

# CARTOONS, KITTENS AND SUPER HEROES



## HOW 2013 TOOK THEM TO TASK

By Adam D.H. Grant, J.D.

Reflecting on this past year, it is clear that Federal Trade Commission used 2013 to make a strong statement about privacy and mobile apps. The FTC reached into many industries utilizing mobile apps, but it appeared to reserve its strongest hold for industries relying upon children who use

mobile apps.

For SpongeBob, a popular cartoon character who lives in a town called, "Bikini Bottoms" with a friendly, but not so bright, starfish as a best friend, even the threat of involving the FTC proved too much. In December 2012, the Center for Digital Democracy

("CDD") filed a complaint with the FTC against Nickelodeon and mobile game-maker PlayFirst for deceptive marketing of the SpongeBob Diner Dash game and for violating the Children's Online Privacy Protection Act (COPPA). The game, which was free for the iPhone and iPad app,

# THE COMPANY ALSO WILL PAY \$800,000 TO SETTLE CHARGES THAT IT ILLEGALLY COLLECTED PERSONAL INFORMATION FROM CHILDREN WITHOUT THEIR PARENTS' CONSENT.

assured consumers that the game complied with COPPA. However, according to CDD, Nickelodeon and PlayFirst engaged in several practices which violated COPPA.

According to the complaint, the app's "data collection is in accordance with applicable law, such as COPPA," when in fact it is not. The complaint alleged that the game asked children to provide a wide range of personal information, including name, email address, and other online contact information, without providing notice to parents or obtaining prior parental consent, as COPPA requires.

Within a week following the complaint, Nickelodeon pulled the app. "We elected to pull the app temporarily while we investigate the complaint," a spokesman for Nickelodeon told NBC News. Nickelodeon later reported that after a "thorough review" of the app, "we can confirm that no names, email addresses or other personally identifiable information were collected, and, therefore, we believe that no violation of COPPA occurred." The company said it plans to resubmit the app to Apple's App Store again.

"Nickelodeon has long prided itself as being a leader in COPPA compliance, and we are looking forward to maintaining that leadership position in the industry," a company spokesman said. Apparently, they made good on the promise, as the app remains available on the iPhone app store. Nevertheless, clearly the mere threat of an investigation by the FTC got Nickelodeon's immediate attention.

Shortly after the FTC issued its report on mobile privacy disclosures on February 1, 2013 and stressing how to build trust through transparency, it settled a complaint with Path on its use of a social networking app. According to the FTC, "the settlement requires Path, Inc. to establish a comprehensive privacy program and to

obtain independent privacy assessments every other year for the next 20 years. The company also will pay \$800,000 to settle charges that it illegally collected personal information from children without their parents' consent."

According to the FTC, Path violated COPPA by: not spelling out its collection, use and disclosure policy for children's personal information; not providing parents with direct notice of its collection, use and disclosure policy for children's personal information; and not obtaining verifiable parental consent before collecting children's personal information.

According to the FTC, "the settlement with Path is part of the FTC's ongoing effort to make sure companies live up to the privacy promises they make to consumers, and that kids' personal information isn't collected or shared online without their parents' consent."

In April, the FTC kept the ball rolling by issuing updated FAQ on the amended COPPA rules, which would take effect in July 2013. "Complying With COPPA: Frequently Asked Questions" contains information directed to websites and online services whose work online may involve the collection of personal information from children under age 13. The document provides guidance from the FTC staff that supplements the rule and other COPPA-related material previously published by the FTC.

The FTC also announced it maintains a "COPPA Hotline" email address, [COPPAHotLine@ftc.gov](mailto:COPPAHotLine@ftc.gov), where industry members can send questions on how to ensure they are compliant with the rule. FTC staff will periodically update the FAQs. Comments on the FAQs or suggestions for new FAQs may be submitted through the COPPA Hotline email address.

In July, the long awaited amendments to COPPA took effect. The amendments, among other requirements, increased the scope of what was considered personal identifiable information and expanded the requirements for parental approval. It did not take long, but as 2013 comes to close, kittens and super heroes can now count themselves as coming under the FTC's scrutiny thanks to an industry watch dog, the Center for Digital Democracy. On December 12, CDD requested that the FTC investigate and take enforcement action against two major players in the children's online media marketplace; Hello Kitty Carnival mobile phone app and the website Marvelkids.com. These are the first complaints filed by the CDD under the revised rules.

The CDD complaint claims that Hello Kitty is an extraordinarily popular brand among girls and that the Hello Kitty Carnival app is child-directed and must comply with COPPA, but does not. The complaint claims that the app can access and collect at least three different types of personal information from children, including identifiers that are unique to the mobile device, information regarding the mobile device's physical location, and photographs containing images of children.

Despite clearly obtaining children's PII, the complaint alleges that the app does not provide COPPA compliant notice or gain verifiable parental consent before collecting the information. Additionally, CDD alleges that the app does not attempt to provide direct notice to parents or to obtain their consent. Finally, CDD claims that the privacy policy is not clearly and understandably written and contains confusing and contradictory material.

Interestingly enough, one always questions just how an entity like the CDD determines all of this information about an app without actually obtain-

ing documentation from the entity. According to the complaint, CDD relied upon testimony of an expert in the field and on certain analytics. Ian Davey, an independent mobile and web privacy researcher who holds a master's degree in computer science from Princeton University, conducted the analysis. Mr. Davey's declaration, attached to the complaint, details the methods, procedures and findings generated by his analysis. The detailed information in the declaration provides clear notice to all the level of scrutiny their apps will be subjected to if their app finds its way to the FTC.

The complaint filed involving Marvelkids.com takes a different route. The CDD claims that the website is very popular with young boys and contains advertisements for toys such as Sonic the Hedgehog and Legos. The complaint alleges that Marvel admits it collects PII from children and that it uses the information to customize communications with the children. The privacy policy, according to the complaint, states that Marvel discloses the information to third party ad companies and advertising companies. In particular, it is alleged that Marvel allows third parties to directly collect PII from its users through various tracking technologies. Despite prominently displaying the BBB CARU Safe Harbor seal, the CDD alleges that Marvel does not provide a COPPA compliant notice. Specifically, the CDD alleges that Marvel makes no attempt to provide direct notice to parents or to obtain their consent.

With these two new complaints on file with the FTC based on amendments only a few months old, it is clear that as 2014 unfolds, the FTC will be taming what appears to be a rather wild kitten and trying find out just how powerful those super heroes are in real life. ❖

## ON DECEMBER 12, CDD REQUESTED THAT THE FTC INVESTIGATE AND TAKE ENFORCEMENT ACTION AGAINST TWO MAJOR PLAYERS IN THE CHILDREN'S ONLINE MEDIA MARKETPLACE;



**Adam Grant**

Adam is the Chief Legal Contributor for App Developer Magazine and is

a partner with Alpert, Barr & Grant, A Professional Law Corporation. With over 20 years of experience, he supports the firm's litigation practice with expertise in complex business disputes, mobile app law, privacy and embezzlement issues, construction law and real estate matters. He has litigated in both state and federal courts.