

Chris Connolly
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AUSTRALIA

To:
Jon Leibowitz, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington DC 20580
(By post and email)

Re: Facebook – Complaint re Unfair and Deceptive Conduct

Dear Chairman and Commissioners,

I am writing to complain about Facebook's unfair and deceptive conduct in relation to its Privacy Policy. In short, Facebook claims that its privacy practices are certified by an "independent" organisation (TRUSTe). In reality, Facebook and TRUSTe are not independent organisations. They are owned by the same majority shareholders and share common Directors. This false claim misleads consumers about the level of independent oversight of Facebook's Privacy Policy at a time when Facebook's privacy practices are the subject of significant global concern.

A more detailed complaint is attached.

I urge you to take this matter seriously and use all of your investigative and enforcement powers to end this unfair and deceptive conduct by one of the world's largest companies, based in your jurisdiction, and affecting millions of citizens in the USA, Australia and elsewhere.

I look forward to your response.

My contact details are:

Daytime telephone number: [suppressed] or [suppressed]
Email: [suppressed]

Yours sincerely,

Chris Connolly (24 May 2010)

COMPLAINT

To: Federal Trade Commission

Complainant: Chris Connolly

Respondent: Facebook Inc.

Regarding: Unfair and deceptive conduct

Overview

This complaint concerns a false claim made in the online Privacy Policy of Facebook, one of the world's largest social network services.

Facebook claims that its privacy practices are certified by an allegedly "independent" organisation (TRUSTe). In reality, Facebook and TRUSTe are not independent organisations. They are closely related corporations with common and overlapping owners and directors. This false claim misleads consumers about the level of independent oversight of Facebook's Privacy Policy at a time when Facebook's privacy practices are the subject of significant global concern.

This false claim is a business practice that amounts to an Unfair and Deceptive Trade Practice, subject to review by the Federal Trade Commission under section 5 of the *Federal Trade Commission Act*.

Facebook is aware of this matter. The complainant has complained about this issue to Facebook and they did remove a *prior* false claim from their Privacy Policy relating to TRUSTe. (Facebook used to claim that TRUSTe was an "independent non-profit" organisation after the date at which TRUSTe became a for-profit corporation). However, they have not removed the word "independent" which is equally, if not more, deceptive.

The Commission is urged to investigate Facebook, determine whether the company has in fact engaged in unfair and/or deceptive trade practices, require Facebook to remove the word "independent" from its claim regarding third party privacy certification in its online Privacy Policy, and seek other appropriate relief.

Parties

The respondent, Facebook Inc. is headquartered at 156 University Avenue, Suite 300, Palo Alto, CA 94301. It has substantial offices in Dublin, London, Milan, Paris, Stockholm, Sydney and Toronto. At all times material to this complaint, Facebook's business has been affecting "commerce", as defined in Section 4 of the Federal Trade Commission Act.¹

The complainant is Chris Connolly, a private citizen based in Sydney, Australia, and a former member of Facebook. Chris Connolly is a well-known privacy advocate, and has provided information to the FTC and other US and international regulators regarding privacy practices and privacy claims relating to a large number of organisations. For example, the FTC investigated and reached settlements² with a number of organisations relating to false claims of membership of the EU US Safe Harbor Privacy Framework, in part following complaints, publications and information provided by Mr Connolly.³

Mr Connolly is lodging this complaint in his private capacity, and the views expressed in this complaint are his alone. They do not represent the views of organisations that Mr Connolly is associated with, either as an employee, board member or affiliate.

Factual background

Facebook is one of the world's largest social network service providers. Facebook has approximately 400 million active users, and it is regularly ranked in the top 5 visited web sites in the United States and amongst the top 10 visited web sites in the world.⁴

Facebook is the subject of regular and repeated criticism regarding its privacy practices. These issues are extremely high profile and are the subject of numerous other complaints to the FTC. There is no need to repeat these issues in the current complaint.

The key tool for managing Facebook's privacy practices is its online Privacy Policy. The policy changes from time to time, and the current version can be viewed at this location:

<http://www.facebook.com/policy.php>

¹ Facebook, *Corporate Fact Sheet*, May 2010 <<http://www.facebook.com/press/info.php?factsheet>>

² Federal Trade Commission, *FTC Settles with Six Companies Claiming to Comply with International Privacy Framework*, June 2009, <<http://www.ftc.gov/opa/2009/10/safeharbor.shtm>>

³ Connolly C, *The US Safe Harbor - Fact or Fiction?*, December 2008, <http://www.galexia.com/public/research/articles/research_articles-pa08.html>

⁴ Alexa Internet Statistics, <<http://www.alexa.com/topsites/global>>

At the date of lodging this complaint (24 May 2010) the Privacy Policy included the following paragraph:

TRUSTe Program. Facebook is a certified licensee of the TRUSTe Privacy Seal Program. This means that our privacy policy and practices have been reviewed by TRUSTe, an independent organization focused on reviewing privacy and security policies and practices, for compliance with its strict program requirements. This privacy policy covers the website www.facebook.com.

A similar claim has appeared in all prior versions of the Facebook Privacy Policy, subject to one amendment. Some prior versions of the Facebook Privacy Policy claimed that TRUSTe was an “independent non-profit” organisation. This claim was still in place for more than twelve months after the date at which TRUSTe became a for-profit corporation (18 July 2008).

The word “non-profit” was removed from the Facebook Privacy Policy in late 2009. However, when the word “non-profit” was removed, Facebook did not remove the word “independent”.

In reality, Facebook and TRUSTe are not independent organisations. They are closely related corporations, sharing the same substantial owners. Accel Partners is the sole owner of TRUSTe, and is a substantial owner of Facebook.

Also, the Directors of both Facebook and TRUSTe are appointed by and represent the same common party (Accel Partners). TRUSTe has no independent Directors – two directors are from Accel Partners and two Directors are from TRUSTe’s senior management. Facebook has 5 Directors, one of whom is a representative of Accel Partners.

Accel Partners lists both Facebook and TRUSTe as “our companies” on its website and in its publications.⁵

Conduct

The Facebook Privacy Policy is one of the most important documents used by consumers to understand their commercial relationship with Facebook. It is essential that this document provides clear and accurate information to potential and current members of Facebook.

⁵ Accel Partners, “Our Companies – Consumer Internet and Media ” web page, <http://www.accel.com/company/sector.php?sector_view=2>

The Privacy Policy places a great deal of emphasis on the claim that Facebook's privacy practices are the subject of certification by an independent third party. Consumers would normally be justified in believing that certification by an independent third party provided a degree of confidence regarding Facebook's privacy practices. Many consumers would place heavy reliance on this claim.

The Privacy Policy does not disclose that Facebook and TRUSTe are related corporations. It does not disclose that they share common ownership, or that their directors are appointed by the same common organisation. Although this corporate link is not actively hidden, in order to ascertain the link between Facebook and TRUSTe, consumers would need to conduct detailed research in other parts of the Facebook, TRUSTe and Accel Partners websites or publications.

The word "independent" is a very strong word to use in a privacy policy claim regarding certification. Indeed, it is the strongest word that can be used in the English language to describe the lack of a relationship between two organisations. It is a word that is easily and quickly recognised by consumers, and leaves no room for ambiguity or alternative interpretations.

The word "independent" is clearly misleading in this situation. Its only purpose for inclusion is to encourage trust and confidence in the value of TRUSTe's inspection and certification of Facebook's privacy practices.

If Facebook disclosed in its Privacy Policy that its privacy practices were certified by a related organisation, with overlapping ownership and common directors, consumers would be free to make their own decision about the value of such a certification. However, the use of the word "independent" removes the opportunity for consumers to make this assessment with accurate information before them.

Impact

The real and potential impact of this false claim is substantial. The Facebook Privacy Policy is the single most important document regarding privacy that a consumer is likely to read. Although Facebook's privacy practices have been the subject of constant debate and criticism, Facebook has never lost its certification by TRUSTe. So the claim of independent oversight has remained in place, and it is likely to have proved influential for many consumers.

Many Government agencies, regulators, media publications and even community organisations have recommended to consumers that they look for independent certification of websites as a mark of increased confidence in the business practices of that website. Many trustmark operators, including TRUSTe, claim that a certification of this type can lead to a substantial increase in membership and/or increased sales.⁶

⁶ For example, TRUSTe provides examples of sites where certification purportedly increased sales by 29%: <http://www.truste.com/privacy_seals_and_services/small_medium_business_privacy/index.html>

It is almost certain that consumers expect certification to be undertaken by independent organisations, without any risk of bias, conflicts or intervention. When this expectation is re-enforced by use of the word “independent” in a Privacy Policy, it provides a completely false level of assurance to the consumer.

The Law

The complainant submits that Facebook is engaging in unfair and deceptive acts and practices. Such practices are prohibited by the FTC Act, and are within the FTC’s jurisdiction.

The FTC Policy Statement on Deception⁷ includes the relevant three tests:

First, there must be a representation, omission or practice that is likely to mislead the consumer.

Second, the practice is examined from the perspective of a consumer acting reasonably in the circumstances.

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception.

The complainant submits that the current practice easily meets all three tests.

First, Facebook makes a false representation that their privacy practices are certified by an “independent” third party, and this claim is likely to mislead consumers.

Second, a consumer acting reasonably in the circumstances would have no cause to doubt the claim of independence, and would have to undertake a substantial amount of research to discover the truth.

Third, the representation is “material” in that the Privacy Policy is an important document, relied on for its accuracy in making decisions about membership of Facebook, and subsequent conduct on Facebook (such as the choice of user settings). Consumer injury is highly likely to result from over-confidence in Facebook’s privacy practices, based on a false claim of independent certification.

⁷ Federal Trade Commission, *Policy Statement on Deception*, 1983, <<http://www.ftc.gov/bcp/policystmt/ad-decept.htm>>

Relief

The Complainant asks the Commission to:

Compel Facebook to utilise the services of a different, independent privacy certification provider, or to remove claims of certification completely from its Privacy Policy; or

(In the alternative) Compel Facebook to remove the false claim that TRUSTe is “independent” from its Privacy Policy, and provide sufficient information so that a reasonable consumer would clearly understand that Facebook and TRUSTe are related corporations.

The complainant urges the Commission to consider additional relief, including but not limited to:

Compel Facebook to issue corrective advertising and /or corrective member communications; and

Compel Facebook to compensate consumers for the harm caused by the deceptive conduct, either individually or through a collective process; and

Provide such other relief as the Commission finds necessary and appropriate.

COMPLAINANT:

Chris Connolly
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AUSTRALIA

24 May 2010