



WORLD **PRIVACY** FORUM

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Comments of the World Privacy Forum

Regarding

Sears Holdings Management Corporation Petition to Reopen and Modify Commission Order Concerning Online Browsing Tracking; In the Matter of Sears Holdings Management Corporation, File Nos. 082 3099 and C4264

Via <https://ftcpublic.commentworks.com/ftc/searspetition/>

December 5, 2017

FTC Office of the Secretary,
600 Pennsylvania Ave., N.W.,
Washington, DC 20580

The World Privacy Forum welcomes the opportunity to comment on the request by Sears Holding Management that the FTC reopen and modify a 2009 FTC order settling charges that Sears failed to disclose adequately the scope of consumers' personal information it collected via a downloadable software app. See <https://www.ftc.gov/news-events/press-releases/2017/11/ftc-seeks-public-comment-sears-holdings-management-corporation>, and <https://www.ftc.gov/system/files/documents/cases/c4264searspetitiontomodifyorder.pdf>.

The World Privacy Forum is a non-profit public interest research and consumer education group. We publish in-depth research papers, policy comments, and consumer education focusing on privacy and security issues. Much of our work explores emerging technology and privacy issues, including health, biometrics, consent, data analytics, and many other rapidly evolving areas of privacy. You can see our publications and more information at www.worldprivacyforum.org.

Our comments below respond to the substance of Sears' petition. In general, we find that the petition is deeply lacking in supporting facts, and would set a precedent deleterious to consumer interests.

I. Lack of Factual Basis for Petition

We have multiple questions regarding the lack of a fact pattern or factual basis for this petition. We find the lack of facts in this petition to be troubling enough that we suggest the petition not be granted on this issue alone.

There is much argument about how Sears may be treated differently than its competitors as a result of the 2009 order, an order that it entered into freely and because its activities were demonstrably unfair to consumers. In its petition, Sears did not state or provide sufficient proof that in the intervening years it lost a single customer or a single sale as a result of the steps required by the 2009 order.

We read the affidavit from Eui Chung with some care, and we still did not find any factual support for an actual adverse effect on Sears's sales or its ability to induce customers to accept its apps. In many ways, Sears's argument is "all the other kids have one." However, Sears is not like the other kids because of its past unwelcome behavior that the FTC documented.¹

When customers who sought to download and install a Sears app faced the prominent disclosure required by the Order, how many declined to accept the app? The petition offers no information, yet we suspect that Sears would know this number. It may be telling that Sears did not offer any real data. It is not clear, nor did Sears prove with incontrovertible facts, that Sears has been disadvantaged in any meaningful way by the disclosures it must make to its customers and the other limits in the original order.

Facts should be required to support arguments. Otherwise anyone could simply put forward any argument to make a case. For example, one could argue that the disclosures and limits on Sears could have attracted more customers than they repelled. Instead of guesswork here, we suggest that the Commission ask Sears for much more support and documentation for its petition in the form of actual facts about customer acceptance of its apps and how a documentable rate of acceptance/rejection compares to comparable merchants. We need a robust fact pattern here to support this petition, and Sears did not provide one. Until this is remedied, the petition should not be granted.

II. Reliance on Platform Standards as Primary Defense

The petition throughout cites the role that both Apple and Google play in setting standards for apps allowed in their respective platform stores. We think these platform practices are a good thing to have in place. We also think the platforms do a lot to police bad apps. However, the practices of the platforms is not what is most relevant in this matter, because this petition is focused on Sears' practices, not the platform practices. It is not enough for Sears to rely on the

¹ See *US Federal Trade Commission Administrative Complaint re: Sears Holding Management Corporation*, <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090604searscomplaint.pdf> and *Sears Holding Management Corporation, Analysis of Agreement Containing Consent Order to Aid Public Comment*. Federal Register 74:113 June 15, 2009. https://www.ftc.gov/sites/default/files/documents/federal_register_notices/sears-holding-company-management-corporation-analysis-agreement-containing-consent-order-aid-public/090615searsco.pdf

existence of appropriate platform standards for proving their individual app behavior is also appropriate.

We invite the Commission to join the World Privacy Forum in being reluctant to rely on platform standards as a basis for drawing key conclusions about the performance of an individual app. While good standards are important, their existence should not be wielded as an automatic defense against inappropriate behavior by apps participating on any given platform.

Creating a precedent that accepts at 100% value the manner in which an individual app complies with platform standards just by virtue of the app being on a platform would be unfortunate. It would set a precedent that would allow other apps to use this same defense. There are good reasons that the "Good Housekeeping" seal of approval has been difficult to fully replicate in a digital ecosystem; digital ecosystems, as the FTC knows, are complex and require multiple layers of defense against bad behavior. Platforms appropriately set their standards. But apps need to be able to affirmatively prove and robustly document their own adherence both to platform standards as well as to their own posted privacy policies. Here too, the Commission should seek actual facts upon which to draw a conclusion.

III. "Consumer Expectation of Privacy" Argument in Petition

Here's the summary of what Sears is requesting, in the words of the petition:

Sears does not seek to modify the Order's core continuing mandate: that the Company "clearly and prominently" provide notice and obtain consent regarding software applications that may not align with consumer expectations and commonly accepted practices. As noted in the Relief Requested section above, Sears instead seeks modest changes that would make the scope of the Order consistent with more recent FTC consent orders by excluding software applications that engage in data collection and analysis that is limited to (a) the configuration of the software program or application itself; (b) whether the program or application is functioning as represented; or (c) the consumer's use of the program or application itself.

We have three comments on this paragraph.

First, we are deeply reluctant to rely on a reasonable-expectation-of-consumer-privacy test as suggested in the petition. We note the work of Professor Joseph Turow and others at the University of Pennsylvania who found that consumers seem resigned to the lack of control over their data and feel powerless to stop its exploitation. Turow has stated:

The findings also suggest, in contrast to other academics' claims, that Americans' willingness to provide personal information to marketers cannot be explained by the public's poor knowledge of the ins and outs of digital commerce. In fact, people who know more about ways marketers can use their personal information are more likely rather than less likely to accept discounts in exchange for data when presented with a real-life scenario.

Our findings, instead, support a new explanation: a majority of Americans are resigned to giving up their data—and that is why many appear to be engaging in tradeoffs. Resignation occurs when a person believes an undesirable outcome is inevitable and feels powerless to stop it. Rather than feeling able to make choices, Americans believe it is futile to manage what companies can learn about them. Our study reveals that more than half do not want to lose control over their information but also believe this loss of control has already happened.²

If Professor Turow is correct, and we think his work is insightful, consumer data collection, including by brick and mortar retailers, has already undermined consumer expectations of privacy by oftentimes undisclosed collection and analysis of personal data to the point that any consumer expectation test is now almost or totally meaningless. The activities of Sears that gave rise to the original 2009 Order may well have contributed in part to undermining its own customers' trust. Because of this, the test of "consumer expectation of privacy" in this case is not an appropriate one.

Second, in regards to the first two requested modifications, those that would allow for collection and analysis of (a) the configuration of the software program or application itself, and (b) whether the program or application is functioning as represented, we acknowledge marketplace changes since 2009. These activities do not appear on their surface to have any significant potential to harm consumers, and we would not object to (a) and (b) *provided that* the data would not be used for browser fingerprinting or other consumer identification or tracking. If Sears is granted this relief, they should be required to state with much more specificity how they will and will not use the data, and the FTC needs to ensure the activities are not a behavioral fingerprinting work-around.

Third, we have serious concerns about Sears' request to collect and analyze a consumer's use of the program or application itself. This language can and does have many implications, and the petition was unclear regarding all that this phrase means. Lacking specificity, we are left to understand that this could mean broad uses of the data. What if a program or app collects other information on the consumer's phone or other mobile device? What if an app connects the consumer to another app (e.g., a mapping app, health app, etc.)? Will Sears be able to collect and analyze a consumer's use of an app to which it provided a link? We just do not see any natural or clear limit to the notion of either "collecting and analyzing" or "use of a program or app." Our concern is that the vague language here would open the door to almost anything.

Therefore, the Commission should reject the third request (c) for modification entirely.

If the Commission decides to grant the third request (c), we urge that the Commission limit collection and analysis to activities that occur only on the Sears app, that involve communications only with Sears, and that the order exclude any activity that occurs anywhere else on the web or in another app. The ability to collect information should not extend to other

² Joseph Turow, Michael Hennessy, & Nora Draper, THE TRADEOFF FALLACY How Marketers Are Misrepresenting American Consumers And Opening Them Up to Exploitation at 3(2015), https://www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf.

information on a consumer's mobile phone or mobile devices, including but not limited to identity of other apps or access to location information, the microphone, camera, the consumer's address book, or browsing history.

An express exclusion of these classes of information would be important, both as a limit on Sears and as a signal to others of where lines should be drawn. Further, Sears should be expressly banned from selling, renting, sharing, or allowing other to use in any way identifiable or potentially identifiable information collected under this authority.

The World Privacy Forum is grateful for the opportunity to participate in this matter. We would be pleased to respond to any questions you may have.

Respectfully submitted,

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