

More for Your Legal Department: The Importance to Adhering to Online Terms, Such as Facebook's API Terms

Did FTC Complaint Just Turn Online Terms Into Federal Law?

By Reed Freeman, Morrison & Foerster

Law360, New York (April 29, 2014, 1:11 PM ET) -- The [Federal Trade Commission](#)'s announcement earlier this month that it had filed a complaint against Jerk LLC and its websites like "jerk.com" looks at first glance like a run-of-the-mill FTC Section 5 enforcement action involving allegedly deceptive practices online. But hidden in the facts of Jerk's alleged misbehavior is a potentially significant expansion of the FTC's use of its deception authority.

According to the FTC's complaint, Jerk allegedly led consumers to believe that the profiles on its websites were created by other users of the website. The company also allegedly sold "memberships" for \$30 a month that supposedly included features that would enable consumers to alter or delete their profiles, or to dispute false information in the profiles. Jerk also charged consumers a \$25 fee to email Jerk's customer service department, according to the FTC's complaint.

The FTC alleges that Jerk created between 73.4 million and 81.6 million unique consumer profiles primarily using information such as names and photos pulled from [Facebook](#) through application programming interfaces, or APIs. The complaint states that "[d]evelopers that use the Facebook platform must agree to Facebook's policies," such as obtaining users' explicit consent to share certain Facebook data and deleting information obtained from Facebook upon a consumer's request.

These alleged facts lend themselves to a straightforward violation of Section 5 of the FTC Act for deceptive acts or practices. Jerk allegedly represented that the content on its websites was user-generated, while it was in fact primarily pulled by Jerk from Facebook, making Jerk's representation false and misleading. The FTC, however, has gone well beyond this straightforward deceptiveness accusation here.

Rather than simply alleging that Jerk's representations were false and misleading because the content was not generated by users, but rather from Facebook information, the complaint goes much further in alleging that Jerk "populated or caused to be populated the content on the vast majority of Jerk profiles by taking information from Facebook in violation of Facebook's policies."

The fact that the information was pulled from Facebook in violation of Facebook's policies does not seem to be material — let alone essential — to the deceptiveness allegation. Nonetheless, the complaint only alleges that "the representation [regarding the source of the content] was, and is, false or misleading" after stating that Jerk took information from Facebook in violation of Facebook's policies.

The FTC is breaking new ground here. Jerk is not the first time the FTC has brought a case based (in part) on an alleged violation of another company's terms or policies, but it is the first time the FTC has alleged that the violation of another company's terms or policies can be part of a violation of Section 5 in its own right.

In January 2000, the FTC brought a complaint against ReverseAuction.com, an auction website that was attempting to compete with [eBay](#). The FTC's complaint was based, in part, on the allegation that Reverse Auction obtained and used email addresses and user IDs of eBay customers "after registering as an eBay user and agreeing to comply with and be bound by eBay's User Agreement."

Like Facebook, eBay requires users to adhere to its applicable policies. In both the Reverse Auction and the Jerk matters, the FTC charged that the applicable website operator failed to comply with the policies that applied to such website operator's actions. The crucial difference in the cases is that, in Reverse Auction, the FTC's theory of deception was that Reverse Auction "represented to eBay" that Reverse Auction would comply with eBay's policies. In light of this precedent, Jerk is significant because the FTC's complaint alleges only that Jerk made false representations about the source of its information, not about its compliance with Facebook's policies per se.

In other words, the FTC's complaint can be read to suggest that simply using information pulled from Facebook in violation of Facebook's policies is a deceptive act or practice, without any alleged misrepresentation to Facebook regarding the use of the information.

The FTC's Jerk action thus breaks away from Reverse Auction by characterizing actions inconsistent with a third party's policies as deceptive in their own right, as opposed to finding any representation regarding compliance with those policies to be deceptive. In that light, the FTC appears to have taken a case with ugly facts (including, allegedly, public availability on Jerk's websites of photos of children that had been tagged as "private" on Facebook) and leveraged such case to allege that noncompliance with Facebook's policies themselves is part of a violation of Section 5 in its own right.

If the FTC continues to pursue this theory, it would essentially be turning Facebook's policies into "federal law," with compliance effectively enforced by the threat of Section 5 enforcement simply for using Facebook content in violation of Facebook's policies.

—By Reed Freeman, John Delaney and Adam Fleisher, [Morrison & Foerster LLP](#)

[Reed Freeman](#) is a partner in Morrison & Foerster's Washington, D.C., office. [John Delaney](#) is a partner in the firm's New York office. [Adam Fleisher](#) is an associate in the firm's Washington office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

PRIVILEGED AND CONFIDENTIAL -- SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

D. Reed Freeman, Jr.

Morrison & Foerster LLP

2000 Pennsylvania Avenue, NW | Washington, DC 20006-1888

P: 202.887.6948 | C: 703.304.2974

RFreeman@mfo.com | www.mfo.com