

**UNITED STATES OF AMERICA
IN THE FEDERAL TRADE COMMISSION**

IN THE MATTER OF Epic Market Place Inc. and)
Epic Media Group, LLC , Delaware corporations)
with their principal place of business at 512 7th)
Avenue, 12th Floor, New York, NY 10018.)
)
COMMISSIONERS: Jon Leibowitz *esq*)
Chairman, J. Thomas Rosch, Edith Ramirez,)
Julie Brill, and Maureen K. Ohlhausen.)
)

**STEERADS' PUBLIC COMMENTS RESPECTING A PROVISIONAL CONSENT
AGREEMENT BETWEEN EPIC MARKET PLACE INC., EPIC MEDIA GROUP, LLC AND
THE FEDERAL TRADE COMMISSION IN SETTLEMENT OF VIOLATIONS OF THE
FEDERAL TRADE COMMISSION ACT 15 U.S.C. § 45 (a) (1) PROHIBITING UNFAIR OR
DECEPTIVE ACTS OR PRACTICES**

STATEMENT OF INTEREST

On December 11, 2012, the Federal Trade Commission (“Commission”) issued a notice in the Federal Register, 77 Fed. Reg. 73,655 (2012), inviting public comments in the above-captioned matter. Steerads, hereby, submits public comments for the Commission’s consideration. Steerads is a corporation governed by the laws of the Province of Québec, Canada, having its principal place of business at 3535 Queen Mary Street, Suite 200, Montréal, Québec, H3V 1H8, Canada, and an office in the United States, at 461 22nd Street West, Suite E, New York City, New York 10111, USA. The solutions developed by Steerads improve online advertisers’ return on investment by optimizing user-specific advertisements bids. www.steerads.com.

The volume of advertising on the Internet, interstate, calls for vigorous enforcement of the prohibition on unfair or deceptive acts or practices, in Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45 (a) (1)) ("section 5"). As we have already pointed out in previous comments submitted to the Commission, businesses should maintain and improve competitiveness by transmitting truthful and accurate information to consumers in the marketplace. The

nonadjudicative proceeding initiated by the Commission is obviously in the public interest, as consumers must be able to make informed judgments on the Internet. Privacy interests must be protected effectively against intermediaries who manage to obtain, deceptively, personal information on the Internet.

The Commission settles most section 5 cases, involving online invasion of privacy, by negotiating “naked” cease and desist consent orders with respondents. By naked cease and desist consent order we mean a consent order with no provision for damages, or any other form of restitution in favor of those whose privacy has been illegally invaded. We believe that the Commission should reconsider this approach, and insist on the inclusion of a compensatory provision or “asphalt clause”, in the consent order negotiated in the above-captioned matter.

PUBLIC COMMENTS

The Commission issued a draft complaint, in which it alleges Epic has engaged in unfair or deceptive acts or practices, in violation of section 5. Basically, the draft complaint charges Epic Market Place Inc. and Epic Media Group, LLC (“Epic”) “failed to disclose that [it] engaged in history sniffing”, a practice which consist of “determining whether a consumer has visited a webpage by checking how a user’s browser styles the display of an hyperlink”. Draft Complaint, ¶¶ 8 and 18. This insidious act of invasion of privacy was accomplished by making misrepresentations online, to entice consumers on providing personal information, they might have preferred keeping confidential, otherwise.

I.

We have reviewed the draft complaint, agreement containing consent order (“consent order”), and the analysis of agreement containing order to aid public comment. We want to

comment on a specific aspect of the consent order: relief, in particular the waiver provision. Agreement Containing Consent Order § 3. It is worth mentioning that the consent order provides an innovative enforcement mechanism: section III orders Epic to file with the Commission a sworn statement confirming that all information illegally obtained from consumers online has been deleted or destroyed. This provision did not appear in previous consent orders negotiated by the Commission, in settlements on charges of online invasion of privacy; we welcome this new provision.

More generally, the consent orders' compliance provisions in the matters of Compete and Epic represent a notable improvement, over past settlements (e.g. Google and MySpace). We perceive a trend toward more effective enforcement and compliance provisions, in consent orders negotiated by the Commission. Still, the consent order negotiated with Epic contains only prospective relief: cease and desist provisions combined with mandatory compliance provisions, without compensatory provision. Civil penalties attach only in case of noncompliance with any of the consent order's provisions. (15 U.S.C. § 45 (l)). This approach should be reconsidered, at this stage.

We submit that the Commission should not give final approval to the consent order, unless an "asphalt clause" is added thereto. In short, an "asphalt clause ... gives a consent decree the effect of a litigated decree. It states that the defendant will not deny in any court that the consent decree holds him *prima facie* liable in treble damages to any person who can prove injury from the conduct alleged in the complaint". Mark J. Green, Beverly C. Moore, Jr., and Bruce Wasserstein, *The Closed Enterprise System* (1972) (citing *United States v. Lake Asphalt & Petroleum Co.*, 1960 Trade Cases ¶ 69,835 (D. Mass.); *United States v. Allied Chemical Corp.*, 1961 Trade Cases ¶ 69,923 (D. Mass.);

United States v. Bituminous Concrete Ass'n, 1961 Trade Cases ¶ 69,878 (D. Mass.).

We propose the inclusion of an “asphalt clause” in section 3 to the consent order, in addition to the provision whereby Epic agrees, subject to final approval of the consent order, to waive judicial review and any other form of legal challenge. In other words, we propose a waiver of all statutory limitations set forth in the Antitrust Procedures and Penalties Act (15 U.S.C. § 16 (a)) (“Tunney Act”), specifically the provision preventing consent judgment and decrees from having *prima facie* effect in civil actions for damages pursuant to Clayton Act Section 4 (15 U.S.C. § 15). If Epic can waive any right to judicial review, under the Federal Trade Commission Acts, it can also waive limitations in the Tunney Act.

An “asphalt clause” establishes a mere presumption in favor of persons injured by respondent’s conduct; respondent may introduce evidence to rebut the presumption. The burden to prove damages and causation on a balance of probabilities remains on plaintiff. Fed. R. Evidence 301. See Herbert Hovenkamp *Federal Antitrust Policy* (4th Ed.) (§ 16.8d.) (“[The] *prima facie* evidence rule applies only to matters that were put in issue, explicitly decided and necessary to the outcome. Even then, the statute creates only a rebuttable presumption in the plaintiff’s favor”). The presumption is not conclusive, refuting any argument that an “asphalt clause” is unfair to respondent.

A compensatory provision or “asphalt clause” is the most appropriate relief to deter future illegal conduct while making victims whole, to the fullest extent possible. Online invasion of privacy for profits is widespread, as recent consent order proceedings initiated by the Commission show Google, MySpace, Compete, and now Epic. It seems naked cease and desist consent orders have had no deterrent effect, considering the costs associated with a violation of section 5. There is no incentive to obey the law, in a regulatory environment where the sole consequence for invading

the privacy of millions of individuals, for profits, is a cease and desist order. Only compensation to victims would send a clear message that the law must be obeyed.

II.

Congress has delegated broad powers to the Commission respecting regulation of competition in interstate commerce: initiate an administrative proceeding to prevent “unfair methods of competition” and “unfair or deceptive acts or practices”, where the Commission is of the view such a proceeding is “in the interest of the public”. 15 U.S.C. §§ 45 (a) (1) and (b). The above statutory grant of authority was construed to confer on the Commission the power “to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws”. *FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 239 (1972) (White, J.) quoted in, Herbert Hovenkamp *Federal Antitrust Principles* (4th ed.) (§ 15.2).

A consent order is a convenient vehicle for settling antitrust cases, taking into account antitrust agencies’ limited resources. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (1995) (Silberman, C.J.). Prosecutorial discretion is another relevant consideration. *Ibid*, at 1457. Yet, monitoring compliance with terms of a consent order requires considerable resources (human and administrative) with no, or little, deterrence virtues. Likewise, considerable resources are necessary to investigate the conduct subject to a settlement agreement. On the other hand, the prospect of protracted litigation, with all attending costs and uncertainties, is more likely to incite compliance with section 5.

Obtaining personal information *via* deceptive practices directed at consumers on the Internet is a serious encroachment on both privacy interests and market principles; so, it should be vigorously enforced by way of administrative proceedings, where necessary. Consent order should

be reserved for instances where there are “weakness[es] in the [Commission’s] case”. 56 F.3d, at 1461. It appears from the information in the public record that the Commission has conducted an in-depth investigation; the evidence discovered is overwhelming. We concede the Commission is best situated to assess the strength of the case in the above-captioned matter, based on the whole evidentiary record. And enforcing FTC section 5 on the Internet is no small task. Nevertheless, we have reservations with the consent order, as it stands, without a compensatory provision.

The whole respectfully submitted,

This 7th day of January 2013

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