



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of the Secretary

May 6, 2021

World Privacy Forum

Re: *In the Matter of Everalbum, Inc.*  
FTC File No. 1923172

Thank you for your comment regarding the Federal Trade Commission's ("FTC's") proposed consent agreement with Everalbum, Inc. ("Everalbum"). The Commission appreciates your feedback.

The two-count complaint in this matter alleges that Everalbum violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by misrepresenting the company's practices with respect to photos and videos (collectively, "content") that users of the company's "Ever" application ("app") uploaded to the company's cloud servers. Count one alleges that Everalbum misrepresented the circumstances under which it would apply face recognition to the content of the photo storage and organization app's users. Count two alleges that Everalbum misrepresented that the company would delete the content of Ever app users who deactivated their Ever accounts.

The proposed order contains provisions to address Everalbum's conduct and prevent the company from engaging in the same or similar acts or practices in the future. It prohibits Everalbum from making misrepresentations related to the privacy, security, availability, confidentiality, or integrity of information from or about an individual consumer. It requires Everalbum to clearly and conspicuously disclose, and obtain consumers' affirmative express consent for, all purposes for which the company will use or share biometric information before using the information to create data needed for face recognition analysis or to develop face recognition models or algorithms. The proposed order further requires Everalbum to delete, and provide sworn statements confirming deletion of, (a) photos and videos of Ever app users who requested deactivation of their accounts, (b) face recognition data that it created without obtaining users' affirmative express consent, and (c) models and algorithms it developed in whole or in part using images from users' photos. It also includes provisions requiring Everalbum to keep certain records and submit to the Commission a compliance report and other documents to enable the Commission to monitor compliance with the order.

Your comment generally supports the proposed order. At the same time, however, your comment points out your concerns regarding a number of important privacy issues. We have closely examined the proposed order to make certain that the proposed order addresses the concerns you raise.

You recommend revisions to the proposed order’s definition of “Biometric Information” to ensure it will encompass “any image from which one can extract an identifying template.” The Commission believes that the proposed order’s definition already meets that test by broadly including “data that depicts or describes the physical or biological traits of an identified or identifiable person.” Furthermore, though your comment implies that the current definition does not include data relating to “behavioral” (as opposed to “physical or biological”) traits, the proposed definition explicitly includes “characteristic movements or gestures (e.g., gait or typing pattern).” Therefore, we believe that sleep, health, or exercise data, to the extent that they are sufficient to identify an individual, fall within the existing definition.

You recommend revisions to the proposed order’s definition of “Clearly and Conspicuously” to be “more clearly inclusive of [disclosures made through] videoconferencing types of interactions.” Because the proposed order’s definition of “Clearly and Conspicuously” already requires that disclosures be “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers” in “each medium through which [a disclosure] is received,” the Commission believes that disclosures in videoconferencing types of interactions are clearly included.

You recommend revisions to the proposed order’s definition of “Face Embedding” based on your concern that the proposed definition would not cover “probabilistic face embeddings (PFEs) which give a distributional estimation.” Relatedly, you recommend adding language to the proposed order’s deletion requirements “because some [face] embeddings” are “based upon and/or derived from . . . information collected from users,” other than images. Because the proposed order’s definition of “Face Embedding” already broadly includes “data . . . derived in whole or in part from an image of an individual’s face,” the Commission believes it already includes probabilistic face embeddings. Furthermore, the Commission believes that the deletion requirements are appropriate to address the practices—including Everalbum’s creation of Face Embeddings from Ever users’ photos and videos—alleged in the proposed complaint.

You recommend adding language to the proposed order’s notice and affirmative consent provision to state explicitly that it applies to the use of biometric information collected from a user to create “any type of” face embedding. As stated above, the Commission believes that the existing language already encompasses any type of face embedding. You also recommend that the provision state explicitly that it applies to the use of biometric information collected from a user to “utilize” or “update” (in addition to “train,” “develop,” or “alter”) any face recognition “system” (in addition to any face recognition “model” or “algorithm”). Because the proposed provision applies broadly to cover any instance in which Everalbum uses biometric information collected from a user to create a “Face Embedding” or to alter a face recognition model or algorithm, the Commission believes that the additions you propose are redundant.

Your comment requests that the Commission make Everalbum’s compliance report public proactively rather than requiring members of the public to file Freedom of Information Act (“FOIA”) requests to obtain it. Based upon your comment and the Commission’s recognition that there has been substantial public interest in the proposed order’s requirement for Everalbum to delete certain data, the Commission commits to making Everalbum’s compliance report public, subject to appropriate redactions for trade secrets or other confidential commercial or

financial information, as permitted by FOIA.

Finally, your comment criticizes the proposed consent agreement for not including a monetary penalty. The Commission agrees that civil penalties can be an effective deterrent for privacy and data security violations. However, the Commission has not brought previous actions against Everalbum, and Section 5 of the Federal Trade Commission Act does not allow the Commission to seek civil penalties for a party's first offense. The Commission continues to urge Congress to enact privacy and data security legislation that would grant the agency civil penalty authority for first-time offenses.

The Commission has placed your comment on the public record pursuant to rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii). Having considered all the facts of this case and all the comments submitted in response to the proposed Order, the Commission has now determined that the public interest would best be served by issuing the Complaint and Decision and Order in final form without further modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. The Commission thanks you again for your comment.

Sincerely,



April J. Tabor  
Secretary