

FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of)
)
WhatsApp, Inc.)
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)
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_____)

**Supplemental Materials in Support of Pending Complaint, Request for
Investigation and Injunction, and Other Relief;
Related Commentary Concerning Commission’s Surprising
Expedition of Google-Nest Review**

I. Introduction

1. On March 6, 2014, the Electronic Privacy Information Center (“EPIC”) and the Center for Digital Democracy (“CDD”) filed a Complaint with the Federal Trade Commission (“FTC” or “Commission”) requesting an injunction and investigation.¹ The Complaint concerned the proposed acquisition of WhatsApp, Inc. by Facebook, Inc., specifically in regard to the effects of the acquisition on user privacy. As Petitioners stated in the original Complaint:

This complaint concerns the impact on consumer privacy of the proposed acquisition of WhatsApp, Inc. by Facebook, Inc. As set forth in detail below, WhatsApp built a user base based on its commitment not to collect user data for advertising revenue. Acting in reliance on WhatsApp representations, Internet users provided detailed personal information to the company including private text to close friends. Facebook routinely makes use of user information for advertising purposes and has made clear that it intends to incorporate the data of WhatsApp users into the user profiling business model. The proposed acquisition will therefore violate WhatsApp users’ understanding of their exposure to online advertising and constitutes an unfair and deceptive trade practice, subject to investigation by the Federal Trade Commission.²

¹ In the Matter of WhatsApp, Inc., (2014) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://www.epic.org/ftc/WhatsApp-Complaint.pdf>.

² *Id.*

2. The Petitioners stated that “WhatsApp represented to consumers that the company will not retain or repurpose information collected from their mobile phones,” and that “facts about WhatsApp’s philosophy of privacy and anonymity were material to users in their decision to install and use WhatsApp.” Therefore, Petitioners stated, “WhatsApp’s failure to adequately disclose that this commitment to privacy was subject to reversal constitutes a deceptive act or practice.”³
3. The Petitioners requested the Commission to provide relief and specifically to:
 - Initiate an investigation of the proposed acquisition of WhatsApp by Facebook specifically with regard to the ability of Facebook to access WhatsApp’s store of user mobile phone numbers and metadata;
 - Until the issues identified in this Complaint are adequately resolved, use the Commission’s authority to review mergers to halt Facebook’s proposed acquisition of WhatsApp;
 - In the event that the acquisition proceeds, order Facebook to insulate WhatsApp users’ information from access by Facebook’s data collection practices; and
 - Provide such other relief as the Commission finds necessary and appropriate.⁴
4. The Petitioners stated also reminded the Commission that Facebook’s acquisition of WhatsApp implicates Safe Harbor compliance. The Petitioners stated, “The Commission has previously issued an Order and Settlement Agreement with Facebook, following an investigation into whether ‘Facebook deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public,’” and “Currently, Facebook represents that it complies with the requirements of Safe Harbor program.”⁵
5. This supplement to the original Complaint presents new evidence that WhatsApp’s acquisition by Facebook constitutes an unfair and deceptive practice that the FTC should investigate.

³ *Id.*

⁴ *Id.*

⁵ *Id.*; Facebook, *Safe Harbor*, <https://www.facebook.com/safeharbor.php> (last accessed Mar. 6, 2014).

ADDITIONAL FACTS

I. WhatsApp Users Continue to Object to the Proposed Acquisition

6. Commenter DonColeman posted to Ars Technica, “I don't trust that the public statements of the executives of WhatsApp has any real legal force. I certainly feel tricked by WhatsApp -- I chose them because they were independent, totally focused on messaging, with a income model that held the promise of working, and they promised to stay that way. As a person spending lots of time both in Europe & the US, I got all my regular US contacts to install WhatsApp.”⁶
7. Commenter steelghost posted to Ars Technica, “I don't want my messages stored anywhere.....the fact that your messages are only stored on your phone is one of the reasons many people use WhatsApp - that and they have (had?) a sensible charging model that doesn't compel them to mine your data for money.”⁷
8. Commenter Ryan R. posted to Huffington Post, “This will be the worst acquisition of all time.”⁸
9. Commenter Gary Michael posted to Huffington Post, “I'm lining up for that class action suit!”⁹
10. Ars Technica reported:

Facebook draws legal complaints for treading outside the bounds of responsible data use on a fairly regular basis. There was Beacon, which posted users' activity to third party sites without so much as a heads up. There were Sponsored Stories, which placed users' photos and names alongside ads. There was the sudden unsolicited use of facial recognition. The list goes on with many new and interesting ways Facebook has found to use the information it's collected, but it's plain that given an opportunity, Facebook is more likely to ask forgiveness than permission.

⁶ Casey Johnston, *Facebook's shot at WhatsApp data gets both companies an FTC complaint*, ARS TECHNICA, Mar. 6, 2014, <http://epic.org/privacy/internet/ftc/whatsapp/arstechnica.com/tech-policy/2014/03/facebooks-shot-at-whatsapp-data-gets-both-companies-an-ftc-complaint/> [hereinafter ARS TECHNICA].

⁷ *Id.*

⁸ Dino Grandoni, *WhatsApp's Biggest Promise May Get Broken With Facebook Deal*, HUFFINGTON POST, Mar. 10, 2014, http://www.huffingtonpost.com/2014/03/10/facebook-whatsapp-privacy_n_4934639.html [hereinafter HUFFINGTON POST].

⁹ *Id.*

Facebook getting its hands on WhatsApp data is decidedly a privacy concern, but how immediate that concern is lies in how you interpret Koum's post-sale blog post. The founder promised that “nothing” will change. In one sense, this means that WhatsApp will continue to keep customer phone numbers, metadata, and their contacts' information off its servers, and it will continue to not store messages. In this case, Facebook will not actually have access to anything, because there are no logs.

However, Koum seemed mostly focused on the consumer end—how a user experiences the product—as opposed to how WhatsApp does business. Koum assured users that the experience will remain ad-free and operate on nominal fees. He also promised that WhatsApp will not “compromise on the core principles that will always define our company.”

He did not specifically mention data collection or transmission.¹⁰

II. WhatsApp Users Believe that Companies Acquired By Facebook Will Lose The Ability to Keep User Data Private

11. Commenter Neumenon posted to CNET, “Facebook has repeatedly made it very clear that your privacy is not their primary concern. Everyone should be crystal clear about that”¹¹
12. Commenter usarloclave1 posted to CNET, “For a large chunk of the companies online their business model is selling information about you. So pretty much the only one who cares about your privacy is you.”¹²
13. Commenter Susan Fourtané posted to Gizmodo, “Facebook is not precisely a model on respecting users' privacy. Facebook will use all the data it collects as it pleases to get a good ROI out of the \$19 billion.”¹³
14. Commenter Bubblebee posted to Ars Technica, “WhatsApp should change it's privacy policy to state that it can't be changed unless ordered to by court ruling to prevent Facebook to start harvesting what it craves. I'm not

¹⁰ ARS TECHNICA, *supra* at 1.

¹¹ Seth Rosenblatt, *Privacy groups ask FTC to block Facebook-WhatsApp deal*, CNET, Mar. 6, 2014, http://news.cnet.com/8301-1009_3-57620026-83/privacy-groups-ask-ftc-to-block-facebook-whatsapp-deal.

¹² *Id.*

¹³ Tom Pritchard, *WhatsApp Purchase Challenged Over Privacy Concerns*, GIZMODO, Mar. 8, 2014, <http://www.gizmodo.co.uk/2014/03/whatsapp-purchase-challenged-over-privacy-concerns> [hereinafter GIZMODO].

using, nor have I used, WhatsApp, but I would be worried about my data when it falls into Facebook's arms."¹⁴

15. Commenter Fatesrider posted to Ars Technica:

Were I a WhatsApp user, I'd be bailing now.

Facebook's history with regard to all data it's exposed to has ALWAYS been "begging for forgiveness rather than asking for permission." Zuckerberg's stated goal is to expose everything about everyone and his company has always acted toward that goal. Whether intentionally or with a level of privacy incompetence that makes the sinking of the Titanic sound like a case of it having a slight moisture problem, Facebook has always regarded all data as its own to do with as it will.

Now that WhatsApp has been sold to Facebook (or at least the deal is in the works), WhatsApp has absolutely no fiscal incentive to keep its user data private. Its privacy promise was its draw, but they're not the owners anymore. Facebook is. And their stated, historical agenda has been to data-mine everything it is exposed to, whether people say it's okay or not. The financial incentive for Facebook is to use WhatsApp data to further its own business goals.

And with its long, repeated and virtually unapologetic history of exposing its users' data to the world, I don't see how anyone using WhatsApp could possibly believe that their data is going to be kept private under Facebook's ownership, or that it hasn't already been compromised.¹⁵

16. Commenter BobsYourUncleBob posted to Ars Technica:

Any & all concerns over how Facebook will utilize WhatsApp user data are extremely well founded. While \$16 - \$19 billion can certainly purchase ample reserves of good will, I don't believe that M.Z. or Facebook are overly anxious to cultivate a sterling reputation for customer privacy concerns or carrying forth a mantle of impeccable good will. They will surely expect something "more" for their money.

It's rather shameful that, whenever a corporate acquisition is under consideration in the U.S., the citizenry are relegated to "asking" that their

¹⁴ ARS TECHNICA, *supra* at 1.

¹⁵ *Id.*

privacy "please be respected" or, in the alternative, are forced to file preemptive law suits in order to buy time & erase evidence of their existence.

It becomes clearer with each day that passes; corporations are not, in fact, "people". They occupy a position of primacy once reserved for "human people" or as Orwell might have phrased it, "Corporations are people too, but are simply "far more equal" than people will ever be!"

Please excuse me while I retreat to The Looking Glass.¹⁶

17. Commenter umaromc posted to Ars Technica, "If *nothing* changes then what's Facebook to gain from the purchase? I don't believe it."¹⁷
18. Commenter Sage Royal posted to Huffington Post, "If Whatsapp is purchased and integrated with Facebook, i will most likely delete it. FB isn't very big on privacy."¹⁸
19. Commenter tloracle posted to Ars Technica, "WhatsApp user's are screwed. Even if they leave they'll still have a trail on the WatsApp servers and FB will mine that to sell ads once they get the privacy policy changes out."
20. Commenter SonnyHood posted to Ars Technica, "im deleting whatsapp next week, ive recently had a notice pop up saying please update and confirm something within 14 days which i think was privacy statement, not an update from google play, it was within whatsapp. I cancelled it and have already alerted everyone [].".
21. Commenter SachinEE posted to Information Week, "it is a very simple question for me at least. If I am using one service and satisfied with the terms of usage as well, then suddenly someone else purchases that service and brings in totally different terms and conditions of use, I would certainly think more than once whether or not to use that service anymore. With Facebook, one would have to be vigilant against subtle terms as well."¹⁹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ HUFFINGTON POST, *supra* at 3.

¹⁹ Kristin Burnham, *Facebook's WhatsApp Deal Under Fire*, INFORMATION WEEK, Mar. 8, 2014, <http://www.informationweek.com/software/social/facebooks-whatsapp-deal-under-fire/d/d-id/1114183>.

22. Slashgear reported, “Facebook has a spotty history of handling private data entrusted to them, so a complaint like this is not necessarily surprising.”²⁰
23. Tech Times reported, “In a blog post shortly after the deal was announced, WhatsApp founder Jan Koum wrote that the messaging system would remain ‘autonomous and operate independently’ of Facebook. Time will tell as to whether or not Facebook will indeed allow WhatsApp to operate independently - the company's track record on such matters might seem to suggest otherwise.”²¹
24. Gizmodo reported, “Facebook's recent acquisition of messaging service WhatsApp took a great many people by surprise, and unsurprisingly a number of people have raised concerns about the implications the purchase will have on user privacy. This is Facebook, after all.”²²
25. Commenter shabir posted to ValueWalk, “FB said privacy wont be changed before buying instagram, but as soon acquisition happened, it integrated it with FB and changed privacy settings. FB has promised to change FB privacy settings, but it only did partially and that's pretty bad. Fb is also knows to spread rumor and let people forget about it and take advantage for share price. So, Word by mouth should not be trusted especially from FB,”²³
26. ValueWalk reported, “There is a big reason to be concerned. WhatsApp is known for its ad-free service and high standards of privacy. And Facebook Inc is equally notorious for violating user privacy policies. European Union watchdogs are already keeping an eye on the deal. A total of 28 European authorities may open probes into WhatsApp. They all have the same concern: how Facebook would use the mobile messaging company’s massive user data.”²⁴
27. Slate reported:

²⁰ Nate Swanner, *Privacy groups demand Facebook Whatsapp acquisition be halted*, SLASHGEAR, Mar. 7, 2014, <http://www.slashgear.com/privacy-groups-demand-facebook-whatsapp-acquisition-be-halted-07319969>.

²¹ Michael McEnaney, *Facebook's purchase of WhatsApp shines light on personal data privacy once again*, TECH TIMES, Mar. 10, 2014, <http://www.techtimes.com/articles/4215/20140310/facebooks-purchase-of-whatsapp-shines-light-on-personal-data-privacy-once-again.htm>.

²² GIZMODO, *supra* at 8.

²³ Vikas Shukla, *Privacy Advocates Urge FTC To Halt Facebook Inc - WhatsApp Deal*, VALUE WALK, Mar. 7, 2014, <http://www.valuewalk.com/2014/03/ftc-to-halt-facebook-inc-whatsapp-deal>.

²⁴ *Id.*

As communications scholar and privacy blogger Nicholas John has pointed out, WhatsApp's terms of service clarify that they don't keep the contents of your messages: "Once a message has been delivered, it no longer resides on our servers," the terms say. "The contents of any delivered messages are not kept or retained by WhatsApp." But they do keep your metadata: "WhatsApp may retain date and time stamp information associated with successfully delivered messages and the mobile phone numbers involved in the messages, as well as any other information which WhatsApp is legally compelled to collect."

John speculates that Facebook could use that information to figure out which of your friends you're genuinely close to. That could be a big asset in the company's quest to build the world's most comprehensive social graph.²⁵

IV. WhatsApp and Facebook Represent That WhatsApp User Information Will Not Be Shared

28. Following the filing of Petitioner's Complaint, WhatsApp founder Jan Koum stated:

Above all else, I want to make sure you understand how deeply I value the principle of private communication. For me, this is very personal. I was born in Ukraine, and grew up in the USSR during the 1980s. One of my strongest memories from that time is a phrase I'd frequently hear when my mother was talking on the phone: "This is not a phone conversation; I'll tell you in person." The fact that we couldn't speak freely without the fear that our communications would be monitored by KGB is in part why we moved to the United States when I was a teenager.

Respect for your privacy is coded into our DNA, and we built WhatsApp around the goal of knowing as little about you as possible: You don't have to give us your name and we don't ask for your email address. We don't know your birthday. We don't know your home address. We don't know where you work. We don't know your likes, what you search for on the internet or collect your GPS location. None of that data has ever been

²⁵ See, e.g., Will Oremus, *Privacy Group Calls for Federal Investigation of Facebook's \$19 Billion WhatsApp Deal*, SLATE, Mar. 6, 2014, http://www.slate.com/blogs/future_tense/2014/03/06/epic_ftc_privacy_complaint_calls_for_investigation_of_facebook_s_whatsapp.html.

collected and stored by WhatsApp, and we really have no plans to change that.

If partnering with Facebook meant that we had to change our values, we wouldn't have done it. Instead, we are forming a partnership that would allow us to continue operating independently and autonomously. Our fundamental values and beliefs will not change. Our principles will not change. Everything that has made WhatsApp the leader in personal messaging will still be in place. Speculation to the contrary isn't just baseless and unfounded, it's irresponsible. It has the effect of scaring people into thinking we're suddenly collecting all kinds of new data. That's just not true, and it's important to us that you know that.

Make no mistake: our future partnership with Facebook will not compromise the vision that brought us to this point. Our focus remains on delivering the promise of WhatsApp far and wide, so that people around the world have the freedom to speak their mind without fear.²⁶

V. The Commission Must Review the Facebook Acquisition of WhatsApp with More Diligence than the Commission Review of Google's Acquisition of Nest

29. The Commission recently considered another merger that raised substantial privacy concerns for consumers but failed to give the matter adequate review.
30. On January 13, 2014, Google announced its acquisition of Nest, Inc., a manufacturer of home thermostats programmed with machine learning algorithms that combine user-provided data with user behaviors to predict user preferences.²⁷
31. The Nest "Privacy Policy" page lists the categories of data collected by Nest devices as "Information input during setup; Environmental data from the Nest Learning Thermostat's sensors; Direct temperature adjustments to the device; Heating and cooling usage information; Technical information from the device."²⁸ "Environmental data" includes data collected from the devices' light and motion sensors.²⁹

²⁶ WhatsApp Blog, *Setting the Record Straight*, <http://blog.whatsapp.com/index.php/2014/03/setting-the-record-straight/> (Mar. 17, 2014).

²⁷ Google Investor Relations, *Google to Acquire Nest*, <https://investor.google.com/releases/2014/0113.html> (Jan. 13, 2014).

²⁸ Nest: *Privacy Statement*, <https://nest.com/legal/privacy-statement/> (last visited Feb. 18, 2014).

²⁹ *Id.*

32. Google regularly collapses the privacy policies of the companies it acquires.³⁰
33. Consumer and Industry Analysts widely noted the significant negative privacy impact that would result from the Google acquisition of Nest.³¹
34. The Hart–Scott–Rodino Antitrust Improvements Act normally subjects mergers of this size to a 30-day waiting period so that the Commission and Department of Justice can complete a pre-merger review.³²
35. On February 4, 2014, the Commission approved an “early termination” request in the Google/Nest merger, ending the pre-merger review.³³
36. This was a surprising outcome given the Commission’s earlier and extensive consideration of the Google acquisition of Doubleclick.³⁴
37. The Commission clearly failed to address the significant privacy concerns presented in the Google acquisition of Nest.

³⁰ *Updating our Privacy Policies and Terms of Service*, The Google Blog (Jan. 24, 2012 1:30 PM), <http://googleblog.blogspot.com/2012/01/updating-our-privacy-policies-and-terms.html>.

³¹³¹ Brian Fung, *Google Just Bought Nest for 3.2 Billion. What happens to Nest’s user data?*, WASH. POST (Jan. 13, 2014), available at <http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/13/google-just-bought-nest-for-3-2-billion-what-happens-to-nests-user-data/>. See also, e.g., Quentin Hardy, *Google and Nest: Two companies in the business of understanding you*, N.Y. TIMES (Jan. 13, 2014), <http://bits.blogs.nytimes.com/2014/01/13/google-and-nest-two-companies-in-the-business-of-understanding-you>; Nick Bilton, *Shooting for the moon, Google hopes to own the future*, N.Y. TIMES (Jan. 13, 2014), <http://bits.blogs.nytimes.com/2014/01/13/shooting-for-the-moon-google-hopes-to-own-the-future/>; Jenna Wortham, *Building toward the home of tomorrow*, N.Y. TIMES (Jan. 20, 2014), <http://www.nytimes.com/2014/01/20/technology/building-toward-the-home-of-tomorrow.html>; Marcus Wohlsen, *What Google Really Gets Out of Buying Nest for \$3.2 Billion*, WIRED (Jan. 14, 2014), <http://www.wired.com/business/2014/01/googles-3-billion-nest-buy-finally-make-internet-things-real-us/>; Dan Gallagher, *Google Is Still Feathering Its Nest*, WALL STREET J. (Jan. 22, 2014), <http://online.wsj.com/news/articles/SB10001424052702304856504579336810209798636>; Alexis C. Madrigal, *Why Google Bought Nest: A Theory*, THE ATLANTIC (Jan. 13, 2014), <http://www.theatlantic.com/technology/archive/2014/01/why-google-bought-nest-a-theory/283048/>; Carlos Watson, *Three takeaways from Google’s purchase of Nest*, USA TODAY (Jan. 22, 2014) <http://www.usatoday.com/story/money/business/2014/01/22/google-buys-nest-labs/4778693/>; Romain Dillet, *Nest Team Will Become Google’s Core Hardware Group*, TECH CRUNCH (Jan. 29, 2014) <http://techcrunch.com/2014/01/29/nest-team-will-become-googles-core-hardware-group/>.

³² The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §15f(b).

³³ Fed. Trade Comm’n, *Early Termination Notices, 200140457: Nest Labs, Inc., and Google, Inc.*, (Feb. 4, 2014), <http://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notice/20140457>.

³⁴ DoubleClick, Inc., *Statement of the Commission*, FTC File No. 071-0170 (2000), <http://www.ftc.gov/sites/default/files/documents/cases/2007/12/071220statement.pdf>.

CONCLUSION

38. Petitioners incorporate by reference the Requests for Relief set forth in the Complaint.
39. Further, Petitioners request the Commission examine the evidence presented above during its investigation of the proposed purchase of WhatsApp by Facebook.

Respectfully Submitted,

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