

The Federal Trade Commission, Plaintiff v Spokeo, Inc.

US District Court, Case No. CV12-05001, 12 June 2012

The Federal Trade Commission issued an \$800,000 penalty to Spokeo, a data broker gathering consumer information from online sources. The FTC's judgment makes clear that the Fair Credit Reporting Act applies to online data collection markets.

In June, an increasingly active US Federal Trade Commission ('FTC') announced a settlement in the form of a consent decree with data broker Spokeo, Inc. for violations of the Fair Credit Reporting Act ('FCRA'), a consumer protection statute passed in 1970. The FCRA is designed to protect the collection, dissemination and use of consumer credit information. Spokeo agreed to pay a \$800,000 penalty and to undertake various compliance initiatives, including undertaking twenty years of recordkeeping requirements and implementing procedures to help ensure FCRA compliance. This action puts data brokers, employers, credit issuers, and sellers on notice that the FTC is carefully monitoring compliance with consumer protection laws in the online and social networked environments.

Background

Spokeo, a California-based company, is a data collector and broker that assembles consumer information from 'hundreds of online and offline sources.' These sources include social networking sites and other data brokers. The information Spokeo collects on individuals includes individual names, home addresses, phone numbers, marital status, age ranges, and email addresses. Spokeo may also include information on a person's hobbies, ethnicity, religion, participation on social networking sites, and photos. Spokeo sells these profiles through paid subscriptions. Spokeo marketed to various businesses, in particular, during 2008-2010, those in the human resources, background screening and recruiting industries. Those entities could use Spokeo's profile information on individuals as a factor in deciding whether to interview or hire a job candidate.

During 2008-2010, Spokeo's advertising promoted the use of its profiles in the hiring context. The FTC's complaint charged that Spokeo 'affirmatively targeted companies in the human resources, background screening, and recruiting industries,' encouraging those companies to 'Explore Beyond the Resume.'

The FCRA applies to 'consumer reports,' defined by that law as including 'any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness... character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for' credit or insurance (in the personal, family or household context, employment purposes; or certain other purposes).

To protect consumers, the FCRA limits the provision of consumer reports to those with a statutory 'permissible purpose' for using the report. Such permissible purposes include a credit transaction, employment purposes, insurance underwriting, and other 'legitimate business needs' for the information in connection with a business transaction involving the consumer. The FCRA requires that the consumer reporting agency maintain reasonable procedures to limit their furnishing of consumer reports for these purposes, including requiring users to identify themselves to the consumer reporting agency, to certify the purpose for which the information is sought, and to certify that the information will not be used for other purposes. Consumer reporting agencies are also obligated to make a reasonable effort to verify the identity of each

new prospective user and to obtain the certification before furnishing a consumer report. Consumer reporting agencies are further required to follow reasonable procedures to assure 'maximum possible accuracy of consumer report information.' Further, such agencies must provide a required notice to users of these reports advising users that they must inform a consumer if they take an adverse action based upon the information in the report.

Spokeo's FTC problems

Consumer Reporting Agency
The FTC charged that the consumer profiles Spokeo provides to third parties are 'consumer reports' under the FCRA because the profiles 'bear on a consumer's character, general reputation, personal characteristics, or mode of living...and are used or expected to be used in determining a consumer's eligibility for employment or other purposes' under the FCRA. As a consumer report provider, Spokeo was a 'consumer reporting agency.' By marketing and selling its reports to human resources and recruiting personnel in particular, Spokeo was in the business of furnishing consumer reports to third parties which reports are used or expected to be used for employment purposes - and thus covered by all of the FCRA's obligations.

Failure to Maintain Procedures

The FTC charged that Spokeo failed to maintain the procedures required by FCRA to verify a permissible purpose and a permissible user of the consumer report and to obtain proper certifications from its users. The FTC also found fault with Spokeo's adherence to the requirements of the FCRA as to the accuracy of consumer report information, stating in its Complaint that

'Spokeo has failed to follow any reasonable procedures to assure maximum possible accuracy of the information in reports that it prepared.' The FTC further contended that Spokeo did not provide the required 'Notice to Users of Consumer Reports: Obligations of Users Under the FCRA' (also called the 'User Notice') to users of Spokeo's consumer reports. The User Notice is important for several reasons, including the fact that the FCRA requires that it inform users that they are required to advise consumers if an adverse action is taken against the consumer based on information contained in the consumer report.

Online Endorsements

Interestingly, the FTC also charged Spokeo with violating Section 5 of the FTC Act, which broadly prohibits 'unfair or deceptive acts or practices in or affecting commerce.' The agency charged that Spokeo had directed its employees to draft comments endorsing Spokeo on news and technology websites. According to the FTC, Spokeo managers reviewed and edits those comments, and then posted them, using account names that would give readers the impression that the comments were submitted by ordinary, independent consumers or business users, rather than employees. The FTC claimed that the endorsements were false and misleading and thus violated Section 5.

Settlement - payment and remediation

Spokeo entered into a consent decree with the FTC, and agreed to pay \$800,000 as a civil penalty. It also agreed that it would be enjoined from violating the FCRA, and that it would ensure compliance with the permissible

purpose/permissible user and the User Notice requirements. The consent decree further enjoined Spokeo from misrepresentations in endorsements. In particular, Spokeo must comply with the FTC's 'Endorsement Guides' which, among other requirements, mandate that if there is a material connection between a user and the company whose product it endorses, that connection must be disclosed clearly and prominently. And, Spokeo may no longer misrepresent that a user is an independent user or ordinary consumer when that is not the case.

The consent decree requires compliance reporting by Spokeo and 20 years of records maintenance, including training materials demonstrating compliance with the consent decree, copies of complaints and refund requests, copies of advertisements, and other marketing materials, and files containing names, addresses, and permissible purposes of all entities to whom Spokeo supplies consumer reports (assuming Spokeo operates as a consumer reporting agency going forward). Spokeo must also maintain documents demonstrating the verification of permissible user/permissible purpose under the FCRA.

The FTC and online data collection

The FTC has made clear that it will use the full force of existing laws such as the FCRA and Section 5 of the FTC Act to protect consumers when it comes to their personal data. Many of us would not normally think of a Spokeo-type company as a 'consumer reporting agency' like Equifax or TransUnion. However, the FTC views the type of information compiled and made available by

companies like Spokeo as consumer reports subject to FCRA obligations. Interestingly, even if the reports were not marketed for consumer reporting-type purposes, Spokeo could still have faced enforcement for its alleged FTC Endorsement Guide violations.

Companies that compile, advertise and distribute identifiable consumer data should consider how they are offering this data and whether the FCRA or other FTC-enforced laws may apply. The FTC has stated loud and clear that the old FCRA still applies in the online data collection markets. In fact, just this past February, the FTC issued warnings to several mobile application ('apps') providers - offering background screening apps - that they could be violating the FCRA. The FTC put the apps marketers on notice that, if they have reason to believe the background reports they provide are being used for employment screening, housing, credit, or other similar purposes, they must comply with the FCRA.

As the collection of huge amounts of consumer information continues to increase, along with the proliferation of data brokers, expect to see the FTC wearing its enforcement hat watching over these industries and taking affirmative actions against organisations, using the full panoply of laws and regulations at its disposal.

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