

September 4, 2013

Chairwoman Edith Ramirez
Commissioner Julie Brill
Commissioner Maureen Ohlhausen,
Commissioner Joshua Wright
The Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Facebook's Changes Regarding Sponsored Stories

Dear Madam Chair and Members of the Federal Trade Commission,

We write to bring your attention to proposed changes in Facebook's Statement of Rights and Responsibilities and Data Use Policy. The changes will allow Facebook to routinely use the images and names of Facebook users for commercial advertising without consent. The changes violate Facebook's current policies and the 2011 Facebook settlement with the FTC. The Commission must act to enforce its Order.

The pending changes arise from a class action settlement in which the attorneys who purported to represent the interests of Facebook users granted the company a right that was contrary to the company's policy at the time the litigation was initiated.¹ As a consequence, Facebook users who reasonably believed that their images and content would not be used for commercial purposes without their consent will now find their pictures showing up on the pages of their friends endorsing the products of Facebook's advertisers. Remarkably, their images could even be used by Facebook to endorse products that the user does not like or even use.²

The proposed changes are broad enough to allow Facebook to resurrect programs similar to Beacon, a program that just about everyone including Facebook agreed was wrong and was

¹ See *Fraley v. Facebook*, No. 11-1726 (N.D. Cal. filed Apr. 8, 2011).

² See *Proposed Statement of Rights and Responsibilities*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-pm1/851575_209563965879553_209116475_n.pdf (last visited Sept. 1, 2013) ("You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us."); see also Anthony Wing Kosner, *Facebook Is Recycling Your Likes To Promote Stories You've Never Seen To All Your Friends*, FORBES (Jan. 21, 2013), <http://www.forbes.com/sites/anthonykosner/2013/01/21/facebook-is-recycling-your-likes-to-promote-stories-youve-never-seen-to-all-your-friends/> ("Facebook is now recycling users' Likes and using them to promote "Related Posts" in the news feeds of the user's friends. And one more thing, the users themselves have possibly never seen the story, liked the story or even know that it is being promoted in their name.").

subsequently shut down.³ It requires “Alice in Wonderland” logic to see this as anything but a major setback for the privacy rights of Facebook users.⁴

Under the original Statement of Rights and Responsibilities, Facebook said to users:

You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place.⁵

Under the Proposed Statement of Rights and Responsibilities, Facebook now says:

You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.⁶

The impact on minors is particularly pernicious. According to the proposed policy changes, Facebook simply asserts:

If you are under the age of eighteen (18), or under any other applicable age of majority, you represent that at least one of your parents or legal guardians has also agreed to the terms of this section (and the use of your name, profile picture, content, and information) on your behalf.⁷

Such “deemed consent” eviscerates any meaningful limits over the commercial exploitation of the images and names of young Facebook users.

Facebook is also proposing to dramatically expand the use of personal information for advertising purposes. Originally, the Facebook Data User Policy said:

We do not share any of your information with advertisers (unless, of course, you give us permission). As described in this policy, we may share your information when we have removed from it anything that personally identifies you or combined it with other information so that it no longer personally identifies you. We use the information we

³ Barbara Ortutay, *Facebook to end Beacon tracking tool in settlement*, USA TODAY (Sept. 21, 2009), http://usatoday30.usatoday.com/tech/hotsites/2009-09-21-facebook-beacon_N.htm?csp=34.

⁴ Vindu Goel, *Facebook to Update Privacy Policy, but Adjusting Settings Is No Easier*, NYTIMES (BITS BLOG) (Aug. 29, 2013), http://bits.blogs.nytimes.com/2013/08/29/facebook-to-update-privacy-policy-but-adjusting-settings-is-no-easier/?hpw&_r=1 (“It brings to mind Humpty Dumpty in Lewis Carroll’s “Through the Looking Glass.” As he told young Alice, “When I use a word, it means just what I choose it to mean — neither more nor less.”).

⁵ *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Sept. 4, 2013).

⁶ *Proposed Statement of Rights and Responsibilities*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-pm1/851575_209563965879553_209116475_n.pdf (last visited Sept. 1, 2013).

⁷ *Id.*

receive, including the information you provide at registration or add to your account or timeline, to deliver ads and to make them more relevant to you. This includes all of the things you share and do on Facebook, such as the Pages you like or key words from your stories, and the things we infer from your use of Facebook.⁸

Under the Proposed Data Use Policy, Facebook now says:

... we may use all of the information we receive about you to serve ads that are more relevant to you. For example, this includes:

- information you provide at registration or add to your account or timeline,
- things you share and do on Facebook, such as what you like, and your interactions with advertisements, partners, or apps,
- keywords from your stories, and
- things we infer from your use of Facebook.⁹

Facebook also makes the remarkable claim under the proposed new policies that “User names and User ID’s are the same thing.” This reflects a profound misunderstanding of privacy protection – names are often ambiguous, User IDs are unique identifiers, and it is the misuse of User IDs that has contributed to many of the privacy problems on Facebook.¹⁰

The Federal Trade Commission must act now to protect the interests of Facebook users and to ensure compliance with the 2011 Order.¹¹ The Order requires that, “prior to any sharing of a user’s nonpublic user information by [Facebook] with any third party, which materially exceeds the restrictions imposed by a user’s privacy setting(s),” Facebook must make a “clear[] and prominent[]” disclosure and obtain the “affirmative express consent” of the user.¹² “Nonpublic user information” is “covered information that is restricted by one or more privacy setting(s).”¹³ A privacy setting is “any control or setting provided by [Facebook] that allows a user to restrict which individuals or entities can access or view covered information.”¹⁴ “Third parties” are, subject to limited exceptions, “any individual or entity that uses or receives covered information obtained by or on behalf of [Facebook]”¹⁵

Facebook’s proposed policy changes violate the terms of the Order. Under the proposed policy, Facebook may create advertisements using an individual’s “name, and profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand [they] like) served or enhanced by [Facebook].”¹⁶ By associating a user’s “name, profile

⁸ *Data Use Policy*, FACEBOOK, https://www.facebook.com/full_data_use_policy

⁹ *Proposed Data Use Policy*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-pm1/851585_445264755581605_1677569786_n.pdf.

¹⁰ Emily Steel and Geoffrey Fowler, *Facebook in Privacy Breach*, WALL STREET JOURNAL (Oct. 17, 2010), (revealing that Facebook users’ numeric profile IDs were being leaked to third party advertising companies).

¹¹ *See Facebook, Inc.*, FTC Docket No. C-4365 (2012) (Decision and Order), <http://www.ftc.gov/os/caselist/0923184/120810facebookdo.pdf> [hereinafter FTC Facebook Consent Order].

¹² FTC Facebook Consent Order, § II.

¹³ FTC Facebook Consent Order, ¶ 5.

¹⁴ FTC Facebook Consent Order, ¶ 6.

¹⁵ FTC Facebook Consent Order, ¶ 8.

¹⁶ *Proposed Statement of Rights and Responsibilities*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-pm1/851575_209563965879553_209116475_n.pdf (last visited Sept. 1, 2013).

picture, content, and information” with commercial content, Facebook creates new advertisements. These advertisements represent “nonpublic user information” because they consist of information that had previously been restricted by the user’s privacy settings, specifically the user’s choice whether or not to disclose information for a particular purpose.¹⁷ Furthermore, these advertisements are disclosed to “third parties”: the user’s Facebook contacts. Thus, Facebook’s proposed policy violates the Order’s prohibition on sharing information without user consent.

Furthermore, as quoted above, the amended language involving teens—far from getting affirmative express consent from a responsible adult—attempts to “deem” that teenagers “represent” that a parent, who has been given no notice, have consented to give up teens’ private information. This is contrary to the Order and FTC’s recognition that teens are a sensitive group, owed extra privacy protections.¹⁸

The urgency of FTC action is underscored also by specific actions taken by Facebook to deprive users of the opportunity to express their views on proposed changes and even to organize with other users. On November 21, 2012 Facebook revised its governing documents to prevent users from voting on proposed changes.¹⁹ In 2010 FB shut down all of the privacy groups on Facebook, including “FB users against new TOS,” which had more than 150,000 members.²⁰ And Facebook subsequently revised its governing documents to prevent the use of the company’s name in any Facebook group, including groups that were formed to protest Facebook’s business practices.²¹

We urge you to act. The right of a person to control the use of their image for commercial purposes is the cornerstone of modern privacy law.²² Consumer privacy groups have worked diligently to preserve this right and to protect the interests of Facebook users. Now it is up to the FTC based on the Order that is already in place.

¹⁷ See *Data Use Policy, Part II*, FACEBOOK, https://www.facebook.com/full_data_use_policy (last visited Sept. 1, 2013) (describing the privacy settings under “control each time you post” and “control over your timeline”)

¹⁸ FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 60 (2012), *available at* <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

¹⁹ Elliot Schrage, *Proposed Updates to Our Governing Documents*, FACEBOOK (Nov. 21, 2012), <https://www.facebook.com/notes/facebook-site-governance/proposed-updates-to-our-governing-documents/10152304935685301>.

²⁰ See Shiv Malik, *Facebook Accused of Removing Activists’ Pages*, THE GUARDIAN, Apr. 29, 2011, <http://www.theguardian.com/technology/2011/apr/29/facebook-accused-removing-activists-pages>; see also Facebook Old Groups Migration to New Groups: What You Need to Know, FACEBOOK (May 10, 2011), <https://www.facebook.com/notes/mari-smith/facebook-old-groups-migration-to-new-groups-what-you-need-to-know/10150249514781340>

²¹ Facebook Pages Terms, FACEBOOK, https://www.facebook.com/page_guidelines.php

²² See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 557, 64 N.E. 442, 448 (1902) disapproved of by *Vanderbilt v. Mitchell*, 72 N.J. Eq. 910, 67 A. 97 (1907). After *Roberson*, the New York state legislature enacted a statute protecting against the unauthorized use without consent of “the name, portrait or picture of any living person” for “advertising purposes, or for the purposes of trade.” 1903 N.Y. Laws ch. 132, §§ 1-2. Similar exists now in virtually every state in the country.

Respectfully,

/s/ Marc Rotenberg
Marc Rotenberg, Executive Director
Electronic Privacy Information Center (EPIC)

/s/ Jeff Chester
Jeff Chester, Executive Director
Center for Digital Democracy (CDD)

/s/ John Simpson
John Simpson, Privacy Project Director
Consumer Watchdog

/s/ Deborah Peel
Deborah Peel, Founder and Chair
Patient Privacy Rights

/s/ Edmund Mierzwinski
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/s/ Beth Givens
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Cc:

Mark Pryor, Chairman, Senate Commerce Subcommittee on Consumer Protection, Product Safety, and Insurance

Marco Rubio, Ranking Member, Senate Commerce Subcommittee on Consumer Protection, Product Safety, and Insurance

Lee Terry, Chairman, House Energy Subcommittee on Commerce, Manufacturing and Trade

Jan Schakowsky, Ranking Member, House Energy Subcommittee on Commerce, Manufacturing and Trade

J.B. Van Hollen, President, National Association of Attorneys General (NAAG)