



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 a

