

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE FEDERAL TRADE COMMISSION

In the Matter of DesignerWare, LLC; Timothy Kelly and Ronald P. Koller; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc.; J.A.G. Rents, LLC; Red Zone, Inc.; B. Stamper Enterprises, Inc.; and C.A.L.M. Ventures, Inc.

“FTC File No. File No. 112 3151”

October 25, 2012

By notice published on October 2, 2012, the Federal Trade Commission (“FTC”) has proposed consent agreements with DesignerWare, LLC; Timothy Kelly and Ronald P. Koller; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc.; J.A.G. Rents, LLC; Red Zone, Inc.; B. Stamper Enterprises, Inc.; or C.A.L.M. Ventures, Inc. (“Companies”) that would settle “alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition.”¹ Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to ensure that the final order adequately protects the privacy of consumers who interact with these Companies.

EPIC is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights of consumers.² EPIC’s 2010 complaint concerning Google Buzz provided the

¹ DesignerWare, LLC et al., Analysis of Proposed Consent Order to Aid Public Comment, 77 Fed. Reg. 60119 (proposed October 2, 2012), <http://www.ftc.gov/os/fedreg/2012/10/121002designerwarefrn.pdf>.

² See, e.g., Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney, EPIC (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the

basis for the Commission’s investigation and October 24, 2011 subsequent settlement concerning the improper disclosure of user information.³ In that case, the Commission found that Google “used deceptive tactics and violated its own privacy promises to consumers when it launched [Buzz].”⁴ The Commission’s settlement with Facebook also followed from a Complaint filed by EPIC and a coalition of privacy and civil liberties organization in December 2009 and a Supplemental Complaint filed by EPIC in February 2010.⁵ EPIC has also submitted comments to the Commission on numerous proposed orders that implicate the privacy interests of consumers. However, to date the Commission has adopted these consent orders without any modification.⁶ In fact, it is becoming unclear what purpose is served by the Commission’s request for public comments on a proposed settlement if the agency is unwilling to make any modifications. Nonetheless, EPIC offers these recommendations to strengthen the proposed settlement and to protect the interests of consumers.

In this case, the Companies offered computers to consumers on a rent-to-own basis.

Without informing consumers, the Companies equipped these computers with monitoring

direct marketing industry), http://epic.org/privacy/internet/ftc/ftc_letter.html; DoubleClick, Inc., *FTC* File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; Microsoft Corporation, *FTC* File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; Choicepoint, Inc., *FTC* File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/fcraltr12.16.04.html>.

³ Press Release, Federal Trade Comm’n, *FTC Charges Deceptive Privacy Practices in Google’s Rollout of Its Buzz Social Network* (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> (“Google’s data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”).

⁴ *Id.*

⁵ Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf> [hereinafter EPIC 2009 Facebook Complaint]; Facebook, Inc., (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief) [hereinafter EPIC 2009 Facebook Supplement]; Facebook, Inc., (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf [hereinafter EPIC 2010 Facebook Complaint].

⁶ Comments of the Elec. Privacy Info. Ctr., *FTC* Docket No. 102 3058 (Jun. 8, 2012), *available at* <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., *FTC* Docket No. 092 3184 (Dec. 17, 2011), *available at* <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., *FTC* Docket No. 102 3136 (May 2, 2011), *available at* https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

technology that enabled the capture and transmission back to the Companies of private email messages, as well as the remote enabling of the video camera installed in the computers.

According to the Federal Trade Commission investigation, the Companies secretly captured “user names and passwords for email accounts, social media websites, and financial institutions; Social Security numbers; medical records; private emails to doctors; bank and credit card statements; and webcam pictures of children, partially undressed individuals, and intimate activities at home.”⁷

The consent orders flatly prohibit the Companies from using or licensing others to use any monitoring technology to secretly collect personal data from any computer rented to a customer. The orders enjoin these companies from using geolocational tracking without “clear and prominent notice,” “affirmative express consent,” and “clear and prominent icons.” Furthermore, the orders ban the use of fake software registration screens to gather consumers’ personal information. The orders also require the Companies to delete or destroy all user data collected using the illegal monitoring technology, and prohibits the use of improperly obtained information for debt collection purposes. All the proposed settlements also include record-keeping requirements that allow the FTC to monitor the companies’ compliance with the orders for the next 20 years.

EPIC supports the proposed consent orders in this case. The orders will help prevent the Companies from engaging in similar privacy violations in the future. However, because of the particularly egregious privacy violations at issue in this case and the vulnerability of the targeted consumers, EPIC believes that additional protections are needed. Specifically, EPIC recommends that (1) the Commission require the Companies to implement Fair Information

⁷ Press Release, Fed. Trade Comm’n, FTC Halts Computer Spying (Sept. 25, 2012), <http://www.ftc.gov/opa/2012/09/designware.shtm>.

Practices similar to those contained in the Consumer Privacy Bill of Rights; (2) the Commission make the compliance reports publicly available; and (3) the Commission further investigate—perhaps in a workshop format—the relationship between privacy and inequality, *i.e.* the risk that low-income consumers are more likely to be subject to business practices that place at risk personal privacy.

I. The Commission Should Require the Companies to Implement Fair Information Practices Similar to the Principles in the Consumer Privacy Bill of Rights

Although EPIC supports the relief proposed in the consent orders, the Commission should also require the Companies to implement Fair Information Practices (FIPs).⁸ FIPs appear in various laws and frameworks throughout the information privacy space, such as the Organization for Economic Cooperation and Development (OECD) Privacy Guidelines,⁹ the Privacy Act of 1974,¹⁰ and the European Commission’s recent Data Protection Regulation.¹¹ Several of these principles are also highlighted in the Commission’s recent report, such as privacy by design, choice, and transparency.¹²

⁸ EPIC has made the same recommendation to the FTC in other similar settlement proceeding where the FTC has asked for public comment. *See, e.g.*, Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (Jul. 11, 2012), *available at* <https://epic.org/privacy/ftc/FTC-In-Short-Cmts-7-11-12-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), *available at* <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Project No P114506 (May 11, 2012), *available at* <https://epic.org/privacy/ftc/EPIC-FTC-Ad-Disclosures-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), *available at* <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), *available at* https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf.

⁹ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, *available at* http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html.

¹⁰ Privacy Act of 1974, 5 USC § 552a.

¹¹ Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and the free movement of such data (General Data Protection Regulation), E.C. COM (2012) final, (Jan. 25, 2012), *available at* http://ex.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

¹² FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

One recent formulation of the FIPS is the White House’s Consumer Privacy Bill of Rights (CPBR).¹³ The CPBR is a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability.¹⁴

By requiring that the Companies only employ location tracking technology after obtaining the affirmative express consent of users and that they delete any illegally-collected data, the consent orders will do much to prohibit future instances of the kind of commercial surveillance that occurred in this case. The Commission can accomplish the same objective while better protecting the privacy of consumers by requiring the Companies to implement the FIPs contained within the CPBR: Respect for Context, Security, Access and Accuracy, and Accountability. By requiring the full set of FIPs, the Commission will ensure that the personal data of consumers is protected throughout the data lifecycle. More importantly, the Commission will put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers

The Commission likely developed the consent orders in these to address the specific allegations contained in the complaints. Indeed, in the past, the Commission has declined to require greater protections when it has believed that they did not address the wrongdoing at issue in the case. In *In the Matter of Myspace LLC*, the Commission declined to require Myspace to adopt additional CPBR protections because “the order is designed to address specific conduct as alleged in the complaint, not to impose obligations that may not be tied to such conduct.”¹⁵ But

¹³ See WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL ECONOMY 2012, <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

¹⁴ *Id.*

¹⁵ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Marc Rotenberg et. al (Aug. 30, 2012), *available at* <http://ftc.gov/os/caselist/1023058/120911myspaceletterepic.pdf>.

the Commission has also defended its consent orders on the grounds that they protect against misconduct additional to that giving rise to the complaint. In adopting a consent order with Facebook, the Commission stated that the terms of the settlement “are broad enough to address misconduct beyond that expressly challenged in the complaint.”¹⁶ EPIC believes that the latter view accurately describes the Commission’s power in developing consent orders, and that nothing prohibits the Commission for placing protections in an order that are designed to address related violations. Furthermore, although FIPs are often divided into specific practices, they form a coherent framework that resists division or selective application. In that sense, to apply all of the FIPs to the Companies is not to impose obligations unrelated to the conduct in this case, but to provide full injunctive relief by ensuring adequate privacy protections in the future.

II. The Commission Should Make the Compliance Reports Publicly Available

The Commission should also make the Companies’ compliance reports publicly available to the greatest extent possible. Although companies may exempt trade secrets or confidential commercial information, the initial assessment required by the consent orders should be releasable without redaction.

In the past, the Commission has stated that privacy assessments by other companies would be available to the public, subject to applicable laws. After finalizing a consent order with Google that required similar independent assessments, the Commission wrote to EPIC and stated that “[t]o the extent permissible under law, the public may have access to the submissions

¹⁶ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Marc Rotenberg et. al (Jul. 27, 2012), *available at* <https://epic.org/privacy/facebook/Facebook-Ltr-To-EPIC-07-27-12.pdf>

required pursuant to the order.”¹⁷ Indeed, Google’s initial compliance report was released without redactions.¹⁸

Furthermore, the experience of the international community provides evidence of the feasibility of such transparency. In 2009, Canadian Privacy Commissioner conducted an investigation of Facebook’s privacy policies and released a 113-page report that described in detail the findings of the investigation and the office’s recommendations.¹⁹ More recently, the Irish Data Protection Commissioner’s investigation into Facebook, cited above, produced a 150-page report and 77 pages of “technical analysis” that were made publicly available.²⁰

III. The Commission Should Further Investigate the Connection Between Privacy and Economic and Social Inequality

Finally, it is important that the FTC remain mindful of the fact that these consent orders are not only protecting consumers from unfair and deceptive business practices, but also, more specifically, protecting the most vulnerable consumers. Rent-to-own companies are debt traps for low-income and disadvantaged consumers.²¹ They are also regularly challenged in legal and economic journals, and have been a major topic for study and debate among federal regulatory agencies.

¹⁷ Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Marc Rotenberg et. al (Oct. 13, 2011), <http://www.ftc.gov/os/caselist/1023136/111024googlebuzzepic.pdf>.

¹⁸ Letter from Sarah Mathias, Associate General Counsel, Fed. Trade Comm’n, to Ginger McCall, Director, EPIC Open Gov’t Program (Feb. 15, 2012), *available at* <https://epic.org/privacy/ftc/google/EPIC-FTC-Google-Compliance-Reply-02-17-12.pdf>.

¹⁹ OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, REPORT OF FINDINGS INTO THE COMPLAINT FILED BY THE CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC) AGAINST FACEBOOK INC. (2009), http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.cfm#complaint.

²⁰ *See* DATA PROTECTION COMM’R, REPORT OF AUDIT (2011), <http://dataprotection.ie/documents/facebook%20report/report.pdf/report.pdf>.

²¹ *See, e.g.,* Perez v. Rent-A-Center, Inc., 892 A.2d 1255 (N.J. 2006); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965); *see also* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211 (2003).

Thus, EPIC recommends that the FTC explore business practices where the privacy impact may fall disproportionately on low-income consumers. A workshop would aid the Commission's fact-finding activities and would bring public attention to the subject.

IV. Conclusion

EPIC supports consent orders in this case. However, consumers' privacy would be better protected by modifying the orders to include FIPs and the other recommendations contained in these comments. EPIC therefore urges the Commission to adopt the changes to the proposed orders set out above. EPIC further notes that the Commission has yet to modify an order in response to a request for public comment, and wonders whether the Commission intends in this instance to give any weight to the comments it has requested.

Respectfully Submitted,

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