



Office of Commissioner  
Noah Joshua Phillips

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

**Concurring Statement of Commissioner Noah Joshua Phillips**

*United States v. OpenX Technologies, Inc.*

December 15, 2021

Protecting the online safety and privacy of children is a mission that is not only mandated by law, but also one of our agency's most laudable priorities. To that end, the Federal Trade Commission has brought a range of cases alleging violations of the Children's Online Privacy Protection Act ("COPPA") and Rule.

As detailed in the complaint, OpenX Technologies, Inc. ("OpenX") operates a programmatic advertising exchange that helps publishers of Web sites and mobile applications monetize their properties through advertising. OpenX describes itself as the largest independent advertising exchange, with over 1,200 premium publishers, at least 50,000 mobile apps, and tens of thousands of demand-side partners (i.e., buyers of ad inventory consisting of advertisers, advertising agencies, and advertising networks) participating in the exchange.<sup>1</sup> OpenX promotes itself as the highest quality programmatic advertising marketplace and seeks to attract participants with claims that it employs a dual human and technology approach to traffic quality. According to OpenX, it has the only traffic quality team in the industry that conducts a human review of each property to ensure compliance with OpenX's policies and to classify accurately the subject matter of all Web sites and Apps for the benefit of its demand-side partners.<sup>2</sup>

Despite these efforts, and as alleged in the complaint, OpenX misrepresented its data collection practices on two fronts: by collecting and transferring location data when the consumer had not provided consent or had expressly denied consent; and by misrepresenting its COPPA-related activities and practices. The complaint further alleges that OpenX also ran afoul of COPPA itself, by collecting personal information from users of child-directed properties without providing parents notice and then obtaining consent.

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<sup>1</sup> Complaint at ¶ 12. OpenX is managed separately from other businesses in the online "ad stack," like websites and applications where ads appear and the intermediaries that sit between the advertisers' demand-side partners and the ad exchanges, and between the exchanges and the publishers. By contrast, the largest online ad exchange in America, DoubleClick, is owned and operated by Google, which also owns inter alia, the Google Search engine and YouTube, properties where many online advertisements appear. See Patience Haggin & Kara Dapena, *Google's Ad Dominance Explained in Three Charts*, THE WALL STREET JOURNAL (June 17, 2019), <https://www.wsj.com/articles/why-googles-advertising-dominance-is-drawing-antitrust-scrutiny-11560763800>.

<sup>2</sup> Complaint at ¶¶ 16 and 23.

I concur in today’s decision to forward a complaint and stipulated order to the Department of Justice, settling with OpenX and requiring the payment of civil penalties. But I write separately today to highlight some areas of concern where this case treads, and where I believe the agency should tread more carefully.

**Calculation of Civil Penalties:** Part VIII of the stipulated order imposes a \$7.5 million civil penalty against OpenX; but due to an inability to pay, it suspends the penalty upon the payment of \$2 million in civil penalties. Our statute lays out the factors to be considered in fashioning a penalty.<sup>3</sup> As I explained in my dissenting statement in *HyperBeard*, one important thing to consider is the amount of harm.<sup>4</sup> In comparing the harms of children being exposed to behavioral advertising as compared to the harms of being contacted by strangers, for example, common sense dictates that we punish the latter more. The facts here perhaps warrant the stated civil penalty, for example because the amount per violation aligns with cases involving similar harm and OpenX’s conduct is more indicative of culpability than that of the defendant in *HyperBeard*. But, given the potential for crippling penalty amounts due to the number of violations in a typical COPPA case, the Commission should work toward greater transparency and consistency of how it assesses penalties for privacy violations.

**Knowledge Requirement:** To get penalties under COPPA in a case like this, the law requires “actual knowledge” that the defendant is collecting the information of children. OpenX opened itself up to liability by having people review apps to make sure they were not child directed. According to the complaint, OpenX failed at that review. But, had it not done any such review, it might not be subject to penalties at all.<sup>5</sup> It is not clear to me that we want to discourage human review of whether apps are child directed. And, so, going forward, we need to be careful to weigh the instinct to penalize against the desire to foster a commercial environment where care is taken with regard to apps directed at children.

**Notice Requirements:** Part XI of the stipulated order requires that OpenX email all its “demand-side” clients and inform them that OpenX transferred location data under circumstances where users had not granted or had denied requisite location permissions and failed to adequately comply with COPPA by allowing some child-directed apps to participate in its Ad Exchange, despite its policy of banning child-directed apps from participating. As a result of this alleged failure, targeted advertising was served to some children without parental notice and consent.

As I noted in my separate statement accompanying the administrative settlement in *Flo Health*, when warranted, notice to consumers can be an important tool.<sup>6</sup> In particular, I pointed out that

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<sup>3</sup> See 15 U.S.C. § 45(m)(1)(C).

<sup>4</sup> Dissenting Statement of Commissioner Noah Joshua Phillips, *FTC v. HyperBeard, Inc., et al*, File No. 1923109 (June 4, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1576434/192\\_3109\\_hyperbeard\\_-\\_dissenting\\_statement\\_of\\_commissioner\\_noah\\_j\\_phillips.pdf](https://www.ftc.gov/system/files/documents/public_statements/1576434/192_3109_hyperbeard_-_dissenting_statement_of_commissioner_noah_j_phillips.pdf); see also *U.S. v. Dish Network, L.L.C.*, No. 17-3111, slip op. at 16 (7th Cir. Mar. 26, 2020)(“start with harm rather than wealth”).

<sup>5</sup> See *New Mexico ex rel. Balderas v. Tiny Lab Productions*, 457 F.Supp. 3d 1103, 1112 (D.N.M. 2020).

<sup>6</sup> As a general matter, the Commission has used notice requirements to prevent ongoing harm to consumers and to enable them to remediate the effects of harm suffered. To that end, the Commission has required consumer notice in cases where: consumers’ health or safety is at risk; consumers are subject to recurring charges that they may be unaware of; consumers have a financial or legal interest that needs to be protected; notice is necessary to prevent the

the Commission has found consumer notice appropriate in some privacy and data security cases when there was a need to inform consumers about ongoing data collection and sharing<sup>7</sup> or to correct a deceptive data breach notification.<sup>8</sup> Here – absent any request to require the recipients to delete the data – there is no obvious reason to require that OpenX provide notice to its clients. Other than perhaps to further penalize OpenX. The notice in this case does not, for example, inform kids or their parents that their data was collected without adequate consent. This is an additional, most likely unwarranted, cost upon an entity that apart from the instant matter, provides a valuable service as well as some much-needed competition in the online advertising area. Nevertheless, OpenX has agreed to this notice; and I will not let my concern stand in the way of resolving this matter.

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ongoing dissemination of deceptive information; or consumers on their own would not have been able to discover or determine the illegal behavior and would not know to take remedial action.

<sup>7</sup> Unrollme Inc., No. C-4692 (Dec. 17, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3139/unrollme-inc-matter>.

<sup>8</sup> Skymed International, Inc., File No. 1923140 (Dec. 16, 2020), <https://www.ftc.gov/enforcement/cases-proceedings/1923140/skymed-international-inc-matter>.