



FTC Requires Company to Delete Proprietary Algorithm as Penalty for Alleged Misuse of Data

Jan 28, 2021

Reading Time : **2 min**

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The FTC alleged that in 2017, EverAlbum enabled face recognition by default for all users of its photo storage app, Ever, in connection with the rollout of a new organizational “Friends” feature on the app. Allegedly, behind the scenes, EverAlbum did not limit the use of face recognition to the Friends feature, but instead also pulled images from users’ photos to further develop facial recognition software and to build services for Paravision. The FTC alleged two counts of violating Section 5(a) of the FTC Act.

The FTC’s first count alleged that EverAlbum misrepresented to users in customer support articles that the facial recognition technology would not be in use unless the user affirmatively activated the Friends feature, when in reality the feature was allegedly in use by default and could not be deactivated by the user. The second count alleged the company misrepresented that it would delete user content if they deactivated their accounts when, in reality, the company allegedly kept user content indefinitely. The company neither admitted nor denied the allegations in its settlement.

In an important “course correction” as dubbed by Commissioner Rohit Chopra, the FTC chose not to allow EverAlbum to keep the “fruits” of its alleged conduct but instead required in the proposed consent order that EverAlbum must delete the user content and also the algorithms and models developed using improperly obtained user content. This decision contrasts with past settlements for similar alleged conduct that did not require the forfeiture of intellectual property, including the [landmark action](#) taken against Google and YouTube for their alleged use of children’s personal information for development of behavioral advertising.

The Commissioner also encouraged the proliferation of state laws on the topics of face recognition and biometrics, noting that “[b]ecause the people of Illinois, Washington, and Texas passed laws related to [these topics],” EverAlbum allegedly targeted the user content of individuals living in states without such specific protections, offering the option to opt-out of the face recognition feature only to users in Illinois, Texas, Washington and the European Union.

As noted by Commissioner Chopra and the [press release](#) for the administrative complaint and consent order, EverAlbum owes no monetary damages and no civil penalties unless the consent order is violated. Commission Chopra has vocally criticized such outcomes in recent [published work](#), however, advocating for use of Section 5(m)(1)(B) of the FTC Act, which allows the FTC to seek civil penalties against companies for “Penalty Offenses,” which are committed with knowledge that the FTC has condemned the conduct in a cease-and-desist order. Coupled with the Supreme Court’s [pending decision](#) in *FTC v. AMG Mgmt., LLC*, No. 19-508, which could limit the FTC’s ability to recover monetary relief in federal court under Section 13(b) of the FTC Act, the stage is set for potential resurrection of the “penalty offense” practice.

Categories

FTC

Facial Recognition

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