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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,
 	
   Plaintiff,
 	
   v.
 	
OPENX TECHNOLOGIES, INC.,
a Delaware Corporation,
 	
   Defendant.
	Case No. 2:21-cv-09693
	
	COMPLAINT FOR PERMANENT INJUNCTION, CIVIL PENALTIES, AND OTHER RELIEF

1   Plaintiff, the United States of America, acting upon notification and
2 authorization to the Attorney General by the Federal Trade Commission ("FTC" or
3 "Commission"), for its Complaint alleges that:
4   1.   Plaintiff brings this action under Sections 5(a)(1), 5(m)(1)(A), 13(b),
5 and 16(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a)(1),
6 45(m)(1)(A), 53(b), and 56(a); and Sections 1303(c) and 1306(d) of the Children's
7 Online Privacy Protection Act of 1998 ("COPPA"), 15 U.S.C. §§ 6502(c) and
8 6505(d), to obtain monetary civil penalties, a permanent injunction, and other
9 equitable relief for Defendant's violations of Section 5 of the FTC Act and the
10 Commission's Children's Online Privacy Protection Rule ("Rule" or "COPPA
11 Rule"), 16 C.F.R. Part 312.

JURISDICTION AND VENUE

13   2.   Defendant OpenX Technologies, Inc. ("OpenX") is a Delaware
14 corporation, with its principal place of business in Pasadena, California.
15   3.   OpenX transacts or has transacted business in the Central District of
16 California.
17   4.   This Court has subject matter jurisdiction pursuant to 28 U.S.C.
18 §§ 1331, 1337(a), 1345, and 1355, and under 15 U.S.C. §§ 45(m)(1)(A), and 56(a).
19   5.   Venue in the Central District of California is proper under 15 U.S.C.
20 § 53(b) and 28 U.S.C. §§ 1391(b)(1), (b)(2), (c)(2), and (d).

COMMERCE

22   6.   At all times material to this Complaint, OpenX has maintained a
23 substantial course of trade in or affecting commerce, as "commerce" is defined in
24 Section 4 of the FTC Act, 15 U.S.C. § 44.

SECTION 5 OF THE FTC ACT

26   7.   Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair and
27 deceptive acts or practices in or affecting commerce.

28

THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT

8.   Congress enacted COPPA in 1998 to protect the safety and privacy of children online by prohibiting the unauthorized or unnecessary collection of children's personal information online by operators of Internet Web sites and online services. COPPA directed the Commission to promulgate a rule implementing COPPA. The Commission promulgated the COPPA Rule, 16 C.F.R. Part 312, on November 3, 1999, under Section 1303(b) of COPPA, 15 U.S.C. § 6502(b), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. The Rule went into effect on April 21, 2000. The Commission promulgated revisions to the Rule that went into effect on July 1, 2013. Pursuant to Section 1303(c) of COPPA, 15 U.S.C. § 6502(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57(a)(d)(3), a violation of the Rule constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

9.   The Rule applies to any operator of a commercial Web site or online service directed to children under 13 years of age (which includes operators of online services with actual knowledge that they are collecting personal information directly from users of another Web site or online service directed to children), or any operator that has actual knowledge that it is collecting or maintaining personal information from a child under 13 years of age. 16 C.F.R. § 312.3. The definition of "personal information" includes, among other things, "geolocation information sufficient to identify street name and name of a city or town," and a "persistent identifier that can be used to recognize a user over time and across different Web sites or online services," such as a "customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier." 16 C.F.R. § 312.2.

10.   Among other things, the Rule requires subject operators to meet specific requirements relating to collecting, using, or disclosing personal information from children, including but not limited to:

a. Obtaining verifiable parental consent prior to collecting, using, or disclosing personal information from children (16 C.F.R. § 312.5); and

b. Posting a prominent and clearly labeled link to an online notice on its Web site or online service providing clear, understandable, and complete notice of its information practices, including what information the operator collects from children online, how it uses such information, its disclosure practices for such information, and other specific disclosures set forth in the Rule (16 C.F.R. § 312.4).

11. For purposes of this Complaint, the terms "child," "collects," "collection," "disclose or disclosure," "Internet," "operator," "parent," "personal information," "verifiable parental consent," and "Web site or online service directed to children," are defined as those terms are defined in Section 312.2 of the COPPA Rule, 16 C.F.R. § 312.2.

THE OPENX AD EXCHANGE

12. OpenX operates a programmatic advertising exchange that helps publishers of Web sites and mobile applications ("Apps") monetize their properties through advertising.

13. Programmatic advertising is the automated method of trading ads online in a mobile environment. OpenX provides a real-time bidding platform where it essentially conducts auctions for ad space.

14. OpenX contracts with publishers whose Web sites and Apps send ad requests to OpenX using an OpenX software development kit ("SDK") or another type of technical integration. The OpenX Android SDK and iOS SDK are code components that are integrated with the Apps that allow OpenX to collect data from the consumer's device and facilitate the display of ads within the Apps.

15. OpenX also contracts with advertising technology companies ("Networks") that aggregate and sell advertising inventory for publishers and send ad

1   requests to the OpenX Ad Exchange.

2   16.   OpenX describes itself as the largest independent advertising exchange,

3   with over 1,200 premium publishers, at least 50,000 mobile Apps, and tens of

4   thousands of demand-side partners (i.e., buyers of ad inventory consisting of

5   advertisers, advertising agencies, and advertising networks) participating in the

6   exchange.

7   17.   Programmatic advertising enables advertisers and their agents to select

8   among criteria to deliver targeted messages to preferred audiences. OpenX manages

9   the competing bids submitted by the bidding entities and facilitates the display of an

10   ad associated with the winning bid.

11   18.   The OpenX Ad Exchange supports a variety of targeting criteria used by

12   publishers and advertisers to identify ad space where buyers want ads to be served.

13   19.   "Targeting" involves the collection of data about consumers and their

14   devices, including mobile phones. OpenX's business relies on collecting data that its

15   partners want to use to learn about consumers and maximize the buyers' advertising

16   dollars.

17   20.   An ad request is a set of data fields that OpenX collects from an App

18   when the App requests an ad to be shown. On a daily basis, OpenX processes nearly

19   100 billion ad requests.

20   21.   A bid request includes the information from the ad request that OpenX

21   forwards to buyers, in order to trigger an automated real-time auction on the OpenX

22   Ad Exchange among buyers that want to serve an ad to the requesting Web site or

23   App.

24   22.   The information received in the ad request and transmitted in a bid

25   request is used by buyers to determine whether they want to bid on the ad space, how

26   much they want to bid, and what kind of ad to display in the App. Buyers, also

27   referred to as OpenX's "demand-side partners," include advertisers and service

28   providers that work on behalf of advertisers, such as advertising agencies and

1 advertising networks.

2   23.   OpenX promotes itself as the highest quality programmatic advertising

3 marketplace, and seeks to attract participants with claims that it employs a dual

4 human and technology approach to traffic quality. According to OpenX, it has the

5 only traffic quality team in the industry that conducts a human review of each Web

6 site or App that sends ad requests, to ensure compliance with OpenX's supply

7 policies and to accurately classify the subject matter of all Web sites and Apps for

8 the benefit of its demand-side partners.

9   **ANDROID AND iOS PERMISSION-BASED SYSTEMS**

10   24.   The Android and iOS operating systems provide App developers with

11 application programming interfaces ("APIs") that facilitate the collection of data

12 about consumers and their devices.

13   25.   In order to access certain data from a device, these operating systems

14 require App developers to obtain a consumer's consent through "permissions," which

15 involve notifying the consumer about the sensitive information (e.g., the consumer's

16 location or contacts) or sensitive device functionality (e.g., the device's camera or

17 microphone) that the App would like to access.

18   26.   Through these permission-based systems, consumers can manage

19 privacy settings and exercise control over certain data when using their mobile

20 devices. The setting options are determined by the platforms, and can vary across

21 devices and platform versions.

22   27.   Apps request consent to access location data using a permission dialog

23 box (i.e., a pop-up notification) that prompts the user to allow or deny access to his

24 or her location data. In addition to these App notifications, Android and iOS provide

25 consumers with system settings to restrict access to their location data. Through these

26 settings, the consumer can prevent all or specific applications from accessing the

27 location API.

28   28.   OpenX advises publishers to include location permissions when

1 integrating the OpenX SDKs with their Apps to enable OpenX to collect location

2 data if the consumer grants access.

3   29.   Publishers provide notice to consumers regarding what data the

4 properties, e.g., Web sites and Apps, they are using collect, based on the permissions

5 they incorporate. These representations can be found in the privacy policies

6 disseminated by the publishers.

7   30.   The Android and iOS operating systems consider GPS coordinates—

8 latitude and longitude—and the basic service set identifier ("BSSID") to be precise

9 location data that should only be accessed if the requisite location permissions are

10 granted by the consumer.

11   31.   The BSSID is a 12-digit code that uniquely identifies a wireless access

12 point, such as a specific router. It corresponds to a physical location. The BSSID is

13 also known as the hardware MAC address for a wireless access point, WiFi MAC

14 address, or router MAC address.

15   32.   The BSSID is capable of being used to identify a device's location with

16 the same or better precision than GPS coordinates transmitted by the mobile device.

17   33.   In recognition of the sensitive nature of the BSSID, Android and iOS

18 have applied increasingly restrictive permissions to protect the BSSID over the years.

19   **OPENX'S COLLECTION OF LOCATION DATA**

20   34.   OpenX's privacy policies over the years, including its privacy policy

21 effective May 25, 2018, explain how OpenX collects, uses, and discloses

22 information, and consumers' choices for managing their information preferences.

23 OpenX has stated:

> This Privacy Policy explains how OpenX Software Ltd. and its
> subsidiaries . . . collect, use, and disclose information, and your
> choices for managing your information preferences.
> ***Opting Out for Location Data***: You may opt out of our
> collection, use, and transfer of precise location data by using the
> location services controls in your mobile device's settings.

28 OpenX Technologies, Inc. is a wholly-owned operating subsidiary of OpenX

1   Ltd., which is a wholly-owned subsidiary of OpenX Software Ltd.

2   35.   This information has also been shared on a standalone page providing

3   consumers with their choices for opting out of certain collection, use, and transfer of

4   data. OpenX's Web site home page contains a persistent footer link titled "Interest-

5   Based Advertising" that takes consumers directly to the standalone page.

6   36.   Contrary to OpenX's statements, OpenX collected precise location data,

7   i.e., BSSIDs, from consumers who opted out of such collection.

8   37.   In 2018, it was discovered that, notwithstanding OpenX's inclusion of

9   location permissions in the OpenX Android SDK code, OpenX used a backdoor

10 method to retrieve the BSSID. Under circumstances where a user had not granted, or

11 had outright denied, the requisite location permissions, OpenX accessed the BSSID

12 from a file that stores the ARP cache, instead of using the sanctioned method of

13 accessing the BSSID using the location API.

14 38.   Soon after the discovery, Google notified OpenX that its Android SDK

15 was acquiring location data using the BSSID in a non-sanctioned manner that

16 violated Google's Device and Network Abuse Policy, and that Apps that included the

17 OpenX Android SDK code had been removed from the Google Play store.

18 39.   OpenX responded by updating the Android SDK code, and informed all

19 of the publishers who had integrated it, or who had received OpenX Android SDK

20 documentation, of the necessity to update their Apps with the new version of the

21 Android SDK.

22 40.   But even if publishers updated their Apps, OpenX could still collect the

23 BSSID from the ARP cache through existing code in Apps that was previously

24 installed on consumer devices that consumers did not update.

25 41.   The command for collecting the BSSID from the ARP cache was

26 included in every version of the OpenX Android SDK available from September

27 2012 to October 2018.

28 42.   OpenX transmitted the BSSID to numerous third parties, including

1 location data brokers, advertisers, advertising agencies, and advertising networks.

2 43.   The OpenX Android SDK has been integrated into nearly two hundred

3 Apps, including popular Apps that have been downloaded billions of times by

4 consumers.

5 44.   As a result of OpenX's practices, publishers provided incorrect

6 information to consumers regarding their Apps' privacy practices. Indeed, App

7 developers that have integrated the OpenX SDK represented to consumers in their

8 privacy policies that consumers had the ability to control the collection and use of

9 location data through their Apps and through their device location settings,

10 notwithstanding the fact that OpenX collected the BSSID from their devices without

11 consent.

12 45.   OpenX did not have a regular practice of examining its data collection

13 practices, assessing whether there was a justification or need for collecting various

14 data, or checking whether it complied with Android or iOS platform policies, despite

15 OpenX personnel raising these issues as privacy concerns.

16 **OPENX'S BUSINESS PRACTICES REGARDING COLLECTION OF
INFORMATION FROM CHILD-DIRECTED PROPERTIES**

17

18 46.   COPPA sets forth requirements for any operator of a Web site or online

19 service directed to children and any operator that has actual knowledge that it is

20 collecting or maintaining personal information from a child under 13 years of age.

21 16 C.F.R. § 312.3. As described in Paragraphs 47 to 56, OpenX has actual

22 knowledge that it collects personal information, including location information and

23 persistent identifiers, from users of Web sites and Apps directed to children under 13

24 years of age.

25 47.   OpenX's traffic quality team is tasked with conducting a human review

26 of every Web site or App that sends ad requests to its Ad Exchange. This review is

27 intended to identify restricted content (e.g., pornography, online gambling, and

28 extreme violence), categorize the property by subject matter or content (e.g.,

1 "Finance," "News & Magazines," or "Sports"), and determine whether the property

2 is child-directed, among other goals.

3   48.   To determine whether a property is child-directed, the traffic quality

4 analysts are responsible for thoroughly reviewing the Web sites and Apps, including

5 the App store pages, against numerous criteria, much of which is adopted from the

6 COPPA Rule.

7   49.   According to OpenX policy, the traffic quality analysts must flag Apps

8 directed to children to be banned from participating in the Ad Exchange, unless an

9 exception can be verified with management.

10   50.   Notwithstanding OpenX's policies and procedures, hundreds of child-

11 directed Apps that OpenX reviewed were not flagged as child-directed and have

12 participated in the OpenX Ad Exchange. OpenX had actual knowledge that these

13 Apps were child-directed based on its human review of the Apps. The Apps for

14 which OpenX processed requests include obvious references to children in the App

15 name and developer name. The names of the Apps include terms such as "for

16 toddlers," "for kids," "kids games," "preschool learning," "kindergarten," etc.

17 Moreover, the App store pages included graphics from and descriptions of the Apps

18 that reinforced that they were designed for kids, and listed age ratings of the Apps

19 showing they were appropriate for children under the age of 13.

20   51.   OpenX has received millions, if not billions, of ad requests directly or

21 indirectly from child-directed Apps, and transmitted millions, if not billions, of bid

22 requests containing personal information of children to OpenX's demand-side

23 partners. These requests included location information and persistent identifiers used

24 for online behavioral advertising.

25   52.   OpenX has taken no steps to obtain verified parental consent or provide

26 the requisite notices prescribed by COPPA.

27   53.   Further, OpenX's instructions to its traffic quality analysts narrowly

28 defined child-directed properties to only those "primarily" directed to children,

1 thereby excluding from the definition of child-directed many Web sites and Apps

2 that target children as one of their audiences. Doing so resulted in OpenX collecting

3 and maintaining personal information from Web sites and Apps that are child-

4 directed, in violation of the COPPA Rule. If the Web site and Apps were not

5 identified as child-directed, the personal information collected from those sites could

6 have been used to facilitate targeted advertising.

7   54.   Notwithstanding OpenX's collection, use, and disclosure of personal

8 information from child-directed properties, OpenX has stated that it does not engage

9 in activities that require parental notice or consent under COPPA. For example, its

10 privacy policy states:

11   **Children's Online Privacy Protection Act Notice**.

12   OpenX does not engage in activities that require parental notice
          or consent under the Children's Online Privacy Protection Act

13   (COPPA). If you believe that OpenX has inadvertently
          collected information from a child under 13 that is subject to

14   parental notice and consent under COPPA, please contact
          OpenX using the contact information below to request deletion

15   of the information.

16   55.   In its Data Privacy and Information Security Frequently Asked

17 Questions, OpenX also stated that it has an internal COPPA policy that identifies

18 child-directed properties and places a COPPA flag for inventory from those

19 properties.

20   56.   This statement, however, does not accurately characterize OpenX's

21 COPPA practices. OpenX does not identify all child-directed properties nor does it

22 add a COPPA flag to all inventory coming from child-directed properties. Without

23 the COPPA flag to indicate that the inventory is child-directed, OpenX's demand-

24 side partners have served targeted ads to the users of those child-directed Web sites

25 and Apps.

26

27

28

1

OPENX'S VIOLATIONS OF THE FTC ACT

2

COUNT I: Deception – OpenX Has Misrepresented Its Data Collection
3 **Practices, and Collected Consumer Location Data When the Consumer Had Not**
Provided Consent or Had Expressly Denied Consent
4

5   57.   As provided in Paragraphs 34 and 35, OpenX represented, directly or

6   indirectly, expressly or by implication, that consumers can opt out of OpenX's

7   collection, use, and transfer of precise location data by using the location services

8   controls in their mobile device settings or by denying consent when prompted by a

9   permission dialog box.

10   58.   In fact, as described in Paragraphs 36 to 45, consumers could not opt out

11   of OpenX's collection, use, and transfer of precise location data by using the location

12   services controls in their mobile device settings or by using the permission dialog

13   box within the App. OpenX collected and transferred the BSSID even if the

14   consumer had not provided consent or had expressly denied permission to collect

15   location data.

16   59.   Therefore, the representations referred to in Paragraph 57 were false or

17   misleading, and constitute a deceptive act or practice in violation of Section 5(a) of

18   the FTC Act, 15 U.S.C. § 45(a).

19   **COUNT II: Deception – OpenX Has Misrepresented Its**
                        COPPA Activities and Practices
20

21   60.   As provided in Paragraph 54, OpenX represented, directly or indirectly,

22   expressly or by implication, that it does not engage in activities that require parental

23   notice or consent under COPPA. As provided in Paragraph 55, OpenX also

24   represented, directly or indirectly, expressly or by implication, that it identifies all

25   child-directed properties and includes a COPPA flag to identify inventory from those

26   properties.

27   61.   In fact, as provided in Paragraphs 12 to 23 and 46 to 56, OpenX does

28   engage in activities that require parental notice and consent under COPPA.

1   Moreover, OpenX does not identify all child-directed properties, nor does it include a

2   COPPA flag in bid requests to identify all child-directed inventory.

3   62.   Therefore, the representations referred to in Paragraph 60 were false or

4   misleading, and constitute a deceptive act or practice in violation of Section 5(a) of

5   the FTC Act, 15 U.S.C. § 45(a).

OPENX'S VIOLATIONS OF THE COPPA RULE

COUNT III: COPPA – OpenX Has Collected Personal Information
from Users of Child-Directed Properties
Without Consent and Proper Notice

10   63.   Pursuant to the COPPA Rule, 16 C.F.R. § 312.3, any operator of a Web

11 site or online service directed to children, or any operator that has actual knowledge

12 that it is collecting or maintaining personal information from a child, is required to

13 collect information from children in a COPPA-compliant manner. Those

14 requirements include providing proper notice and obtaining parental consent before

15 collecting, using, and disclosing personal information from children. As described in

16 Paragraphs 12 to 23 and 46 to 56, OpenX is an operator of an online service directed

17 to children because it is an operator of an online service with actual knowledge that it

18 is collecting personal information directly from users of another Web site or online

19 service directed to children.

20   64.   In connection with operating its Ad Exchange and selling ad inventory,

21 OpenX collected, used, and disclosed personal information from users of Web sites

22 or online services directed to children. OpenX collects personal information,

23 including location information and persistent identifiers, in ad requests from users of

24 child-directed Web sites and Apps participating in its Ad Exchange and transmits

25 that information in bid requests to its demand-side partners for use in online

26 behavioral advertising.

27   65.   In numerous instances, in connection with the acts and practices

28 described above, OpenX collected, used, and/or disclosed personal information from

children in violation of the Rule, including by:

      a. Failing to provide sufficient notice on its Web site or online service of the information it collects, or is collected on its behalf, online from children, how it uses such information, its disclosure practices, and all other required content, in violation of Section 312.4(d) of the Rule, 16 C.F.R. § 312.4(d);

      b. Failing to provide direct notice to parents of the information it collects, or information collected on its behalf, online from children, how it uses such information, its disclosure practices, and all other required content, in violation of Sections 312.4(b) and (c) of the Rule, 16 C.F.R. § 312.4(b)-(c); and

      c. Failing to obtain verifiable parental consent before any collection or use of personal information from children, in violation of Section 312.5 of the Rule, 16 C.F.R. § 312.5.

66. Pursuant to Section 1303(c) of COPPA, 15 U.S.C. § 6502(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57(a)(d)(3), a violation of the Rule constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

67. OpenX violated the COPPA Rule as described above with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

68. Each collection, use, or disclosure of a child's personal information in which OpenX violated the Rule in one or more of the ways described above, constitutes a separate violation for which Plaintiff may seek monetary penalties.

69. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, sec. 701, 129 Stat. 599 (2015), and Section 1.98(d) of the FTC's Rules of Practice, 16 C.F.R. § 1.98(d), authorizes this

1 Court to award monetary civil penalties of not more than $43,280 for each such

2 violation of the Rule on or after January 14, 2020.

3   **CONSUMER INJURY**

4   70.   Consumers are suffering, have suffered, and will continue to suffer

5 substantial injury as a result of OpenX's violations of the FTC Act and the COPPA

6 Rule. Absent injunctive relief by this Court, OpenX is likely to continue to injure

7 consumers and harm the public interest.

8   **PRAYER**

9   WHEREFORE, Plaintiff United States of America requests that the Court:

10   A.   Enter a permanent injunction to prevent future violations of the FTC Act

11 by OpenX with respect to the privacy of consumers' personal information;

12   B.   Enter a permanent injunction to prevent future violations of the COPPA

13 Rule by OpenX;

14   C.   Award Plaintiff monetary civil penalties from OpenX for each violation

15 of the COPPA Rule alleged in this Complaint; and

16   D.   Award any additional relief as the Court determines to be just and

17 proper.

18

19 Dated: December 15, 2021   Respectfully Submitted,

20
    FOR THE FEDERAL TRADE   FOR THE UNITED STATES OF
21 COMMISSION: AMERICA:

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