

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

IN THE MATTER OF My Space LLC a Delaware)
limited liability company with its principal place)
of business at 407 North Maple Drive, Beverly)
Hills, CA 90210.)

My Space File No. 102 3058

**PUBLIC COMMENTS SUBMITTED BY STEERADS INC. CONCERNING AN AGREEMENT
CONTAINING CONSENT ORDER SETTLING CHARGES THAT MY SPACE LLC ENGAGED
IN UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN OR AFFECTING COMMERCE IN
VIOLATION OF FEDERAL TRADE COMMISSION ACT § 5 (15 U.S.C. § 45 (a) (1))**

STATEMENT OF INTEREST

On May 14, 2012, the Federal Trade Commission (“Commission”) issued a notice in the Federal Register, 77 Fed. Reg. 28,388 (May 14, 2012), thereby inviting public comments as to an agreement containing consent order 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 on-line advertisers’ return on investment by optimizing user-specific advertisements bids. www.steerads.com. The nonadjudicative proceeding initiated by the Commission in the above-captioned matter is of interest to Steerads, as it concerns on-line advertising.

SUMMARY OF COMMENTS

Mandatory injunctive provisions in Parts II and III of the proposed consent order (“PCO”) lack precision, which compromises effectual compliance and enforcement. In addition, compliance mechanisms in Parts IV, V, and VII are needlessly secretive. To ensure maximum compliance and public accountability, we propose the following modifications to the PCO:

1. Remove the term “reasonable” throughout Part II; enjoin Myspace to implement a privacy program without reasonableness requirement.
2. Make public the identity of all independent third-party professionals submitted to, and considered by, the Commission’s Associate Director of Enforcement (Bureau of Consumer Protection), along with all written decisions denying a person third-party professional status (Part III).
3. Make available for public inspection, print and electronic copies of all documents listed in Part IV, except documents (or part thereof) containing sensitive commercial information.
4. Add a provision in Part V, enjoining Myspace to post on its website a copy of the cease and desist order and relevant documents in support thereof, except documents (or parts thereof) containing sensitive commercial information.
5. Make available for public inspection all compliance reports required under Parts III and VII, except parts thereof containing sensitive commercial information, and direct Myspace to post such reports on its web page.¹

COMMENTS

The Commission investigated Myspace conduct and found that the company violated section 5 of the Federal Trade Commission Act, specifically the provision prohibiting “unfair or deceptive acts or practices in or affecting commerce”. (15 U.S.C. § 45 (a) (1)). The Draft Complaint, basically, charges that “Myspace shared the Friend ID of the viewing user with [third-party] advertisers, which allows advertisers to tie a user’s Friend ID, and the personal information to which it gives access, with tracking cookies. This allows advertisers to link web browsing activity with the personal information available in a user’s Myspace profile”. Draft Complaint, at ¶ 20. A “Friend ID” is “a persistent unique numerical identifier” assigned “each user profile created on Myspace”. Id. at ¶ 4. This is a serious charge. See *California Dental Ass’n v. F.T.C.* 526 U.S. 756, 773 n.9

¹Part II.B (cease and desist order provision regarding membership, adherence to U.S.-EU Safe Harbor Framework) deserves no comments; its terms are clear and enforceable.

(1999). Limited information made public in the Draft Complaint filed in support of the PCO, shows Myspace has invaded users' privacy, systematically, nationwide.

The PCO's core remedial provision enjoins Myspace to cease and desist from misrepresenting "in any manner, expressly or by implication ... the extent to which [Myspace] maintains and protects the privacy and confidentiality of any covered information"; and, orders Myspace to "establish and implement, and thereafter maintain, a comprehensive privacy program". Agreement Containing Consent Order, Parts I-II. Compliance reports must be filed initially, then produced biennially, by a qualified person approved by the Commission's Associate Director of Enforcement (Bureau of Consumer Protection), this "in his or her sole discretion", along with "a true and accurate report, in writing, setting forth in detail the manner and form in which [Myspace] has complied with [the] order". Id., Parts III and VII.

At this stage, [t]he important question is whether [Myspace] will abide [by the PCO's] terms regardless of whether it is willing to admit wrongdoing". *United States v. Microsoft Corp.* 56 F.3d 1448, 1461 (D.C. Cir. 1995). Clarity of compliance terms is of the essence, Id., at 1462; for, a consent order is construed "as it is written" (*United States v. ITT Continental Baking Co.* 420 U.S. 223, 236 (1975) (Brennan, J.) citing *United States v. Armour* 402 U.S. 673, at 681-82 (1971)). We are of the view that the PCO's terms of compliance lacks the level of clarity needed for effectual compliance and enforcement; this shortcoming stems from overly broad terms used to define Myspace obligations thereunder. Accountability is another area where improvement is necessary, as public access to relevant documents and information is needed for monitoring compliance.

Clarity and efficacy. The modifier "reasonable" appears four (4) times in Part II. The PCO directs Myspace to (i) set up a privacy program "*reasonably designed to [...]* address privacy risks

[...] and [...] protect the privacy and confidentiality of covered information” [emphasis added]; and (ii) Parts II. B., C., and D. provide for the implementation of reasonable measures regarding the privacy program’s content. Conditioning compliance with a Commission’s order on the implementation of a “reasonable” privacy program introduces uncertainty. Although absolute certainty is unattainable in a judicial order, avoiding vague and broad terms of compliance contributes a great deal to predictability.

The need for clarity and certainty is compounded by the absence of monetary penalty or restitution order in the PCO. A consent order approved by the Commission establishes no prima facie evidence of an antitrust offense, Antitrust Procedures and Penalties Act (15 U.S.C. § 16 (a)); neither has a final order collateral estoppel effect. See Hovenkamp, Herbert “FEDERAL ANTITRUST POLICY/ THE LAW OF COMPETITION AND ITS PRACTICE” (West 4th Edition) § 16.8d. (“[A] defendant who had *a full and fair opportunity to litigate issues in one proceeding* could be precluded from relitigating them in a later collateral proceeding to which it is also a party”) (emphasis added); citing *Parklane Hosiery Co. v. Shore* 439 U.S. 322 (1979). See also, Draft Complaint, ¶ 5.

A final order is enforceable by way of a civil action for civil penalty (15 U.S.C. § 45 (l)). A court finds continuing noncompliance with a final order, and imposes civil penalties, if a party “neglect to obey” a consent order. Ibid. Accordingly, terms of compliance must be set forth with clarity, objectively. *ITT Continental Baking Co.* 420 U.S., at 237-243. A plain and unambiguous mandatory obligation to implement a privacy program, without modifier, meets the level of clarity demanded for full compliance. Otherwise, the Commission might well seek approval of an unenforceable order. So, besides having incurred no legal consequences for past violation of the

law, Myspace could violate the PCO's core remedial provision with impunity.²

Accountability, openness. Public access to documents and compliance reports is paramount to give effect to the PCO. It is essential that the public has access to:

1. The identity of all independent third-party professionals submitted to, and considered by, the Commission's Associate Director of Enforcement (Bureau of Consumer Protection), for the preparation of initial and subsequent biennial assessments reports. (Part III).
2. Written decisions by the Commission's Associate Director of Enforcement denying a person third-party professional status. (Part III).
3. Compliance reports to be filed with the Commission under Parts III and V, except parts thereof containing sensitive commercial information.

Additional mandatory injunctive provisions are suggested: (i) Post the cease and desist order and documents in support thereof (except documents containing sensitive commercial information) on Myspace website (Part V); and (ii) same for the final compliance report (Part VII). Lastly, it seems there is no positive requirement on Myspace to provide biennial reports to the Commission's Associate Director of Enforcement. The last sentence in Part III is unclear in that regard, reading: "All subsequent biennial Assessments shall be retained by [Myspace] until the order terminated and *provided* to the Associate Director of Enforcement within ten (10) days of *request*" (emphasis added). Order the filing of the initial privacy assessment and report, only, is unsound; a higher level of oversight is called for in the PCO, in light of the serious violations of the law engaged in by Myspace.

²Likewise, the requirement in III.D that privacy assessments and reports be of "*sufficient effectiveness* to provide *reasonable* assurance to protect the privacy of covered information" (emphasis added)) could, also, be unenforceable.

CONCLUSION

We submit that the foregoing proposed modifications should be incorporated in the PCO before the Commission approves it.

This 5th day of June 2012

DANIEL MARTIN BELLEMARE
ATTORNEY AT LAW
Vermont Bar # 3979
Québec Bar 184129-7
1010 Sherbrooke Street West Suite 2200
Montréal, Québec,
Canada H3A 2R7
Tel: (514) 284-2322
dmbellemare@videotron.ca

Counsel to Steerads Inc.

 /s/
BENJAMIN MASSE
3535 Queen Mary Street Suite 200
Montréal, Québec
Canada H3V 1H8

President Steerads Inc.

TO: Federal Trade Commission
Office of the Secretary Room H-113 (Annex D)
600 Pennsylvania Avenue NW
Washington D.C. 20580

