and COPPA. Part V briefly concludes.

II. HISTORY AND CASE LAW OF THE VIDEO PRIVACY PROTECTION ACT

Congress began crafting the VPPA in 1987 when a newspaper published a list of the videos rented by the family of Judge Robert Bork, a nominee to U.S. Supreme Court.¹¹ While the videos rented by Judge Bork's family were innocuous,¹² Congress immediately feared the Orwellian abuses of letting such private information be collected and shared freely.¹³ The VPPA was enacted in 1988¹⁴ during the height of brick-and-mortar video rental stores, and its statutory language reflects the technology of the era.¹⁵

Unforeseeable by the Congressmembers of 1988, traditional video rental stores would gradually fade as new rental methods gained popularity.¹⁶ One of the largest changes in the market

¹¹ S. REP. NO. 100-599, at 5 (1988) (“The impetus for this legislation occurred when a weekly newspaper . . . published a profile of Judge Robert H. Bork based on the titles of 146 films his family had rented from a video store.”).

¹² Andrea Peterson, *How Washington's Last Remaining Video Rental Store Changed the Course of Privacy Law*, WASH. POST: THE SWITCH (Apr. 28, 2014, 2:21 PM), <https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/how-washingtons-last-remaining-video-rental-store-changed-the-course-of-privacy-law/> (“Other than the sheer number of tapes, [the reporter] didn't uncover anything too shocking.”).

¹³ See S. REP. NO. 100-599, at 5–6 (1988) (quoting Senator Patrick Leahy as saying these monitoring practices were “Big Brother” in action).

¹⁴ Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. § 2710 (2018)).

¹⁵ See, e.g., Tom Krazit, *Blockbuster's Last Stand: Inside the Iconic Video Rental Chain's Only Remaining Store*, GEEKWIRE (March 31, 2018, 9:35 AM), <https://www.geekwire.com/2018/blockbusters-last-stand-inside-one-iconic-video-rental-chains-final-u-s-stores/> (noting that Blockbuster had around 3600 stores worldwide when Viacom acquired it for \$8.4 billion in 1994).

¹⁶ See, e.g., *The Story of Netflix*, NETFLIX, <https://about.netflix.com/en> (last visited Dec. 16, 2020) (documenting the early rise of the streaming giant, Netflix, which was founded in 1997);

occurred in the 2000s when Netflix and other video providers began offering online streaming services.¹⁷ By the early 2010s, traditional video rental stores were almost completely replaced by online providers of digital media.¹⁸ As of 2019, 69% of American consumers paid for a streaming service, with the number increasing to 88% for Americans between ages 22 and 35.¹⁹ This high percentage is a result of the increasing expansion of the streaming market: as of 2019, half a dozen major streaming service providers exist, and new providers are coming on the scene.²⁰ Among all of these changes in the video provider market, the VPPA has remained largely the same.²¹

see also *The Tale of How Blockbuster Turned Down an Offer to Buy Netflix for Just \$50M*, GQ (Sept. 19, 2019), <https://www.gq.com.au/entertainment/film-tv/the-tale-of-how-blockbuster-turned-down-an-offer-to-buy-netflix-for-just-50m/news-story/72a55db245e4d7f70f099ef6a0ea2ad9> (“While the streaming company continues to dominate, winning an Oscar and a reported \$16 billion revenue for 2018, Blockbuster in contrast filed for bankruptcy in 2010, with only one privately owned store in the world remaining open today.”).

¹⁷ See *The Story of Netflix*, *supra* note 16 (noting that Netflix introduced online streaming in 2007); *accord About Hulu*, HULU PRESS, <https://press.hulu.com/corporate/> (last visited Dec. 22, 2020) (stating that Hulu launched in 2008 and provided “instant access” to video-streaming services); Mike Boas, *The Forgotten History of Amazon Video*, MEDIUM (Mar. 14, 2018), <https://medium.com/@mikeboas/the-forgotten-history-of-amazon-video-c030cba8cf29> (describing the many different names of Amazon’s video service, which began in 2006 as Amazon Unbox).

¹⁸ See Kate Hagen, *In Search of the Last Great Video Store*, MEDIUM: THE BLACK LIST (June 6, 2018), <https://blog.blcklst.com/in-search-of-the-last-great-video-store-efcc393f2982> (describing the fall of Blockbuster, Movie Gallery, Rogers Plus, and Xtra-vision); Peterson, *supra* note 12 (describing the closure of “the last remaining brick-and-mortar video rental store” in D.C.).

¹⁹ Chris Brantner, *More Americans Now Pay for Streaming Services than Cable TV*, FORBES (Mar. 20, 2019, 4:13 PM), <https://www.forbes.com/sites/chrisbrantner/2019/03/20/americans-now-pay-more-for-streaming-services-than-cable-tv/>.

²⁰ See James K. Willcox, *Guide to Streaming Video Services*, CONSUMER REPORTS, <https://www.consumerreports.org/streaming-media-devices/guide-to-subscription-streaming-video-services/> (last updated Oct. 22, 2020) (listing over a dozen streaming services); Zeitchik, *supra* note 6 (“In the past year, media companies have committed to spending hundreds of millions of dollars on content, begun building massive technological infrastructure and marketed their efforts as the must-have services of the digital age.”).

²¹ Since its enactment in 1988, the VPPA has been amended only once. Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414 (amending 18 U.S.C. § 2710 “to clarify that a video tape service provider may obtain a consumer’s informed, written consent on an ongoing basis and that consent may be obtained through the Internet”).

The VPPA is codified at 18 U.S.C. § 2710, which is split into six subsections.²² These subsections have stayed true to their versions from 1988, with only minor amendments in 2013.²³ While each subsection is independently important, the most controversy and litigation surrounds the first subsection: § 2710(a).²⁴

The drama and excitement of the VPPA case law—particularly in the last few years—involves two of the four definitions in § 2710(a): “consumer” and “personally identifiable information.”²⁵ Courts have interpreted these definitions in light of the ever-changing technology of video sales and rentals, and they have come to different conclusions.²⁶ The three big cases that have split the circuits—*In re Nickelodeon Consumer Privacy Litigation*,²⁷ *Ellis v. Cartoon Network, Inc.*,²⁸ and *Yershov v. Gannett Satellite Information Network, Inc.*²⁹—discuss the definitions of “consumer” and “personally identifiable information” at length and how the VPPA should apply to modern video-streaming providers.³⁰

²² 18 U.S.C. § 2710(a)–(f) (2018).

²³ The 2013 amendments only affected the consent provision of 18 U.S.C. § 2710(b)(2)(B). See *The Video Privacy Protection Act Amendments: A Final Analysis*, COVINGTON: INSIDE PRIVACY (Jan. 11, 2013), <https://www.insideprivacy.com/united-states/the-video-privacy-protection-act-amendments-a-final-analysis/> (explaining the updated consent provision).

²⁴ See *supra* note 5 and accompanying text.

²⁵ *Id.*; see also 18 U.S.C. § 2710(a)(1) (2018) (defining “consumer” as “any renter, purchaser, or subscriber of goods or services from a video tape service provider”); *id.* § 2710(a)(3) (defining “personally identifiable information” as “information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider”).

²⁶ Compare *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 281–90 (3d Cir. 2016) (defining “personally identifiable information” narrowly), and *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1254–58 (11th Cir. 2015) (defining “consumer” and its derivative, “subscriber,” narrowly), with *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486–90 (1st Cir. 2016) (defining “personally identifiable information” and “subscriber” broadly).

²⁷ 827 F.3d 262 (3d Cir. 2016).

²⁸ 803 F.3d 1251 (11th Cir. 2015).

²⁹ 820 F.3d 482 (1st Cir. 2016).

³⁰ Compare *In re Nickelodeon*, 827 F.3d at 284 (“Congress’s purpose in passing the [VPPA] was quite narrow: to prevent disclosures of information that would, with little or no extra effort, permit an ordinary recipient to identify a particular person’s video-watching habits. We do not think that . . . it intended for the law to cover factual circumstances far removed from those that motivated its passage.”), with *Yershov*, 820 F.3d at 486 (“[T]he language reasonably conveys the point that PII is not limited to information that explicitly names a person. Had Congress intended such a narrow and simple construction, it would have had no reason to fashion the more abstract formulation contained in the statute.”). See also *Ellis*, 803 F.3d at 1256 (holding “that payment is not a necessary element of subscription”).

While cases prior to 2012 addressed the VPPA, they mostly involved police efforts to obtain video rental and sales records for investigations and did not address the ambiguity of the definitions in the VPPA's first subsection.³¹ For this Note's purposes, the real story began on August 10, 2012, when the District Court for the Northern District of California found merit in a claim against Hulu for violating the VPPA.³² The court made the critical decision that Hulu counted as a "video tape service provider" under the VPPA,³³ applying the law to Internet video providers for the first time.³⁴ Additionally, the court held that "consumers" under the VPPA—which are defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider"³⁵—do not have to be paying subscribers to a video provider in order to count under the VPPA.³⁶ While the case against Hulu fizzled out over several years,³⁷ the district court's decision proved to be the first spark of the privacy litigation fire involving streaming services and the VPPA.

³¹ See, e.g., *Dirkes v. Borough of Runnemede*, 936 F. Supp. 235, 236 (D.N.J. 1996) (involving an investigation of a former police officer whose video rental history was used in a disciplinary hearing and a legal proceeding). The court in *In re Nickelodeon* referenced this case, too. See 827 F.3d at 280–81 (discussing the *Dirkes* case).

³² See *In re Hulu Priv. Litig.*, No. C 11-03764 LB, 2012 WL 3282960, at *6–8 (N.D. Cal. Aug. 10, 2012) (denying Hulu's motion to dismiss).

³³ The VPPA defines "video tape service provider" in § 2710(a) as well, but this definition is not discussed in the body of the three main VPPA cases this Note discusses. See 18 U.S.C. § 2710(a)(4) (2018) (defining "video tape service provider" as "any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made . . . but only with respect to the information contained in the disclosure"); see also discussion *infra* note 153 and accompanying text.

³⁴ See *In re Hulu*, 2012 WL 3282960, at *6 ("Hulu's remaining argument is only that it is not a 'video tape service provider' because the VPPA does not expressly cover digital distribution Given Congress's concern with protecting consumers' privacy in an evolving technological world, the court rejects the argument.").

³⁵ 18 U.S.C. § 2710(a)(1).

³⁶ See *In re Hulu*, 2012 WL 3282960, at *8 ("If Congress wanted to limit the word 'subscriber' to 'paid sub[s]criber,' it would have said so.").

³⁷ See Schooner Sonntag, *A Square Peg in a Round Hole: The Current State of the Video Privacy Protection Act for Videos on the Internet and the Need for Updated Legislation*, 37 LOY. L.A. ENT. L. REV. 237, 250–53 (2017) (describing the later phases of the *In re Hulu* litigation).

What does a VPPA violation consist of? A video tape service provider can violate the VPPA by knowingly disclosing a consumer's personally identifiable information (PII) to a third party.³⁸ If the video tape service provider is found liable, they can be subject to actual damages not less than \$2500, punitive damages, attorney's fees, and any other equitable relief the court deems appropriate.³⁹ Generally, plaintiffs in VPPA cases argue that streaming service providers collected their online information through "trackers, cookies, and algorithms designed to capture and monetize the information [consumers] generate."⁴⁰ Such plaintiffs commonly argue that these websites or apps collected revealing personal information and proceeded to sell that information to an advertising firm or another entity that buys consumer data.⁴¹ The defendants then argue that the information collected is not PII or that the user of their website or app is not a consumer under the VPPA, leaving the court to wrestle with § 2710(a).⁴²

To begin parsing through the difficulty with VPPA definitions, one should first focus on "consumers." The confusion about the definition of "consumer" within the VPPA began with the Eleventh Circuit's opinion in *Ellis v. Cartoon Network, Inc.* in 2015.⁴³ There, Mr. Ellis had downloaded Cartoon Network's free app onto his Android smartphone to watch free video clips.⁴⁴ Cartoon Network—without Mr. Ellis's consent—kept his viewing records and Android

³⁸ 18 U.S.C. § 2710(b)(1) ("A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided . . .").

³⁹ *Id.* § 2710(c)(2)(A)–(D).

⁴⁰ *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 266 (3d Cir. 2016).

⁴¹ *See id.* at 268–69 (claiming that Viacom was collecting children's information and selling it to advertisers); *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 484–85 (1st Cir. 2016) (discussing the USA Today mobile app's collection of information); *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1253–54 (11th Cir. 2015) (discussing the Cartoon Network mobile app's collection of information).

⁴² The three circuit courts discussed in this Part each noted the difficulty of interpreting terms in the VPPA. *See In re Nickelodeon*, 827 F.3d at 281 ("[W]hat counts as personally identifiable information under the [VPPA] is not entirely clear."); *Ellis*, 803 F.3d at 1255 (noting that "[t]he VPPA does not define the term 'subscriber,' and" that "[t]he few district courts that have weighed in on the issue appear to be divided"); *Yershov*, 820 F.3d at 486 ("The statutory term 'personally identifiable information' is awkward and unclear.").

⁴³ 803 F.3d 1251 (11th Cir. 2015).

⁴⁴ *Id.* at 1254.

ID (which remains constant to an Android device throughout its lifetime) and shared this information with a third-party data analytics company.⁴⁵ Mr. Ellis sued Cartoon Network, alleging he was a “consumer” under the VPPA and that Cartoon Network illegally shared his information.⁴⁶ The Eleventh Circuit’s decision turned on whether Mr. Ellis’s mere download of the app allowed him to count as a “subscriber”—part of the definition of “consumer”—under the VPPA.⁴⁷ The Eleventh Circuit concluded that Mr. Ellis’s involvement with Cartoon Network did not suffice.⁴⁸ The court decided “that ‘subscription’ involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity.”⁴⁹ This remained the only circuit court decision on the definition of “consumer” within the VPPA until the First Circuit reached the issue in April 2016.⁵⁰

The First Circuit took a different stance in *Yershov v. Gannett Satellite Information Network, Inc.* on the definition of “consumer” under the VPPA. The facts of the case were similar to those in *Ellis*: Mr. Yershov downloaded Gannett’s *USA Today* app onto his Android phone, which he used to watch news videos and read articles.⁵¹ Without Mr. Yershov’s consent, the app collected the title of the video he had watched, the GPS coordinates of his phone at the time of viewing, and his phone’s Android ID.⁵² Gannett then sent this information to a data analytics and online marketing firm.⁵³ Mr. Yershov sued Gannett, arguing that he was a consumer under

⁴⁵ *Id.* (noting that the third-party company, Bango, “associate[s] that video history with a particular individual”).

⁴⁶ *Id.* (claiming that “his Android ID and his video viewing records” were “personally identifiable information” under the VPPA).

⁴⁷ *Id.* at 1255 (“The VPPA does not define the term ‘subscriber,’ and we, as a circuit, have yet to address what the term means.”); *see also* 18 U.S.C. § 2710(a)(1) (2018) (defining “consumer” as a “subscriber of goods or services from a video tape service provider”).

⁴⁸ *Ellis*, 803 F.3d at 1258 (“[T]he free downloading of a mobile app on an Android device to watch free content, without more, does not a ‘subscriber’ make.”).

⁴⁹ *Id.* at 1256.

⁵⁰ *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482 (1st Cir. 2016).

⁵¹ *Id.* at 485.

⁵² *Id.*

⁵³ *Id.* at 484 (stating that the third party, Adobe, uses this information “to create user profiles comprised of a given user’s personal information, online behavioral data, and device identifiers”).

the VPPA and that Gannett had shared his personal information.⁵⁴ Unlike the Eleventh Circuit, the First Circuit stated that installing an app on one's phone was satisfactory to count as a subscriber and, thus, a consumer under the VPPA.⁵⁵ By broadening who counts as a subscriber under the VPPA, there was now an official alternative to defining "consumer," and the circuits were split.⁵⁶

But the VPPA drama was hardly complete: the difficulty of defining "personally identifiable information" had just begun. The First Circuit was the first to tackle the definition in *Yershov*, as the Eleventh Circuit dodged the question in a footnote in *Ellis*.⁵⁷ Mr. Yershov's claim—like any plaintiff's claim—under the VPPA rested on the allegation that the video provider disclosed his PII.⁵⁸ The VPPA defines PII as "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."⁵⁹ In *Yershov*, the question remained whether GPS coordinates and a device identifier fell under this definition.⁶⁰ The First Circuit determined that the disclosed information was PII under the VPPA.⁶¹ The court reasoned that PII covered a broad spectrum of information and was "not limited to information that explicitly names a person."⁶² This

⁵⁴ *Id.*

⁵⁵ *Id.* at 489 ("And by installing the App on his phone, thereby establishing seamless access to an electronic version of *USA Today*, Yershov established a relationship with Gannett that is materially different from what would have been the case had *USA Today* simply remained one of millions of sites on the web that Yershov might have accessed through a web browser.").

⁵⁶ *Id.* at 488 (disagreeing with the Eleventh Circuit's decision in *Ellis* and noting "that Congress understood its originally-provided definition to provide at least as much protection in the digital age as it provided in 1988").

⁵⁷ See *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1258 n.2 (11th Cir. 2015) ("Given the basis for our ruling, we express no view on the district court's reading of the term 'personally identifiable information' in the VPPA.").

⁵⁸ *Yershov*, 820 F.3d at 484. Recall that PII refers to "personally identifiable information" under the VPPA. *Id.*

⁵⁹ 18 U.S.C. § 2710(a)(3) (2018).

⁶⁰ *Yershov*, 820 F.3d at 486 ("The statutory term 'personally identifiable information' is awkward and unclear. The definition of that term . . . adds little clarity beyond training our focus on the question whether the information identifies the person who obtained the video.").

⁶¹ *Id.* ("[T]he information about Yershov that Gannett disclosed to Adobe fits the definition of PII."). The court noted, "While there is certainly a point at which the linkage of information to identity becomes too uncertain, or too dependent on . . . unforeseeable detective work, here the linkage, as plausibly alleged, is both firm and readily foreseeable to Gannett." *Id.*

⁶² *Id.*

expansive definition was the only circuit court opinion on the PII issue until the Third Circuit issued its opinion addressing the topic just two months later.⁶³

The class action in *In re Nickelodeon* involved children who claimed that Viacom (the owner of Nickelodeon) had unlawfully collected their personal information through its website.⁶⁴ When a child registered for an account on the Nickelodeon website, Viacom allegedly put a cookie⁶⁵ on the child's computer and contracted with Google to let it place third-party cookies⁶⁶ on the computer as well—all while telling parents that no personal information was being collected.⁶⁷ Using these cookies, Google created advertising profiles that included the child's username, gender, birthdate, IP address, device identifier, and details of web communications from Viacom- and Google-owned websites, along with other online information.⁶⁸ The Third Circuit had to decide whether the information disclosed counted as PII.⁶⁹ The court agreed with Viacom that static digital identifiers (like an IP address or a device identifier) should not count as personally identifiable information under the VPPA.⁷⁰ The court held that “personally identifiable information under the Video Privacy Protection Act means the kind of information that would readily permit an ordinary person to identify a specific individual’s

⁶³ *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262 (3d Cir. 2016) (delivering the opinion in June 2016).

⁶⁴ *Id.* at 268–69.

⁶⁵ *Id.* at 268 (“An Internet ‘cookie’ is a small text file that a web server places on a user’s computing device. Cookies allow a website to ‘remember’ information about a user’s browsing activities . . .” (footnote omitted)).

⁶⁶ *Id.* (“We can distinguish between first-party cookies, which are injected into a user’s computer by a website that the user chooses to visit . . . and third-party cookies, which are placed on a user’s computer by a server other than the one that a person intends to visit Advertising companies use third-party cookies to help them target advertisements more effectively at customers who might be interested in buying a particular product.”).

⁶⁷ *Id.* at 268–69.

⁶⁸ *Id.* at 269–70.

⁶⁹ *Id.* at 281–90. Interestingly, the court first determined that Google was not liable under the VPPA because only those that disclose the personal information—not those that collect the information—are liable. *Id.* at 281 (holding that “only video tape service providers that disclose personally identifiable information can be liable”).

⁷⁰ *Id.* at 286 (“[W]e ultimately do not think that the definition of personally identifiable information in the [VPPA] is so broad as to cover the kinds of static digital identifiers at issue here.”).

video-watching behavior.”⁷¹ While the court claimed this reading did not create a split with the First Circuit,⁷² the Third Circuit’s narrow definition effectively created a split.⁷³ This holding exacerbated the confusion over the VPPA’s definitions, as circuit courts now interpreted “personally identifiable information” and “consumer” differently.⁷⁴

As of 2020, a circuit split exists between the First, Third, and Eleventh Circuits concerning the definitions of “consumer” and “personally identifiable information” under the VPPA.⁷⁵ These definitions are important for determining if video providers—like streaming services—have illegally collected and shared personal information that can be traced back to an average citizen. The confusion that comes with applying these courts’ definitions and the VPPA itself to new situations will become more apparent when the analysis is applied to YouTube.⁷⁶ But first this Note will address the equally difficult situation surrounding COPPA and using it as a tool against streaming services and other modern video service providers.

III. HISTORY AND ENFORCEMENT OF THE CHILDREN’S ONLINE PRIVACY PROTECTION ACT

COPPA became effective on April 21, 2000 and serves to protect children under the age of thirteen on the Internet by preventing the

⁷¹ *Id.* at 290.

⁷² *Id.* at 289 (“Nor does our decision today create a split with our colleagues in the First Circuit.”).

⁷³ See Sonntag, *supra* note 37, at 263 (“The differences between the First and Third Circuit’s interpretation of ‘personally identifiable information’ under the VPPA stem from a fundamental disagreement over whether the term should remain static with a 1980s definition or evolve with changing technology.”).

⁷⁴ See Ethan Forrest, *Third Circuit Takes Narrow View of PII Under the VPPA*, COVINGTON: INSIDE PRIVACY (July 11, 2016), <https://www.insideprivacy.com/united-states/third-circuit-takes-narrow-view-of-pii-under-the-vppa/> (“[A]s appellate courts continue to rule on what types of information constitute PII under the VPPA, the count now stands at 2–1 for a narrow reading of the statute, with the First Circuit’s *Yershov* remaining an outlier and the Third and Eleventh Circuits representing the majority view.”).

⁷⁵ See *supra* note 5 and accompanying text.

⁷⁶ See *infra* Part IV.

collection, use, and disclosure of their personal information.⁷⁷ COPPA requires any website or online service that is directed at children (or any website that has actual knowledge that children use it) to provide public notice on the website about what information is being collected and to obtain parental consent for the collection, use, or disclosure of their child's personal information.⁷⁸ Because most online streaming services have an all-ages audience and would likely have actual knowledge that children use their services, COPPA is one of the major tools available to enforce privacy protection.⁷⁹

Since the substance of COPPA is under the control of the FTC, an independent regulatory body, it is more flexible than statutes like the VPPA.⁸⁰ For example, the FTC has the power to change the definition of "personal information" under COPPA.⁸¹ This has

⁷⁷ *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0>.

⁷⁸ 15 U.S.C. § 6502(a)–(b) (2018). There are several other requirements websites must meet under COPPA, but they are not relevant to the discussion here. *See, e.g., id.* § 6502(b)(1)(B) (describing the requirements websites must meet when contacted by a parent that wants copies of the information the website collected from their child).

⁷⁹ Every major streaming service has content that targets children or families in a way that makes these services "directed toward children." *See* Elaine Low, *Why Kids' Programming Will Be a Major Battleground in the Streaming Wars*, VARIETY (Oct. 17, 2019, 10:17 AM), <https://variety.com/2019/tv/features/kids-programming-netflix-disney-plus-hulu-apple-tv-1203373388/> (describing the massive influx of children's content that Netflix, Apple TV+, CBS All Access, Disney+, and HBO Max have added to their streaming services); *see also* Complaint for Permanent Injunction, Civil Penalties, and Other Equitable Relief at 10, *FTC v. Google L.L.C.*, No. 1:19-cv-2642 (D.D.C. Sept. 4, 2019) [hereinafter *FTC Complaint*] ("Pursuant to Section 312.2 of the COPPA Rule, the determination of whether a website or online service is directed to children depends on factors such as the subject matter, visual content, language, and use of animated characters or child-oriented activities and incentives.").

⁸⁰ 15 U.S.C. § 6505(a) (stating that the FTC will enforce this regulation).

⁸¹ *See id.* § 6501(8)(F) (defining "personal information" as including "any other identifier that the [FTC] determines permits the physical or online contacting of a specific individual"); 16 C.F.R. § 312.9 (2020) (giving the FTC power to enforce this regulation); *see also* Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1834 (2011) ("COPPA explicitly references FTC rulemaking as a way to expand and adapt its definition of PII. The FTC has indeed acted to expand the definition of PII in the statute; its COPPA rule added one element to the statutory concept of PI, namely, the idea of 'a persistent identifier,' such as a cookie." (footnotes omitted)).

allowed COPPA both to expand its scope and to adapt to modern privacy issues affecting children.⁸² While this added flexibility allows COPPA to still be of some use in modern privacy litigation, the FTC's enforcement of COPPA deserves further discussion.

As of 2020, over two decades since COPPA was originally enacted, no company charged by the FTC has ever been taken to court for violating COPPA.⁸³ This is not because COPPA sees no action—on the contrary, COPPA is enforced, albeit weakly, quite often.⁸⁴ Instead, the dearth of trials exists because the FTC has settled every one of its thirty complaints against companies for violating COPPA.⁸⁵

At first glance, this statement hardly seems ground-breaking. After all, it is estimated that up to ninety-seven percent of all civil cases end before trial—mostly because of settlement;⁸⁶ why should COPPA cases be different? That being said, a troubling picture comes into view when looking at the size of these settlements.

⁸² *Contra* Schwartz & Solove, *supra* note 81, at 1835 (“The COPPA twist is to permit the statutory listing to be expanded through agency rulemaking. Nonetheless, the risk remains that new technology will develop too quickly for this approach to be effective.” (footnote omitted)).

⁸³ *See infra* notes 87–115 and accompanying text.

⁸⁴ *See infra* Table 1. Notably, states can and have sued companies under COPPA, but the FTC controls the vast majority of enforcement action, and those decisions will be the focus of this Note. *See Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0> (“COPPA gives states . . . authority to enforce compliance with respect to entities over which they have jurisdiction. For example, New York has brought several COPPA enforcement actions.”).

⁸⁵ *See infra* Table 1.

⁸⁶ Jon Rauchway & Mave Gasaway, *Endless Liability? Evaluating Whether to Settle or Litigate Private Environmental Lawsuits at Regulated Sites*, AM. BAR ASS'N (Nov. 9, 2018), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/november-december-2018/endless-liability/.

Table 1 – FTC Settlements for Alleged COPPA Violations

Date of Settlement	Company Name	Settlement Amount (U.S. Dollars)
July 2000	Toysmart.com	0 ⁸⁷
April 2001	Girls Life, Inc.	30,000 ⁸⁸
	BigMailbox.com, Inc.	35,000 ⁸⁹
	Looksmart Ltd.	35,000 ⁹⁰
October 2001	Lisa Frank, Inc.	30,000 ⁹¹
February 2002	American Pop Corn Co.	10,000 ⁹²
February 2003	Mrs. Fields Cookies	100,000 ⁹³
	Hershey Foods Corp.	85,000 ⁹⁴
February 2004	UMG Recordings, Inc.	400,000 ⁹⁵

⁸⁷ *FTC Announces Settlement with Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Policy Violations*, FED. TRADE COMM'N (July 21, 2000), <https://www.ftc.gov/news-events/press-releases/2000/07/ftc-announces-settlement-bankrupt-website-toysmartcom-regarding>.

⁸⁸ *FTC Announces Settlements with Web Sites that Collected Children's Personal Data Without Parental Permission*, FED. TRADE COMM'N (Apr. 19, 2001), <https://www.ftc.gov/news-events/press-releases/2001/04/ftc-announces-settlements-web-sites-collected-childrens-personal>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Web Site Targeting Girls Settles FTC Privacy Charges*, FED. TRADE COMM'N (Oct. 2, 2001), <https://www.ftc.gov/news-events/press-releases/2001/10/web-site-targeting-girls-settles-ftc-privacy-charges>.

⁹² *Popcorn Company Settles FTC Privacy Violation Charges*, FED. TRADE COMM'N (Feb. 14, 2002), <https://www.ftc.gov/news-events/press-releases/2002/02/popcorn-company-settles-ftc-privacy-violation-charges>.

⁹³ *FTC Receives Largest COPPA Civil Penalties to Date in Settlements with Mrs. Fields Cookies and Hershey Foods*, FED. TRADE COMM'N (Feb. 27, 2003), <https://www.ftc.gov/news-events/press-releases/2003/02/ftc-receives-largest-coppa-civil-penalties-date-settlements-mrs>.

⁹⁴ *Id.*

⁹⁵ *UMG Recordings, Inc. to Pay \$400,000, Bonzi Software, Inc. to Pay \$75,000 to Settle COPPA Civil Penalty Charges*, FED. TRADE COMM'N (Feb. 18, 2004), <https://www.ftc.gov/news-events/press-releases/2004/02/umg-recordings-inc-pay-400000-bonzi-software-inc-pay-75000-settle>.

Date of Settlement	Company Name	Settlement Amount (U.S. Dollars)
February 2004	Bonzi Software, Inc.	75,000 ⁹⁶
September 2006	Xanga.com, Inc.	1,000,000 ⁹⁷
January 2008	Industrious Kid, Inc.	130,000 ⁹⁸
December 2008	Sony BMG Music Entertainment	1,000,000 ⁹⁹
October 2009	Iconix Brand Group, Inc.	250,000 ¹⁰⁰
May 2011	Playdom, Inc.	3,000,000 ¹⁰¹
August 2011	W3 Innovations, LLC	50,000 ¹⁰²
March 2012	RockYou	250,000 ¹⁰³
October 2012	Artist Arena	1,000,000 ¹⁰⁴

⁹⁶ *Id.*

⁹⁷ *Xanga.com to Pay \$1 Million for Violating Children's Online Privacy Protection Rule*, FED. TRADE COMM'N (Sept. 7, 2006), <https://www.ftc.gov/news-events/press-releases/2006/09/xangacom-pay-1-million-violating-childrens-online-privacy>.

⁹⁸ *Imbee.com Settles FTC Charges Social Networking Site for Kids Violated the Children's Online Privacy Protection Act; Settlement Includes \$130,000 Civil Penalty*, FED. TRADE COMM'N (Jan. 30, 2008), <https://www.ftc.gov/news-events/press-releases/2008/01/imbeecom-settles-ftc-charges-social-networking-site-kids-violated>.

⁹⁹ *Sony BMG Music Settles Charges its Music Fan Websites Violated the Children's Online Privacy Protection Act*, FED. TRADE COMM'N (Dec. 11, 2008), <https://www.ftc.gov/news-events/press-releases/2008/12/sony-bmg-music-settles-charges-its-music-fan-websites-violated>.

¹⁰⁰ *Iconix Brand Group Settles Charges its Apparel Web Sites Violated Children's Online Privacy Protection Act*, FED. TRADE COMM'N (Oct. 20, 2009), <https://www.ftc.gov/news-events/press-releases/2009/10/iconix-brand-group-settles-charges-its-apparel-web-sites-violated>.

¹⁰¹ *Operators of Online "Virtual Worlds" to Pay \$3 Million to Settle FTC Charges that They Illegally Collected and Disclosed Children's Personal Information*, FED. TRADE COMM'N (May 12, 2011), <https://www.ftc.gov/news-events/press-releases/2011/05/operators-online-virtual-worlds-pay-3-million-settle-ftc-charges>.

¹⁰² *Mobile Apps Developer Settles FTC Charges it Violated Children's Privacy Rule*, FED. TRADE COMM'N (Aug. 15, 2011), <https://www.ftc.gov/news-events/press-releases/2011/08/mobile-apps-developer-settles-ftc-charges-it-violated-childrens>.

¹⁰³ Lesley Fair, *Data Security & COPPA: RockYou Like a Hurricane*, FED. TRADE COMM'N: BUS. BLOG (Mar. 27, 2012), <https://www.ftc.gov/news-events/blogs/business-blog/2012/03/data-security-coppa-rockyou-hurricane>.

¹⁰⁴ *Operator of Celebrity Fan Websites to Pay \$1 Million to Settle FTC Charges that it Illegally Collected Children's Information Without Their Parents' Consent*, FED. TRADE

Date of Settlement	Company Name	Settlement Amount (U.S. Dollars)
September 2014	Yelp	450,000 ¹⁰⁵
	TinyCo, Inc.	300,000 ¹⁰⁶
November 2014	TRUSTe, Inc.	200,000 ¹⁰⁷
December 2015	LAI Systems, LLC	60,000 ¹⁰⁸
	Retro Dreamer	300,000 ¹⁰⁹
June 2016	InMobi	4,000,000 (partially suspended) ¹¹⁰
January 2018	VTech Electronics Ltd.	650,000 ¹¹¹
February 2018	Prime Sites, Inc.	500,000 ¹¹²

COMM'N (Oct. 4, 2012), <https://www.ftc.gov/news-events/press-releases/2012/10/operator-celebrity-fan-websites-pay-1-million-settle-ftc-charges>.

¹⁰⁵ Lesley Fair, *FTC Case Against Yelp Shows that COPPA Isn't Just for Kids' Sites*, FED. TRADE COMM'N: BUS. BLOG (Sept. 17, 2014), <https://www.ftc.gov/news-events/blogs/business-blog/2014/09/ftc-case-against-yelp-shows-coppa-isnt-just-kids-sites>.

¹⁰⁶ Lesley Fair, *Big COPPA Problems for TinyCo*, FED. TRADE COMM'N: BUS. BLOG (Sept. 17, 2014), <https://www.ftc.gov/news-events/blogs/business-blog/2014/09/big-coppa-problems-tinyco>.

¹⁰⁷ *TRUSTe Settles FTC Charges it Deceived Consumers Through its Privacy Seal Program*, FED. TRADE COMM'N (Nov. 17, 2014), <https://www.ftc.gov/news-events/press-releases/2014/11/truste-settles-ftc-charges-it-deceived-consumers-through-its>.

¹⁰⁸ *Two App Developers Settle FTC Charges They Violated Children's Online Privacy Protection Act*, FED. TRADE COMM'N (Dec. 17, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/two-app-developers-settle-ftc-charges-they-violated-childrens>.

¹⁰⁹ *Id.*

¹¹⁰ Lesley Fair, *Track or Treat? InMobi's Location Tracking Ignored Consumers' Privacy Settings*, FED. TRADE COMM'N: BUS. BLOG (June 22, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/06/track-or-treat-inmobis-location-tracking-ignored-consumers> (noting that the settlement was "partially suspended based on InMobi's financial condition").

¹¹¹ *Electronic Toy Maker Vtech Settles FTC Allegations that it Violated Children's Privacy Law and the FTC Act*, FED. TRADE COMM'N (Jan. 8, 2018), <https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated>.

¹¹² *Online Talent Search Company Settles FTC Allegations it Collected Children's Information Without Consent and Misled Consumers*, FED. TRADE COMM'N (Feb. 5, 2018), <https://www.ftc.gov/news-events/press-releases/2018/02/online-talent-search-company-settles-allegations-it-collected> ("As part of its settlement, the defendant has agreed to a \$500,000 civil penalty, which will be suspended upon payment of \$235,000.").

Date of Settlement	Company Name	Settlement Amount (U.S. Dollars)
February 2019	Musical.ly	5,700,000 ¹¹³
April 2019	Unixiz, Inc.	35,000 ¹¹⁴
September 2019	YouTube (Google)	170,000,000 ¹¹⁵
June 2020	Hyperbeard, Inc.	4,000,000 (partially suspended) ¹¹⁶

For an individual or a small business, these settlements could be considered reasonable or even substantial, but for a large corporation? While it is beyond the scope of this Note to discuss the financial situation of every company that has settled COPPA charges with the FTC, it is worthwhile to discuss the FTC's recent—and largest—settlement for alleged COPPA violations: the settlement with the video service provider YouTube and its parent company, Google. By analyzing the settlement between the FTC and YouTube, one can see that the ineffectual enforcement of COPPA has hindered the protection of children's online privacy.

IV. THE YOUTUBE SETTLEMENT AND THE BLATANT INADEQUACIES OF THE VPPA AND COPPA

This Part assesses the FTC's settlement with YouTube over alleged COPPA violations as an example of how both the VPPA and COPPA are currently ineffective—or, at least, less useful than they

¹¹³ Lesley Fair, *Largest FTC COPPA Settlement Requires Musical.ly to Change its Tune*, FED. TRADE COMM'N: BUS. BLOG (Feb. 27, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/02/largest-ftc-coppa-settlement-requires-musically-change-its>.

¹¹⁴ Lesley Fair, *i-Dressup and a Data Security Mess-up*, FED. TRADE COMM'N: BUS. BLOG (Apr. 24, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/04/i-dressup-data-security-mess>.

¹¹⁵ Fair, *supra* note 9.

¹¹⁶ *Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids' Data without Parental Consent*, FED. TRADE COMM'N (June 4, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/developer-apps-popular-children-agrees-settle-ftc-allegations-it> ("The settlement includes a \$4 million penalty, which will be suspended upon payment of \$150,000 by HyperBeard due to its inability to pay the full amount.").

should be. The first section discusses why the calculations underlying the FTC's settlement with YouTube do not add up. Next, by applying the VPPA to the facts found by the FTC in its investigation of YouTube for COPPA violations, it is apparent that current VPPA law cannot adequately protect consumers of streaming services and other online media providers. Finally, this Part concludes with a prospective analysis as to how the VPPA and COPPA may be improved.

A. THE NUMBERS AND (LACK OF) LOGIC BEHIND THE FTC'S SETTLEMENT WITH YOUTUBE

One hundred and seventy million dollars is a lot of money, particularly when compared to past FTC settlements for alleged COPPA violations.¹¹⁷ When Google agreed to pay this amount to the FTC to settle the allegations that its subsidiary, YouTube, had violated COPPA by collecting and disclosing children's information, the punishment seemed just at first glance.¹¹⁸ But this was not a just punishment. Google avoided litigating damages, admitting guilt, and upsetting shareholders because the FTC agreed to settle for a small sum, when viewed in the context of Google's worth and its illegal actions.¹¹⁹

On September 4, 2019, the FTC announced that Google would pay a record \$170 million to settle allegations that YouTube's video sharing service illegally collected personal information from children without their parents' consent.¹²⁰ The complaint alleged that while YouTube had marketed its platform as being one of the top online destinations for children,¹²¹ YouTube openly stated it did

¹¹⁷ See *supra* Table 1.

¹¹⁸ See Fair, *supra* note 9 (describing the FTC settlement as "record-breaking").

¹¹⁹ See Jon Swartz, *Google Becomes Third U.S. Tech Company Worth \$1 Trillion*, MARKET WATCH (Jan. 16, 2020, 5:21 PM), <https://www.marketwatch.com/story/google-parent-alphabet-joins-1-trillion-in-market-value-for-first-time-2020-01-16> (noting that Google's parent company "became the third technology company" with a market capitalization of one trillion dollars).

¹²⁰ See Fair, *supra* note 9 (describing the claims and settlement).

¹²¹ FTC Complaint, *supra* note 79, at 8 ("Defendants market YouTube to popular brands of children's products and services as a top destination for kids.").

not need to comply with COPPA.¹²² While stating one does not need to follow a law is not illegal, the FTC argued that YouTube had violated COPPA by pushing behavioral advertising¹²³—which collects viewers' information—on all channels on YouTube, including those categorized for children.¹²⁴ The complaint then listed several examples of channels that were clearly directed at children yet used behavioral advertising.¹²⁵ Despite being categorized by age in YouTube's system,¹²⁶ these channels have no age requirement for viewers to watch¹²⁷ and do not require parental consent before YouTube collects the viewer's information through its algorithms and cookies.¹²⁸ The FTC argued that YouTube's actions violated COPPA, and the FTC requested a permanent injunction and damages against YouTube and Google.¹²⁹

YouTube and Google agreed to the FTC's proposed settlement of \$136 million for the FTC (which goes to the U.S. Treasury) and \$34 million for the state of New York.¹³⁰ The settlement was signed on

¹²² *Id.* at 9 (quoting a Google employee as saying that YouTube “is general audience, so . . . no COPPA compliance is needed”).

¹²³ *Id.* at 6 (describing how Google and YouTube “collect personal information, such as persistent identifiers for use in behavioral advertising, on behalf of [other] commercial entities”). Behavioral advertising is also known “as personalized, targeted, or interest-based advertising,” and it “track[s] . . . a consumer's online activities in order to deliver tailored advertising based on the consumer's inferred interests.” *Id.* at 4. This can be compared with contextual advertising, which does not collect the viewer's information for targeted ads, but instead shows ads that are deemed relevant because of the content being watched. *Id.* at 7.

¹²⁴ *Id.* at 6 (“Defendants have actual knowledge they are collecting personal information directly from users of these child-directed channels.”). A YouTube channel owner could turn off behavioral advertising on their channel only by diving into the advanced settings and checking a box to opt out of behavioral advertising; however, “[t]he checkbox . . . contains text stating that doing so ‘may significantly reduce [the] channel's revenue.’” *Id.* at 7 (second alteration in original).

¹²⁵ *Id.* at 10–14 (listing YouTube channels that target children).

¹²⁶ *Id.* at 9 (“Defendants have a content rating system that categorizes content into age groups and includes categories for children under [thirteen] years old.”).

¹²⁷ One must be thirteen years old to make an account on YouTube, which allows one to post comments and subscribe to channels—however, anyone can watch almost any video without logging in. *Id.* at 6–7.

¹²⁸ *Id.* at 16 (stating that Google and YouTube did not obtain parental consent).

¹²⁹ *Id.* at 16–19 (outlining the violation and desired relief).

¹³⁰ Stipulated Order for Permanent Injunction and Civil Penalty Judgment at 20, *FTC v. Google L.L.C.*, No. 1:19-cv-2642 (D.D.C. Sept. 10, 2019) [hereinafter *FTC Stipulated Order*].

September 10, 2019, and the parties went their separate ways.¹³¹ While this may seem like the reasonable end to a simple privacy matter, the \$170 million figure is paltry in the context of what occurred in this case.

While \$170 million is a lot of money to an individual, it is pennies to a corporation like Google. In 2018, Alphabet Inc. (Google's parent company) accrued \$136.819 billion in revenue and its net income was \$30.736 billion—up from \$12.662 billion in 2017.¹³² Although the insignificance of \$170 million to a company that makes \$30 billion a year might be apparent enough, the inadequacy of the settlement warrants further discussion.

A more poignant way exists to break down the FTC's charges against Google. In September 2019, the maximum penalty for a single COPPA violation was \$42,530.¹³³ The FTC settled with YouTube for \$170 million.¹³⁴ That figure divided by 42,530 is 3,997.18. Therefore, the FTC charged YouTube for roughly 4000 maximum violations of COPPA; that would be 4000 charges that YouTube and Google collected, used, or disclosed children's personal information without parental consent.¹³⁵ But there are two *billion* users of YouTube *per month*.¹³⁶ While no statistics show this, one

¹³¹ *Id.*

¹³² See ALPHABET INC., FORM 10-K, at 24 (Feb. 4, 2019), <https://www.sec.gov/Archives/edgar/data/1652044/000165204419000004/goog10-kq42018.htm> (reporting for the fiscal year ending December 31, 2018). Recall how Alphabet, Inc. recently achieved a market capitalization of one trillion dollars—making it the third technology company to do so. See Swartz, *supra* note 119.

¹³³ Kristin Cohen, *YouTube Channel Owners: Is Your Content Directed to Children?*, FED. TRADE COMM'N: BUS. BLOG (Nov. 22, 2019, 12:56 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children> (noting that, in 2019, COPPA “allow[ed] for civil penalties of up to \$42,530 per violation”). The maximum penalty has since been adjusted for inflation from \$42,530 to \$43,280. See *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0>.

¹³⁴ Fair, *supra* note 9.

¹³⁵ See 16 C.F.R. § 312.5(a)(1) (2020) (“An operator is required to obtain verifiable parental consent before any collection, use, or disclosure of personal information from children” (emphasis added)).

¹³⁶ Geoff Weiss, *YouTube Hits 2 Billion Monthly Users, as Number of Channels with 1 Million Subscribers Doubled Last Year*, TUBEFILTER (Feb. 5, 2019), <https://www.tubefilter.com/2019/02/05/youtube-2-billion-monthly-users/>. Importantly, this figure only accounts for “logged-in users,” which represents people who are either using their

can safely assume that more than 4000 children have used YouTube over the course of its existence.¹³⁷ It follows that the \$170 million figure is inconsequential; even if YouTube could only be charged the maximum penalty once under COPPA for every child that visited YouTube *in a single month*, a \$170 million settlement would likely be too low.¹³⁸

Perhaps this limited viewpoint is unfair. After all, there are more ways a company can be hurt beyond paying a portion of its income. Google may have suffered a severe blow to its public good will, and that social cost could be figured into the total settlement. But before discussing any changes in public perception, one should note that accepting a settlement with the FTC for allegedly violating COPPA is not an admission of guilt.¹³⁹ Therefore, even if people were upset that Google and YouTube allegedly stole and sold their children's personal information, that complaint is a mere allegation.¹⁴⁰ At this point, Google and YouTube have no obligation to admit or deny that they profited off illegally collecting children's information.¹⁴¹ The value of never having to admit that fact is intangible and

Google account or their YouTube account. FTC Complaint, *supra* note 79, at 6–7. It is unknown how many people (and children) use YouTube without being logged in.

¹³⁷ Consider YouTube's own advertising—advertising that led to the FTC's complaint—which “marketed itself as a top destination for kids in presentations to the makers of popular children's products and brands.” *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law*, FED. TRADE COMM'N (Sept. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

¹³⁸ YouTube arguably should be charged three times for each time a child used YouTube—for the collection, use, and disclosure of the personal information children share with YouTube whenever they use it. See 16 C.F.R. § 312.5(a)(1) (2020) (“An operator is required to obtain verifiable parental consent before any collection, use, or disclosure of personal information from children” (emphasis added)).

¹³⁹ See, e.g., *FTC Announces Settlements with Web Sites that Collected Children's Personal Data Without Parental Permission*, FED. TRADE COMM'N (Apr. 19, 2001), <https://www.ftc.gov/news-events/press-releases/2001/04/ftc-announces-settlements-web-sites-collected-childrens-personal> (“Stipulated Final Judgments and Orders are for settlement purposes only and do not constitute an admission by the defendant of a law violation.”).

¹⁴⁰ See Fair, *supra* note 9 (“The FTC and the New York AG allege that YouTube's behind-the-scenes conduct violated three key COPPA provisions.”); see also FTC Stipulated Order, *supra* note 130, at 2 (“Defendants neither admit nor deny any of the allegations in the Complaint, except . . . Defendants admit the facts necessary to establish jurisdiction.”).

¹⁴¹ See *supra* note 140.

noteworthy when considering that Google only had to pay \$170 million and remains (technically) guilt-free. Because there is no set method to measure public opinion, Alphabet Inc.'s stock price will be used as a proxy.¹⁴²

The FTC announced its settlement with Google on September 4, 2019, when Alphabet Inc.'s Class A Common Stock closed with a value of \$1182.27 per share on the NASDAQ stock exchange¹⁴³ and its Class C Capital Stock closed with a value of \$1181.41 per share on the same exchange.¹⁴⁴ Both the Class A and Class C stock rose in value steadily throughout September,¹⁴⁵ closing on September 30, 2019, with values of \$1221.14 per share and \$1219 per share, respectively.¹⁴⁶ While stock markets are volatile, reflecting a seemingly endless number of factors, it is plausible that if the public perceives the settlement to be negative, Google's stock price would have fallen.¹⁴⁷ Yet the opposite occurred.¹⁴⁸ And if YouTube and Google paid almost nothing, avoided admitting guilt, and came out with their company looking stronger than ever, then what was the point of the COPPA charges?¹⁴⁹

¹⁴² Recall that Alphabet, Inc. is Google's parent company. See Matthew Johnston, *5 Companies Owned by Google (Alphabet)*, INVESTOPEDIA, <https://www.investopedia.com/investing/companies-owned-by-google/> (last updated July 28, 2020).

¹⁴³ *GOOGL Alphabet Inc. Class A Common Stock*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/googl> (last visited Oct. 6, 2020).

¹⁴⁴ *GOOG Alphabet Inc. Class C Capital Stock*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/goog> (last visited Oct. 6, 2020).

¹⁴⁵ There was not a single day in September when the closing price of either class of stock fell to its price on September 4, 2019, which had been an increase from its price on September 3. See *GOOGL Alphabet Inc. Class A Common Stock*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/googl> (last visited Oct. 6, 2020); *GOOG Alphabet Inc. Class C Capital Stock*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/goog> (last visited Oct. 6, 2020).

¹⁴⁶ *GOOGL Alphabet Inc. Class A Common Stock*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/googl> (last visited Oct. 6, 2020); *GOOG Alphabet Inc. Class C Capital Stock*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/goog> (last visited Oct. 11, 2019).

¹⁴⁷ See Mark Klock, *Do Class Action Filings Affect Stock Prices? The Stock Market Reaction to Securities Class Actions Post PSLRA*, 15 J. BUS. & SEC. L. 109, 155 (2016) ("We do find that, overall, all securities class action filings have a negative impact [on stock value] at the filing date . . .").

¹⁴⁸ See *supra* note 145 and accompanying text.

¹⁴⁹ In addition to the penalty, the settlement requires Google and YouTube to "maintain a system for Channel Owners to designate whether their Content on the YouTube Service is

B. APPLYING THE VPPA TO THE YOUTUBE SETTLEMENT

If COPPA did not adequately rectify YouTube's violations, as argued above, then the VPPA would be the next major tool available to hold Google liable for violating users' privacy. However, applying the VPPA in its current state is confusing, even in a case like YouTube's where the FTC found plenty of evidence that Google collected and sold users' personal information.¹⁵⁰ By walking through a potential application of the VPPA to the YouTube situation, it is apparent that the VPPA cannot protect citizens' online privacy in these contexts until Congress or the U.S. Supreme Court settles the ongoing circuit split by more clearly defining "consumer" and "personally identifiable information."¹⁵¹

For any VPPA analysis, one must ask whether a "video tape service provider" disclosed any "personally identifiable information concerning any consumer" to a third party.¹⁵² In determining whether YouTube's actions violate the VPPA, one first must consider if YouTube is a "video tape service provider." While case law has not fully settled this requirement,¹⁵³ YouTube would likely qualify as a video tape service provider because of its similarities to

directed to Children" so that YouTube can ensure it is complying with COPPA. FTC Stipulated Order, *supra* note 130, at 10. YouTube's system makes creators liable for COPPA violations, when the platform itself is what should be punished. See Makena Kelly & Julia Alexander, *YouTube's New Kids' Content System has Creators Scrambling*, THE VERGE (Nov. 13, 2019, 3:06 PM), <https://www.theverge.com/2019/11/13/20963459/youtube-google-coppa-ftc-fine-settlement-youtubers-new-rules> ("Children's advocacy groups . . . feel that the rules don't go far enough, and that placing most of the burden on creators rather than YouTube itself won't do enough to protect kids online.").

¹⁵⁰ See *supra* notes 121–129 and accompanying text.

¹⁵¹ For a discussion of possible solutions, see *infra* Section IV.C.

¹⁵² 18 U.S.C. § 2710(b) (2018).

¹⁵³ See *In re* Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 281 n.119 (3d Cir. 2016) (noting that whether Google was a "video tape service provider" was not brought up on appeal); *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 485 n.2 (1st Cir. 2016) (stating that even though the defendant "claimed . . . that it is not a 'video tape service provider' . . . it did not challenge the sufficiency of [the plaintiff's] pleading as to [that] element"); *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1253 n.1 (11th Cir. 2015) ("Cartoon Network does not dispute that it is a 'video tape service provider' . . .").

streaming services, like Hulu, which have been found to satisfy the requirement.¹⁵⁴

Second, did YouTube “knowingly disclose” any information? The answer is not straightforward given the nature of advertising on YouTube.¹⁵⁵ The FTC’s complaint spelled out how YouTube collected “personal information, including persistent identifiers for use in behavioral advertising, from viewers of channels and content directed to children under [thirteen] years of age,” leaving little doubt that YouTube collects information from users.¹⁵⁶ However, unlike COPPA, the VPPA requires disclosure of that information, not just collection.¹⁵⁷ For example, in cases like *In re Nickelodeon*, the defendant company disclosed users’ information by selling it to advertising companies, like Google.¹⁵⁸ But, as a matter of law, can YouTube “disclose” information to its own parent company? For the purposes of this Note, the analysis will continue under the assumption that YouTube can be charged with “knowingly disclosing” information to Google or another entity, if only to reach the definitions portion of the analysis.¹⁵⁹

Third, was the disclosed information “personally identifiable” under the VPPA?¹⁶⁰ Answering this question is difficult because it is unclear exactly what information YouTube collects from its users. The FTC’s complaint stated that YouTube and Google had “actual knowledge that they collect personal information, including

¹⁵⁴ *In re Hulu Priv. Litig.*, No. C 11-03764 LB, 2012 WL 3282960, at *6 (N.D. Cal. Aug. 10, 2012) (rejecting Hulu’s argument that it was not a “video tape service provider” because of “Congress’s concern with protecting consumers’ privacy in an evolving technological world”).

¹⁵⁵ See Thomas J. Law, *YouTube Ads for Beginners: How to Advertise on YouTube*, OBERLO (Nov. 17, 2018), <https://www.oberlo.com/blog/youtube-ads-beginners-launch-first-campaign> (comparing the six different types of ads on YouTube and explaining how to start a YouTube ad campaign).

¹⁵⁶ FTC Complaint, *supra* note 79, at 15.

¹⁵⁷ Compare 18 U.S.C. § 2710(b) (2018) (limiting application to providers “who knowingly disclose” information), with 15 U.S.C. § 6502(b)(1)(A)(ii) (2018) (requiring operators to obtain parental consent for “the collection, use, or disclosure” of personal information).

¹⁵⁸ See, e.g., *In re Nickelodeon*, 827 F.3d at 281–82 (describing the sale of information to Google); *Yershov*, 820 F.3d at 484–85 (describing the disclosure of information to Adobe, an online marketing company).

¹⁵⁹ In reality, the answer to this question depends on whether a subsidiary can be charged with disclosing information to its parent company under the VPPA—a discussion beyond the scope of this Note.

¹⁶⁰ 18 U.S.C. § 2710(a)(3) (2018).

persistent identifiers for use in behavioral advertising,” but it does not elaborate what form that personal information takes.¹⁶¹ Is that personal information GPS coordinates and device identifiers, like in *Yershov*;¹⁶² an IP address, device identifiers, and system settings, like in *In re Nickelodeon*;¹⁶³ or device identifiers and viewing records, like in *Ellis*?¹⁶⁴ To answer this question, it is worth revisiting the conflicting standards for what counts as PII. The First Circuit decided in *Yershov* that the standard should be broad, stating that “the language [of the VPPA] reasonably conveys the point that PII is not limited to information that explicitly names a person.”¹⁶⁵ This standard is juxtaposed by the Third Circuit’s holding, which found that the VPPA “was meant to prevent disclosures of information capable of identifying an *actual person’s* reading or video-watching habits” because the VPPA’s legislative history shows “that the Act ‘protects personally identifiable information that identifies a specific person and ties that person to particular videos.’”¹⁶⁶ Without knowing what information YouTube was collecting and disclosing, there is no way to apply either of these standards.

Finally, if one can prove the PII element, was that disclosed information about a YouTube “consumer”? If a YouTube user is subscribed to a channel or has a channel of their own, they likely would qualify as a “consumer” because they would be a “subscriber” under the VPPA.¹⁶⁷ Even though courts interpret the term “subscriber” differently, the relationship between a subscribed user of YouTube and the site would likely satisfy even the most stringent

¹⁶¹ FTC Complaint, *supra* note 79, at 15.

¹⁶² *Yershov*, 820 F.3d at 484 (stating that the defendant disclosed to Adobe “(1) the title of the video viewed, (2) the GPS coordinates of the device at the time the video was viewed, and (3) certain identifiers associated with the user’s device, such as its unique Android ID”).

¹⁶³ *In re Nickelodeon*, 827 F.3d at 281–82.

¹⁶⁴ *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1254 (11th Cir. 2015) (stating that “Cartoon Network sends Bango the Android ID of a CN app user along with his video viewing history”).

¹⁶⁵ *Yershov*, 820 F.3d at 486.

¹⁶⁶ *In re Nickelodeon*, 827 F.3d at 285 (quoting *In re Hulu Priv. Litig.*, No. C 11–03764 LB, 2014 WL 1724344, at *8 (N.D. Cal. 2014)).

¹⁶⁷ 18 U.S.C. § 2710(a)(1) (2018) (defining a “consumer” as “any renter, purchaser, or subscriber of goods or services from a video tape service provider”).

interpretation from *Ellis*.¹⁶⁸ The *Ellis* standard requires a relationship beyond merely visiting a website “and using it to view content at no cost”; instead, it requires an “ongoing commitment or relationship between the user and the entity which owns and operates the [website or] app.”¹⁶⁹ This relationship can be satisfied by establishing an account, by providing personal information to the website operator, by making payments, or by signing up for periodic services.¹⁷⁰ Having an account on YouTube (or Google) entails several of these steps and is likely adequate to establish the necessary relationship.¹⁷¹

While YouTube and Google possibly could be found to have violated the VPPA, several pieces of information would need to be collected, including what type of information YouTube was gathering from viewers and whether YouTube disclosed the information to its parent company. At the very least, YouTube likely would count as a “video tape service provider,” and the plaintiff would almost certainly count as a “consumer” under the VPPA.¹⁷²

While this is hardly the most satisfying answer, the lack of a clear result bolsters this Note’s conclusion: the definition of “personally identifiable information” and “consumer” should be clarified by Congress or the U.S. Supreme Court. The clarification should come sooner rather than later, given the rapid expansion of the streaming market and the concordant increase in potential violators of the VPPA. If the VPPA only ambiguously applies to a fact pattern as clear and documented as the FTC’s suit against YouTube, then the VPPA likely cannot protect future plaintiffs from the multitude of new streaming services entering the market.¹⁷³

¹⁶⁸ Compare *Ellis*, 803 F.3d at 1257 (interpreting “subscriber” narrowly), with *Yershov*, 820 F.3d at 487–89 (interpreting “subscriber” more broadly).

¹⁶⁹ *Ellis*, 803 F.3d at 1257.

¹⁷⁰ See, e.g., *id.* (holding that the plaintiff was not a “subscriber” for a variety of reasons: he “did not sign up for or establish an account,” “provide any personal information to,” “make any payments to,” “become a registered user of,” “receive a Cartoon Network ID,” “establish a Cartoon Network profile,” “sign up for any periodic services or transmissions,” or “make any commitment or establish any relationship that would allow him to have access to exclusive or restricted content”).

¹⁷¹ *Subscriptions*, YOUTUBE, <https://developers.google.com/youtube/v3/docs/subscriptions> (last visited Nov. 16, 2020) (explaining what channel subscriptions on YouTube entail).

¹⁷² See *supra* notes 153–154 & 167–171 and accompanying text.

¹⁷³ See *supra* notes 16–19 and accompanying text.

C. NECESSARY CHANGES TO THE VPPA AND COPPA

Both the VPPA and COPPA are antiquated; however, both can be fixed. Updating both of the Acts is necessary as the expansion of the streaming market and a massive influx of new actors will increase the need to protect online users' private information and to ensure that these new streaming services follow the law.

The FTC is aware that something needs to be done: it decided to do its ten-year review of COPPA four years early.¹⁷⁴ The FTC held a COPPA workshop in Washington, D.C., on October 7, 2019,¹⁷⁵ and it accepted comments on the Federal Register about COPPA's review until December 11, 2019.¹⁷⁶ Considering the FTC has the power to alter COPPA without Congress,¹⁷⁷ an amendment or other serious revision of COPPA may occur in response to the comments the FTC receives.¹⁷⁸

After the lengthy discussion of the YouTube settlement, it follows that the area that needs the most attention might not be in COPPA itself; instead, the FTC's settlement policy needs to change. FTC settlements need to monetarily impact the companies charged with violating COPPA.¹⁷⁹ Unsurprisingly, this criticism has been brought

¹⁷⁴ See Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, 84 Fed. Reg. 35,842, 35,842 (July 25, 2019) (to be codified at 16 C.F.R. pt. 312) ("The Commission typically reviews its Rules every ten years to ensure that they have kept up with changes in the marketplace, technology, and business models. Although the Commission's last COPPA Rule review ended in 2013, the Commission is conducting its ten-year review early because of questions that have arisen about the Rule's application . . .").

¹⁷⁵ *FTC to Host Workshop on October 7 to Examine COPPA Rule*, FED. TRADE COMM'N (Oct. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-host-workshop-october-7-examine-coppa-rule>.

¹⁷⁶ Lesley Fair, *COPPA Comment Deadline Extended to December 11th*, FED. TRADE COMM'N: BUS. BLOG (Dec. 10, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/12/coppa-comment-deadline-extended-december-11th>.

¹⁷⁷ See *supra* note 81 and accompanying text.

¹⁷⁸ As of October 2020, the FTC has made no changes to COPPA beyond updating the guidelines on COPPA's website in July. Lesley Fair, *Tidying Up: Decluttering the COPPA FAQs*, FED. TRADE COMM'N: BUS. BLOG (July 22, 2020, 11:49 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2020/07/tidying-decluttering-coppa-faqs>.

¹⁷⁹ *But cf.* Nick Werle, Note, *Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366, 1370 (2019) ("When defendant companies are so large, so systemically important, and so politically powerful that

up before, albeit prior to the YouTube settlement.¹⁸⁰ Accordingly, the FTC should replace the maximum penalty per violation provision with one that sets the defendant's damages as a percentage of their income. This would allow the rule to flexibly address both individuals and giant corporations. The European Union's equivalent of COPPA has such a provision and sets the percentage at four percent of the defendant's income from the previous fiscal year.¹⁸¹ Such a change would set a new standard for the FTC and judges to enforce. This, of course, is only one possible solution to a part of COPPA, but this change would at least begin to address absurd outcomes like the YouTube settlement figure.

The VPPA is a different animal. Because only Congress can amend the VPPA,¹⁸² it will likely take much longer for the text of the VPPA to be amended. The second-best result would be if the U.S. Supreme Court weighed in on how to interpret the definitions found in the VPPA. Unfortunately, the Court recently denied certiorari to a VPPA case, and it could be a while before the Court considers the issue.¹⁸³ Ideally, in this hypothetical amendment or Court opinion, a final answer should emerge for how to define "consumer" and "personally identifiable information." There is a vast array of opinions on how both terms should be defined.¹⁸⁴ The

prosecutors cannot credibly threaten them with a 'socially optimal' penalty, does deterrence still work? . . . [W]hen firms become [too big to jail], deterrence breaks down.").

¹⁸⁰ Specifically, these criticisms were rampant when the FTC settled with Facebook for \$5 billion dollars earlier in 2019. *See, e.g.*, Devin Coldewey, *9 Reasons the Facebook FTC Settlement is a Joke*, TECHCRUNCH (July 24, 2019, 8:01 PM), <https://techcrunch.com/2019/07/24/9-reasons-the-facebook-ftc-settlement-is-a-joke/> ("Leaving aside that Facebook at this point probably makes [\$5 billion] in a month, it simply does not correspond to the harm done or rewards reaped.").

¹⁸¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 83 ("Infringements of the following provisions shall . . . be subject to administrative fines up to [twenty million euros], or . . . up to [four percent] of the total worldwide annual turnover of the preceding financial year, whichever is higher . . .").

¹⁸² *Compare* 18 U.S.C. § 2710 (2018) (lacking a delegation of authority to an independent agency), *with* 15 U.S.C. § 6502(b)(1) (2018) (mandating that the FTC create regulations for the subject).

¹⁸³ *See* C.A.F. v. Viacom Inc., 137 S. Ct. 624 (2017) (mem.) (denying certiorari).

¹⁸⁴ *See, e.g.*, Schwartz & Solove, *supra* note 81, at 1862–91 (discussing a new interpretation of PII for the VPPA).

most persuasive opinions address the evolving nature of PII and the inadequacies of the current legislation considering today's technology.¹⁸⁵ No matter what the right answer is on how the text of the VPPA should change or how to define the words within it, confusion about the VPPA will likely linger for several years, all while streaming services continue to proliferate and potentially violate the law.

V. CONCLUSION

The Video Privacy Protection Act turned thirty years old in 2018,¹⁸⁶ and the Children's Online Privacy Protection Act turned twenty the same year.¹⁸⁷ These two laws have done much to protect the privacy rights of American citizens since their inception, but they are beginning to show their age. To remain relevant and valuable, both the VPPA and COPPA must be updated to account for modern technology and to reflect the privacy concerns of our current age.

The VPPA has become a confusing, unhelpful provision that has split the circuits when it comes to its application to the modern world of video-streaming and mobile apps.¹⁸⁸ The definitions of "consumer" and "personally identifiable information," which might have been clear in 1988, are no longer easy to determine when dealing with cookies, behavioral advertising, and other data collection concerns that did not exist in the 1980s. Either Congress needs to amend the VPPA to clarify how it should be applied to modern technology, or the U.S. Supreme Court needs to rectify the circuit splits.¹⁸⁹ Worryingly, it could be a long wait before either occurs, all while the streaming market expands and potential violators of the VPPA grow in numbers.¹⁹⁰

COPPA, while more in tune with modern privacy concerns, is ineffective because the FTC settles for laughably small sums with

¹⁸⁵ *Id.* at 1836–47 (discussing problems with the current interpretation).

¹⁸⁶ 18 U.S.C. § 2710 (2018).

¹⁸⁷ 15 U.S.C. § 6502 (2018).

¹⁸⁸ *See supra* Part II.

¹⁸⁹ *See supra* Section IV.C.

¹⁹⁰ *See supra* notes 16–19 and accompanying text.

alleged COPPA violators.¹⁹¹ Using the FTC's recent settlement with YouTube and Google as an example, one can see that alleged violators of COPPA can avoid costly litigation, acknowledgement of their guilt, public outrage, and any real fiscal trouble by settling for paltry amounts with the FTC.¹⁹² COPPA must be updated to include a standard for determining damages that reflects the size of the defendant's wallet.¹⁹³ This will set a statutory example for the FTC. Although COPPA is undergoing change at this very moment and may be amended soon, whether any changes will address the FTC's enforcement procedures remains unclear.¹⁹⁴

Online privacy is only becoming more important as American law enters the 2020s. Technology will continue to evolve and adapt, and the law must as well. Laws from the 1980s and 1990s are becoming archaic in light of today's technology. Correcting the Video Privacy Protection Act and the Children's Online Privacy Protection Act must be a top priority for lawmakers.

¹⁹¹ See *supra* Table 1.

¹⁹² See *supra* Section IV.A.

¹⁹³ See *supra* notes 180–181 and accompanying text.

¹⁹⁴ See *supra* notes 174–176 and accompanying text.