

MEMORANDUM

TO: ESPC Membership

FROM: D. Reed Freeman, Jr.
Nicholas Datlowe

DATE: May 9, 2012 FILE: 68223-0000001

RE: FTC Complaint and Proposed Settlement with MySpace (Announced May 8, 2012)

We write this memo to update you regarding the recently [proposed settlement agreement](#) (formally styled “Agreement Containing Consent Order”) between the Federal Trade Commission (FTC) and MySpace LLC (*In the Matter of MySpace LLC*, File No. 102 3058).¹ The proposed settlement agreement resolves the FTC’s claims that MySpace misrepresented its protection of users’ personal information, as well as its compliance with the U.S./E.U. Safe Harbor Framework. If the proposed settlement agreement is made final as currently drafted, MySpace will be barred from making future privacy misrepresentations; will have to implement a written privacy protection program; and will have to submit to biennial, independent privacy audits for the next twenty years.

MySpace is an online social network that allows users to create and customize personal profiles. When a user signs up, MySpace requires substantial information to establish the account: the user’s full name, email address, date of birth, and gender. MySpace also allows users to add additional information, such as a username, profile picture, relationship status, sexual orientation, hobbies and interests; and other information may be added to profiles over time, such as “friends,” other pictures and videos, and messages. MySpace assigns each user a unique “Friend ID” number, which is a component of the URL for each individual’s profile page.

MySpace offered privacy settings that allowed users to designate some of their profile information as accessible only to their MySpace “friends.” The following categories of information, however, were considered “basic profile information,” not subject to the privacy settings: the user’s profile picture, Friend ID, location, gender, age, display name, and full name. Of this information, only full name could be hidden from the general public. *Thus, someone with access to a user’s Friend ID would have the ability to access a variety of very personal information, even if the user had limited his or her profile to only his or her MySpace friends.*

¹ The press release announcing the proposed settlement, with links to the complaint and proposed order, is available at <http://ftc.gov/opa/2012/05/myspace.shtm>.

According to [the FTC's complaint](#) (see also the [exhibits to the FTC's complaint](#)), from January 2009 through June 2010, MySpace transmitted, unencrypted, the Friend ID, age and gender of a user viewing an ad on MySpace to an ad network affiliated with MySpace. This information was occasionally transmitted, through the ad network, to other third-party advertisers. From June 2010 to October 2011, the same information was transmitted in encrypted format to the ad network and later to Rubicon Project, Inc., which bought the ad network in October 2010. The decryption key was sent along with this information, so that the ad network and Rubicon could decrypt the information.

Alleged Representation:

- According to the FTC, the privacy policy that MySpace used in the relevant period represented that MySpace did not use or share a user's personally identifiable information ("PII") except as described in the privacy policy; that the means through which MySpace customized ads did not allow advertisers access to PII; and that users' web browsing activity shared with advertisers was anonymized.

Alleged Falsity:

- The FTC alleged, however, that the sharing with ad networks of Friend ID, age and gender information was not disclosed in the privacy policy, that the transmission of the Friend ID allowed third-party advertisers to access PII, and that users' web browsing activity was not anonymized. For these reasons, the FTC alleged, MySpace's Privacy Policy was deceptive.

Safe Harbor Allegations:

- According to the FTC's complaint, MySpace has been self-certified under the U.S./E.U. Safe-Harbor Framework since December 9, 2010. Proper self-certification requires compliance with "Notice" and "Choice" provisions that require MySpace to, among other things, disclose to its users the parties with whom their information is shared and allow them to choose whether their information is shared with a third party. Because MySpace did not properly notify users about what information was shared and allow them the opportunity to opt out of that sharing, the FTC alleges that MySpace was not, in fact, compliant with the Safe Harbor Framework, and its representations that it was were therefore deceptive.

The terms under which MySpace settled the complaint are similar to those in the FTC's settlements with Google² and Facebook,³ among others, and are fast becoming familiar. MySpace agreed that:

² Links to the complaint and proposed settlement, as well as the news release announcing the settlement, are available at <http://ftc.gov/os/caselist/1023136/index.shtm>.

³ Links to the complaint and proposed settlement, as well as the news release announcing the settlement, are available at <http://www.ftc.gov/os/caselist/0923184/index.shtm>.

- ◆ it would not misrepresent the extent to which it protects its users' privacy or the extent of its compliance with the Safe Harbor Framework;
- ◆ it would:
 - establish and maintain a comprehensive privacy program including the designation of an employee or employees to coordinate and be responsible for the program,
 - identify foreseeable risks and evaluate the safeguards in place to mitigate them,
 - design and implement privacy controls and procedures to address risks identified in the risk assessment,
 - take reasonable steps to select service providers that adequately protect privacy, and
 - adjust the program as necessary; and
- ◆ it would obtain an initial and biennial privacy assessments from an independent auditor for the next twenty years.

The agreement also imposes certain recordkeeping requirements on MySpace.

In the agreement, MySpace did not admit to any wrongdoing or to any of the factual allegations contained in the complaint. The proposed settlement agreement was preliminarily approved by a Commission vote of 4-0-1, with newly-confirmed Commissioner Maureen Ohlhausen not participating. *The proposed agreement is tentative pending 30 days for public input, ending June 8, and final approval by the Commission.*