

September 29, 2011

Honorable Jon Leibowitz, Chairman
Honorable William E. Kovacic, Commissioner
Honorable J. Thomas Rosch, Commissioner
Honorable Edith Ramirez, Commissioner
Honorable Julie Brill, Commissioner
The Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Mr. Chairman and Members of the Commission:

In light of recent changes announced by Facebook that impact the privacy interests of almost two hundred million Facebook users in the United States, we would like to bring your attention to new privacy and security risks to American consumers, the secret use of persistent identifiers (“cookies”) to track the Internet activity of users *even after they have logged off of Facebook*, and the company’s failure to uphold representations it has made regarding its commitments to protect the privacy of its users.

Facebook’s tracking of post-log-out Internet activity violates both the reasonable expectations of consumers and the company’s own privacy statements. Although Facebook has partially fixed the problem caused by its tracking cookies, the company still places persistent identifiers on users’ browsers that collect post-log-out data and could be used to identify users.¹ “Frictionless sharing” plays a leading role in the changes Facebook announced at the recent f8 development conference, and works through the interaction of Facebook’s Ticker, Timeline, and Open Graph. These changes in business practices give the company far greater ability to disclose the personal information of its users to its business partners than in the past. Options for users to preserve the privacy standards they have established have become confusing, impractical, and unfair.

The Electronic Privacy Information Center (“EPIC”), The American Civil Liberties Union, The American Library Association, Bill of Rights Defense Committee, The Center for Digital Democracy, The Center for Media and Democracy, Consumer Action, Consumer Watchdog, PrivacyActivism, and Privacy Times recommend that the Commission investigate whether the changes recently announced by Facebook are consistent with the policies and representations that were in place when consumers provided their personal information to Facebook or whether they constitute unfair and deceptive trade practices, in violation of consumer protection law in the United States.

Factual Background

¹ See *infra* Post Log-Out Tracking.

Facebook is easily the largest social network service provider in the world. 800 million people² now use Facebook worldwide, 150 million³ of which fall under the FTC's jurisdiction. Fifty percent of active users log on to Facebook in any given day.⁴ The amount of social activity on Facebook is staggering: there are over 900 million objects (pages, groups, events) with which users can interact, and the average user is connected to 80 of those objects.⁵

At the 2011 f8 development conference⁶, Facebook updated the News Feed and Open Graph, and announced two new changes: Ticker and Timeline. The changes function together to facilitate "frictionless sharing": Facebook's term for allowing applications to automatically share users' activity rather than having users initiate each instance of sharing themselves. Some of these changes, such as Timeline, will not be publicly available until September 30, 2011. Other changes have already begun to appear, such as Ticker, but are not yet in universal use.⁷ Thus, the FTC should address the privacy and security risks inherent in these changes now, before their use spreads and any associated harm is compounded.

Also, an Australian researcher recently revealed that Facebook has been tracking the Internet activity of users even after they have logged out of Facebook. Facebook has been engaging in post-log-out tracking for at least a year, and only issued a partial fix after facing intense criticism, indicating an unwillingness to respect consumer privacy without external pressure.⁸

News Feed and Ticker

The updated News Feed functions as a personal newspaper that reports the social activity of a user's friends, with "important" stories appearing at the top.⁹ Ticker appears at the upper-right portion of the News Feed and displays a real-time stream of the Facebook activities of a user's friends.¹⁰ Ticker displays every type of Facebook activity in which a user can engage: sharing links, posting status updates, commenting on other posts, posting pictures, tagging

² Facebook, *Statistics*, <https://www.facebook.com/press/info.php?statistics> (last visited September 27, 2011).

³ *Facebook Statistics, Stats & Facts For 2011*, DIGITAL BUZZ BLOG, (Jan. 18, 2011), <http://www.digitalbuzzblog.com/facebook-statistics-stats-facts-2011/>.

⁴ Facebook, *Statistics*, <https://www.facebook.com/press/info.php?statistics> (last visited September 27, 2011).

⁵ *Id.*

⁶ F8 DEVELOPERS CONFERENCE 2011, <https://f8.facebook.com/> (last visited September 27, 2011).

⁷ See Barbara Ortutay and Michael Liedtke, *Facebook Looks to Extend Online Reach*, CASA GRANDE DISPATCH (Sept. 26, 2011),

http://www.trivalleycentral.com/articles/2011/09/26/casa_grande_dispatch/business/doc4e80acac865bc476977314.txt.

⁸ See Nik Cubrilovic, *Logging out of Facebook is not enough*, NIK CUBRILOVIC (Sept. 25, 2011), <https://nikcub.appspot.com/logging-out-of-facebook-is-not-enough>.

⁹ Mark Tonkelowitz, *Interesting News Any Time You Visit*, THE FACEBOOK BLOG (Sept. 20, 2011, 3:30 PM), <https://blog.facebook.com/blog.php?post=10150286921207131>.

¹⁰ *Id.*

people in pictures, “liking” things, and so on.¹¹ Hovering over or clicking on an item that appears in Ticker causes a box to expand with the complete “story” that shows what the user would see if she manually tracked down the activity of the friend. Once paired with the Open Graph, Ticker’s feed will also include information about activities engaged in outside of Facebook, such as the music, food, websites, news articles, books, and videos that a user consumes.¹²



Timeline

Timeline acts as a user’s “main” profile page and automatically summarizes the user’s life, from birth to the present day.¹³ Timeline uses every piece of information that has ever been shared with Facebook—by the user or by third parties—to construct these life-summaries. Then, a computer algorithm analyzes and orders the information by importance and ensures that the important events feature more prominently in Timeline. Timeline will contain nearly everything: “[I]ove, loss, friends, frenemies, birthdays, breakups, cats, kegstands—all of it, from zeroday to today, shared with everyone you know online.” Mark Zuckerberg, Facebook’s CEO, describes Timeline as “the story of your life.”¹⁴

¹¹ Brian Ries, *What Did Facebook Change Now?*, THE DAILY BEAST (Sept. 22, 2011, 6:52 PM), http://www.thedailybeast.com/articles/2011/09/22/facebook-ticker-and-timeline-what-did-facebook-change-at-f8.html?obref=obinsite_

¹² *Id.*

¹³ See Mark Tonkelowitz, *Interesting News Any Time You Visit*, THE FACEBOOK BLOG (Sept. 20, 2011, 3:30 PM), <https://blog.facebook.com/blog.php?post=10150286921207131>.

¹⁴ Mike Swift, *'It's the story of your life': Facebook introduces 'Timeline' to site*, THE NEWS TRIBUNE (Sept 23, 2011, 3:44 AM), <http://www.thenewstribune.com/2011/09/23/1836071/its-the-story-of-your-life-facebook.html>.

Open Graph

The Open Graph broadcasts connections that users make between themselves and a wide variety of objects, websites, and activities through “social apps,” which are applications that connect to a user’s profile and automatically share information about the user’s activities and interests.¹⁵ Rather than merely having users make connections by “liking” and object or activity, the Open Graph now allows them to form a variety of verbal connections. For example, Spotify’s music app¹⁶ shares all of the songs to which a user listens, Hulu’s app¹⁷ shares the TV shows that a user watches, the Washington Post’s Social Reader app¹⁸ shares the news articles that a user reads, and Foodspotting’s app¹⁹ shares the food that a user eats. The apps share this information on Timeline and Ticker.

Post-Log-Out Tracking

Although not announced at f8, an Australian researcher recently revealed that Facebook has been tracking users even after they logged out of Facebook.²⁰ Facebook places at least six cookies on a user’s browser whenever the user visits Facebook. One of these persistent identifiers, “a_user”, contains information about the user’s identity and continued to report back to Facebook until the user closed her browser completely. The other persistent identifiers performed various functions, such as tracking failed login attempts, tracking new account creations, remembering a user’s browser language, and other performance and security-related functions. Whenever a user visits a site with a Facebook “like” button, or share button, or other application, the persistent identifiers send the user’s information to Facebook.

Privacy Issues

Frictionless sharing creates several privacy and security problems for users, as does the secret tracking of post-log-out activity.

Frictionless Sharing: Ticker

¹⁵ See Sheila Shayon, *Facebook Timeline's New Breed of Apps Lets Brands Get More Social*, BRAND CHANNEL (Sept. 26, 2011, 1:01 PM), <http://www.brandchannel.com/home/post/2011/09/26/Facebook-Timeline-Social-Apps-Branding.aspx>.

¹⁶ Spotify, *Spotify introduces music to your social life*, <http://www.spotify.com/us/blog/archives/2011/09/21/spotify-and-facebook/> (last visited Sept. 27, 2011).

¹⁷ Betina Chan-Martin, *Hulu: Now Available on Facebook*, HULU BLOG (Sept 22, 2011), <http://blog.hulu.com/2011/09/22/hulu-now-available-on-facebook/>.

¹⁸ WASHINGTON POST SOCIAL READER, <http://www.washingtonpost.com/socialreader> (last visited Sept. 27, 2011).

¹⁹ Foodspotting, *Coming Soon: Add Foodspotting to Your Facebook Timeline!*, <http://www.foodspotting.com/blog/posts/236-coming-soon--add-foodspotting-to-your-facebook-timeline-> (last visited Sept. 27, 2011).

²⁰ Nik Cubrilovic, *Logging out of Facebook is not enough*, NIK CUBRILOVIC (Sept. 25, 2011), https://nikcub.appspot.com/logging-out-of-facebook-is-not-enough_

Ticker allows a user to see the Facebook posts of complete strangers—or even Facebook interactions *between* complete strangers—to which a friend of the user has connected. Facebook users were initially surprised by this phenomenon, prompting a host of negative comments on Facebook’s blog,²¹ blog posts criticizing Facebook,²² advice on how to ensure the privacy of a user’s post,²³ advice on removing Ticker entirely,²⁴ and even a petition to Facebook to remove Ticker.²⁵ Frictionless sharing will amplify Ticker’s problems because under the frictionless sharing model social apps will automatically post the user’s activity to the ticker feeds of anyone to which the user is connected. Thus, in addition to being populated by traditional Facebook activities—“likes,” comments, wall posts, picture posts, and so on—Ticker will soon be filled with detailed information about users’ media consumption and lifestyle habits—the TV shows they watch, the books they read, the websites they visit, and the routes they jog, most likely without users affirmatively setting their preferences to share such information.

Users have already reported problems caused by the new availability of personal information on Ticker.²⁶ And once social apps enter the picture, Facebook users could unknowingly share information about nearly every aspect of their lives, ranging from the embarrassing but otherwise innocuous revelation of questionable music taste (“[u]sers unaware of their Ticker broadcasts will be upset, for some time, that Ticketmaster told the world they’ll be attending Boyz II Men’s reunion show”)²⁷ to the potentially dangerous revelation that one is consuming the “wrong” political or religious content (“Once you are on the WP Social Reader app, everything you read within the app will automatically be shared in the following ways. . .

²¹ See the comments of Robyn Buckler, posted to <https://blog.facebook.com/blog.php?post=10150286921207131>: Facebook, please stop changing things. If you are going to constantly keep changing things then give us the option wether or not we want to change! I am sick of constantly reading what has changed ESPECIALLY WITH MY PRIVACY! I am really angry at the way photos has been changed. If I have my photo's set to friends, I only want my friends seeing it or commenting on it, I think that is reasonable, don't you? Now I can't tag anyone or let any of my friends be tagged because I don't want everyone and their neighbours boyfriend commenting and looking at my photos. Seriously thinking of moving to Google plus. You better start listening to folks or you will end up like myspace, and no one uses that crap anymore.

²² Clare Washbrook, *Facebook’s Ticker Privacy Scare, And What You Should Do About It*, NAKED SECURITY (Sept. 26, 2011), <http://nakedsecurity.sophos.com/2011/09/26/facebook-ticker-privacy-scare/>.

²³ *Id.*

²⁴ See Facebook, *Help Center*, <https://www.facebook.com/help/community/question/?id=1421045> (last visited Sept. 27, 2011); *Remove the Facebook Ticker in Firefox and Chrome*, TECH FOR LUDDITES (Sept. 25, 2011), <http://www.techforluddites.com/2011/09/remove-the-facebook-ticker-in-firefox-and-chrome.html>.

²⁵ See PETITION TO REMOVE FACEBOOK TICKER, <https://www.facebook.com/topic.php?uid=20531316728&topic=53852> (last visited Sept. 27, 2011).

²⁶ See Ted Samson, *Facebook makes it easier than ever to eavesdrop*, INFO WORLD (Sept. 21, 2011), <https://www.infoworld.com/t/social-networking/facebook-makes-it-easier-ever-eavesdrop-173657> (discussing how Ticker led to the author’s discovery that one of his friends commented on the web site of a homosexual adult film star).

²⁷ Brian Ries, *What Did Facebook Change Now?*, THE DAILY BEAST (Sept. 22, 2011, 6:52 PM), <http://www.thedailybeast.com/articles/2011/09/22/facebook-ticker-and-timeline-what-did-facebook-change-at-f8.html?obref=obinsite>.

.”).²⁸ Indeed, the Iranian government has a history of retaliating against those who engage in politicized Facebook activity. For example, one Iranian-American graduate student who was politically active on Facebook received a threatening email that read “we know your home address in Los Angeles,” and directed the user to “stop spreading lies about Iran on Facebook.”²⁹

Frictionless Sharing: Timeline

Timeline presents similar privacy problems, as any information about a user that has ever been shared with Facebook—by the user herself, by the user’s contacts, or by a social app—can appear on Timeline. Thus, every aspect of a user’s life that Facebook can access—“all the way back to where you were born,” according to Mark Zuckerberg³⁰—is now available in a single, easily-accessible, “beautiful,”³¹ package. This level of exposure is vastly different from that of the old Facebook Profile:

Today, if someone wanted to see what I did on Facebook four years ago, he or she would have to laboriously plod through the last four years of my Facebook activity—in Timeline, friends can click straight through to 2007 to revisit old status updates and see old pictures you were tagged in.³²

ZDNet’s David Meyer explains that “[u]ntil now, Facebook has allowed a certain amount of obscurity for older content, but that is no longer the case.”³³ In Facebook’s eyes, this abundance of readily-available personal information is actually one of the *benefits* of Timeline:

The way your profile works today, 99% of the stories you share vanish. The only way to find the posts that matter is to click “Older Posts” at the bottom of the page. Again. And again. With Timeline, now you have a home for all the great stories you’ve already shared. They don’t just vanish as you add new stuff.³⁴

²⁸ WASHINGTON POST SOCIAL READER PRIVACY POLICY, <http://www.washingtonpost.com/social-reader/privacy-policy> (last visited Sept. 27, 2011).

²⁹ Farnaz Fassihi, *Iranian Crackdown Goes Global*, WALL STREET JOURNAL (Dec. 4, 2009), <http://online.wsj.com/article/SB125978649644673331.html>.

³⁰ Eric Eldon, *Live Blog: Facebook’s f8 Developer Conference 2011 Keynote*, INSIDE FACEBOOK (Sept. 22, 2011), <http://www.insidefacebook.com/2011/09/22/live-blog-facebooks-f8-developer-conference-2011-keynote/>.

³¹ Sam Biddle, *Facebook Timeline Review: This Is the Greatest Thing Facebook’s Ever Done*, GIZMODO (Sept. 23, 2011), <http://gizmodo.com/5843354/facebook-timeline-review-this-is-the-greatest-thing-facebooks-ever-done>.

³² Justin Brookman, *Facebook’s New Grab for More Data*, THE DAILY BEAST (Sept. 23, 2011 1:34 AM), <http://www.thedailybeast.com/articles/2011/09/23/facebook-redesign-seeks-more-data-sharing-but-will-users-be-in-control.html>.

³³ David Meyer, *Facebook May Have Taken A Privacy-Busting Step Too Far*, ZDNET (Sept. 26, 2011), <http://www.zdnet.co.uk/blogs/communication-breakdown-10000030/facebook-may-have-taken-a-privacy-busting-step-too-far-10024425/>.

³⁴ Samuel W. Lessin, *Tell Your Story With Timeline*, THE FACEBOOK BLOG (Sept. 22, 2011 1:30PM), <https://blog.facebook.com/blog.php?post=10150289612087131>.

Nor is Timeline limited to the types of information shared in the past. As users connect to social apps, Timeline will contain new categories of information regarding media consumption and lifestyle habits. A journalist describes Timeline's new "Health and Wellness" item:

Here, I can piece together my entire medical history on the social network. Never mind that I had an X-ray of my fractured femur as my profile picture for a while last year; now I can collate every minor or major medical procedure for the benefit of... whom exactly?

Who wants to know? It's one thing handing over medical data to those who claim some sort of genuine purpose for their systems, but why does Facebook need that information? As has been pointed out elsewhere, this kind of information turns Facebook into an actuarial goldmine.³⁵

Indeed, Facebook is already used by the leading pharmaceutical companies to market drugs and medical treatments.³⁶ The use of Facebook by health advertising companies led the Center for Digital Democracy to file a complaint with the Commission last year.³⁷ The complaint discussed Facebook applications such as HealthSeeker, which was designed to help people with diabetes make informed lifestyle choices, but which neglected to mention "how users are tracked and monitored or what kinds of data are collected."³⁸

Security experts have said that Timeline makes it "a heck of a lot easier" for computer criminals to unearth personal details that can be used to craft attacks.³⁹ "Because people often use personal information to craft passwords or [in] the security questions that some sites and services demand answered before passwords are changed, the more someone adds to Timeline, the more they put themselves at risk."⁴⁰ Timeline's treasure trove of personal information can also provide a tempting target for stalkers, government agents, or employers.

The new wealth of consumer information increases the opportunities for intrusive and problematic advertising. Facebook has shown an increased willingness to cash in on the personal data of its users by constantly seeking new ways for advertisers to target the company's broad and rapidly expanding user base, which includes children as young as thirteen. In April 2011, Facebook created a new website designed to show advertisers how to best exploit the wealth of

³⁵ David Meyer, *Facebook May Have Taken A Privacy-Busting Step Too Far*, ZDNET (Sept. 26, 2011), <http://www.zdnet.co.uk/blogs/communication-breakdown-10000030/facebook-may-have-taken-a-privacy-busting-step-too-far-10024425/>.

³⁶ Scott Roberts, *Digital Pharma Meets Facebook*, DIGIPHARM, <http://blogs.terrapinn.com/digipharm/2011/09/02/pharma-facebook/>.

³⁷ See Center for Digital Democracy et al FTC Complaint, In re Online Health and Pharmaceutical Marketing that Threatens Consumer Privacy and Engages in Unfair and Deceptive Practices, November 23, 2010, <http://www.democraticmedia.org/sites/default/files/2010-11-19-FTC-Pharma-Filing.pdf>.

³⁸ See *id.* at 94-95.

³⁹ Gregg Keizer, *Facebook's Timeline will be boon for hackers*, COMPUTERWORLD (Sept. 23, 2011 3:32 PM), https://www.computerworld.com/s/article/9220240/Facebook_s_Timeline_will_be_boon_for_hackers_.

⁴⁰ *Id.*

consumer data that Facebook holds.⁴¹ For example, Facebook now allows advertisers to make their ads visible on users' News Feed pages.⁴² Each new social app allows advertisers to target users that the advertisers may not have been aware of before.⁴³

One government has already warned consumers about the dangers presented by Timeline. Australia's Privacy Commission warned consumers to be careful what information they share with Facebook, stating that the company is "trying to change how people think and encourage them to normalize over-sharing and abandon any restraint on storage and use and exposure of private information."⁴⁴

Facebook states that Ticker "doesn't mean that privacy around Facebook has changed."⁴⁵ Rather, users who can view the activity of strangers can only do so because those strangers have set the privacy of their comments or posts to "Everyone" or "Friends of Friends." Thus, Ticker itself does not reveal any new information, it merely makes it easier to see the information that others have already revealed—in Facebook's words, it "makes things easier to discover."⁴⁶ Second, users of social apps can select whether their activities are published to their friends, to a custom group of people, or to everyone. For example, the Yahoo News app has a function called "Social" that can be turned "on," which enables the app to automatically share the articles that the user reads with the user's contacts, or "off," which requires that the user click a "Like" button before an article is shared.⁴⁷ And users can avoid the problem by refusing to use any of the social apps in the first place. Finally, Timeline allows users to manually set the level of privacy for each item that appears on Timeline or delete the item altogether.⁴⁸

Frictionless Sharing: Facebook Fails to Address Privacy Concerns

Facebook's responses fail to address the core problems with the new changes. First, and most troubling, all of the information that users have shared with Facebook to date was shared under a different privacy regime, with a different set of justified user expectations. Ticker, for

⁴¹ See Irina Slutsky, *Facebook to Ad Agencies: Let's Be 'in a Relationship'*, AD AGE DIGITAL (April 18, 2011), <http://adage.com/article/digital/facebook-ad-agencies-a-relationship/227051/>.

⁴² See INTRODUCING SPONSORED STORIES, <https://www.facebook.com/video/video.php?v=10100328087082670> (last visited Sept. 27, 2011).

⁴³ See Josh Constone, *What f8 Means for Advertisers: The Ability to Target Users Based on Media Consumption*, INSIDE FACEBOOK (Sept. 22, 2011), <http://www.insidefacebook.com/2011/09/22/what-f8-means-for-advertisers-the-ability-to-target-users-based-on-media-consumption/>.

⁴⁴ Andrew Colley, *Every click you make, Facebook tracker will be watching you*, THE AUSTRALIAN (Sept. 24, 2011, 12:00 AM), <http://www.theaustralian.com.au/australian-it/exposure-warning-as-facebook-wheels-out-web-usage-tracker/story-e6frgax-1226144921037>.

⁴⁵ Facebook Help Center, *Does Ticker Change Privacy Settings?*, <https://www.facebook.com/help/?faq=140532576040937> (last visited Sept. 27, 2011).

⁴⁶ Facebook Help Center, *Does Ticker Change Privacy Settings?*, <https://www.facebook.com/help/?faq=140532576040937> (last visited Sept. 27, 2011).

⁴⁷ Ian Paul, *Facebook's Frictionless Sharing: A Privacy Guide*, PCWORLD (Sept. 26, 2011), https://www.pcworld.com/article/240592/facebooks_frictionless_sharing_a_privacy_guide.html.

⁴⁸ Facebook Help Center, *How do I remove a story from my Timeline?*, <https://www.facebook.com/help/?faq=2612r11860580476> (last visited Sept. 27, 2011).

example, might only reveal information about strangers that was previously viewable, but because a user would have had to decide (1) to search for that stranger and (2) to search at or near the time the stranger posted the content, such content was effectively invisible under the previous privacy regime. The comments of a user illustrate this point:

Unless you were some type of stalker (and a very odd one) you wouldn't be going to people's pages that you don't know wondering if your friend posted a comment on their wall/picture.⁴⁹

Likewise, under the old regime, a user would have to “click ‘Older Posts’ at the bottom of the [profile] page . . . [a]gain . . . [a]nd again” in order to see anything dating back farther than a few weeks. With Timeline, all of this information is instantly available. Making all of a user's information readily available is a vast change, especially when that information might have been posted years ago, when Facebook's privacy policy claimed that “[w]e understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information.”⁵⁰

Under the previous privacy framework, sharing content on Facebook was an active experience: a user had to “like” or comment or otherwise take some action in order for Facebook to publish a connection between the user and the item with which she was interacting. Now, under the frictionless sharing model, content sharing is a passive experience in which a social app prompts the user once, at the outset, to decide the level of privacy for the app (with “public” being a common default)⁵¹ and then proceeds to share every bit of information obtained thereafter.

Frictionless Sharing is Consistent with Facebook's Pattern of Failing to Protect Consumer Privacy

As with past changes, Facebook's new changes all point squarely in the direction of decreased consumer privacy, encouraging the sharing of increasing amounts of personal information. Timeline, for example, prompts users to fill in blank sections.⁵² Encouraging or prompting users to share personal information is detrimental to consumer privacy not only because the information will be exploited by Facebook and third parties for advertising and other purposes, but also because Facebook could unexpectedly and improperly make significant changes to its Terms of Service or Privacy Policy that would further expose users' personal information. Indeed, Facebook has a long history of improperly changing its service in ways that harm users' privacy. In September 2006, Facebook disclosed users' marital and dating status

⁴⁹ Sarah Kimmel, *Understanding the Facebook Ticker & Privacy*, TECHNOLOGY FOR MOMS (Sept. 22, 2011), <http://www.tech4mommies.com/2011/09/understanding-the-facebook-ticker-privacy/>.

⁵⁰ See Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUNDATION (Apr. 28, 2010), <https://www.eff.org/deeplinks/2010/04/facebook-timeline>.

⁵¹ See the Washington Post Social Reader, for example: <http://www.washingtonpost.com/socialreader>.

⁵² Gregg Keizer, *Facebook's Timeline will be boon for hackers*, COMPUTERWORLD (Sept. 23, 2011 3:32 PM), https://www.computerworld.com/s/article/9220240/Facebook_s_Timeline_will_be_boon_for_hackers.

without their knowledge or consent through the “News Feed” program.⁵³ On February 4, 2009, Facebook revised the Terms of Service, asserting broad, permanent, and retroactive rights to users’ personal information—even after they deleted their accounts.⁵⁴ Facebook stated that it could make public a user’s “name, likeness and image for any purpose, including commercial or advertising.”⁵⁵ Users objected to Facebook’s actions, and Facebook reversed the revisions on the eve of an EPIC complaint to the Commission. Finally, the Commission is currently investigating Facebook’s secret use of facial recognition technology to build a biometric database from users’ pictures.⁵⁶ Facebook’s use of facial recognition technology violated the company’s Privacy Policy, as well as public assurances made by Facebook to users.

Facebook has also experimented with passive (automatic) sharing in its failed “Beacon” program, launched in 2007. Beacon automatically disclosed users’ personal information, including their online purchases and video rentals, without their knowledge or consent.⁵⁷ After a public outcry, Mark Zuckerberg apologized, and the program was canceled. Facebook is a defendant in multiple federal lawsuits arising from the “Beacon” program.⁵⁸ In the lawsuits, users allege violations of federal and state law, including the Video Privacy Protection Act, the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, and California’s Computer Crime Law.

Facebook’s Changes Associated with Frictionless Sharing Create Confusion About and Deter Users from Updating Privacy Settings

Facebook’s frequent changes are confusing and increase the likelihood that a user will fail to adjust the profile settings necessary to ensure a desired level of privacy and security. As one journalist notes, “[o]ne of the problems Facebook has had in the past is that its constantly changing formats and privacy settings left users unclear about what they were sharing, and with whom.”⁵⁹ After Facebook announced the newest round of changes, websites quickly began warning users not to overshare on the social apps and offered solutions to increase privacy on Ticker.⁶⁰ Privacy protection is made more difficult by the fact that privacy settings are often

⁵³ See generally EPIC, *Facebook Privacy*, <http://epic.org/privacy/facebook/>.

⁵⁴ Chris Walters, *Facebook’s New Terms Of Service: “We Can Do Anything We Want With Your Content. Forever”* THE CONSUMERIST (Feb. 15, 2009), <http://consumerist.com/2009/02/facebooks-new-terms-of-service-wecan-do-anything-we-want-with-your-content-forever.html#reset>.

⁵⁵ *Id.*

⁵⁶ EPIC et al FTC Complaint, In re Facebook and the Facial Identification of Users, June 10, 2011, https://epic.org/privacy/facebook/EPIC_FB_FR_FTC_Complaint_06_10_11.pdf.

⁵⁷ See generally EPIC, *Facebook Privacy*, <http://epic.org/privacy/facebook/> (last visited Sept. 27, 2011).

⁵⁸ See e.g., *Harris v. Facebook, Inc.*, No. 09-01912 (N.D. Tex. filed Oct. 9, 2009); *Lane v. Facebook, Inc.*, No. 5:08-CV-03845 (N.D. Cal. filed Aug. 12, 2008); see also *Harris v. Blockbuster*, No. 09-217 (N.D. Tex. filed Feb. 3, 2009), *appeal docketed*, No. 09-10420 (5th Cir. Apr. 29, 2009).

⁵⁹ J Justin Brookman, *Facebook’s New Grab for More Data*, THE DAILY BEAST (Sept. 23, 2011 1:34 AM), <http://www.thedailybeast.com/articles/2011/09/23/facebook-redesign-seeks-more-data-sharing-but-will-users-be-in-control.html>.

⁶⁰ Richard McManus, *“Read” in Facebook - It’s Not a Button, So Be Careful What You Click!*, READWRITEWEB (Sept. 22, 2011), https://www.readwriteweb.com/archives/read_in_facebook_social_news_apps.php; Sarah

needlessly complicated. For example, avoiding frictionless sharing with the Washington Post's Social Reader requires at least seven steps.⁶¹ These complications lead to the proliferation of misinformation, as seen in the case of Ticker, where at least one incorrect method of restoring privacy has been popularized.⁶²

Social Apps that Require a User to Create a Facebook Profile Force Users to Disclose Personal Information to Facebook

Finally, while it is true that users can “opt-out” of the social apps or of Facebook altogether, they are increasingly finding themselves in an “all or nothing”⁶³ situation. Facebook accounts are now prerequisites for many of the applications that had previously functioned as stand-alone services. Spotify is the leading example of this kind of tying arrangement: users now need a Facebook account in order to register for Spotify.⁶⁴ It is unrealistic to expect consumers to forego their favorite music, gaming, or reading applications simply because they want to maintain their pre-existing privacy protections.

Post-Log-Out Tracking

An Australian researcher recently revealed that Facebook was utilizing cookies to track users even after they have logged out of Facebook.⁶⁵ Facebook places at least six persistent identifiers on a user's browser whenever the user visits Facebook. One of these persistent identifiers, “a_user”, contains information about the user's identity and continued to report back to Facebook until the user closed her browser completely. Whenever a user visits a site with a Facebook “like” button, or share button, or other application, the cookies send the user's information to Facebook. The only solution, according to Nik Cubrilovic, who uncovered the secret tracking, is to delete all of Facebook's persistent identifiers after every Facebook session.⁶⁶

Bosdiccica, *Facebook's new ticker profile feature causes privacy scare*, 100GF: POLITICS AND COMPUTERS (Sept. 26 2011), <https://100gf.wordpress.com/2011/09/26/facebooks-new-ticker-profile-feature-causes-privacy-scare/>.

⁶¹ *How to stop social reader from posting news you read to on facebook*, SURVIVAL GUIDE (Sept. 25, 2011), <http://www.survivalguide4idiots.com/how-to-stop-social-reader-from-posting-news-you-read-to-on-facebook.html>; see also Laura June, *Facebook Changes Turn the Concept of Sharing Into an “All or Nothing” Proposition*, WASH. POST BUSINESS (Sept. 26, 2011), http://www.washingtonpost.com/business/economy/facebook-changes-turn-the-concept-of-sharing-into-an-all-or-nothing-proposition/2011/09/26/gIQAeVMVzK_story.html (“There is a convoluted and complicated way to duplicate my previous use of the [Rdio], but it's clear that almost no one will do so, and that Facebook doesn't want them to.”).

⁶² See Clare Washbrook, *Facebook's Ticker Privacy Scare, And What You Should Do About It*, NAKED SECURITY (Sept. 26, 2011), <http://nakedsecurity.sophos.com/2011/09/26/facebook-ticker-privacy-scare/>.

⁶³ *Id.*

⁶⁴ Paul Sawers, *New Spotify users are now required to have a Facebook account*, THE NEXT WEB (Sept. 26, 2011), <http://thenextweb.com/facebook/2011/09/26/new-spotify-users-are-now-required-to-have-a-facebook-account/>.

⁶⁵ Nik Cubrilovic, *Logging out of Facebook is not enough*, NIK CUBRILOVIC (Sept. 25, 2011), <https://nikcub.appspot.com/logging-out-of-facebook-is-not-enough>.

⁶⁶ *Id.*

This type of data collection directly contradicts Facebook’s website, which states that “[i]f you log-out of Facebook, we will not receive this information about partner websites but you will also not see personalized experiences on these sites.”⁶⁷

Post-log-out tracking is also similar to OnStar’s recent announcement that it would continue to track the location of customers’ vehicles even after the customers canceled their service—a decision that prompted Senator Charles Schumer to write to the Commission.⁶⁸

Cubrilovic wrote to Facebook twice over the past year regarding the company’s tracking of users’ post-log-out activity. Only after he blogged about the problem and a media firestorm ensued did Facebook respond.⁶⁹ Facebook’s response deemed the persistence of the “a_user” persistent identifier to be “a bug” and fixed the problem so that the cookie is now destroyed after a user leaves Facebook.⁷⁰ Although Cubrilovic and other researchers considered the a_user persistent identifier to be the most problematic, at least five other cookies still remain on the user’s browser even after logging out of Facebook.⁷¹ Facebook states that the remaining identifiers are used only to improve performance and security. However, there is no technical reason why they could not be used to track a user’s identity in a manner similar to the a_user cookie.⁷² Thus, just as before, consumers must rely on Facebook’s assurances that the other identifiers are not being used for tracking purposes. The Office of the Australian Information Commissioner is investigating whether the cookies breached the country’s privacy laws.⁷³

Facebook’s Use of Frictionless Sharing and Post-Log-Out Tracking Constitutes an Unfair and Deceptive Trade Practice

The FTC has the authority to review antitrust issues under Section 5 of the Federal Trade Commission Act (FTCA), which prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”⁷⁴ The FTC will make a finding of deception if there has been a “representation, omission or practice that is likely

⁶⁷ Facebook Help Center, *What information does Facebook receive about me when I visit a website with a Facebook social plug in?*, <http://www.facebook.com/help/?faq=186325668085084> (last visited Sept. 27, 2011).

⁶⁸ Press Release, Senator Charles Schumer, *Schumer Calls on Onstar to Immediately Stop Tracking Former Customers and Refrain from Selling Drivers’ Data; Calls on FTC to Investigate*, (Sept. 26, 2011), <http://schumer.senate.gov/Newsroom/record.cfm?id=334193>.

⁶⁹ Nik Cubrilovic, *Logging out of Facebook is not enough*, NIK CUBRILOVIC (Sept. 25, 2011), <https://nikcub.appspot.com/logging-out-of-facebook-is-not-enough>.

⁷⁰ See Nik Cubrilovic, *Facebook fixes logout issue, explains cookies*, NIK CUBRILOVIC (Sept. 27, 2011), <https://nikcub.appspot.com/facebook-fixes-logout-issue-explains-cookies>.

⁷¹ See *id.*

⁷² See *id.*; see also Ryan Tate, *Why You Never Really Log Out of Facebook*, GAWKER (Sept. 27, 2011), <http://gawker.com/5844346/why-you-never-really-log-out-of-facebook> (“The milisecond request log, for example, could be trivially traced back to a specific Facebook user using the company’s server logs, as Cubrilovic points out.”).

⁷³ Richard Chirgwin, *Facebook cookies ‘fixed’ as Oz privacy bureaucrats investigate*, THE REGISTER (Sept. 28, 2011), http://www.theregister.co.uk/2011/09/28/facebook_now_killing_cookies/.

⁷⁴ 15 U.S.C.A. § 45 (2010).

to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."⁷⁵ According to FTC Commissioner Kovacic, "[c]ourts have interpreted Section 5 as enabling the FTC to prosecute conduct that violate the letter of the antitrust statutes . . . and to proscribe behavior that contradicts their spirit."⁷⁶

Facebook's frictionless sharing and post-log-out tracking harms consumers throughout the United States by invading their privacy and allowing for disclosure and use of information in ways and for purposes other than those to which users have consent and relied upon. Facebook has said that it "may not want everyone in the world to have the information you share on Facebook," and that users "have extensive and precise controls available to choose who sees what among their network and friends, as well as tools that give them the choice to make a limited set of information available to search engines and other outside entities."⁷⁷ Facebook has also stated that "[i]f you log out of Facebook, we will not receive this information about partner websites but you will also not see personalized experiences on these sites."⁷⁸

Much of the data which Facebook now plans to publicize in new ways was shared by users who relied on a different privacy framework, or, in the case of post-log-out tracking, on Facebook's representations of a different framework. For users who wish to maintain something approaching their old privacy settings, Facebook has offered solutions that are confusing, impractical, and unfair. By concealing the company's tracking of users' post-log-out activity and materially changing the framework under which users' share data without providing a clear opportunity for users' to maintain existing privacy protections, Facebook is engaging in unfair and deceptive trade practices.

Request for Investigation

EPIC, The American Civil Liberties Union, The American Library Association, Bill of Rights Defense Committee, The Center for Digital Democracy, The Center for Media and Democracy, Consumer Action, Consumer Watchdog, PrivacyActivism, and Privacy Times respectfully request that the Commission investigate the extent of the harm to consumer privacy and safety caused by Facebook's secret tracking of the post-log-out activity of the company's users and by the adoption of frictionless sharing.

⁷⁵ Fed. Trade Comm'n, FTC Policy Statement on Deception (1983), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

⁷⁶ KOVACIC ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 970 (Thomson West 2002).

⁷⁷ Testimony of Chris Kelly, Chief Privacy Officer, Facebook, Before the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection Subcommittee on Communications, Technology and the Internet (June 18, 2009), *available at* http://energycommerce.house.gov/Press_111/20090618/testimony_kelly.pdf.

⁷⁸ Facebook Help Center, *What information does Facebook receive about me when I visit a website with a Facebook social plug in?*, <http://www.facebook.com/help/?faq=186325668085084> (last visited Sept. 27, 2011).

Sincerely,

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American Civil Liberties Union
American Library Association
Bill of Rights Defense Committee
Center for Digital Democracy
Center for Media and Democracy
Consumer Action
Consumer Watchdog
PrivacyActivism
Privacy Times

Individual Signers:

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