



COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE FEDERAL TRADE COMMISSION

Blurred Lines: Advertisement or Editorial? FTC Workshop on Native Advertising

FTC Project No. P134510

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1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

+1 202 483 1148 [tel]

+1 202 483 1248 [fax]

www.epic.org

By notice published on September 16, 2013, the Federal Trade Commission (“FTC” or “Commission”) seeks comments regarding a workshop on “native advertising” or “sponsored content.”¹ That workshop is now scheduled for December 4, 2013.² Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) recommends that the workshop address the privacy implications—particularly the appropriation tort and the right of publicity—involved in native advertising on social media.

EPIC is a public interest research center located in Washington, D.C., that focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the Commission to address emerging privacy issues and to safeguard the privacy rights of consumers.³ EPIC’s 2010 complaint concerning Google Buzz provided the

¹ Press Release, Fed. Trade Comm’n, *FTC Native Advertising Workshop on December 4, 2013 Will Explore the Blurring of Digital Ads With Digital Content* (Sept. 16, 2013), <http://www.ftc.gov/opa/2013/09/nativeads.shtm>.

² Fed. Trade Comm’n, *Blurred Lines: Advertising or Content?*, <http://www.ftc.gov/bcp/workshops/native-advertising/> (last visited Dec. 3, 2013).

³ See, e.g., Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney, EPIC (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the

basis for the Commission’s investigation and October 24, 2011 subsequent settlement concerning the improper disclosure of user information.⁴ In that case, the Commission found that Google “used deceptive tactics and violated its own privacy promises to consumers when it launched [Buzz].”⁵ The Commission’s settlement with Facebook also followed from a Complaint filed by EPIC and a coalition of privacy and civil liberties organization in December 2009 and a Supplemental Complaint filed by EPIC in February 2010.⁶ EPIC has also submitted comments for and participated in numerous Commission workshops, such as Face Facts: A Forum on Facial Recognition Technology,⁷ In Short: Advertising and Privacy Disclosures in a Digital World,⁸ and the Internet of Things: Privacy and Security in a Connected World.⁹

The Commission’s workshop will examine “the practice of blending advertisements with news, entertainment, and other content in digital media”¹⁰ This practice, referred to as “native advertising” or “sponsored content,” is, in the Commission’s view, increasingly replacing

direct marketing industry), http://epic.org/privacy/internet/ftc/ftc_letter.html; DoubleClick, Inc., *FTC* File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; Microsoft Corporation, *FTC* File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; Choicepoint, Inc., *FTC* File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/fcaltr12.16.04.html>.

⁴ Press Release, Federal Trade Comm’n, *FTC Charges Deceptive Privacy Practices in Google’s Rollout of Its Buzz Social Network* (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> (“Google’s data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”).

⁵ *Id.*

⁶ Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf>; Facebook, Inc., (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief); Facebook, Inc., (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf.

⁷ Federal Trade Comm’n, *Face Facts: A Forum on Facial Recognition Technology*, <http://www.ftc.gov/bcp/workshops/facefacts/> (last visited May 31, 2013)

⁸ Federal Trade Comm’n, *In Short: Advertising and Privacy Disclosures in a Digital World*, <http://www.ftc.gov/bcp/workshops/inshort/> (last visited May 31, 2013)

⁹ Federal Trade Comm’n, *Internet of Things: Privacy and Security in a Connected World*, <http://www.ftc.gov/bcp/workshops/internet-of-things/> (last visited Nov. 25, 2013).

¹⁰ Press Release, Fed. Trade Comm’n, *FTC Native Advertising Workshop on December 4, 2013 Will Explore the Blurring of Digital Ads With Digital Content* (Sept. 16, 2013), <http://www.ftc.gov/opa/2013/09/nativeads.shtm>.

banner advertisements.¹¹ Specifically, the Commission states that the workshop will cover the ways in which “paid messages [are] integrated into, or presented as, regular content”; the “business models [that] support and facilitate the monetization and display of native or integrated advertisements”; and methods of differentiating sponsored content from regular content.¹²

EPIC recommends that the Commission consider the unique ways that native advertising on social media implicates appropriation, publicity, and the Commission’s endorsement guidelines. In the comments below, EPIC outlines the contours of the appropriation tort and the right of publicity, and discusses the interests protected by each right. Next, EPIC reviews the FTC’s endorsement guidelines. Finally, EPIC considers business practices of Facebook, Google, and LinkedIn that involve using the content, image, or likenesses of consumers for commercial purposes.

I. Appropriation and Publicity

The tort of appropriation and the right of publicity both implicate the ability of consumers to control the use and dissemination of their names or likenesses. The tort of appropriation provides that “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”¹³ The right of publicity provides that “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in [the Restatement of Unfair Competition].”¹⁴

The scope of appropriation and publicity has been shaped by decades of doctrinal development. They are purpose-specific, and “may be waived for one purpose, and still asserted

¹¹ *Id.*

¹² *Id.*

¹³ RESTATEMENT (SECOND) OF TORTS § 652C (1977).

¹⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 (1995).

for another.”¹⁵ They apply to celebrities and non-celebrities alike.¹⁶ Finally, they extend beyond name or likeness to any identifiable aspect of personality.¹⁷

These rights protect three primary interests: (1) the dignitary interest of the individual; (2) the commercial value of the individual’s identity; and (3) the individual’s interest in self-development.

As the Restatement explains, “personal feelings against mental distress [were] an important factor leading to a recognition of the rule.”¹⁸ The dignitary interest was present in the first appropriation cases. In *Roberson v. Rochester Folding Box Company*, the New York Court of Appeals considered a claim for invasion of privacy by a young woman whose image had been used without consent in posters advertising flour from a flour manufacturer.¹⁹ The woman based her claim primarily upon the subjective injury that appropriation had caused, alleging that she had been “greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement,” and that “her good name has been attacked, causing her great distress and suffering, both in body and mind.”²⁰ Although the court rejected her claim, Judge Gray issued a powerful dissent in which he found “no difficulty” accepting “that the conspicuous display of her likeness in various public places has so humiliated her by the notoriety and by the public comments it has provoked as to cause her distress and suffering in body and mind, and to confine her to her bed with illness.”²¹ Judge Gray further noted that “security of person”

¹⁵ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 72 (1905)

¹⁶ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4-19 to 4-20 (2d ed. 2000)

¹⁷ *See* *Midler v. Ford Motor Co.*, 849 F.2d 460, 461, 463 (9th Cir. 1988); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1348, 1354-55 (D.N.J. 1981); *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 256-57, 263-64 (N.Y. Sup. Ct. 1984).

¹⁸ RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977).

¹⁹ 64 N.E. 442, 449 (1902).

²⁰ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (1902) *disapproved of by* *Vanderbilt v. Mitchell*, 67 A. 97 (1907).

²¹ *Roberson*, 64 N.E. at 449 (1902).

demanded protection from “the scandalous portraiture and display of one's features and person.”²²

The court noted that the state legislature might “provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent.”²³ The legislature did so in 1903 by enacting a statutory Right of Privacy.²⁴ The law was the first recognition of the appropriation tort, and provided that “A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”²⁵ The New York state law became the basis for similar statutory protections across the country concerning the use of personal images for commercial purposes.

Judge Gray’s reasoning was also adopted in 1905 by the Supreme Court of Georgia.²⁶ The court recognized the existence of a claim for invasion of privacy resulting from the unconsented use of an artist’s photographic portrait in a newspaper advertisement for life insurance. The court emphasized in great detail the psychic interest at stake in appropriation:

The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts. or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.²⁷

²² *Id.* at 450.

²³ *Id.* at 545 (1902).

²⁴ 1903 N.Y. Laws ch. 132, §§ 1-2.

²⁵ *Id.*

²⁶ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (1905).

²⁷ *Id.* at 80.

In addition to psychological wellbeing, appropriation and publicity seek to protect the individual against deprivation of the commercial value of their identity. This value was also recognized in *Pavesich*, where the court noted the fact that the plaintiff's picture was published "as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser."²⁸ In *Zacchini v. Scripps-Howard Broadcasting, Company*, the Supreme Court acknowledged the right of publicity and described its underlying economic rationale.²⁹ The case involved the broadcast, by a local television station, of the plaintiff's entire performance as a "human cannonball." In broadcasting the performance, the station deprived Zacchini of the right "to reap the reward of his endeavors."³⁰ Indeed, "the broadcast of petitioner's entire performance . . . goes to the heart of petitioner's ability to earn a living as an entertainer."³¹

Finally, appropriation and publicity protect an individual's freedom for self-development.³² The original appropriation opinions were framed in terms of the liberty interest at stake. For example, in *Pavesich*, the court emphasized the individual's awareness that "his liberty has been taken away from him" and the extent to which loss of control of his image placed him "under the control of another."³³ "Thus, appropriation can be harmful even if it is not humiliating, degrading, or disrespectful. Being unwillingly used to endorse a product resembles, in certain respects, being compelled to speak and to represent certain viewpoints."³⁴

II. The Commission's Endorsement Guidelines and Dot Com Disclosures

²⁸ *Id.* at 80-81.

²⁹ 433 U.S. 562 (1977).

³⁰ *Id.* at 573

³¹ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576, (1977).

³² See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 545-49 (2006).

³³ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (1905).

³⁴ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 548-49 (2006).

The Commission has recently revised its advertising guidelines concerning the use of endorsements and testimonials.³⁵ The endorsement guidelines are intended to “address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising.”³⁶ The Commission states that “practices inconsistent with these Guides may result in corrective action by the Commission.”³⁷ The use of native advertising on social media implicates several provisions of the guidelines. First, “Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.”³⁸ Additionally, “[w]hen the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given.”³⁹

Earlier this year, the Commission also revised its advertising guidelines, known as the Dot Com Disclosures.⁴⁰ In general, the guidelines state that disclosures required to prevent an advertisement from being deceptive must be presented “clearly and conspicuously.”⁴¹ “The key is the overall net impression of the ad — that is, whether the claims consumers take from the ad are truthful and substantiated.”⁴² When evaluating the prominence of the disclosure, the Commission considers size, color, and graphics of the disclosure.⁴³ The disclosure guidelines state that in contexts where space is limited, such as in social media, “[s]hort-form disclosures might or might not adequately inform consumers of the essence of a required disclosure.”⁴⁴

III. Current Business Practices

³⁵ Guidelines concerning the use of endorsements and testimonials, 16 C.F.R. § 255 (2009), *available at* <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>.

³⁶ *Id.* § 255.0(a).

³⁷ *Id.*

³⁸ *Id.* § 255.1(a)

³⁹ *Id.* § 255.1(c)

⁴⁰ FED. TRADE COMM’N, DOT COM DISCLOSURES (2013), *available at* <http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

⁴¹ *Id.* at 6.

⁴² *Id.*

⁴³ *Id.* at 17.

⁴⁴ *Id.* at 16.

A. Facebook

Facebook recently announced changes to the company's Statement of Rights and Responsibilities and Data Use Policy that will allow Facebook to routinely use the content of Facebook users for commercial advertising without consent. Under the Proposed Statement of Rights and Responsibilities, Facebook claims:

You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.⁴⁵

Facebook will also display the names and likenesses of minors in Sponsored Stories. The proposed Terms of Service state "If you are under the age of eighteen (18), or under any other applicable age of majority, you represent that at least one of your parents or legal guardians has also agreed to the terms of this section (and the use of your name, profile picture, content, and information) on your behalf."⁴⁶

The pending changes arise from a settlement in a class action lawsuit that has the practical effect of legitimizing the challenged conduct: Sponsored Stories.⁴⁷ Sponsored Stories are commercial messages that republish actions users have taken on Facebook, such as: likes on a page; likes, shares, or comments on a page's post; votes on a question; check ins at a location; joins of an event; installs of an app; uses or plays of an app; likes or shares of a website.⁴⁸ In addition to merely republishing a user's interaction or content, Sponsored Stories can include

⁴⁵ *Proposed Statement of Rights and Responsibilities*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/851575_209563965879553_209116475_n.pdf (last visited Dec. 3, 2013)

⁴⁶ *Id.*

⁴⁷ See *Fraley v. Facebook*, No. 11-1726 (N.D. Cal. filed Apr. 8, 2011).

⁴⁸ *What actions can be turned into Sponsored Stories?*, FACEBOOK, <https://www.facebook.com/help/326113794144384/>

additional advertiser content that the user may have never encountered, let alone endorsed, under the category of a “Related Post.”

Sponsored Stories implicate many of the interests protected by the tort of appropriation and the right of publicity. First, by changing the context or violating the purpose behind interactions on Facebook, Sponsored Stories might cause subjective harm—in the form of embarrassment or annoyance—to Facebook users. For example, one Facebook user “liked” Vice magazine, and subsequently found himself associated with content that Vice published that he did not endorse and had never read.⁴⁹ The user stated that “my friends & family might think I like inappropriate content, or information I don’t agree with.”⁵⁰

Second, because Facebook users express themselves through their likes, shares, posts, and other interactions, Sponsored Stories reduce users’ freedom to develop their online personalities. In a recent case holding that use of the Facebook Like button was speech protected by the First Amendment, the Fourth Circuit elaborated on the expressive nature of Facebook activity.⁵¹ “On the most basic level,” the court held, “clicking on the “like” button literally causes to be published the statement that the User ‘likes’ something, which is itself a substantive statement. In the context of a political campaign’s Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable.”⁵² In the political context, liking something was “the Internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech.”⁵³ Critical to the court’s analysis of the

⁴⁹ Damien Gayle, *Is Facebook ‘impersonating’ users to promote stories they’ve never seen to all their friends?*, DAILY MAIL (Jan. 24, 2013) <http://www.dailymail.co.uk/sciencetech/article-2267575/Is-Facebook-impersonating-users-promote-stories-theyve-seen-friends.html>.

⁵⁰ *Id.*

⁵¹ *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013), *as amended* (Sept. 23, 2013)

⁵² *Id.* at 386 (4th Cir. 2013)

⁵³ *Id.*

First Amendment interest is that it is the user’s decision to express support, not the company’s decision on behalf of the user, that constitutes the protected speech.

Finally, Sponsored Stories capture the economic value of user endorsements. Users are more likely to purchase products that have been recommended by their contacts. One study found significantly higher click-through rates for Sponsored Stories compared to regular Facebook advertisements.⁵⁴ In a recent class-action settlement involving Sponsored Stories, a federal court allowed each class member to claim \$15 each.⁵⁵

Sponsored Stories also implicate the Commission’s endorsement and advertising guidelines, which require that endorsements “reflect the honest opinions, findings, beliefs, or experience of the endorser.”⁵⁶ Many Sponsored Stories violate this requirement. Related Posts, for example, contain content that users have never seen, and therefore could not have endorsed. Furthermore, Related Posts implicate the advertising guidelines in the clarity and prominence of their disclosures. The connection between the content that the Facebook user actually liked or interacted with and the Related Post is denoted with the term “related,” but the size of the term, combined with the advertisements proximity to an explicit user action—such as likes, shares, or check ins—has given audiences the impression that users choose to associate with Related Posts.

B. LinkedIn

LinkedIn expands its network by encouraging users to send invitations to their contacts. If a user enters an external email address, LinkedIn may send an “invitation to connect” email to all of the user’s contacts. Contacts that do not respond to the initial email receive two more “reminder” emails. Each invitation to connect associates the user’s name and likeness with the

⁵⁴ SALESFORCE MARKETING CLOUD, THE FACEBOOK ADS BENCHMARK REPORT (2013), *available at* <http://www.salesforcemarketingcloud.com/resources/ebooks/the-facebook-ads-benchmark-report/?d=7013000000tIBb>.

⁵⁵ See *Fraley v. Facebook*, No. 11-1726 (N.D. Cal. filed Apr. 8, 2011).

⁵⁶ 16 C.F.R. § 255.1(a)

LinkedIn brand. LinkedIn's interface is designed in a way that leads many consumers to unintentionally sign up to have invitations sent to their contacts.

Consumer reactions to these business practices demonstrate the kind of harm the tort of appropriation was designed to protect against. Consumers have expressed psychological distress from the use of their identity to promote LinkedIn, as well as a loss of control over their ability to present themselves to their contacts. For example, on a LinkedIn help forum, one user states that:

one of the people on my contact list is mentally ill and the last thing I wanted was to invite her to be my connection on linkedin. not to mention all the other people I don't want contact with who remain on my contact list.”⁵⁷

And another LinkedIn user said:

I strictly use LinkedIn for professional contacts, not personal ones. The people receiving these fake email invitations are all personal contacts, not professional ones. They all have legitimate LinkedIn accounts, but I have not asked them to join me on LinkedIn. These people have begun to email me at my private AOL email account asking me why I invited them to LinkedIn. This makes me very upset and embarrassed!⁵⁸

C. Google

Google recently announced changes to its Terms of Service that will allow users' content to be widely used in advertisements. These “Shared Endorsements” will combined “your Profile name and photo, and content like the reviews you share or the ads you +1'd” with commercial content supplied by businesses.⁵⁹ Unlike Facebook's Sponsored Stories, Shared Endorsements will not use the names or likenesses of minors.

Users will not be asked to consent to the use of their names and likenesses in Shared Endorsements; they are allowed only to opt out by visiting the Shared Endorsements settings

⁵⁷ *LinkedIn, Please stop Hacking and Spamming*, LINKEDIN HELP CENTER, <http://community.linkedin.com/questions/3666/linkedin-please-stop-hacking-and-spamming.html?page=3&pageSize=10&sort=votes> (comment of Robin Epstein).

⁵⁸ *LinkedIn, Please stop Hacking and Spamming*, LINKEDIN HELP CENTER, <http://community.linkedin.com/questions/3666/linkedin-please-stop-hacking-and-spamming.html?page=3&pageSize=10&sort=votes> (comment of Meg Linker-Estes).

⁵⁹ Google, *Summary of changes*, <http://www.google.com/policies/terms/changes/> (last visited Dec. 3, 2013).

page, clicking “Edit,” and unchecking a box that states “Based upon my activity, Google may show my name and profile photo in shared endorsements that appear in ads.”⁶⁰ Google attempts to dissuade users who opt out of Shared Endorsements with a message that reads “Are you sure? When you disable this setting, your friends will be less likely to benefit from your recommendations.”⁶¹

Google’s Shared Endorsements raise problems similar to Facebook’s Sponsored Stories and LinkedIn’s invitations to connect. Because Google appropriates users’ identities without affirmative consent, many consumers will find themselves appearing in advertisements and other commercial content. In many cases, Shared Endorsements will violate the purpose or context of the consumer’s original interaction. Currently, however, the content of Shared Endorsements appears limited to republication of user interactions with businesses, rather than the implicit modification of user interactions contained in the Related Post version of Sponsored Stories.

IV. Conclusion

In an effort to resemble organic social interactions, advertisements on social media often involve characteristics of users’ identities. These new forms of commercial content implicate traditional privacy rights, such as appropriation, as well as the Commission’s endorsement guidelines. EPIC welcomes the opportunity to work with the Commission in the future on this issue.

⁶⁰ Settings, GOOGLE, <https://plus.google.com/settings/endorsements>

⁶¹ Thomas Claburn, *Google Ads will Feature You* (Oct. 11, 2013), <http://www.informationweek.com/security/privacy/google-ads-will-feature-you/240162564> (last visited Dec. 3, 2013)

Respectfully Submitted,

Marc Rotenberg, EPIC President and Executive
Director
David Jacobs, EPIC Consumer Protection Counsel
Electronic Privacy Information Center
1718 Connecticut Ave. NW Suite 200
Washington, DC 20009
202-483-1140 (tel)
202-483-1248 (fax)