Comments of
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on
Face Facts: A Forum on Facial Recognition Technology

Before the Federal Trade Commission[2]
January 31, 2012

The Federal Trade Commission plays a vital role in punishing unfair and deceptive trade practices. Fulfilling its statutory duty to protect consumers requires, of course, carefully monitoring the development of new technologies that, like facial recognition, directly affect consumers. Thus, inquiries such as this one—and related workshops—deserve praise, encouragement and the greatest possible degree of input from all stakeholders.

And yet, with the best of intentions, the Commission is treading on dangerous constitutional ground. Proposals to restrict the use of facial recognition technology—even through opt-out mandates—implicate difficult First Amendment questions: When may government restrict our right to observe the world around us, such the faces we see on the street, and to reduce those observations to mathematical terms? May an individual bar others from using the unique mathematical description of his or her face? In other words, do we have a property right in our visage? If so, what other personal information—or raw facts—may be property-tized?

The Center for Democracy & Technology touches—thoughtfully but incompletely, on some of these questions, citing the Supreme Court's 1973 decision in *U.S. v. Dionisio*: "No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world."[3] CDT may indeed, be correct that even information available to the naked senses should be protected against systematized—and potentially persistent and ubiquitous—observation through increasingly sophisticated technological measures. But this is a *Fourth* Amendment question—about when observation of information constitutes a "search" for which probable cause (or some lower standard of proof) may be required.

We agree with the argument made by the Cato Institute in their *amicus* brief in the recently decided *Jones* case: The Supreme Court has fundamentally misinterpreted its 1967 *Katz*

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2 Project No. Project No. P115406.

3 410 U.S. 1 (1973).

decision; rather than hinging on "reasonable expectations" (a term used in Justice Harlan's solo concurrence) it actually hinges on accessibility, much as CDT argues here. Justice Stewart's majority opinion, joined by six justices, used a different standard:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Getting this standard right could go a long way to ensuring that the Courts protect Americans from the abuse of facial recognition tracking. While it is understandable that the FTC has ruled this problem out of bounds for this inquiry, given its limited authority, doing so has resulted in the perverse result that the most dangerous use of a technology is discussed as a problem to be addressed only indirectly, by limiting the use of facial recognition by private actors.

Herein lies the danger of this inquiry: Creating property rights in our likeness risks becoming a right to keep people from looking at—and talking about—us, with all the perils for the protection of free expression more generally. This is precisely the problem First Amendment scholar and UCLA Law Professor Eugene Volokh warned about in his seminal 2000 law review article, "Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You,"[4] which I submit herewith as an essential part of the record in this inquiry. As Volokh opens his piece:

> Privacy is a popular word, and government attempts to "protect our privacy" are easy to endorse. Government attempts to let us "control . . . information about ourselves" sound equally good: Who wouldn't want extra control, especially of things that are by hypothesis personal? And what fair-minded person could oppose requirements of "fair information practices"?

The difficulty is that the right to information privacy—the right to control other people's communication of personally identifiable information about you—is a right to have the government stop people from speaking about you. We already have a code of "fair information practices," and it is the First Amendment, which generally bars the government from "control[ling the communication] of information" (either by direct regulation or through the authorization of private lawsuits), whether the communication is "fair" or not. While privacy protection secured by contract turns out to be constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.

Among Volokh's central concerns is the suppression of facts. As the Supreme Court recently put it in its *Sorrell* decision: "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[5] Volokh explains how imposition of at least some of the Fair Information Practice Principles in general

[4] 52 Stan. Law. Rev. 1049 (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=200469.

[5] *Sorrell v. IMS Health*, 564 U.S. ___ , 15 (2011).

can result in the suppression of truthful speech—and what this would mean for the rest of First Amendment doctrine. In particular, he notes that the purported "right of publicity" (on which many arguments for restrict facial rest) has never been recognized by the Supreme Court—and argues that, if it were ever recognized, it would be narrowly limited.[6]

This is not an argument that the government should do nothing. The First Amendment neither protects fraud (such as violation of the kind of self-regulatory program for facial recognition advanced by CDT) nor precludes the government from mandating truthful disclosures about corporate privacy practices (such as when, where, and how they use facial recognition). Restrictions on demonstrably harmful *uses* of data are, in general, likely to raise fewer First Amendment problems than restrictions on observation, analysis and distribution (provided they are content and viewpoint neutral).

For now, this is simply an argument that the FTC should tread carefully—and focus on using its existing authority effectively to protect consumers. More than anything else, that means giving Prof. Volokh's excellent essay the attention it deserves—and remembering that if the Fourth Amendment does not adequately protect us from government snooping into our private affairs, the inevitable result will be intrusions on free speech protected by the First Amendment.

[6] 52 Stan. Law. Rev. 1049 at 17.