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FTC Orders Destruction of Algorithms Created From Unlawfully Acquired Data

*By Randi Singer and Michael
Goodyear*

On May 6, 2021, the Federal Trade Commission (“FTC”) approved its [Final Consent Order](#) against Everalbum, a cloud photo storage app, for misrepresenting its privacy practices and violating Section 5 of the FTC Act. Although the FTC has taken action against companies for poor privacy practices before, this Order represents a significant development: it requires the destruction of models and algorithms developed in whole or in part from user photos that it scanned and used without permission.

Everalbum and Its Privacy Practices

Everalbum operated “Ever”, a photo storage and organization app and website that allowed users to upload photos and videos. In 2017, it added a feature that used facial recognition to organize photos by the faces of the people who appear in them. Initially, facial recognition was enabled by default for all users of the app and there was no option to disable it. A few users in Texas, Illinois, Washington and the EU were given the option to affirmatively opt in (pursuant to state biometric laws and the GDPR) in 2018, but the option to disable the feature was not offered to the majority of users until 2019, two years after the feature was introduced. According to the complaint, Everalbum used images it extracted from users’ photos to create a series of data sets between 2017 and 2019; these data sets were used to develop facial recognition technology for the app, as well as to build facial recognition services offered by Everalbum’s enterprise brand, Paravision (f/k/a Ever AI), which offered face recognition technology to enterprise customers for purposes such as security, access control, and facilitating payments. The complaint alleges that Everalbum misrepresented to users that it would not apply facial recognition technology without an affirmative opt-in and that it would delete content when users deactivated their accounts – neither of which was true for at least certain periods of time, according to the complaint.

Everalbum shut down on August 31, 2020, citing “increasing competition over the last several years from Apple and Google’s photo storage products.”¹ Paravision is still operating and following the release of the proposed version of the FTC’s Final Order on January 11, 2021, Paravision appointed a Chief AI Ethics Advisor and published a set of AI principles, which includes obtaining all necessary rights in data before using them.² A representative for Paravision stated that the current Paravision model does not use any user data collected from the Ever app.³ Class action litigation against Paravision, alleging privacy violations based on illegally scraping Ever users’ photos to develop the facial recognition model in violation of the Illinois Biometric Information Privacy Act (“BIPA”), was settled on February 1, 2021.⁴

The FTC Order

The final Order:

- Prohibits Everalbum from making various misrepresentations about the collection, use, disclosure, retention, or deletion of information, and about what Everalbum does with the information;
- Requires Everalbum to make certain disclosures and obtain affirmative consent for all uses of biometric information, including any use in developing face recognition models or algorithms;
- Requires Everalbum to delete photos and videos of users who requested deactivation;
- Requires Everalbum to delete Face Embedding [“data, such as a numeric vector, derived in whole or in part from an image of an individual’s face”] derived from photos, videos or any other Biometric Information [“data that depicts or describes the physical or biological traits of an identified or identifiable person, including depictions (including images), descriptions, recordings, or copies of an individual’s facial or other physical features (e.g., iris/retina scans), finger or handprints, voice, genetics, or characteristic movements or gestures (e.g., gait or typing pattern)”] collected from users who have not provided express affirmative consent

for use of their information to create Face Embeddings;

- Requires Everalbum to **delete or destroy** “any models or algorithms developed in whole or in part using Biometric Information Respondent collected from Users of the “Ever” mobile application”; and
- Imposes reporting and compliance obligations for twenty years.

The FTC order became final following a public comment period in which only three publicly available comments were submitted. The World Privacy Forum advocated for more technical definitions, monetary fines, and publicly available compliance reports, while also supporting the deletion requirements of both the underlying data and the algorithms trained on that data.⁵ The FTC responded that its definitions of “biometric information” and “face embedding” were broad enough to protect all images and images derived from information other than images. The FTC further noted that, because it was Everalbum’s first offense, the FTC Act does not allow the FTC to seek civil monetary penalties.⁶

A Brave New World for Algorithms?

Commissioner Rohit Chopra issued a separate statement chastising Everalbum for breaking its promises to consumers, and calling the Order “an important course correction” from a prior FTC settlement with Google and YouTube.⁷

In the prior action against Google and YouTube for violating the Children’s Online Privacy Protection Act Rule (“COPPA”), the FTC allowed those companies to retain the algorithms and technologies that had been trained on the allegedly violative data.⁸ Prior FTC orders also allowed respondents to keep the resulting algorithms, even if they had to delete the underlying data.⁹

The Everalbum Order applies a new application of the “fruit of the poisonous tree” doctrine, ordering the destruction of not just allegedly violative data, but any algorithms to which those data contributed. Acting Chair Rebecca Slaughter explained:

We routinely obtain disgorgement of ill-gotten monetary gains when consumers pay for a product that is marketed deceptively. Everalbum shows how we can apply this principle to privacy cases where companies collect and use consumers' data in unlawful ways: we should require violators to disgorge not only the ill-gotten data, but also the benefits—here, the algorithms—generated from that data.¹⁰

Takeaways

The Everalbum Order highlights that the FTC may be increasingly focused on tech companies, both in regards to facial recognition programs and other user data-based algorithms. The Order could be a harbinger for other regulatory authorities at the state and federal level. Indeed, Commissioner Chopra urged states to follow the lead of Illinois, Washington, and Texas and pass biometrics laws.¹¹ Hundreds of class actions have been filed in Illinois alleging BIPA violations, including the putative class action against Paravision, illustrating the growing litigation interest in companies' use of data.

The Order also creates a potentially significant new development for many tech companies. If it appears that the data set includes biometric or personal information from consumers that was collected in a deceptive manner, there is now precedent for requiring that the algorithms created from or trained by the data set be destroyed.

It is more important than ever to understand the provenance of data sets used to train algorithms. This FTC Order presents a potentially significant development in the use and retention of data for the creation of algorithms. Companies should consider how this affects their own products and practices.

¹ Sarah Perez, *Ever, Once Accused of Building Facial Recognition Tech Using Customer Data, Shuts Down Consumer App*, TECH CRUNCH (Aug. 24, 2020 2:23 PM), available at: <https://techcrunch.com/2020/08/24/ever-once-accused-of-building-facial-recognition-tech-using-customer-data-shuts-down-consumer-app>.

² *Paravision Appoints Chief AI Ethics Advisor, Publishes AI Principles*, PARAVISION (Jan. 2021), available at: <https://www.paravision.ai/news/paravision-appoints-chief-ai-ethics-advisor/#:~:text=Publishes%20AI%20Principles,-January%202021%20San&text=SAN%20FRANCISCO%2C%20California%20%E2%80%93%20Paravision%2C,it%20has%20appointed%20Elizabeth%20M>.

³ Kathryn M. Rattigan, *Everalbum Settles with FTC Over Facial Recognition Technology in Its Ever App*, NAT'L L. REV. (Jan. 13, 2021), available at: <https://www.natlawreview.com/article/everalbum-settles-ftc-over-facial-recognition-technology-its-ever-app>.

⁴ Order Granting Joint Motion to Dismiss, *Walton v. Everalbum* (N.D. Cal. 2020) (4:20-cv-06895).

⁵ Comments of the World Privacy Forum to the Federal Trade Commission Regarding Proposed Consent Order, In the Matter of Everalbum, Inc., File No. 1923172 (Feb. 23, 2021), available at: <https://www.regulations.gov/comment/FTC-2021-0009-0004>.

⁶ Response of the Federal Trade Commission to the World Privacy Forum, In the Matter of Everalbum, Inc., File No. 1923172 (May 6, 2021), at 2, 3, available at: https://www.ftc.gov/system/files/documents/cases/wpf_response_final_0.pdf.

⁷ Statement of Commissioner Rohit Chopra, In the Matter of Everalbum, Inc., No. 1923172 (Jan. 11, 2021), at 1, available at: https://www.ftc.gov/system/files/documents/public_statements/1585858/updated_final_chopra_statement_on_everalbum_for_circulation.pdf.

⁸ See In the Matter of Google LLC and Youtube, LLC, No. 1723083 (Sep. 10, 2019), available at: <https://www.ftc.gov/public-statements/2019/09/statement-commissioner-rohit-chopra-regarding-youtube>.

⁹ See, e.g., Commission Order Modifying Order, In the Matter of Facebook, Inc., No. 0923184 (Apr. 28, 2020), available at: <https://www.ftc.gov/system/files/documents/cases/c4365facebookmodifyingorder.pdf>.

¹⁰ Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm'n, Protecting Consumer Privacy in a Time of Crisis, Remarks at the Future of Privacy Forum (Feb. 10, 2021), available at: https://www.ftc.gov/system/files/documents/public_statements/1587283/fpf_opening_remarks_210_.pdf.

¹¹ Statement of Commissioner Rohit Chopra, *supra* note 7, at 2.

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Editor:

Randi Singer (NY)	View Bio	randi.singer@weil.com	+1 212 310 8152
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Contributing Authors:

Randi Singer (NY)	View Bio	randi.singer@weil.com	+1 212 310 8152
Michael Goodyear (NY)	View Bio	michael.goodyear@weil.com	+1 212 310 8213

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