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Don't Forget to Subscribe: Regulation of Online Advertising Evaluated Through YouTube's Monetization Problem

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DON'T FORGET TO SUBSCRIBE:
REGULATION OF ONLINE ADVERTISING EVALUATED
THROUGH YOUTUBE'S MONETIZATION PROBLEM

*Nicole E. Pottinger*¹

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INTRODUCTION

Every time a consumer accesses the internet, it is inevitable that they will come across some form of online advertising. This ad may be in the form of a banner, a video, a pop-up, or a piece of content that was sponsored by an advertiser.² These advertisements generate millions of dollars per year for the advertising companies, the brands sponsoring the advertisement, the websites hosting the advertisement, and the creators contributing content on the websites. In June of 2017 alone, 253 million individuals (a staggering 78% of the U.S. population) accessed the internet via a computer or mobile device.³ This audience spent 1.3 trillion minutes online during the month, generating \$40.1 billion of overall digital ad revenue in the first six months of 2017.⁴ These online advertisements were effective: 39% of U.S. adults said their electronics purchases were influenced by internet advertising.⁵

Online advertising comes in a variety of formats, but video advertising has experienced significant growth.⁶ In June 2017 alone, 221 million Americans streamed digital video and spent 170 billion minutes watching streaming video.⁷ During that time, a total of 46 billion videos were streamed, resulting in 23 billion video ads.⁸ More than half of the dollars spent on digital video advertising in 2017 were traded using programmatic advertising, and that number is expected to grow to three-quarters in 2018.⁹

Programmatic advertising, which pairs users and advertising in an automated “ad auction,” is becoming the dominant force in online advertising.¹⁰ It is also the reason many prominent brands have pulled advertising from YouTube.com, resulting in the “Adpocalypse” of March, 2017.¹¹ Though almost two years have passed, there has not been a viable solution and many content creators on YouTube are still unsatisfied in how YouTube has addressed this problem.¹²

² Gloria Boone, Jane Secci & Linda Gallant, *Emerging Trends in Online Advertising*, 5 DOXA COMUNICACIÓN 242, 244 (2007), <http://doxacomunicacion.es/pdf/articuloboonesecciygallant.pdf> [<https://perma.cc/WZ9E-EWPB>]. The technique of an advertisement that is sponsored by a piece of content is called native advertising. Lilli Levi, A Faustian Pact: Native Advertising and the Future of the Press, 57 ARIZ. L. REV. 647, 649, 655-59 (2015). Most modern advertising techniques are a form of native advertising. *Id.*

³ INTERACTIVE ADVERT. BUREAU, DIGITAL TRENDS: CONSUMER USAGE OF DIGITAL AND ITS INFLUENCE ON AD REVENUE 2 (2017), <https://www.iab.com/wp-content/uploads/2017/12/Digital-Trends-Consumer-Usage-of-Digital-and-its-Influence-on-Ad-Revenue.pdf> [<https://perma.cc/SEWY-AUWC>].

⁴ *Id.*

⁵ *Id.* Of course, internet advertising does not only affect electronics purchases. 32% of adult clothing and 16% of medicine purchases were influenced by internet ads. *Id.* at 12.

⁶ *Id.* at 39.

⁷ *Id.* at 40.

⁸ *Id.*

⁹ *eMarketer Releases New Programmatic Advertising Estimates*, EMARKETER (Apr. 18, 2017), <https://www.emarketer.com/Article/eMarketer-Releases-New-Programmatic-Advertising-Estimates/1015682> [<https://perma.cc/3UYZ-22ST>].

¹⁰ Sheila Kloefkorn, *Trends in Programmatic Advertising to Watch This Year*, FORBES (May 16, 2017, 8:00 AM), <https://www.forbes.com/sites/forbesagencycouncil/2017/05/16/trends-in-programmatic-advertising-to-watch-this-year/#425d85747f11> [<https://perma.cc/4G2A-YDSL>].

¹¹ See *infra* Part II.

¹² See *infra* Part II.

Despite calls for regulation of online advertising, there has been little regulation accomplished by either Congress or the Federal Trade Commission.¹³ While the Federal Trade Commission is largely responsible for regulation of online activity,¹⁴ the FTC has chosen to not promulgate many rules on the topic of online activity.¹⁵ Those in the advertising industry must follow a set of voluntary guidelines posted by the Interactive Advertising Bureau.¹⁶ Further, it is unclear which government body should regulate online advertising and what type of regulation should be enacted in order to “effectively protect consumer privacy while still allowing flexibility for ongoing technological advancements.”¹⁷

Due to this lack of regulation, a variety of issues have come to fruition, including concerns about consumer privacy, fraud, and a lack of transparency.¹⁸ This Note seeks to evaluate whether regulation of digital video online advertising is necessary or appropriate for consumer protection through the lens of YouTube’s advertising model. Part I will evaluate different methods of online advertising, focusing on digital video advertising and its impact on consumers. Part II will look specifically at the issues created by YouTube’s advertising methods in the eyes of the different parties involved. Part III will survey viable solutions and their impact on all parties, and Part IV will lay out this Note’s solution to this problem, which is a set of mandatory guidelines to be promulgated and policed by the FTC.

I. ONLINE ADVERTISING METHODS AND PRACTICES

In order to understand the legal problems at hand, it is important to have a general understanding of the methods and practices used in the online advertising industry. These methods and practices are directly at issue in YouTube’s brand safety issue and would be the subject of any potential regulation. This section will briefly review the progression of online advertising, evaluate general online advertising methods, explain how digital video advertising works, and then look at the impact of digital video advertising and its importance in today’s society. This background information is essential to understanding how online advertising affects users and will be vital to understanding YouTube’s advertising problem.

¹³ See Laura J. Bowman, *Pulling Back the Curtain: Online Consumer Tracking*, 7 I/S: J. L. & POL’Y FOR INFO. SOC’Y 721, 730, 744 (2012).

¹⁴ See Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2042 (2000).

¹⁵ See *id.* at 2045. There are at least three notable exceptions to the FTC’s lack of regulation. See 15 U.S.C. § 45c (2012); 15 U.S.C. §§ 6501–6506 (2012); 15 U.S.C. §§ 8401–8405 (2012).

¹⁶ INTERACTIVE ADVERT. BUREAU TECH. LAB. MEDIA RATING COUNCIL, DIGITAL VIDEO IMPRESSION MEASUREMENT GUIDELINES 5 (2018), https://www.iab.com/wp-content/uploads/2016/12/Digital-Video-Impression-Measurement-Guidelines_1.1.pdf [<https://perma.cc/L973-9WRD>].

¹⁷ Bowman, *supra* note 13, at 730.

¹⁸ See CTR. FOR DIG. DEMOCRACY ET AL., ONLINE BEHAVIORAL TRACKING AND TARGETING CONCERNS AND SOLUTIONS 3–4 (2009), <https://www.eff.org/files/onlineprivacylegprimersept09.pdf> [<https://perma.cc/5J9R-JU3M>].

A. Early Online Advertising Methods

Online advertising is a distinct market from offline advertising.¹⁹ The online advertising industry has evolved so as to create its own toolbox full of distinct methods and practices that are inherently different from traditional advertising practices.²⁰ Online advertising began in 1978 with advertisements sent over email.²¹ Online advertising as we know it today did not develop until 1994, when online magazine HotWired sold a banner ad to AT&T and displayed the ad on the top of its webpage.²²

“By 1998, over \$1 billion [was] spent [on] Internet advertising” consisting primarily of the banner ad.²³ The late 1990s brought the introduction of pop-up advertisements, which proved to be thirteen times more effective than banner ads.²⁴ However, pop-up advertisements were seen as a nuisance to users, and have since largely disappeared from the modern internet in their traditional form.²⁵

In 1998, sponsored searches, which show ads connected to certain keywords, gained popularity as search engines such as Yahoo and MSN grew.²⁶ Sponsored searches became even more popular after the rise of Google in the early 2000s.²⁷ Today, sponsored searches account for nearly half of all online ad purchases and are especially effective for smaller businesses that do not have an established brand.²⁸

¹⁹ European Commission Decision Feb. 18, 2010, Doc. 32010M5727, Case No. COMP/M.5727 ¶61, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1542140625797&uri=CELEX:32010M5727> [<https://perma.cc/CXJ5-UQJW>]; see also INTERACTIVE ADVERT. BUREAU, GUIDE TO DIGITAL VIDEO ADVERTISING: PRACTICAL ADVICE FOR CROSS-PLATFORM VIDEO ADVERTISING 47–48 (2017), https://video-guide.iab.com/sites/default/files/iab_guide_to_digital_video_advertising.pdf [<https://perma.cc/SQ5T-CREF>] (illustrating examples of the difference between online and offline advertising).

²⁰ Ankit Oberoi, *The History of Online Advertising*, ADPUSHUP BLOG (July 3, 2013), <https://www.adpushup.com/blog/the-history-of-online-advertising/> [<https://perma.cc/3GAP-SS5P>].

²¹ *Id.*

²² Adrienne LaFrance, *The First-Ever Banner Ad on the Web*, ATLANTIC (Apr. 21, 2017), <https://www.theatlantic.com/technology/archive/2017/04/the-first-ever-banner-ad-on-the-web/523728/> [<https://perma.cc/PA2R-6TPL>]. Banner advertisements are rectangular text or photo advertisements that are displayed above, below, or to the side of content on a website. *Banner Advertising*, INVESTOPEdia, <https://www.investopedia.com/terms/b/banneradvertising.asp> [<https://perma.cc/ZNG9-6VVY>].

²³ Boone, *supra* note 2, at 244.

²⁴ *Id.* at 244. A pop-up advertisement is an ad that creates a new browsing window in which the advertisement is displayed. *Pop-Up Ad*, MARKETINGTERMS.COM, https://www.marketingterms.com/dictionary/pop_up_ad/ [<https://perma.cc/8ZZL-BNRM>].

²⁵ See Kate Rogerson, *The Rise and Fall of the Pop-Up Ad—and What’s Set to Replace It*, VE (July 11, 2016), <https://www.ve.com/blog/the-rise-and-fall-of-the-pop-up-ad-and-whats-set-to-replace-it> [<https://perma.cc/FE4W-WVGW>] (“By 2004, a study found that 95% of web users reacted ‘negatively’ or ‘very negatively’ to pop-ups . . .”); Julie Durante, *Do Pop-up Ads Actually Work? Here’s the Data You Need*, SMARTBUG (June 10, 2016) <https://www.smartbugmedia.com/blog/do-pop-up-ads-actually-work-heres-the-data-you-need> [<https://perma.cc/LH8G-YPWX>].

²⁶ Boone, *supra* note 2, at 244. An example of sponsored searches would be a pet supply company paying for keywords such as “dog food” or “cat toys.” When a user searched for those terms, the ads on the web page would be from the pet supply company. See *id.*

²⁷ Rogerson, *supra* note 25; see also Anindya Ghose & Sha Yang, *An Empirical Analysis of Search Engine Advertising: Sponsored Search in Electronic Markets*, 55 MGMT. SCI. 1605, 1605–08 (2009).

²⁸ Weijia Dai & Michael Luca, *Effectiveness of Paid Search Advertising: Experimental Evidence* (Harvard Bus. Sch. Negotiation, Orgs. & Mkts. Unit, Working Paper No. 17-025, 2016),

Traditionally, ads based on brands were sold based on the number of “impressions” or times an individual saw an ad.²⁹ Web ads were sold based on “cost per mille” or “CPM” which sold ads based on per thousand views.³⁰ In 1996, the CPM advertising model was abandoned in favor of the “cost per click” or “CPC” model.³¹ The CPC model originated from a deal made between Proctor & Gamble and Yahoo!, where Yahoo! was compensated per click of the user’s mouse on an advertisement.³² The CPC model more closely resembles traditional advertising methods, such as mail and telephone advertising campaigns, because the advertiser can guarantee the user had to respond to the ad.³³

Rich media, such as video, audio, photos, and animations transformed online advertising “from a direct response model to a brand marketing model.”³⁴ As a result, advertising companies began focusing on building a client’s brand.³⁵ In the early 2000s, larger companies such as Toyota, American Express, and Sony began utilizing rich media to “showcase” their respective brands.³⁶ The modern approach to online advertising, detailed below, ultimately grew out of rich media and brand advertising.

B. Modern Advertising Practices

Modern online advertising is fundamentally different than traditional advertising because “publishers and ad networks [are able] to learn considerably more about online users” than they could have in “traditional media [forms] such as print, radio, and television.”³⁷ This section seeks to explain what behavioral tracking is, how it works, the privacy considerations, and how this fits into the larger picture.

“[Online behavioral advertising] generally seeks to increase the relevance of advertising displayed to the user, based on data collected about the user, with the aim of increasing the strength of the connection between advertising efforts and purchasing behavior.”³⁸ Ad networks, through online resources, are able to know when a user is viewing an ad, in many cases what the user’s zip code is, and what other sites the user may have visited to learn other details.³⁹ Additionally, other websites that collect user information, such as social media networks, may use or

<https://ssrn.com/abstract=2847084> [<https://perma.cc/UL34-6UZK>]. Researchers found that sponsored searches were less effective for larger brands such as eBay. *Id.* at 3.

²⁹ David S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, 23 J. ECON. PERSP. 37, 38 (2009).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Boone, *supra* note 2, at 244.

³⁵ *See id.* at 245

³⁶ *Id.*

³⁷ Evans, *supra* note 29, at 42.

³⁸ Steven C. Bennett, *Regulating Online Behavioral Advertising*, 44 JOHN MARSHALL L. REV. 899, 899 (2011).

³⁹ Evans, *supra* note 29, at 42. This is possible through technology such as cookies and IP (Internet Protocol) addresses. *Id.* at 55.

sell that information to advertise to consumers.⁴⁰

By 2005, services such as Google developed technology called “behavioral targeting” to “personalize advertisements” to specific consumers “based on ‘prior search queries, search results, [and] demographic, geographic, psychographic and activity information.’”⁴¹ Google collects this information and creates a profile of each user’s interests using its service AdSense.⁴² Google then “uses this profile to tailor the ads delivered on the Google Content Network,” which includes YouTube, to each individual user.⁴³

These practices are different than traditional advertising because ad networks know which advertisements are likely to be effective to specifically tracked demographics.⁴⁴ A TV station has no way to know when a consumer is watching an advertisement or went to the kitchen for a snack. This is true for all forms of traditional media, including radio or newspaper advertisers.

There are, however, downsides to behavioral targeting. First, because the advertisements are meant to target a smaller audience, there must be a higher rate of return for advertisers to invest.⁴⁵ Only about 1 in 400 consumers clicks an advertisement, and the rate of purchasing the advertised product is even slimmer.⁴⁶ Due to these statistics, advertisers may prefer to cast a broader net to reach as many consumers as possible.⁴⁷ This broader net approach, while cheaper, is reminiscent of traditional advertising techniques and is not the most efficient way to utilize modern technology.

Second, behavioral tracking campaigns are expensive. The advertiser must have access to a large enough population of consumers in order to make the advertising campaign worthwhile. If only 20% of individuals reached results in a consumer purchase, then an advertiser would need access to 2,500,000 people to reach 500,000 people via targeted advertising.⁴⁸

Finally, many consumers have begun implementing ad blockers: browser extensions that block ads from being displayed on your browser window.⁴⁹ In 2015, ad blockers cost the global advertising industry \$22 billion dollars in revenue.⁵⁰ It was expected that by 2017 at least one in three internet users would have an ad blocker installed.⁵¹ The installation of ad blockers was thought to have a significant

⁴⁰ *Id.* at 40–42.

⁴¹ Bennett, *supra* note 38, at 901 (quoting Loren Baker, *Google Advertising Patents for Behavioral Targeting, Personalization and Profiling*, SEARCH ENGINE J. (Oct. 7, 2005), <http://www.searchenginejournal.com/google-advertising-patents-for-behavioral-targeting-personalizationand-profiling/2311/> [<https://perma.cc/VF9Z-QBPE>]).

⁴² Bowman, *supra* note 13, at 748.

⁴³ *Id.* at 748–49.

⁴⁴ Evans, *supra* note 29, at 42.

⁴⁵ *Id.* at 51.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Shailesh Shukla, *How Ad Blocking Impacts the Online Advertising Ecosystem*, NATIVE ADVERT. INST., <https://nativeadvertisinginstitute.com/blog/ad-blocking-impact-online-advertising-ecosystem/> [<https://perma.cc/4N6K-T64S>].

⁵⁰ *Id.*

⁵¹ *Id.*

impact on where online advertising was to go in the future, but this impact appears to be negligible as the prevalence of online advertising continues to grow.⁵²

Regardless of these downsides, behavioral tracking does not appear to be disappearing. Quite the opposite—the Wall Street Journal has called behavior-tracking practices one of the largest growing internet businesses.⁵³ According to a TRUSTe report, at least 1,300 third-party firms are monitoring the top 100 visited websites to identify what websites users have visited, as well as information such as what zip code they live in and what they have shopped for.⁵⁴ Search advertising, a form of behavioral advertising, accounted for nearly half of digital ad revenues in 2008, which was 12% of the overall advertising market in the United States.⁵⁵

Unsurprisingly, behavioral tracking has raised a number of legal concerns. Primarily, many consumer privacy advocates argue that behavioral tracking is a violation of consumer's privacy rights.⁵⁶ Advocates for consumer privacy, however, also argue that behavioral tracking can be used to take advantage of vulnerable customers, unfairly discriminate, and be used “beyond commercial purposes” such as for “warrantless searches and attacks from identity thieves.”⁵⁷

There has been remarkably little regulation in this field, much to the chagrin of privacy advocates and legal scholars.⁵⁸ Regulation of online advertising will be discussed in much greater detail in Part II.

C. Digital Video

When it comes to digital video advertisements, “targeting and personalization” are the most important aspects to brands and advertisers.⁵⁹ There are two formats of digital video ads: linear and non-linear.⁶⁰ Linear, in-stream ads are video advertisements that play before, during, or after the content the user wished to view.⁶¹ In contrast, non-linear ads are images, text, interactive media, or videos that “overlay” the desired content, and are typically small enough to allow a “relatively

⁵² See INTERACTIVE ADVERT. BUREAU, *supra* note 3, at 2.

⁵³ Julia Angwin, *The Web's New Goldmine: Your Secrets*, WALL STREET J. (July 31, 2010), <https://www.wsj.com/articles/SB10001424052748703940904575395073512989404> [<https://perma.cc/B3W7-9JA8>].

⁵⁴ *Getting to Know You*, THE ECONOMIST (Sep. 11, 2014), <https://www.economist.com/special-report/2014/09/11/getting-to-know-you> [<https://perma.cc/D7B5-4LDG>].

⁵⁵ SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., ADVERTISING INDUSTRY IN THE DIGITAL AGE (2009), https://www.ipmall.info/sites/default/files/hosted_resources/crs/R40908_091109.pdf [<https://perma.cc/PDR2-6CW8>].

⁵⁶ See, e.g., CTR. FOR DIG. DEMOCRACY ET AL., *supra* note 18, at 3; *Online Tracking and Behavioral Profiling*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/privacy/consumer/online-tracking/> [<https://perma.cc/3TEA-2ENJ>].

⁵⁷ CTR. FOR DIG. DEMOCRACY ET AL., *supra* note 18, at 3–4.

⁵⁸ Bowman, *supra* note 13, at 730.

⁵⁹ See INTERACTIVE ADVERT. BUREAU, *supra* note 19, at 20. The concept of “targeting and personalization” can be simplified to “delivering fewer ads, to the right people, at the right time.” *Id.*

⁶⁰ *Id.* at 17.

⁶¹ *Id.*

unobstructed view of the content.”⁶² Both linear and non-linear ads may be complemented by a “companion ad,” which is text, video, rich media, or a “skin” that wraps around the video player.⁶³ Companion ads offer “sustained visibility” of the sponsoring brand and are always paired to a linear or non-linear ad.⁶⁴

Ad units, which are purchased by the advertisers, may be divided into two categories: in-stream and out-stream.⁶⁵ In-stream ads are videos that are played before, during, or after the content the user wanted to view.⁶⁶ Out-stream video ads are ads that appear outside of the video content and “are not the primary focus of the page.”⁶⁷

Each of these advertising methods are used on digital video across multiple platforms including Facebook and, more importantly for this Note, YouTube. By far the most controversial method of online advertising, as well as the root of YouTube’s advertising problem, is the implementation of programmatic advertising.

D. Programmatic Advertising: The Ad Auction

Programmatic advertising is “the algorithmic purchase and sale of advertising space in real time.”⁶⁸ This means instead of humans, software buys, places, and matches advertising spaces with advertisers in real time via a bidding system.⁶⁹ This process is sometimes referred to as the “Ad Auction.”⁷⁰ Programmatic advertising is based on the information gathered through behavioral targeting practices.⁷¹ Essentially, the advertiser is able to tailor a specific advertisement to a specific person at the correct time and in the right format using the information the advertiser has gathered about the individual.⁷²

Programmatic advertising works by pairing a user profile with relevant advertisement using bots.⁷³ Imagine a user goes to an advertiser’s website and leaves before they make a purchase. The advertiser’s “data management platform (DMP) collects data about [that] user . . . , then warehouses and processes it . . . to inform future . . . online advertising decisions.”⁷⁴ The advertiser’s DMP works with a

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 17–18.

⁶⁵ *Id.* at 18.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Russell O’Sullivan, *What is Programmatic Marketing, Buying, and Advertising?*, ST. DIGITAL (Oct. 26, 2015), <http://www.stateofdigital.com/what-is-programmatic-marketing-buying-and-advertising/> [<https://perma.cc/4KKC-G3UF>].

⁶⁹ *Id.*

⁷⁰ *About the Ad Auction*, ADSENSE, <https://support.google.com/adsense/answer/160525?hl=en> [<https://perma.cc/8EST-EJ75>]; see also Ashwinkumar Badanidiyuru, Kshipra Bhawalkar & Haifeng Xu, *Targeting and Signaling in Ad Auction* 1 (Nov. 1, 2017), <https://arxiv.org/pdf/1708.00611.pdf> [<https://perma.cc/UPF2-6B7D>].

⁷¹ See O’Sullivan, *supra* note 68.

⁷² *Id.*

⁷³ See *id.*

⁷⁴ Mollie Panzner, *How Programmatic Advertising Can Lead to “Inappropriate” Ad Placement: The Allstate/Breitbart Problem*, EVIDON (Mar. 29, 2017), <https://www.evidon.com/blog/digital-governance/programmatic-advertising-allstate-breitbart/> [<https://perma.cc/FT4G-WZMV>].

demand side platform (DSP) bot that bids on behalf of the advertiser for an advertising slot that may appeal to a future customer.⁷⁵ This slot may be in front of a video on a certain social media platform or on the side of a website. The buyers and sellers “‘meet’ at a real-time auction to negotiate the sale of [the advertising] slot.”⁷⁶ The DSP is typically sponsored by an advertiser, as opposed to the supply side performer (SSP), which works with the publisher service that is trying to sell advertising spaces on different types of websites.⁷⁷ The SSP will have these slots broken into categories that reflect the needs of a specific demographic the DSP will want to target.⁷⁸ The SSP that wins the ad auction later distributes the advertisements to the website that it negotiates with.⁷⁹

This entire process occurs in milliseconds. The instant a page with a space for advertising is loaded, the information is gathered about the user and the page it is to be placed on. This information is then exchanged between the platform and the ad exchange.⁸⁰ The space is “‘auctioned off to the highest bidder and the[] ad is placed in the space” by the time the webpage is fully loaded.⁸¹

Programmatic advertising is used on websites such as YouTube because there is simply too much content being uploaded to the website to have ads hand-picked for each video.⁸² It also means that humans are no longer needed to complete this essential task; it can be completed much faster and with fewer resources via automation.⁸³ Further, according to an individual working in online digital advertising, in one case programmatic advertising was five hundred eight percent more effective than traditional pay-per-click advertising.⁸⁴ Programmatic marketing, however, is not only used online; it is slowly being implemented in TV, radio, and larger marketing channels.⁸⁵

Programmatic advertising has been called the “wild west” of advertising in 2017.⁸⁶ As a result, there is no substantive regulation of programmatic advertising, despite being critiqued for consumer privacy issues, fraud, and issues surrounding brand safety.⁸⁷ The FTC has not promulgated any regulations surrounding

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *Id.*; see also CGP Grey, *This Video Made \$2,5167 at Auction. How Ads Work on YouTube. (Post-Adocalypse Updated Estimate)*, YOUTUBE (Apr. 5, 2017), <https://www.youtube.com/watch?v=KW0eUrUiyxo> [<https://perma.cc/8LCN-MLPY>]; INTERACTIVE ADVERT. BUREAU, AN EVOLVING FRAMEWORK FOR ADVERTISING AUTOMATION (2017), https://www.iab.com/wp-content/uploads/2017/05/IAB_ProgrammaticSimplified_WEB_V1-1.pdf [<https://perma.cc/SV5C-J2C3>] (discussing the implication of automation in advertising).

⁸⁰ O’Sullivan, *supra* note 68.

⁸¹ *Id.*

⁸² CGP Grey, *supra* note 79.

⁸³ O’Sullivan, *supra* note 68.

⁸⁴ Kloefkorn, *supra* note 10.

⁸⁵ O’Sullivan, *supra* note 68.

⁸⁶ 5 *Advertising Law Trends to Watch in 2018*, LAW 360 (January 12, 2018), <https://www.law360.com/articles/1000694/5-advertising-law-trends-to-watch-in-2018> [<https://perma.cc/TLJ9-ES4M>].

⁸⁷ JULIAN MILLSTEIN ET AL., *DOING BUSINESS ON THE INTERNET FORMS AND ANALYSIS* § 1.08(g) (2014) (“Some legal issues associated with programmatic advertising include data ownership and usage;

programmatic advertising or the use of consumer data; in fact, the House of Representatives rolled back consumer privacy protections enacted by the Federal Communications Commission that required transparency and user consent before taking data.⁸⁸ Programmatic advertising is the primary tool YouTube uses to pair video content with advertising.⁸⁹ At the time of this writing, there has not been any indication of regulatory action in sight. This lack of regulation of programmatic advertising has caused YouTube's "Adpocalypse," which does not appear to have any meaningful solution in sight.

II. YOUTUBE AND THE "ADPOCALYPSE"

A. Introduction

YouTube is a video sharing platform worth \$75 billion as of 2017.⁹⁰ It has over a billion users, who watch a billion hours of videos each day.⁹¹ YouTube mobile alone reaches more 18-34 and 18-49 year-olds than any cable network in the United States.⁹² Google Sites, which includes YouTube, was the top visited video property in 2017, garnering 142,607,000 unique visitors in June of that year.⁹³ In 2015, YouTube maintained the largest share of U.S. video ad revenue.⁹⁴ YouTube's business model is based on advertising, as well as their monthly subscription service 'YouTube Red,'⁹⁵ so it should come as no surprise that advertisers want to take advantage of YouTube's audience. This is exacerbated by the rapid decline of

the transparency of pricing and the number of parties that leverage fees in the programmatic 'stack'; transparency of ad placements; audit rights; online advertising fraud; viewability standards; measurements of success and credible metrics; and privacy issues and compliance with industry standards relating to online behavioral advertising.")

⁸⁸ Aaron Pressman, *Privacy Advocates Pour Hate on Vote to Repeal Internet Privacy Protections*, FORTUNE (March 29, 2017), <http://fortune.com/2017/03/29/privacy-advocates-decry-repeal-internet-privacy/> [<https://perma.cc/E4TK-DA68>].

⁸⁹ CGP Grey, *supra* note 79.

⁹⁰ Berkeley Lovelace, Jr., *If YouTube Were a Stock, it Would be Worth \$75 Billion, Says Leading Google Analyst*, CNBC (July 25, 2017, 11:31 AM), <https://www.cnbc.com/2017/07/25/top-google-analyst-says-youtube-is-worth-75-billion.html> [<https://perma.cc/AT7X-WYL2>].

⁹¹ *YouTube for Press*, YOUTUBE, <https://www.youtube.com/yt/about/press/> [<https://perma.cc/WD36-NQQA>].

⁹² *Id.*; Lorenzo Ligato, *YouTube is Crushing Cable TV, According to Google*, HUFFINGTON POST (July 21, 2015), https://www.huffingtonpost.com/entry/youtube-vs-cable_us_55acf44fe4b0d2ded39f5370 [<https://perma.cc/YQ5F-LEJP>].

⁹³ INTERACTIVE ADVERT. BUREAU, *supra* note 3, at 41.

⁹⁴ *Retail Brands Continue to Advertise Heavily on YouTube*, EMARKETER (Jan. 20, 2016), <https://www.emarketer.com/Article/Retail-Brands-Continue-Advertise-Heavily-on-YouTube/1013485> [<https://perma.cc/M556-S6QF>]; *see also What do Marketers Think of YouTube Data and Analytics?*, EMARKETER (August 25, 2015), <https://www.emarketer.com/Article/What-Do-Marketers-Think-of-YouTube-Data-Analytics/1012903?cid=MX1086> [<https://perma.cc/KZ5E-QLQW>].

⁹⁵ Hank Green, *The Adpocalypse: What it Means*, YOUTUBE (Apr. 21, 2017), [<https://perma.cc/8UG9-WXKZ>].

traditional cable television⁹⁶ and the development of YouTubeTV, which streams live TV through YouTube and bypasses traditional cable TV altogether.⁹⁷

When a video is uploaded to YouTube, it must go through two algorithms. The first determines whether or not the video meets YouTube's community standards and is allowed on the website at all, and the second determines whether or not the video is eligible for YouTube's monetization program.⁹⁸ In order to be eligible for monetization, the video must meet a certain set of qualifications. For every 10,000 views, the content creator gets about sixty percent of ad revenue generated, while YouTube gets the other forty percent.⁹⁹ It is unclear exactly how much each individual creator makes per 10,000 views; YouTube does not allow its creators to disclose this exact amount.¹⁰⁰ Regardless, popular YouTube content creators (called "YouTubers") can make millions of dollars per year making videos that appeal to a wide audience.¹⁰¹

Traditional advertising agencies have begun to realize the power behind YouTube's viewing audience. Unfortunately, these agencies are attempting to utilize old models of marketing rather than adapt to a new medium.¹⁰² In the past, through traditional advertising mediums, advertisement agencies have been able to dictate the type of content their advertisements appear on.¹⁰³ Due to YouTube's advertising model, which relies primarily on programmatic advertising by way of algorithm, this is much harder to facilitate.¹⁰⁴ As a result, ad agencies are now unable to dictate what type of content their advertisements appear on.¹⁰⁵ This concern for brand safety on YouTube came to a head in March 2017.

B. "Adpocalypse" and Fallout

In March, 2017, YouTube's use of programmatic advertising put ads for major brands, including Coca-Cola, Amazon, and Microsoft, on videos that promoted

⁹⁶ See Ligato, *supra* note 92.

⁹⁷ David Sims, *Could YouTube TV Mean the End of Cable?*, ATLANTIC (Mar. 1, 2017), <https://www.theatlantic.com/entertainment/archive/2017/03/does-youtube-tv-mean-the-end-of-cable/518346/> [<https://perma.cc/ZED7-7AL8>].

⁹⁸ Hank Green, *35 Minutes on Demonetization*, YOUTUBE (Oct. 6, 2017), <https://www.youtube.com/watch?v=ouMeAaAWUEg> [<https://perma.cc/BA3M-XWPM>].

⁹⁹ CGP Grey, *supra* note 79.

¹⁰⁰ *Id.*

¹⁰¹ See *DanTDM Named Richest YouTuber of 2017 After Making £12.3m*, BBC (Dec. 7, 2017), <http://www.bbc.co.uk/newsbeat/article/42265938/dantdm-named-richest-youtuber-of-2017-after-making-123m> [<https://perma.cc/U2MV-G2YQ>].

¹⁰² Green, *supra* note 98.

¹⁰³ *Id.*

¹⁰⁴ CGP Grey, *supra* note 79.

¹⁰⁵ *See id.*

objectionable content,¹⁰⁶ such as ISIS recruitment videos and videos containing hate and anti-Semitic speech.¹⁰⁷

As a result, major brands began pulling their advertisements from YouTube videos altogether.¹⁰⁸ Google, as YouTube's parent company, immediately began reviewing their advertising policies, but this was not enough for some brands.¹⁰⁹ Financial analysts predicted that the ad boycott of March 2017 could cost Google up to \$750 million.¹¹⁰ YouTube's most popular content creator, Felix Kjellberg, declared this phenomenon the "Adpocalypse" because content creators were losing significant amounts of money as a result of the brand boycott.¹¹¹

While many brands have still not returned to YouTube, some have: Verizon re-introduced advertisements in August of 2017 and Proctor & Gamble updated their policy in April 2018.¹¹² Despite predictions of major losses, Google's bottom line actually showed twenty one percent growth over the previous year in digital advertising.¹¹³ It is not insignificant, however, that digital video streaming increased to 31.1% in 2017 from 22.3% in 2012,¹¹⁴ and that Google owns 75.8% of the global advertising market in 2016.¹¹⁵ It may not be a question of how much their bottom line shrunk, but how much it did not grow.

The controversy did not end there. In late November 2017, brands found their advertisements on videos frequented by known pedophiles.¹¹⁶ Google once again

¹⁰⁶ Jack Nicas, *Google's YouTube Has Continued Showing Brands' Ads with Racist and Other Objectionable Videos*, WALL STREET J. (March 24, 2017), <https://www.wsj.com/articles/googles-youtube-has-continued-showing-brands-ads-with-racist-and-other-objectionable-videos-1490380551> [<https://perma.cc/RBY2-U3WA>].

¹⁰⁷ *Id.*; see also Mike Shields, *YouTube Is Jacking Up Ad Prices After a String of Brand-Safety Issues*, BUS. INSIDER (Dec. 4, 2017), <http://www.businessinsider.com/youtube-raising-ad-prices-in-2018-even-after-a-brand-safety-complaints-2017-12> [<https://perma.cc/4R56-TKML>].

¹⁰⁸ Todd Spangler, *AT&T, Verizon Suspend YouTube Ads Over Hate-Speech Videos*, VARIETY (Mar. 22, 2017, 12:02 PM), <http://variety.com/2017/digital/news/att-youtube-advertising-terrorism-hate-videos-1202014165/> [<https://perma.cc/6QKF-JMMJ>].

¹⁰⁹ *Id.*

¹¹⁰ Mathew Ingram, *Why the YouTube Ad Boycott Could Cost Google \$750 Million*, FORTUNE (Mar. 27, 2017), <http://fortune.com/2017/03/27/google-youtube-ad-boycott/> [<https://perma.cc/9YN9-GUPK>].

¹¹¹ Garrett Sloane, *New YouTube Rules Restrict Ads to Vetted Channels as PewDiePie Declares the 'Adpocalypse'*, ADAGE (Apr. 6, 2017), <http://adage.com/article/digital/pewdiepie-declares-adpocalypse-youtube-makes-rules/308591/> [<https://perma.cc/48XK-MBVL>].

¹¹² George P. Slefo, *Verizon Ends Its YouTube Boycott*, ADAGE (Aug. 15, 2017), <http://adage.com/article/digital/verizon-ends-youtube-boycott-brand-safety/310123/> [<https://perma.cc/A6UV-RPPV>]; *P&G Ends its Youtube Boycott After More Than a Year*, AD AGE (Apr. 20, 2018), <https://adage.com/article/digital/p-g-ends-youtube-boycott-a-year/313215/> [<https://perma.cc/8DWE-UY9B>].

¹¹³ George P. Slefo, *YouTube's New Ad Boycott Not Likely to Hurt Any More Than the Last*, ADAGE (Nov. 28, 2017), <http://adage.com/article/digital/year-adidas-mars-spent-a-combined-15m-youtube/311422/> [<https://perma.cc/8NJY-Q7RP>].

¹¹⁴ *U.S. Total Media Ad Spend Inches Up, Pushed by Digital*, EMARKETER (August 22, 2013), <https://www.emarketer.com/Article/US-Total-Media-Ad-Spend-Inches-Up-Pushed-by-Digital/1010154> [<https://perma.cc/4V73-Q9CB>].

¹¹⁵ Tess Townsend, *Google's Share of the Search Ad Market Is Expected to Grow*, RECODE (Mar. 14, 2017, 9:05 AM), <https://www.recode.net/2017/3/14/14890122/google-search-ad-market-share-growth> [<https://perma.cc/QE7D-6AQ5>].

¹¹⁶ Shields, *supra* note 107; see also Julia Alexander, *YouTube Kids Has Been a Problem Since 2015 – Why Did It Take So Long to Address?*, POLYGON (Dec. 8, 2017, 11:00 AM),

began to review their monetizing policy in the wake of another YouTube boycott. This boycott found Adidas, Mars, Inc., and HP pulling advertising from YouTube.¹¹⁷ In response, CEO Susan Wojcicki released a statement that to the community in which she said: “We are planning to apply stricter criteria and conduct more manual curation.”¹¹⁸ This was done by adding 10,000 jobs for ad reviewers to ensure ads are only playing where they need to and no videos were accidentally being demonetized.¹¹⁹

As of early 2018, YouTube has created a new bracket of advertising, called “reserved inventory,” that ensures brands will have their advertisement placed over specific programming.¹²⁰ “Reserved inventory” functions like the traditional ad model in that advertisers and brands are able to purchase specific space ahead of time over specific programming.¹²¹ The new bracket will likely feature content created by large, established media companies, rather than videos uploaded by users or even big-name YouTube stars.¹²² While this seems like a viable solution, “reserved inventory” costs 20% more than regular programming.¹²³ YouTube is also utilizing third-party partners to help review content that has been flagged and determine which videos are safe for advertising.¹²⁴

These changes have had, and will continue to have, a profound effect on content creators, users, advertisers, and the online advertising market as a whole. Despite promises from Google to change YouTube’s ad policies, and major brands pulling advertising funding from YouTube, Google has not created a real solution to this problem.¹²⁵ As a result of YouTube’s inaction, interested parties have begun to adapt to this problem on their own.

<https://www.polygon.com/2017/12/8/16737556/youtube-kids-video-inappropriate-superhero-disney> [<https://perma.cc/HRE7-NCF4>]. The channels were later removed after an extensive investigation by BuzzFeed News. Blake Montgomery, *YouTube Has Deleted Hundreds of Thousands of Disturbing Kids’ Videos*, BUZZFEED NEWS (Nov. 27, 2017, 10:52 PM), https://www.buzzfeed.com/blakemontgomery/youtube-has-deleted-hundreds-of-thousands-of-disturbing?utm_term=.nrDR8QWGr#.ptVn1PWKY [<https://perma.cc/6WBP-9XN8>].

¹¹⁷ Slefo, *supra* note 113.

¹¹⁸ Susan Wojcicki, *Protecting Our Community*, YOUTUBE CREATOR BLOG (Dec. 04, 2017), <https://youtube-creators.googleblog.com/2017/12/> [<https://perma.cc/CJQ4-R73B>].

¹¹⁹ Rishi Iyengar, *Google Is Hiring 10,000 People to Clean Up YouTube*, CNN (Dec. 6, 2017, 4:12 AM), <http://money.cnn.com/2017/12/05/technology/google-youtube-hiring-reviewers-offensive-videos/index.html> [<https://perma.cc/ZX6Y-6AWY>].

¹²⁰ *About Reserved Media Placements on YouTube*, GOOGLE, <https://support.google.com/partners/answer/6030919?hl=en> [<https://perma.cc/2EXN-K2L7>].

¹²¹ Shields, *supra* note 107.

¹²² Peter Kafka, *YouTube Is Telling Advertisers It Has a New Plan to Clean Up the Video Site*, RECODE (Jan. 11, 2018, 4:29 PM), <https://www.recode.net/2018/1/11/16880456/youtube-advertising-plan-safety-logan-paul> [<https://perma.cc/9NGF-H83F>].

¹²³ Shields, *supra* note 107.

¹²⁴ George P. Slefo, *Insiders Share How YouTube Will Combat Its Brand Safety Crisis*, ADAGE (Jan. 12, 2018), <http://adage.com/article/digital/youtube-explores-possibility-screening-preferred-videos/311925/> [<https://perma.cc/3Z8E-DXR5>].

¹²⁵ See Mike Shields, *Google Hardly Seems Bothered by the YouTube Advertiser Boycott*, BUS. INSIDER (July 24, 2017), <http://www.businessinsider.com/google-hardly-seems-bothered-by-the-youtube-advertiser-boycott-2017-7> [<https://perma.cc/J94C-42AC>]. As of this writing, YouTube has hired 100,000 employees to ensure its algorithms are more effective in determining whether content is allowed on YouTube and whether it is able to be monetized. As of this writing, YouTube has hired

C. Effects on Interested Parties

Programmatic advertising on YouTube affects all parties to this online transaction: creators suffer from YouTube's monetary guidelines, consumers suffer because the content is not as varied as it could be, and the online market itself may be changing as Google is the currently largest online ad provider—but may not be for long.

i. Advertisers

Advertisers are not happy with YouTube's "solution." As of 2018, most brands have not returned to YouTube, including AT&T, Priceline, and Squarespace.¹²⁶ The CEO and co-founder of MediaRadar told Business Insider that "the perception is that YouTube is struggling to solve this problem."¹²⁷ P&G's spokesman stated that "the days of giving digital a pass are over" and the company laid out its own strategy for online advertising, which includes contract transparency and a crackdown on digital ad fraud.¹²⁸ Many brands are outraged at YouTube's "solution" of a new ad tier at a higher price, calling it "absurd."¹²⁹ It is clear that advertisers are not happy with YouTube's solution, especially following the second round of brand boycotts in November.

In fact, some advertisers are developing solutions without YouTube's involvement. JP Morgan, tired of YouTube's inaction, went so far as to develop its own in-house algorithm. The algorithm contains seventeen different layers to determine "safe" channels for its advertising.¹³⁰ This response indicates how little advertisers trust YouTube's ability to solve their self-imposed problem. It also begs the question: If JP Morgan can create a solution, why can't YouTube?

ii. Content Creators

There are many content creators on YouTube whose primary job is to make YouTube videos for an audience. As of 2013, the top one thousand YouTube

100,000 employees to ensure its algorithms are more effective in determining whether content is allowed on YouTube and whether it is able to be monetized. Iyengar, *supra* note 119.

¹²⁶ Tanya Dua, 'Absurd': Angry Advertisers Are Slamming YouTube's Response to its Brand Safety Snafus, BUS. INSIDER (Dec. 11, 2017, 6:00 AM), <http://www.businessinsider.com/advertisers-slam-youtubes-response-to-brand-safety-call-its-move-to-raise-prices-absurd-2017-12> [<https://perma.cc/6P3D-UQYU>].

¹²⁷ *Id.*

¹²⁸ Jack Neff, P&G Tells Digital to Clean Up, Lays Down New Rules for Agencies and Ad Tech to Get Paid, ADAGE (Jan. 29, 2017), <http://adage.com/article/media/p-g-s-pritchard-calls-digital-grow-up-new-rules/307742/> [<https://perma.cc/2JBW-FEXW>].

¹²⁹ Dua, *supra* note 126.

¹³⁰ Tanya Dua, JPMorgan Was So Worried About Its Ads Appearing Next to Sketchy YouTube Videos It Developed Technology to Keep That from Happening, BUS. INSIDER (Jan. 2, 2018, 9:20 AM), <http://www.businessinsider.com/jpmorgan-frustrated-youtube-brand-safety-ads-2017-12> [<https://perma.cc/X9U5-WAG2>].

channels bring in around \$23,000 per month.¹³¹ YouTube creators, or “Youtubers” are incredibly influential both online and offline; seventy percent of subscribers say that YouTube creators “shape the pop culture”, and sixty percent of subscribers said Youtubers, rather than a TV or movie star, would influence their buying decisions.¹³² Content creators on YouTube are a strong part of the YouTube community, and have a lot of influence over any policy changes YouTube implements.¹³³

As a response to “Adpocalypse,” YouTube tightened their algorithm to ensure a smaller amount of videos with certain subject matter would receive monetization status.¹³⁴ This resulted in thousands of creators’ videos being unnecessarily demonetized because their older content was deemed “not advertiser friendly” or “NAF.”¹³⁵ Creators were only receiving fifteen to thirty percent of their original revenue pre-demonetization, and many creators were not notified that their video had been demonetized.¹³⁶ Further, in April of 2017, YouTube implemented a new policy: in order to be monetized, a creator must have 10,000 lifetime views.¹³⁷

The tightened algorithm also disproportionately demonetized videos that focused on LGBTQ issues, which sparked a controversy about YouTube not even-handedly applying their algorithm.¹³⁸ Some creators called this demonetization a form of censorship.¹³⁹ Certain videos about social issues on both sides of the political fence were demonetized.¹⁴⁰ Creator Phillip DeFranco argued that the new community

¹³¹ Carla Marshall, *How-To Make a Living from YouTube’s Partner Earnings*, TUBULAR INSIGHTS (Oct. 23, 2013), <http://tubularinsights.com/youtube-partner-earnings/> [https://perma.cc/F68M-YWF7].

¹³² Andrew Arnold, *Why YouTube Stars Influence Millennials More Than Traditional Celebrities*, FORBES (June 20, 2017, 3:16 PM), <https://www.forbes.com/sites/under30network/2017/06/20/why-youtube-stars-influence-millennials-more-than-traditional-celebrities/#1bf31f8148c6> [https://perma.cc/67RD-RXRD].

¹³³ *Creator Influence on YouTube*, YOUTUBE, <https://support.google.com/youtube/answer/7650329?hl=en> [https://perma.cc/8U7V-3KD8].

¹³⁴ Hannah Kuchler, *YouTube Tightens Rules for Video Creators to Make Money from Advertising*, FIN. TIMES (Jan. 16, 2018), <https://www.ft.com/content/49304588-fb24-11e7-a492-2c9be7f3120a> [https://perma.cc/PE7E-9T9P].

¹³⁵ What’s Trending, *YouTube SUEd By Creators in Class-Action Lawsuit | What’s Trending Now!*, YOUTUBE (July 18, 2017), <https://www.youtube.com/watch?v=35M710b89gw&t=3s> [https://perma.cc/UPE8-YUM5].

¹³⁶ *Id.*; see also Rachel Dunphy, *Can YouTube Survive the Adpocalypse?*, N.Y. MAG.: INTELLIGENCER (Dec. 28, 2017), <http://nymag.com/selectall/2017/12/can-youtube-survive-the-adpocalypse.html> [https://perma.cc/BD9B-4NQC].

¹³⁷ Neal Mohan & Robert Kyncl, *Additional Changes to the YouTube Partner Program (YPP) to Better Protect Creators*, YOUTUBE: CREATOR BLOG (Jan. 16, 2018), <https://youtube-creators.googleblog.com/2018/01/additional-changes-to-youtube-partner.html> [https://perma.cc/V2DG-3CR3].

¹³⁸ Ian Birnbaum, *YouTube Is Leaving Its Creators in the Dark*, OUTLINE (Sept. 18, 2017, 9:23 AM), <https://theoutline.com/post/2258/youtube-is-leaving-its-creators-in-the-dark?zd=1> [https://perma.cc/3PAH-AJWX].

¹³⁹ See, e.g., Phillip DeFranco, *YouTube Is Shutting Down My Channel and I’m Not Sure What to Do*, YOUTUBE (Aug. 31, 2016), <https://www.youtube.com/watch?v=Gbph5or0NuM> [https://perma.cc/2BP6-FKST].

¹⁴⁰ Birnbaum, *supra* note 138; Nate Church, *YouTube’s ‘Diamond and Silk’ Believe They Were Demonetized for Trump Support*, BREITBART (Aug. 11, 2017), <http://www.breitbart.com/tech/2017/08/11/youtubes-diamond-and-silk-believe-they-were-demonetized-for-trump-support/> [https://perma.cc/36TR-DGJA].

guidelines should be considered censorship because YouTube took away money because creators said things that YouTube did not deem “okay.”¹⁴¹ While he argued that this was within YouTube’s rights as a private entity, he did deem the censorship ‘concerning’ because either YouTube intentionally discriminated between videos or was “asleep at the wheel.”¹⁴²

This new algorithm caused outrage in the creator community and even spawned a class-action lawsuit, filed on behalf of one of YouTube’s most popular channels, against YouTube.¹⁴³ The complaint alleges that YouTube has “economically stifled the pursuits of enterprising and creative content providers, causing significant loss of revenue and profit” through the use of its algorithms, which “under-inclusively failed to capture and demonetize content that was sexually explicit, racist or otherwise not in compliance with the spirit of the guidelines, while over-inclusively demonetizing content that did not violate the spirit of the guidelines and was not objectionable to advertisers (such as Plaintiffs’ videos).”¹⁴⁴ Subsequently, YouTube filed a motion to dismiss, which was granted on March 7, 2018.¹⁴⁵

Despite the lawsuit, many content creators have expressed concern over YouTube’s response to this problem.¹⁴⁶ YouTube has implemented an appeals process to any video that has been demonetized.¹⁴⁷ An appeal ensures that instead of an algorithm, a human will review the video to see if it qualifies for monetization status.¹⁴⁸ However, it is unclear how long the appeal process takes.¹⁴⁹ Creators are now calling for more transparency and oversight in how YouTube functions in relation to its advertising partnerships in the wake of the Logan Paul scandal.¹⁵⁰

As of January 16, 2018, YouTube implemented a new monetization policy that has caused distress among smaller creators. In order to be monetized, a creator must fulfill two requirements: “4,000 hours of watchtime within the past 12 months and 1,000 subscribers.”¹⁵¹ This means that any channel under 1,000 is ineligible for monetization. Many smaller creators found the prioritization of bigger channels to

¹⁴¹ DeFranco, *supra* note 139.

¹⁴² *Id.*

¹⁴³ What’s Trending, *supra* note 135.

¹⁴⁴ Class Action Complaint at 1, 3, Sweet v. Google, Inc., No. 3:17-cv-03953-MEJ (N.D. Cal. July 13, 2017).

¹⁴⁵ Order Granting Defendants’ Motion to Dismiss at 1, Sweet v. Google, Inc., No. 3:17-cv-03953 EMC (N.D. Cal. Mar. 7, 2018).

¹⁴⁶ See Erik Kain, *YouTube Wants Content Creators to Appeal Demonetization, But It’s Not Always That Easy*, FORBES (Sept. 18, 2017, 8:00 AM), <https://www.forbes.com/sites/erikkain/2017/09/18/adpocalypse-2017-heres-what-you-need-to-know-about-youtubes-demonetization-troubles/> [<https://perma.cc/B6ZW-LU2P>].

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Dunphy, *supra* note 136.

¹⁵⁰ Julia Alexander, *YouTube Creators Demand Transparency After Re-Uploads of Logan Paul’s Video Appear*, POLYGON (Jan. 4, 2018, 1:50 PM), <https://www.polygon.com/2018/1/4/16849046/youtube-trending-logan-paul-phili-defranco-keemstar-pyrocyical> [<https://perma.cc/Q6FW-MN6X>]. Logan Paul is one of YouTube’s biggest names. *Id.* He uploaded a video of a recent suicide victim and was promoted to the ‘trending’ list, despite many people flagging the video as inappropriate. *Id.* Many creators are calling for transparency and criticizing YouTube for lack of oversight. *Id.*

¹⁵¹ Mohan & Kyncl, *supra* note 137.

be discouraging, especially as a large part of the YouTube community is made up of smaller creators.¹⁵² Some creators even questioned what problem YouTube had attempted to solve with the new policy.¹⁵³ This policy was safer for YouTube because it can guarantee the production quality and large viewership from larger channels. Additionally, any misbehavior from a creator would result in greater public accountability.¹⁵⁴

Content creators are not satisfied with the way YouTube has addressed the “Adpocalypse” issue.¹⁵⁵ This is not YouTube’s first spat with its creators; many are unsatisfied with the way YouTube handles its Copyright disputes, false flagging, and oversight over its personalities.¹⁵⁶

iii. The Online Video Streaming Market

Due to YouTube’s domination of the user-uploaded, video-streaming market, it is improbable that content creators will leave the platform to create their own websites. This may be a bold tactic, but it is not out of the realm of possibilities. Phillip DeFranco, one of YouTube’s biggest personalities, has started using Patreon, where his fans can directly fund his videos as an alternative to YouTube for monetization.¹⁵⁷

Many creators who engage in “Let’s Play” videos, which are videos of personalities playing video games in real time, have utilized Twitch to supplement

¹⁵² Julia Alexander, *YouTube’s Lesser-Known Creators Worry for the Future After Major Monetization Change (Update)*, POLYGON (Jan. 17, 2018, 9:27 AM), <https://www.polygon.com/2018/1/17/16900474/youtube-monetization-small-creators-adsense> [<https://perma.cc/4J4B-9L8M>].

¹⁵³ See, e.g., Hank Green (@hankgreen), TWITTER (Jan. 16, 2018, 8:16 PM), <https://twitter.com/hankgreen/status/953435952730464256> [<https://perma.cc/8VX2-M46Q>].

¹⁵⁴ Larger creators, such as Felix Kjellberg and Logan Paul, have had to deal with the public as a result of their questionable actions. Kjellberg held up a sign on video that said, “Death to All Jews,” and has been criticized for racist language, and Paul made a video that displayed a recent suicide victim. Each personality faced significant media pushback, as well as a reaction on YouTube. See Aja Romano, *YouTube Star PewDiePie Used the N-Word in a Live Stream, After Months of Denying He’s Racist*, VOX (Sept. 11, 2017, 5:30 PM), <https://www.vox.com/culture/2017/9/11/16288826/pewdiepie-n-word-playerunknown-battlegrounds> [<https://perma.cc/RQQ4-KWF3>]; Aja Romano, *The Controversy Over YouTube Star PewDiePie and His Anti-Semitic “Jokes,” Explained*, VOX (Feb. 17, 2017, 12:20 PM), <https://www.vox.com/culture/2017/2/17/14613234/pewdiepie-nazi-satire-alt-right> [<https://perma.cc/B77R-Y2RW>]; Jackie Wattles & Brian Stelter, *YouTube Punishes Logan Paul for ‘Suicide Forest’ Video*, CNN (Jan. 10, 2018, 9:15 PM), <http://money.cnn.com/2018/01/10/media/youtube-logan-paul/index.html> [<https://perma.cc/S2UF-U88D>].

¹⁵⁵ Dunphy, *supra* note 136.

¹⁵⁶ See Alexander, *supra* note 152; Russell Brandom, *YouTube’s Complaint System Is Pissing Off Its Biggest Users*, VERGE (Feb. 1, 2016, 1:11 PM), <https://www.theverge.com/2016/2/1/10887120/youtube-complaint-takedown-copyright-community> [<https://perma.cc/HN6L-EDMW>].

¹⁵⁷ What’s Trending, *PHILLIP DEFranco Launches Independent Network and Is YouTube Over?!*, YOUTUBE (May 3, 2017), <https://www.youtube.com/watch?v=IBGfDQCV44> [<https://perma.cc/Y28J-W4FZ>].

their YouTube channel.¹⁵⁸ This includes Felix Kjellberg, previously YouTube's biggest personality, who has started his own channel on the video game streaming website.¹⁵⁹

While leaving YouTube may be a viable solution for the biggest names on the platform, it is certainly not a solution for the smaller names. It is unclear, however, what the impact will be on Google and its shareholders, and whether Kjellberg's use of Twitch will have any effect on YouTube's advertising strategy and the market of online video streaming. This problem is nearly a year old, yet YouTube has been unable to come up with a solution that meets all parties' needs.

This problem is not exclusive to YouTube. Advertising on social media has many similar consequences because online advertising is still considered "The Wild West."¹⁶⁰ Many problems on other social media platforms, however, concern brand advertising, which the FTC has recently regulated to some extent.¹⁶¹ The next section will review the current solution to online and programmatic advertising, discuss proposed solutions, and lay out this Note's ideal solution.

III. SOLUTIONS

Technology is rapidly evolving, and in order to protect consumers, regulation of online advertising must balance consumer privacy while "still allowing flexibility for ongoing technological advancements."¹⁶² This notion that any direct regulation of online activity would inhibit technology is the most common argument against regulation and is a major culprit for why there has not been any legislation regarding online data privacy.¹⁶³ Completely forgoing consumer privacy in the name of technological advancements, however, is not acceptable.

YouTube's advertising problem is a direct result of its algorithm and use of programmatic advertising. YouTube is the biggest online video streaming platform, and an inability to properly respond may hurt its ad revenue and bottom line as more advertisers boycott YouTube. Google recognizes that there is a brand-safety problem

¹⁵⁸ See Paul Tamburro, *PewDiePie Deals Major Blow to YouTube After Moving to Twitch*, MANDATORY (Apr. 10, 2017), <http://www.craveonline.com/design/1245979-pewdiepie-deals-major-blow-youtube-moving-twitch> [<https://perma.cc/WT47-2CP6>]. Twitch is an online video streaming platform that specializes in "Let's Play" streaming. Matthew Gardner, *Everything You Wanted to Know About Twitch but Were Too Afraid to Ask Your 13-Year-Old*, ADAGE (Oct. 24, 2018), <https://adage.com/article/opinion/wanted-twitch/315344/> [<https://perma.cc/3WCP-L7YU>].

¹⁵⁹ Tamburro, *supra* note 158.

¹⁶⁰ See Remy Smidt, *This Mom's Full-Time Job Is Posting to Instagram and This Is What It's Like*, BUZZFEED NEWS (Jan. 25, 2018, 8:45 AM), https://www.buzzfeed.com/remysmidt/mila-emma-katie-stauffer?utm_term=.tcgv3R89y#.cyALaexYo [<https://perma.cc/PPF8-6P65>].

¹⁶¹ See FED. TRADE COMM'N, GUIDES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING (2009), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf> [<https://perma.cc/3SR6-GBEV>].

¹⁶² Bowman, *supra* note 13, at 723.

¹⁶³ See *id.* at 750–51.

here, and that it has not done enough to address it.¹⁶⁴ But this problem extends beyond YouTube: there is a brand safety issue when advertisers rely on automation and computers to perform a task that was previously accomplished by humans.¹⁶⁵ Programmatic advertising, and the algorithms that drive it, is the means by which videos are able to be monetized.

The inability to control programmatic advertising, and consequently monetization of video, has staggering consequences. Many digital news companies are being forced to scale back their digital video production, which has resulted in significant layoffs. Vox Media is laying off about five percent of its total workforce, CNN just went through restructuring of its digital news operation, and Vice and BuzzFeed went through similar cutbacks in 2017.¹⁶⁶ These types of cutbacks are a result of pressure from companies such as Google and Facebook, which dominate the digital advertising field.¹⁶⁷ The CEO of one such company, Medium, explained a 50-person layoff from his own company by stating: “The current system causes increasing . . . pressure to put out more content more cheaply—depth, originality, or quality be damned. It’s unsustainable and unsatisfying for producers and consumers alike.”¹⁶⁸

YouTube’s inability to provide its advertisers an efficient monetization method is directly affecting the structure of the digital advertising market. If YouTube is unable to provide a stable solution to its problem, it is entirely possible that the digital advertising market will evolve without it. Ultimately, the lack of regulation regarding programmatic advertising has resulted in a multi-billion-dollar brand safety problem that could shape the way the digital advertising market functions.

Failure to regulate user data collection allowed for the development of online behavioral tracking.¹⁶⁹ From online behavioral tracking came programmatic advertising, which evolved into the monetization of digital video.¹⁷⁰ Now, an entire industry is being forced to re-structure as a result of this failure to address online data privacy. YouTube must address online data privacy to find a solution to its monetization problem.

There are four solutions to this problem, each of which will be described below: self-regulation, regulation by agency, regulation through legislation, and intervention by courts. Finally, this Note will propose a fifth solution: promulgation of FTC regulations that are legally enforceable and binding.

¹⁶⁴ Emma Hall, *Google Admits Brand Safety Is a Global Problem*, ADAGE (Mar. 20, 2017), <http://adage.com/article/special-report-advertising-week/google-admits-brand-safety-problem/308344/> [<https://perma.cc/XE47-XRJX>].

¹⁶⁵ See *id.*

¹⁶⁶ Julia Horowitz, *Vox Media to Lay Off Around 50 Staffers in Latest Round of Industry Cuts*, CNN (Feb. 21, 2018, 1:12 PM), <http://money.cnn.com/2018/02/21/media/vox-layoffs/index.html> [<https://perma.cc/BMM8-ZXC8>].

¹⁶⁷ *Id.*

¹⁶⁸ Ev Williams, *Renewing Medium’s Focus*, MEDIUM (Jan. 4, 2017), <https://blog.medium.com/renewing-mediums-focus-98f374a960be> [<https://perma.cc/Z25B-BHY2>].

¹⁶⁹ See Section I.B.

¹⁷⁰ See Section I.B.

A. Self-Regulation

Currently, online advertising is governed by self-regulation within the industry.¹⁷¹ Despite nearly thirty years of self-regulation, scholars argue that self-regulation is no longer adequate based on the mounting concerns regarding privacy.¹⁷² John Villafranco and Katherine Riley explained that “[i]n the 1990s, the Online Privacy Alliance (OPA) issued Guidelines for online privacy as a response to an FTC demand for industry self-regulation.”¹⁷³ There was very little participation in the industry—only 100 companies subscribed to the Guidelines, and “big players” in the industry, such as Amazon, were “notably absent.”¹⁷⁴ Further, the Guidelines did not have any framework “for monitoring and disciplining non-compliant members.”¹⁷⁵

In July of 2009, a variety of trade associations developed a set of online advertising self-regulatory guidelines.¹⁷⁶ These Industry Guidelines were released in conjunction with the FTC’s guidelines.¹⁷⁷ The Industry Guidelines set forth seven core principles: (1) transparency; (2) consumer control; (3) data security; (4) notification of material changes in privacy practices; (5) enhanced protection of sensitive data; (6) consumer education; and (7) accountability.¹⁷⁸ Five of these Guidelines correspond to the FTC Guidelines: Transparency and Consumer Control Principles, the Data Security Principle, the Material Changes Principle, and the Sensitive Data Principle.¹⁷⁹

In 2010, after the introduction of the Boucher-Stearns Privacy Discussion Draft and the BEST PRACTICES Act,¹⁸⁰ several advertising industry trade associations announced the creation of the Digital Advertising Alliance (DAA).¹⁸¹ The DAA was formed to oversee self-regulation in the industry.¹⁸² This was done by displaying the

¹⁷¹ See *supra* notes 13–16 and accompanying text.

¹⁷² See Ira S. Rubinstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 J I/S: J. L. & POL’Y FOR INFO. SOC’Y 355, 363–64 (2011).

¹⁷³ John E. Villafranco & Katherine E. Riley, *So You Want to Self-Regulate? The National Advertising Division as Standard Bearer*, 27 ANTITRUST ABA 79, 82–83 (2013).

¹⁷⁴ *Id.* at 83.

¹⁷⁵ *Id.*

¹⁷⁶ The trade associations were the American Association of Advertising Agencies, Association of National Advertisers, the Council of Better Business Bureaus, the Direct Marketing Association, and the Interactive Advertising Bureau. See INTERACTIVE ADVERT. BUREAU ET AL., SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING (2009), https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/seven-principles-07-01-09.pdf [<https://perma.cc/4D8S-AEZV>].

¹⁷⁷ *Id.* at 1.

¹⁷⁸ *Id.* at 2–4.

¹⁷⁹ *Id.*

¹⁸⁰ See *infra* Part II.C.

¹⁸¹ Wendy Davis, *Industry Coalition Bows Self-Regulation Info Web Site, Readies New Trade Organization*, ONLINE MEDIA DAILY (Sept. 30, 2010), <https://www.mediapost.com/publications/article/136831/industry-coalition-bows-self-regulation-info-web-s.html?edition=6253> [<https://perma.cc/Q6BK-3TVE>].

¹⁸² *Id.* The “Digital Advertising Alliance” is currently comprised of seven trade associations, including the Interactive Advertising Bureau, American Association of Advertising Agencies, American Advertising Federation, Association of National Advertisers, Better Business Bureau, Direct Marketing Association, and the Network Advertising Initiative. *Id.*

Industry Guidelines, offering information to companies, and educating consumers about what online behavioral advertising is and how to control the use of their data.¹⁸³ The DAA is only one of several groups that attempts to ensure industry compliance with the FTC and Industry Guidelines.¹⁸⁴

In 2000, the Network Advertising Initiative (“NAI”) introduced a Code of Conduct, which is another set of self-regulatory principles that require NAI member companies to provide notice and choice regarding Interest-Based Advertising and Ad Delivery and Reporting activities.¹⁸⁵ Opt-in consent is required to collect sensitive data, such as names, addresses, telephone numbers, email addresses, financial account numbers, government-issued identifiers, and any other data used or intended to be used to identify, contact or precisely locate a person.¹⁸⁶

The online behavioral advertising segments may only be used for marketing purposes, but there is no limitation on the creation or use of other sensitive marketing segments and no limit on assigning consumers to certain advertising segments based on their profile.¹⁸⁷ Further, the Code of Conduct does nothing to restrict members from engaging in unfair and discriminatory profiling.¹⁸⁸

B. Agency Regulation

Rather than promulgate regulations, the Federal Trade Commission (FTC) has relied on the industry to police itself. Since the mid-1990s, the FTC has had a part in overseeing online advertising practices.¹⁸⁹ Between 1995 and 1997, the FTC held public workshops that explored consumer data privacy issues.¹⁹⁰ Unsurprisingly, those in the online advertising industry advocated for self-regulation, while those in favor of privacy pressed for prior affirmative consent and emphasized that self-regulation is only possible with the foundation of “legally enforceable rights to

¹⁸³ *Digital Advertising Alliance (DAA) Self-Regulatory Program*, DIGITAL ADVERT. ALLIANCE, <http://www.aboutads.info/> [https://perma.cc/M44B-S8YY].

¹⁸⁴ See Tom Foremski, *TRUSTe Tries to Manage the Massive Problem of Internet User Privacy*, ZDNET (Oct. 7, 2010, 5:05 AM), <http://www.zdnet.com/blog/foremski/truste-tries-to-manage-the-massive-problem-of-internet-user-privacy/1523> [https://perma.cc/8WMW-3PGG].

¹⁸⁵ NETWORK ADVERT. INITIATIVE, 2018 NAI CODE OF CONDUCT (2018), http://www.networkadvertising.org/sites/default/files/nai_code2018.pdf [https://perma.cc/W36A-KCH9].

¹⁸⁶ *Id.* at 10, 16–17.

¹⁸⁷ *See id.* at 11, 22.

¹⁸⁸ *See id.*; see also Nancy J. King & Pernille Wegner Jessen, *Profiling the Mobile Customer—Is Industry Self-Regulation Adequate to Protect Consumer Privacy When Behavioral Advertisers Target Mobile Phones?—Part II*, 26 COMPUT. L. & SEC. REV. 1, 10–11 (2010), <https://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/19453/KingJessenProfiling.PartII.PosPrint2010.pdf?sequence=5/> [https://perma.cc/S75A-5XLL].

¹⁸⁹ See Bennett, *supra* note 38 at 904–07.

¹⁹⁰ *FTC Announces Two Significant Efforts in Its Comprehensive Examination of Consumer Privacy*, FED. TRADE COMM’N. (Mar. 4, 1997), <https://www.ftc.gov/news-events/press-releases/1997/03/ftc-announces-two-significant-efforts-its-comprehensive> [https://perma.cc/JPT9-HZP7]; *Staff Report: Public Workshop on Consumer Privacy on the Global Information Infrastructure*, FED. TRADE COMM’N. (Dec. 1996), <https://www.ftc.gov/reports/staff-report-public-workshop-consumer-privacy-global-information-infrastructure> [https://perma.cc/5X37-VW86].

information privacy.”¹⁹¹

In 1998, the FTC undertook a comprehensive review of commercial website disclosure, and laid out the “Fair Information Practice Principles.”¹⁹² These principles, which have since been updated, focus on “notice/awareness,” “choice/consent,” “access/participation,” “integrity/security,” and “enforcement/redress.”¹⁹³ The FTC relied on a “notice and choice” model of regulation, where online companies are required to post privacy policies that describe their information collection and use practices.¹⁹⁴ In rare cases, failure to post privacy policies constituted a deceptive act or practice, which then became actionable by the FTC.¹⁹⁵

In 2000, the FTC recommended Congress pass online privacy legislation to create a basic level of data privacy protection for consumer-oriented commercial websites.¹⁹⁶ A few months later, the FTC further recommended including online profiling in any online privacy legislation.¹⁹⁷ Under the FTC’s 2000 recommendation, all online advertising networks and websites that collected information from or about consumers would be required to implement and comply with the Fair Information Practice Principles.¹⁹⁸

Between the years 2000 and 2007, the FTC turned away from further attempts to regulate online privacy and online behavioral advertising, instead relying on existing legislation.¹⁹⁹ FTC Commissioner Timothy Muris justified this change stating: “[T]he slowing of the growth of the Internet emphasizes the need to understand the cost of online privacy legislation. . . . At this time, we need more law enforcement, not more laws.”²⁰⁰ Contrary to Muris’ belief, the Internet only grew larger and more prevalent in everyday life.

¹⁹¹ See, FED. TRADE COMM’N, CHAPTER 2. ONLINE PRIVACY: GENERAL PRACTICES AND CONCERNS 2 (1996), https://www.ftc.gov/sites/default/files/documents/reports/staff-report-public-workshop-consumer-privacy-global-information-infrastructure/ftc_staff_report_public_workshop_on_consumer_privacy_on_the_global_informati_on_infrastructure_-_0.pdf [<https://perma.cc/NZM8-VMTY>].

¹⁹² FED. TRADE COMM’N, PRIVACY ONLINE: A REPORT TO CONGRESS 7 (1998), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf> [<https://perma.cc/Q7R7-VNY2>].

¹⁹³ *Id.* at 7-10.

¹⁹⁴ FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESS AND POLICYMAKERS 2-3 (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> [<https://perma.cc/9GPG-AG7W>].

¹⁹⁵ See *id.* at 14.

¹⁹⁶ FED. TRADE COMM’N, ONLINE PROFILING: A REPORT TO CONGRESS 21 (2000), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf> [<https://perma.cc/L7G7-VWVN>].

¹⁹⁷ *Id.* at 22.

¹⁹⁸ See *id.* at 19-21.

¹⁹⁹ See *Privacy, Information Security Continue as Top FTC Priorities*, FED. TRADE COMMISSION (Oct. 28, 2004), <https://www.ftc.gov/news-events/press-releases/2004/10/privacy-information-security-continue-top-ftc-priorities> [<https://perma.cc/WSB6-ADPX>].

²⁰⁰ Timothy J. Muris, Former Chairman, Fed. Trade Comm’n, Remarks at The Privacy 2001 Conference, Protecting Consumers’ Privacy: 2002 and Beyond, Remarks delivered at the Privacy

In 2007, the FTC became concerned with the growth of behavioral advertising technologies.²⁰¹ As a result, the FTC hosted a town hall meeting that resulted in a set of proposed guidelines that intended to bring together “consumer advocates, industry representatives, technology experts, and academics to address consumer protection issues raised by the practice of tracking consumers’ activities online to target advertising,” a practice also known as “behavioral advertising.”²⁰²

The town hall meeting ultimately resulted in guidelines regarding Online Behavioral Advertising.²⁰³ They were, however, voluntary regulations that the FTC hoped would “address practices that raise genuine privacy concerns without interfering with practices—or stifling innovation—where privacy concerns are minimal.”²⁰⁴ The Guidelines focused on four main principles: (1) control and transparency; (2) security and limited data retention; (3) affirmative express consent for material changes to existing privacy promises; and (4) affirmative express consent to (or prohibition against) use of sensitive data for behavioral advertising.²⁰⁵ Ultimately, the Guidelines were a “call for companies to obtain affirmative express consent from consumers before they use data in a manner that is materially different than promised at the time of collection and before they collect and use ‘sensitive’ consumer data for behavioral advertising.”²⁰⁶

In 2010, the FTC again recommended legislation related to online behavioral advertising.²⁰⁷ The FTC’s report acknowledged the shortcomings of its current notice and choice system.²⁰⁸ In order to solve the shortcomings of the notice and choice system, the FTC’s proposed framework called for companies to provide consumers with a “meaningful choice” regarding tracking.²⁰⁹ The FTC set forth “commonly accepted practices” which are described as “a limited set of data practices for which choice is not necessary.”²¹⁰ These practices include: “internal operations,” “fraud

2001 Conference (Oct. 4, 2001), <https://www.ftc.gov/public-statements/2001/10/protecting-consumers-privacy-2002-and-beyond> [<https://perma.cc/KC4F-2XSM>].

²⁰¹ See *FTC Staff Proposes Online Behavioral Advertising Privacy Principles*, FED. TRADE COMMISSION (Dec. 20, 2007), <https://www.ftc.gov/news-events/press-releases/2007/12/ftc-staff-proposes-online-behavioral-advertising-privacy> [<https://perma.cc/73FM-8YCL>].

²⁰² *Behavioral Advertising: Tracking, Targeting, and Technology*, FED. TRADE COMMISSION, <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml> [<https://perma.cc/P37R-ZVXR>]; see also FED. TRADE COMM’N, *ONLINE BEHAVIORAL ADVERTISING MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF-REGULATORY PRINCIPLES* 1–2 (2007), https://www.ftc.gov/sites/default/files/documents/public_statements/online-behavioral-advertising-moving-discussion-forward-possible-self-regulatory-principles/p859900stnmt.pdf [<https://perma.cc/D8KP-J35N>].

²⁰³ FED. TRADE COMM’N, *STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING* i–iv (2009), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf> [<https://perma.cc/5ADZ-UGZL>].

²⁰⁴ *Id.* at 1.

²⁰⁵ *Id.* at 11–12.

²⁰⁶ *Id.* at ii.

²⁰⁷ FED. TRADE COMM’N, *supra* note 194, at iv–viii.

²⁰⁸ The FTC report noted that “the notice-and-choice model, as implemented, has led to long, incomprehensible privacy policies that consumers typically do not read, let alone understand.” *Id.* at iii.

²⁰⁹ *Id.* at 52–53.

²¹⁰ *Id.* at 53.

prevention,” “legal compliance,” “first-party marketing,” and “contextual marketing.”²¹¹

As a part of the 2010 report, the FTC proposed “Do Not Track,” which was to serve as a “uniform and comprehensive consumer choice mechanism.”²¹² The Do Not Track feature would allow consumers to easily indicate they are not willing to be tracked or receive targeted advertisements.²¹³

In 2011, representatives of the FTC appeared before the United States Senate Commerce Committee to recommend imposing more stringent measures to protect Internet users against unauthorized tracking, including the Do Not Track feature.²¹⁴ The same Senate hearing also saw the Obama administration call for a new “Internet user’s bill of rights” that would ultimately grant the FTC authority to regulate online behavioral advertising.²¹⁵

In late 2017, the FTC ran an Informational Injury Workshop to learn more about how consumers suffer if their information is misused.²¹⁶ This indicates that the FTC may be considering extending the current legal framework that only allows for standing in court for informational injuries if the injuries are concrete.²¹⁷ The Interactive Advertising Bureau (IAB) published a memo including comments from advertising trade associations, vehemently discouraging the FTC from changing the current legal framework because it would cause “uncertainty in the market” and may inhibit economic growth.²¹⁸ Ultimately, it is unclear whether the FTC will attempt to address behavioral advertising in the context of consumer privacy in the future. The FTC has a Division of Privacy and Identify Protection, which aims to protect online consumer privacy, ensure information is secure, and combat identity theft.²¹⁹ This makes the FTC an ideal candidate for the promulgation of rules regarding online behavioral tracking and user data.

The FTC is not the only agency concerned with the collection of consumer data. In 2010, the Department of Commerce released a green paper on commercial data

²¹¹ *Id.* at 53–55; *see also id.* at 55 n.134.

²¹² *Id.* at 66–69.

²¹³ *Id.*

²¹⁴ Dominique R. Shelton & Clinton J. McCord, *How to Respond to Recent Developments in Consumer Information Regulation*, LEXOLOGY (Mar. 23, 2011), <https://www.lexology.com/library/detail.aspx?g=e5edf68d-04e1-4764-abdb-82292fc4bc4e> [<https://perma.cc/CUP9-WXSF>].

²¹⁵ *Id.*

²¹⁶ *Informational Injury Workshop: Event Description*, FED. TRADE COMMISSION (Dec. 12, 2017 9:15 AM), <https://www.ftc.gov/news-events/events-calendar/2017/12/informational-injury-workshop> [<https://perma.cc/Y2F7-4TCT>].

²¹⁷ *See* Michael C. Dorf, *Supreme Court Requires “Concrete” Injury for Standing*, VERDICT (May 18, 2016), <https://verdict.justia.com/2016/05/18/supreme-court-requires-concrete-injury-standing> [<https://perma.cc/3DYA-J8YH>].

²¹⁸ Letter from American Advertising Federation et al., to Donald S. Clark, Federal Trade Commission 3–4 (Oct. 27, 2017), https://www.iab.com/wp-content/uploads/2017/10/Multi-Trades-Comments-Regarding-the-FTC-Informational-Injury-Workshop_10-27-2017.pdf [<https://perma.cc/65A3-Y4XB>].

²¹⁹ *Division of Privacy and Identity Protection*, FED. TRADE COMMISSION, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-privacy-and-identity> [<https://perma.cc/2BWL-PAGF>].

privacy.²²⁰ It stated: “From the consumer perspective, the current system of notice-and-choice does not appear to provide adequately transparent descriptions of personal data use, which may leave consumers with doubts (or even misunderstandings) about how companies handle personal data and inhibit their exercise of informed choices.”²²¹ The Department’s green paper provides suggestions for the establishment of a new framework for Internet policy, including a guide of possible legislative schemes.²²²

There have been many attempts at legislation in online advertising in the last decade, but none of them have come to fruition.²²³ Extensive scholarship on the subject contains many proposals for regulation, varying from very broad guidelines to specific regulations.²²⁴ At least one writer has argued that “[t]he unregulated collection and use of consumer information may result in discriminatory practices, security breaches, and damage to the concept of liberty at the very core of American society.”²²⁵ While this may seem dramatic, it is not untrue. The right to exclude is fundamental to property’s common law “bundle of rights.”²²⁶

C. Congress

Congress has failed to enact any substantive legislation concerning consumer privacy, despite ample opportunity to do so. In May of 2010, the Boucher-Stearns Privacy Discussion Draft was released to the public.²²⁷ The Draft expands responsibilities regarding online advertising and additional privacy rights for individuals.²²⁸ The Draft requires companies that collect information about consumers to display a “clear and conspicuous” and easily understandable privacy policy.²²⁹ Although the Draft expands the FTC’s enforcement authority, it explicitly precludes a private right of action.²³⁰ Unfortunately, the sponsoring Congressman lost his seat in 2010, and the Draft did not become law.²³¹

²²⁰ DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, COMMERCIAL DATA PRIVACY AND INNOVATION IN THE INTERNET ECONOMY: A DYNAMIC POLICY FRAMEWORK (2010), https://www.ntia.doc.gov/files/ntia/publications/iptf_privacy_greenpaper_12162010.pdf [<https://perma.cc/8CPN-2Q7L>].

²²¹ *Id.* at 22.

²²² *Id.* at 20–66.

²²³ See *supra* notes 196–198, 207 and accompanying text.

²²⁴ See Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?*, 34 SEATTLE U. L. REV. 439, 440–43 (2011).

²²⁵ Bowman, *supra* note 13, at 722.

²²⁶ See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. (1998) (discussing the right to exclude and how it should be used to define property).

²²⁷ Hirsch, *supra* note 224, at 452; *Reps. Boucher, Stearns Release Draft Privacy Bill*, ASS’N NAT’L ADVERTISERS, <https://www.ana.net/content/show/id/1872> [<https://perma.cc/QR9K-N632>].

²²⁸ See *id.* at 452–53.

²²⁹ *Id.* at 453.

²³⁰ DANIEL CASTRO, INFO. TECH. & INNOVATION FOUND., ONE STEP FORWARD, FIVE STEPS BACK: AN ANALYSIS OF THE DRAFT PRIVACY LEGISLATION (2010), http://www.itif.org/files/2010-privacy-legislation.pdf?_ga=2.14445303.1528964580.1554677556-108489986.1554677556 [<https://perma.cc/G7K3-JKU9>].

²³¹ Catherine Schmierer, *Better Late than Never: How the Online Advertising Industry’s Response to Proposed Privacy Legislation Eliminates the Need for Regulation*,

In July of 2010, the BEST PRACTICES Act was introduced on the House floor.²³² It aimed to regulate the collection and use of consumer information by online behavioral advertisers and other media providers.²³³ The BEST PRACTICES Act addresses concerns such as data brokers, consumer security, and includes several accountability provisions.²³⁴ The BEST PRACTICES Act was met with support from members of the online industry and from both parties.²³⁵ Despite this support, many companies were concerned about the Act's private right of action.²³⁶ The BEST PRACTICES Act, despite its support, was not enacted.

In 2011, a Do Not Track Internet privacy bill was introduced into Congress. This Act would create a Do Not Track registry, similar to the Do Not Call registry implemented in 2003.²³⁷ The bill did not pass in 2011, was re-introduced in 2013, but still did not find enough support to get off the Senate floor.²³⁸ A third 'Do Not Track' bill was introduced in 2015, which would require the FTC to promulgate regulations that established greater transparency and opportunity for individuals to opt-out of data collection, and rules that prohibit collection of data after a user has opted out.²³⁹ In line with its precedents, this bill did not gain any traction in the Senate and ultimately died on the floor.²⁴⁰

Representative Jackie Speier, who sponsored the bill, stated that the "bill[] sends a clear message" that the government prioritizes "privacy over profit."²⁴¹ There was a lot of pushback that argued any regulation would inhibit technology and the availability of free content that is funded by advertisers.²⁴² Others argue that the implementation itself would be tricky because browser makers must build the feature and it would only work if tracking companies would agree to honor the user's request.²⁴³

17 RICH. J.L. & TECH. 1, 39 (2011).

²³² Also known as the Building Effective Strategies to Promote Accountability Choice Transparency Innovation Consumer Expectations and Safeguards Act. BEST PRACTICES Act, H.R. 5777, 111th Cong. (2010).

²³³ *See id.*

²³⁴ *See id.*

²³⁵ Catherine Schmierer, *supra* note 231, at 40–41; *Privacy Bills Comparison Chart*, CTR. FOR DEMOCRACY & TECH., 1-12 (2010), http://www.cdt.org/files/pdfs/Privacy_bills_comparison_chart_CDT_0.pdf [<https://perma.cc/X6MG-FFWL>].

²³⁶ Schmierer, *supra* note 231, at 41.

²³⁷ *See* David Sarno, 'Do Not Track' Internet Privacy Bill Introduced in House, L.A. TIMES (February 11, 2011), <http://articles.latimes.com/2011/feb/11/business/la-fi-do-not-track-20110212> [<https://perma.cc/NL9Z-VNCM>].

²³⁸ Do-Not-Track Online Act of 2013, S.418, 113th Cong. (2013); Do-Not-Track Online Act of 2011, S. 913, 112th Cong. (2011).

²³⁹ S.2404 – Do Not Track Online Act of 2015, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2404> [<https://perma.cc/CT7L-6VAQ>].

²⁴⁰ *Id.*

²⁴¹ Sarno, *supra* note 237.

²⁴² *Id.*; *see also* Julia Angwin & Jennifer Valentino-Devries, *FTC Backs Do-Not-Track System for Web*, WALL ST. J. (Dec. 2, 2010 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704594804575648670826747094> [<https://perma.cc/9YLL-FCQT>] (“‘FTC endorses “do not track”; an emotional goodbye to free content so kindly funded by advertisers,’ tweeted Rob Norman, chief executive of WPP PLC’s GroupM North America, which buys ads on behalf of corporate clients.”).

²⁴³ *See* FED. TRADE COMM’N, *supra* note 194, at 66.

A variety of federal privacy bills were introduced in 2015, including the Consumer Privacy Protection Act,²⁴⁴ the Student Digital Privacy and Parental Rights Act,²⁴⁵ and the Data Broker Accountability and Transparency Act.²⁴⁶ Not one of the three bills passed.

The Consumer Privacy Protection Act would have provided protection for many types of data, including social security numbers, financial information, online usernames and passwords, biometric data, information about a person's physical and mental health, geo-location, and access to private digital photographs and videos.²⁴⁷

The Student Digital Privacy and Parental Rights Act would have prohibited operators of websites, apps, and other online services, from selling students' personal information to third parties and using or disclosing students' personal information for targeted advertising.²⁴⁸ Further, the bill would have given parents access to collected information about their child and allow them to correct and/or delete information.²⁴⁹ Finally, parents would have the ability to download any material their child has created.²⁵⁰

The Data Broker Accountability and Transparency Act explicitly provided limitations on how data brokers are able to get their information, and the limits of what they can do with it.²⁵¹ The Act prohibits data brokers from collecting information under false pretenses, the solicitation of information from consumers, and requires data brokers to take reasonable measures to ensure any information they collect is correct.²⁵² There is also a provision that allows consumers to review and correct the information collected at no cost.²⁵³ Most significantly, the Act lays out methods by which victims of data brokers may enjoin the company, recover damages, or enforce civil penalties.²⁵⁴

The inability of Congress to pass privacy legislation in 2015, especially as it pertains to consumer privacy and online advertising, appears to have been prophetic, as no legislation has been promulgated since. In October of 2016, the Federal Communications Commission imposed regulations on Internet providers that required providers "to get permission from customers before sharing or selling personal information such as web browsing history, geographic location, financial information, and children's information."²⁵⁵ These provisions seemed like a step forward, but in March of 2017, the House of Representatives voted to roll back these protections.²⁵⁶

²⁴⁴ S. 1158, 114th Cong. (2015)

²⁴⁵ H.R. 2092, 114th Cong. (2015)

²⁴⁶ S. 668, 114th Cong. (2015).

²⁴⁷ S. 1158.

²⁴⁸ H.R. 2092.

²⁴⁹ *Id.*; see also Natasha Singer, *Legislators Introduce Student Digital Privacy Bill*, N.Y. TIMES (Apr. 29, 2015 1:09 PM), <http://bits.blogs.nytimes.com/2015/04/29/legislators-introduce-student-digital-privacy-bill/> [<https://perma.cc/W22E-NWF7>].

²⁵⁰ Singer, *supra* note 249.

²⁵¹ S. 668.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Pressman, *supra* note 88.

²⁵⁶ *Id.*

This decision was not without controversy. The Electronic Frontier Foundation, a non-profit dedicated to protecting Internet users, declared that the decision to roll back regulations “would erase privacy protections and harm cybersecurity.”²⁵⁷ On the other hand, US Telecom, a trade group for major telecommunications companies, argued that rolling back these regulations “would simply maintain the status quo.”²⁵⁸ US Telecom’s CEO further stated that US Telecom would “continue to support the FTC privacy framework.”²⁵⁹

The privacy framework supplied by the FTC, however, is quite bare. The only statute that is explicitly for the protection of consumers online is the U.S. Safe Web Act, enacted in 2012, which “provides the FTC with a number of tools to improve enforcement regarding consumer protection matters.”²⁶⁰

In January 2017, the FTC released a Staff Report addressing “Privacy & Security in a Connected World.”²⁶¹ This report recommended that industries develop self-regulation techniques and that any legislation would be “premature” because this industry is still in its early stages.²⁶² The only recommendation regarding legislation of data security was in the context of cybersecurity.²⁶³

An argument exists that the FTC is able to regulate online behavioral advertising to some degree, because it is able to police unfair advertising practices.²⁶⁴ To date, the FTC has only brought one enforcement action that is specifically related to online behavioral advertising.²⁶⁵ This scant enforcement is for two reasons. First, the agency cannot bring an enforcement action for a deceptive practice if advertisers fully disclose their data collection practices in online privacy policies or a website’s terms of use.²⁶⁶ Second, the FTC is unable to fulfill the second prong of the requisite test because although the collection of data may “harm” consumers, they obtain an off-setting benefit because they receive free access

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *U.S. Safe Web Act*, FED. TRADE COMMISSION, <https://www.ftc.gov/enforcement/statutes/us-safe-web-act> [<https://perma.cc/LN96-6LF9>].

²⁶¹ FTC STAFF REPORT, INTERNET OF THINGS PRIVACY & SECURITY IN A CONNECTED WORLD (2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf> [<https://perma.cc/5BEA-QWXA>].

²⁶² *Id.* at 48–49.

²⁶³ *Id.* at 49.

²⁶⁴ See Schmierer, *supra* note 231, at 16–18.

²⁶⁵ *In re Chitika, Inc.*, No. 102-3087, 2011 WL 914035 (F.T.C. March 14, 2011). There have been two enforcement actions about deceptive practices online. See *In re Gateway Learning Corp.*, 138 F.T.C. 443, 450, (2004); *In re Sears Holdings Mgmt. Corp.*, No. 082-3099, 2009 WL 2979770, at *5 (F.T.C. Aug. 31, 2009).

²⁶⁶ J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Some Reflections on the Future of the Internet: Net Neutrality, Online Behavioral Advertising, and Health Information Technology at the U.S. Chamber of Commerce Telecommunications & E-Commerce Committee Fall Meeting 5 (Oct. 26, 2009), <http://www.ftc.gov/speeches/rosch/091026chamber.pdf> [<https://perma.cc/UV6H-M5WT>].

to online content.²⁶⁷ The FTC, without a statute from Congress to follow, is powerless to meaningfully regulate online behavioral advertising.

D. Judicial Interference

It does not appear that courts are willing to change the status quo regarding collection of consumer data. In November, a California district court judge threw out a \$15 billion lawsuit that accused Facebook of unlawfully tracking users' internet browsing activity using third-party websites after the user had logged out of the site.²⁶⁸ The Court ultimately granted Facebook's (third) motion to dismiss the claims for lack of standing and failure to state a claim.²⁶⁹ The Court ultimately dismissed the Plaintiff's resulting claims for breach of contract and breach of duty of good faith and fair dealing.²⁷⁰

The Court found that Plaintiffs failed to show they had a reasonable expectation of privacy in the URLs of the pages they visit in order to support claims for invasion of privacy.²⁷¹ Further, Judge Davila noted that Plaintiffs could have taken steps to keep their browsing histories private, and that Facebook's intrusion could have been easily blocked, had Plaintiffs chosen to do so.²⁷² The Court also stated that Facebook's requests are "part of routine internet functionality and can be easily blocked."²⁷³

The Court is placing the onus of responsibility on the user, rather than on the intermediary platform that is utilizing the data. This directly contradicts the FTC's guidelines, which places the responsibility of consumer data privacy protection on the platform, as opposed to the consumer. Rather than expecting the user to take actions, the responsibility should be placed on the platforms that are engaging in data collection. The platforms, such as YouTube or Facebook, have the upper hand in drafting the contracts and privacy statements,²⁷⁴ and should be required to disclose their activity or halt data collection altogether.

The Court's point of view is not conducive to the promulgation of rules that regulate behavioral tracking and online advertising. Further, the Court's unsympathetic attitude towards the Plaintiffs' arguments indicates that judicial action may be a nonstarter for change in privacy law, especially as it pertains to regulation of online advertising. This type of ambivalence reinforces the need for congressional action.

²⁶⁷ *Id.* at 10.

²⁶⁸ *In re Facebook Internet Tracking Litigation*, 290 F. Supp. 3d 916, 918, 922–23 (2017); see also Don Reisinger, *Facebook Sued for \$15 Billion Over Alleged Privacy Infractions*, CNET (May 18, 2012 8:00 AM), <https://www.cnet.com/news/facebook-sued-for-15-billion-over-alleged-privacy-infractions/> [<https://perma.cc/H4YU-D83J>].

²⁶⁹ *In re Facebook Internet Tracking Litigation* 290 F. Supp. 3d at 918, 923.

²⁷⁰ *Id.*

²⁷¹ See Jonathan Stempel, *Facebook Beats Privacy Lawsuit in U.S. Over User Tracking*, REUTERS (July 3, 2017 10:53 AM), <https://www.reuters.com/article/us-facebook-decision/facebook-beats-privacy-lawsuit-in-u-s-over-user-tracking-idUSKBN1901Q4> [<https://perma.cc/6Q8Z-M8Y8>].

²⁷² See *id.*

²⁷³ Allison Grande, *Facebook Again Shakes \$15B User Tracking MDL*, LAW360 (July 3, 2017), <https://www.law360.com/articles/940743> [<https://perma.cc/3TNR-6USL>].

²⁷⁴ See Internet Creators Guild, *Confronting Creator Contract Concern*, MEDIUM (Jan. 15, 2017), <https://medium.com/internet-creators-guild/contracts-91f64f4c41d0> [<https://perma.cc/LBM3-XRQE>].

E. Proposed Solution

The online advertising market has been largely self-regulated since its advent in 1998. This lack of regulation is the reason the biggest video-streaming platform on the Internet is having a litany of social and legal issues.²⁷⁵ Additionally, the government's "piecemeal approach" to protecting online privacy has been called inadequate by scholars and privacy advocates.²⁷⁶

This Note advocates for a solution that is one step above self-regulation: FTC regulations that are broad enough to encourage technology while maintaining a consumer's right to privacy. These regulations should mirror the FTC's self-regulatory guidelines from 2009,²⁷⁷ while adding more updated provisions. The updated provisions should reflect the sophistication of online advertising technology, primarily behavioral tracking and programmatic advertising.

Ideally, users should be able to opt-out of tracking without downloading additional software. This regulation should include a prohibition on cross-tracking (tracking a single user across multiple devices)²⁷⁸ without user's knowledge.

The type of information collected should be limited to non-sensitive information. "Sensitive information" would need to be defined by the FTC, but it should include at least information regarding health, finances, ethnicity, race, sexual orientation, personal relationships, and political activity.²⁷⁹ As it stands now, most of this data is able to be collected and used for "commercial purposes."²⁸⁰

The most important aspect of the FTC's regulations should be transparency on the part of advertisers. Many users do not know what data is being collected, how it is being used, or what the effects of this collection on their privacy may be. It is imperative that the FTC implement safeguards for the consumers that force advertisers to clearly lay out how information is collected and for what purpose. Simply hiding the information in the lengthy terms and conditions is not enough in an age where only lawyers read the terms and conditions.

Finally, there must be a method of enforcement in place. This would ensure accountability for all parties involved in the transaction of data. Ideally, in the event of violating the regulation, the party must pay a fine to be determined by the FTC. The FTC should provide a private cause of action against advertisers and brands for the use of their data without permission. This may require a change in how courts view the informational injury, and perhaps expanding our current understanding of what an 'informational injury' encompasses.

In the current political climate, it seems unlikely that Congress will pass a statute

²⁷⁵ This includes copyright issues, advertising fraud, control over its personalities, as well as limiting its monetization process. *See supra* Part II.

²⁷⁶ Bowman, *supra* note 13, at 730.

²⁷⁷ *See* FED. TRADE COMM'N, *supra* note 203.

²⁷⁸ *See* FED. TRADE COMM'N, STAFF REPORT: CROSS-DEVICE TRACKING, 2 (2017), https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf [<https://perma.cc/253W-5TDV>].

²⁷⁹ *See* CTR. FOR DIG. DEMOCRACY ET AL., *supra* note 18.

²⁸⁰ *Id.* at 4, 6.

requiring the FTC to promulgate regulations regarding online consumer privacy, especially in light of Congress' rolling back of online privacy protections in March of 2017.²⁸¹ However, such regulations are necessary in order to protect consumers and try to prevent further advertising issues on prominent social media platforms.

CONCLUSION

Programmatic advertising and its effect on brand safety and consumer privacy is a significant problem in the current online advertising industry, and it does not appear to be going away.²⁸² Self-regulation isn't effective, and while technology is continuing to grow, the best solution for all parties is for the FTC to promulgate regulations regarding behavioral tracking. This note proposes mandatory regulations and enforcement by the FTC in order to limit large companies' power over content creators and interference with user's online privacy. These regulations should seek to prevent harmful behavior while simultaneously promoting technological advancement.

²⁸¹ See Steve Lohr, *Trump Completes Repeal of Online Privacy Protections From Obama Era*, N.Y. TIMES (April 3, 2017), <https://www.nytimes.com/2017/04/03/technology/trump-repeal-online-privacy-protections.html> [<https://perma.cc/8V3L-ARKC>].

²⁸² Susan Borst, *Outlook 2018: Brand Safety & Transparency are the Game Changers for Native Advertising*, INTERACTIVE ADVERT. BUREAU (January 11, 2018), <https://www.iab.com/news/2018-native-predictions/> [<https://perma.cc/XSX5-F88E>].