

collection and use of data for cross-app³ IBA, the application must provide notice and enhanced notice of this fact. Further, when an app is directed to children under the age of 13, it must also meet the more stringent requirements of the Sensitive Data Principle, specifically section VI.A. of the OBA Principles, which requires that covered companies that collect and use “personal information” (PI) as defined in the Children’s Online Privacy Protection Act of 1998 (COPPA) for IBA do so only in compliance with COPPA.⁴

COMPANY STATUS

Bearbit Studios is a mobile application development company that publishes the mobile game Smashy Road: Wanted (Smashy Road). The application is available on the Android and iOS operating systems.⁵ Bearbit Studios shares the same development team as related studios Kortenoeverdev and RK Games Studio. For purposes of this case, these three app publishers are treated as a single entity and are herein referred to collectively as Bearbit.

INQUIRY

This case continues the Accountability Program’s enforcement of the Mobile Guidance. When mobile enforcement began in September 2015, the Accountability Program undertook a review of popular applications on the Android and iOS operating systems. A number of these popular apps were gaming applications that appeared to be directed to children. While testing the gaming application Smashy Road, the Accountability Program found that its publisher, Bearbit, allowed third parties⁶ to collect user data for IBA without providing the required notice and enhanced notice. This data included our test phone’s IDFA,⁷ a unique, persistent identifier associated with

³ *Mobile Guidance* Definition D at 5. (“Cross-App Data is data collected from a particular device regarding application use over time and across non-Affiliate applications. Cross-App Data does not include Precise Location Data or Personal Directory Data.”)

⁴ *OBA Principles* § VI.A. at 16-17. (“Entities should not collect ‘personal information,’ as defined in the Children’s Online Privacy Protection Act (‘COPPA’), from children they have actual knowledge are under the age of 13 or from sites directed to children under the age of 13 for Online Behavioral Advertising, or engage in Online Behavioral Advertising directed to children they have actual knowledge are under the age of 13 except as compliant with the COPPA.”)

⁵ Bearbit Studios, *Bearbit Studios*, www.bearbitstudios.com (last visited Mar. 9, 2016) (“Bearbit Studios is an Indie game development studio, located in the Netherlands.”) *See also*, Google Play, *Bearbit Studios*, <https://play.google.com/store/apps/details?id=com.rkgames.smashywanted> (last visited Mar. 9, 2016); *see* Apple App Store, *Smashy Road: Wanted*, <https://itunes.apple.com/us/app/smashy-road-wanted/id1020119327?mt=8> (last visited Mar. 9, 2016).

⁶ *Mobile Guidance* Definition N at 12. (“An entity is a Third Party to the extent that it collects Cross-App Data or Precise Location Data from or through a non-Affiliate’s application or collects Personal Directory Data from a device.”)

⁷ Using the Accountability Program’s testing equipment, we captured and inspected Internet Protocol (IP) packets being transmitted from the application. Through analysis of the application’s network traffic, we observed third parties collecting cross-app data, likely for IBA. Among those third parties, the Accountability Program noted the collection of Android’s Advertising ID (AAID or IFA), a unique alphanumeric string used to identify a particular device for advertising purposes. AAIDs or IFA are the Android equivalent of Apple’s Identifiers for Advertisers (IDFA). *See* Greg Sterling, *Google Replacing “Android ID” with “Advertising ID” Similar to Apple’s IDFA*, Marketing Land, <http://marketingland.com/google-replacing-android-id-with-advertising-id-similar-to-apples-idfa-63636> (October 31, 2013); *see also* Grace Fletcher, *The Impact of iOS 7 on Mobile Attribution*, Tune.com blog, <http://www.tune.com/blog/impact-ios-7-mobile-attribution/> (August 27, 2013); *see also* DoubleClick, *Target Mobile Apps With IDFA or AAID*, DoubleClick Ad Exchange Buyer Help,

our testing device used for targeted mobile advertising. During testing, the Accountability Program found that Smashy Road allowed this collection to occur when the game's user appeared to be under the age of 13. This prompted a further review of Bearbit's compliance with the DAA Principles.⁸

We examined the Smashy Road application pages in both Apple's and Google's mobile application stores for the presence of the enhanced notice links required when companies allow third parties to collect cross-app data. Publishers may place this link in the application store, often pointing the link labeled "Privacy Policy" directly to the IBA disclosure on their privacy policy webpage. However, Bearbit provided no such links on the Smashy Road application pages. We also found no evidence of enhanced notice links at the other compliant locations and times prescribed by the Mobile Guidance.

We then looked for Bearbit's privacy policy, but we could not easily locate it by visiting any of the websites associated with Bearbit. Indeed, the only way we could locate Bearbit's privacy policy page at all was to do an Internet search of the publisher's email address, which eventually led to Bearbit's privacy policy. However, this privacy policy did not contain a compliant IBA disclosure, as it did not disclose third-party data collection occurring through its apps, did not explain how consumers could opt out of IBA on their mobile devices, and did not include statement of Bearbit's adherence to the DAA Principles. Looking further, we did not find an IBA disclosure anywhere else within the Smashy Road application itself or on Bearbit's websites.

During our investigation but prior to our initiating a formal inquiry, Bearbit updated the Smashy Road application store pages to include a link to its privacy policy. This link was also placed within the settings of the application, but, since the new links did not direct consumers to a compliant disclosure, the issues discussed above remained.

During our review, we made note of several facts that suggested that Smashy Road was geared to an audience of children under the age of 13. First, the application features cartoon vehicles in a blocky, colorful environment. Second, the game's controls are quite simple and appear likely to be understood by children under 13. Third, the application is given a rating of "E" for everyone in the Google Play store; a 9+ rating in the Apple App Store; and a "10 and up" rating in the Windows Application Store.⁹ As a result, we also reviewed the application for compliance with the portion of the Sensitive Data Principle related to children, section VI.A. of the OBA Principles, which requires that all companies covered by the DAA Principles collect persistent identifiers for use in IBA from children they know to be under the age of 13 or from child-

<https://support.google.com/adxbuyer/answer/3221407?hl=en> (last visited Apr. 20, 2016); *see also Mobile Guidance Definition D at 5* ("Cross-App Data is data collected from a particular device regarding application use over time and across non-Affiliate applications. Cross-App Data does not include Precise Location Data or Personal Directory Data.")

⁸ The Accountability Program tested other applications published by Bearbit in the course of its review for comparison. Unless stated otherwise, this decision addresses the application Smashy Road.

⁹ Google Play, *Smashy Road: Wanted*, <https://play.google.com/store/apps/details?id=com.rkgames.smashywanted> (last visited Apr. 8, 2016); *see also* Apple App Store, *Smashy Road: Wanted*, <https://itunes.apple.com/us/app/smashy-road-wanted/id1020119327?mt=8> (last visited Apr. 8, 2016). Windows Store, *Smashy Road: Wanted*, <https://www.microsoft.com/en-us/store/apps/smashy-road-wanted/9nblggh6j4j> (last visited Apr. 8, 2016).

directed sites only in compliance with COPPA.¹⁰ Because we observed third-party collection in our initial tests, we went on to examine the Smashy Road application for the presence of a mechanism for obtaining verifiable parental consent or, alternatively, conducting a compliant age screen to prevent third-party collection of information from children under the age of 13 without prior parental consent. However, we did not observe Bearbit employing either of these two methods for complying with COPPA.

Based on the above review, the Accountability Program sent an inquiry letter to Bearbit explaining the compliance issues found regarding the Smashy Road application.

COMPANY'S POSITION

After some initial difficulties in establishing a line of communication with Bearbit, the company committed to coming into compliance with the DAA Principles. The company consulted with the Accountability Program to develop a plan to modify its application in order to reach compliance. To meet its responsibilities, Bearbit has made the following changes:

I. Mobile Guidance compliance

A. Cross-app enhanced notice

As mentioned above, Bearbit added privacy policy links on the Smashy Road application pages in both the Google Play and Apple App stores prior to our contacting them. The links direct users to Bearbit's privacy policy page (www.bearbitstudios.com/privacy/). To come into compliance with the enhanced notice provisions of the Mobile Guidance, Bearbit added an IBA disclosure to the top of this page such that the privacy policy links in the app stores take consumers directly to the disclosure. This disclosure contains a description of third-party IBA activity taking place in the Smashy Road application, a statement of Bearbit's adherence to the DAA Principles, and information about a number of choice mechanisms. These choice mechanisms include a link directing users to the AppChoices website (www.aboutads.info/appchoices) and instructions on how to turn on the "Limit Ad Tracking" and "Opt out of interest-based ads" settings on iOS and Android mobile devices.

Bearbit also provided the Accountability Program with an updated Android version of Smashy Road for technical analysis. This version of the game is modified to comply with the DAA Principles. It includes a link labelled "Privacy Policy" on the settings screen. This link properly directs users to Bearbit's privacy policy page, where the consumer will find a compliant IBA disclosure at the top of the page.

B. Sensitive data compliance

Bearbit did not dispute the Accountability Program's position that Smashy Road likely appeals to a substantial audience of children under the age of 13, although it was intended primarily for an older audience. Bearbit agreed to add an age screen to the Smashy Road application to bring it into compliance with the Sensitive Data Principle. This age screen now requires users to enter

¹⁰ Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§ 6501-6505.

their year of birth prior to beginning play. Users who enter a birth year that indicates they are under the age of 13 are flagged as such, and collection of persistent identifiers for IBA is disabled for these users. Accountability Program testing using a year of birth of 2009 confirmed that Bearbit no longer authorizes third parties to engage in collection for IBA when the user is under the age of 13.

The modified version of Smashy Road containing the age gate and privacy policy link has been pushed to the app stores and will be included as part of users' regular app update cycles unless they have disabled this functionality. In addition, Bearbit has made identical modifications to its other applications to ensure all of its mobile games comply with the DAA Principles.

DECISION

The Mobile Guidance adapts the desktop-oriented rules of the OBA Principles to the mobile world, including the core requirements to provide transparency and consumer control of IBA. In particular, when first parties permit third parties to collect data through their apps for use in IBA, they must provide enhanced notice and choice about such third-party data collection.¹¹

As with the original OBA Principles, the Mobile Guidance treats companies according to the roles they play in the online advertising ecosystem. Here, Bearbit has duties as a first-party mobile app publisher. In this case, we address Bearbit's responsibilities under section III.A.(3) of the Mobile Guidance to provide an enhanced notice link to a compliant IBA disclosure and under section VI.A. of the OBA Principles to ensure that data collection or use regarding children under 13 is allowed only in compliance with COPPA.

I. First party enhanced notice and consumer control for cross-app data collection

Since Bearbit authorizes third parties to engage in cross-app IBA through the Smashy Road application, it has first party obligations under the cross-app provisions of the Mobile Guidance.¹²

According to section III.A.(3) of the Mobile Guidance, first parties who affirmatively authorize a third party to collect or use cross-app data for IBA must provide a clear, meaningful, and prominent link to a disclosure that 1) describes the third party collection, 2) points to a choice mechanism/setting or lists all third parties with links to their opt outs, **and** 3) contains a statement of adherence to the DAA Principles.¹³ The enhanced notice link must be provided either prior to download (e.g., in the app store on the application's page), during download, on first opening of the app, **or** at the time cross-app data is first collected, **and** in the application's settings or any privacy policy.¹⁴

These enhanced notice requirements make information about privacy more accessible to users, so they can make an informed decision about whether to participate in data collection and use for

¹¹ See *Mobile Guidance* § III.A.-B. at 14-20.

¹² Bearbit did not dispute that it had authorized this third-party data collection.

¹³ *Mobile Guidance* at 17.

¹⁴ *Id.*

IBA. The enhanced notice link must go **directly** to the place where the app explains its IBA practices.¹⁵ Moreover, the link must be provided **at or before** the moment a user’s engagement with the app results in third-party data collection for IBA. This replaces the old-fashioned practice of burying information about IBA—if it was provided at all—somewhere in the privacy policy for the consumer to unearth. It also requires that the company’s disclosure explain to consumers how they can opt out of IBA, including providing links to easy-to-use opt-out mechanisms like the DAA’s AppChoices tool.

Bearbit addressed these compliance issues by adding privacy policy links to Smashy Road’s pages on the Apple App and Google Play stores. These links now direct users to an IBA disclosure at the top of its privacy policy page that explains the third-party collection for IBA occurring through Bearbit’s apps, indicates Bearbit’s adherence to the DAA Principles, and provides users with access to multiple choice mechanisms. Bearbit also added a privacy policy link to its application’s settings which takes users to the same IBA disclosure.

II. Sensitive data obligations

The Mobile Guidance triggers additional responsibilities when companies authorize the collection of certain types of data, including the persistent identifiers that underpin IBA, through applications that are directed to children. This is because the Mobile Guidance incorporates all of the self-regulatory principles and definitions of the OBA Principles, including section VI.A., the Sensitive Data Principle.¹⁶ Compliance with the Sensitive Data Principle requires, among other things, compliance with the pertinent provisions of COPPA.¹⁷ COPPA, in part, requires companies to obtain verifiable parental consent¹⁸ when they 1) allow the collection of PI¹⁹ from children they have actual knowledge are under the age of 13, or 2) allow the collection of PI on applications that are directed to children.²⁰ Since our testing revealed third-party collection of persistent identifiers (a type of PI under COPPA) through Smashy Road, which appears likely to attract a significant audience under 13, we determined that Bearbit also has heightened responsibilities under the Mobile Guidance.²¹ In analyzing these responsibilities, we examined the FTC’s body of COPPA rules, guidance, and cases.

¹⁵ We note that where the third party is unable to provide enhanced notice and choice in an app, the first party should work with the third party to ensure that such notice and choice are provided. *See Mobile Guidance* § III. B.(1) at 18-19; *Compare* Online Interest-Based Advertising Accountability Program, *Compliance Warning*, available at <http://www.asrcreviews.org/wp-content/uploads/2013/10/Accountability-Program-First-Party-Enhanced-Notice-Compliance-Warning-CW-01-2013.pdf> at 2 (“Both the third party and the first party share responsibility for provision of enhanced notice. Because the third party which is collecting the data generally has no direct means to provide notice and choice on the website where its data collection is occurring, providing just-in-time notice of collection and an opt out requires cooperation between the third party engaged in the collection and the first party on whose website such collection is permitted.”)

¹⁶ *Mobile Guidance* at 1.

¹⁷ *OBA Principles* at 16-17; *see also* COPPA, 15 U.S.C. §§ 6501-6505.

¹⁸ 15 U.S.C. § 6501(9).

¹⁹ Federal Trade Commission, *Complying with COPPA: Frequently Asked Questions*, § A.3., <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions> (last visited Apr. 6, 2016) (“The amended Rule defines personal information to include...A persistent identifier that can be used to recognize a user over time and across different websites or online services.”) *See also* 15 U.S.C § 6501(8). There is a narrow exception for collection and use of PI for “internal operations” which is not at issue here

²⁰ *Id.*; *see also supra* note 17.

²¹ Bearbit did not dispute that it had authorized this third party data collection.

Under section 312.2 of the FTC’s COPPA regulations, the determination of whether an application is targeted to children is based on a multi-factor test which considers factors such as subject matter, visual content, language, use of animated characters, and use of child-oriented activities or incentives.²² The FTC recently addressed this issue in its *TinyCo* settlement.²³ In that case, the FTC alleged that the company’s mobile apps were child-directed because they “appeal[ed] to children by containing brightly-colored, animated characters... and by involving subject matters such as a zoo, tree house, or resort inspired by a fairy tale.”²⁴

In its official FAQ for COPPA, the FTC strongly encourages a company to investigate whether its app falls within the FTC definitions of child-directed (that is, whether it has either a primary or secondary audience of children under 13). The FTC notes that if the app is child-directed under the multi-factor test the agency has developed, the app will have violated the regulation, and the company will be held liable.²⁵ Further, COPPA imposes strict liability on the owners and operators of child-directed websites and online services where third parties collect PI from children for IBA.²⁶ This precludes first parties from disclaiming responsibility for the actions of third parties on its app or website.²⁷

²² See *supra* note 19 at § D.1. (“The amended Rule sets out a number of factors for determining whether a website or online service is directed to children. These include subject matter of the site or service, its visual content, the use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, or whether advertising promoting or appearing on the website or online service is directed to children.”)

²³ *FTC v. TinyCo*, FTC Matter 132 3209 (Sept. 2014).

²⁴ *Id.*

²⁵ See *supra* note 19 at § D.3. (“As the operator, you should carefully analyze who your intended audience is, the actual audience, and in many instances, the likely audience for your site or service.”); see also *supra* note 19 at section G.2. (“Although you may intend to operate a “teen service,” in reality, your site may attract a substantial number of children under 13, and thus may be considered to be a “Web site or online service directed to children” under the Rule. Just as the Commission considers several factors in determining whether a site or service is directed to children, you too should consider your service’s subject matter, visual content, character choices, music, and language, among other things. If your service targets children as one of its audiences – even if children are not the primary audience – then your service is “directed to children.” In circumstances where children are not the primary audience of your child-directed service, the amended Rule allows you to employ an age screen in order to provide COPPA’s protections to only those visitors who indicate they are under age 13. Note that sites or services directed to children cannot use the age screen to block children under age 13. See FAQ D.2 above. Once you identify child visitors, you may choose to: 1. Collect parents’ online contact information to provide direct notice in order to obtain parents’ consent to your information collection, use and disclosure practices; or 2. Direct child visitors to content that does not involve the collection, use, or disclosure of personal information.”)

²⁶ Children’s Online Privacy Protection Act Rule; Final Rule, Vol. 38 No. 12, 16 C.F.R. Part 312 (2013), <http://www.gpo.gov/fdsys/pkg/FR-2013-01-17/pdf/2012-31341.pdf> (“For the reasons discussed below, the Commission, with some modifications to the proposed Rule language, will retain the strict liability standard for child-directed content providers that allow other online services to collect personal information through their sites.”) See also, 15 U.S.C. § 6501(2) (“The term “operator”— (A) means any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service, involving commerce....”)

²⁷ *Id.*

COPPA allows the designation of some child-directed apps as “mixed-audience” when the app does not target children as its primary audience but nonetheless “attract[s] a substantial number of children under 13.”²⁸ COPPA allows publishers to employ an age gate in these circumstances to flag users under the age of 13 so first parties can prevent third parties from collecting their PI, obtain verifiable parental consent prior to collection, or direct the children to content that does not involve the collection or use of PI.²⁹

The Accountability Program concluded that Smashy Road appeared to be a mixed-audience app based on the following characteristics that we observed. Smashy Road involves a car that is constantly moving while being chased by police cars in a colorful, cartoonish environment. The controls are quite simple and appear likely to be understood by children under 13. The user is able to direct the car’s direction by simply touching the left or right sides of the screen. As noted above, the application is given a rating of “E” for everyone in the Google Play store; a 9+ rating in the Apple App Store; and is given a “10 and up” rating in the Windows Application Store.³⁰ However, we also noted that the game’s objective is to evade capture by the police, which often involves the player causing the police to crash their vehicles. On balance, these factors seem to indicate that the game is aimed primarily at a teenaged audience but likely attracts a substantial audience of children under 13.

Assuming, arguendo, that Smashy Road is a mixed-audience app, then it initially failed to comply with COPPA. During the Accountability Program’s original compliance tests, Smashy Road allowed third parties to collect persistent identifiers for use in IBA without obtaining verifiable parental consent prior to collection or employing an age gate to screen users under the age of 13, as required under COPPA.

Bearbit agreed with the Accountability Program’s position that its application is likely a mixed-audience app and committed to bringing the Smashy Road application into compliance with the DAA Principles. The Accountability Program recently tested an updated version of the Smashy Road application provided to us by Bearbit and found Bearbit employing a compliant age screening mechanism to achieve compliance with the DAA Principles as they reflect the pertinent provisions of COPPA relating to IBA. Because the tested application—now live on the relevant mobile application stores—no longer allows the third-party collection of IBA data from users under the age of 13 nor itself collects such data, the compliance problem under section VI.A. of the DAA’s OBA Principles is now resolved

CONCLUSION

This case represents the continuing effort of the Accountability Program to enforce the Principles outlined in the Mobile Guidance. Companies must be cognizant of how they reach consumers online and ensure they are compliant with the rules that cover each type of data collected.

²⁸ See *supra* note 25.

²⁹ *Id.*

³⁰ Google Play, *Smashy Road: Wanted*, <https://play.google.com/store/apps/details?id=com.rkgames.smashywanted> (last visited Apr. 8, 2016). Apple App Store, *Smashy Road: Wanted*, <https://itunes.apple.com/us/app/smashy-road-wanted/id1020119327?mt=8> (last visited Apr. 8, 2016). Windows Store, *Smashy Road: Wanted*, <https://www.microsoft.com/en-us/store/apps/smashy-road-wanted/9nblggh6j4j> (last visited Apr. 8, 2016).

Companies who publish apps that are child-directed, or who have actual knowledge that they are collecting data from children under the age of 13, must be aware of their legal and self-regulatory compliance obligations.

The willingness of mobile app publishers like Bearbit to make all necessary modifications to come into compliance demonstrates industry's commitment to consumer privacy as embodied in the DAA Principles. The Accountability Program appreciates the support of successful app publishers such as Bearbit. We especially appreciate that Bearbit, a small company based in The Netherlands, worked diligently and responsibly to comply with US self-regulation. We believe that this demonstrates that self-regulation is an international language and is understood by responsible companies around the world. If properly explained and vigorously enforced, these standards know no national boundaries.

COMPANY'S STATEMENT

Bearbit supports the OBA principles as they align with our values of transparency and consumer choice in online advertising. We appreciate the opportunity to work with the Advertising Self-Regulatory Council to improve our current practices.

DISPOSITION OF DECISION

Practices voluntarily corrected.



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