

December 9, 2020

ProctorU, Inc.  
2200 Riverchase Ctr.  
Suite 600  
Birmingham, AL 35244

Dear Counsel:

We write in regard to ProctorU, Inc.'s provision of online test proctoring services. We represent the Electronic Privacy Information Center ("EPIC"), a public interest research center located in Washington, D.C., focused on emerging privacy and civil liberties issues. EPIC is one of the leading consumer protection organizations in the country specializing in privacy and data protection. EPIC has a long history of promoting transparency and accountability for information technology.<sup>1</sup> Our members include experts in law, technology, and public policy.

This letter serves as notice that EPIC has filed a Complaint and Request for Investigation, Injunction, and Other Relief with the Office of the Attorney General for the District of Columbia regarding ProctorU's online proctoring tools. As we set forth in the Complaint, ProctorU's excessive and unjustified collection of students' personal information (including biometric data) and reliance on opaque, unproven AI analysis to flag purported instances of cheating constitute unfair or deceptive trade practices under the D.C. Consumer Protection Procedures Act ("DCCPPA") and the Federal Trade Commission Act ("FTC Act"). This letter also serves as notice of EPIC's intent to bring an action against ProctorU for violations of the DCCPPA if ProctorU fails to promptly cure its unlawful trade practices.

In response to the COVID-19 pandemic, many educational institutions have implemented online test proctoring services as part of their remote learning arrangements.<sup>2</sup> But this rapid growth has brought renewed attention to the invasive nature of online proctoring systems. In order to meet their academic obligations, students must increasingly agree to compulsory collection of biometric

---

<sup>1</sup> See EPIC, *Algorithmic Transparency* (2020), <https://www.epic.org/algorithmic-transparency/>; EPIC, *Algorithms in the Criminal Justice System* (2020), <https://www.epic.org/algorithmic-transparency/crim-justice/>; Complaint of EPIC, *In re Airbnb* (Feb. 26, 2020); Petition of EPIC, *In re Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce* (Feb. 2020), <https://epic.org/privacy/ftc/ai/epic-ai-rulemaking-petition/>; Complaint of EPIC, *In re HireVue* (Nov. 6, 2019), [https://epic.org/privacy/ftc/hirevue/EPIC\\_FTC\\_HireVue\\_Complaint.pdf](https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf); Comments of EPIC, *Consumer Welfare Implications Associated with the Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics*, Fed. Trade Comm'n (Aug. 20, 2018), <https://epic.org/apa/comments/EPIC-FTC-Algorithmic-Transparency-Aug-20-2018.pdf>.

<sup>2</sup> Drew Harwell, *Mass School Closures in the Wake of the Coronavirus Are Driving a New Wave of Student Surveillance*, Wash. Post (Apr. 1, 2020), <https://www.washingtonpost.com/technology/2020/04/01/online-proctoring-college-exams-coronavirus/>; see also Shea Swauger, *Software that Monitors Students During Tests Perpetuates Inequality and Violates Their Privacy*, MIT Tech. Rev. (Aug. 7, 2020), <https://www.technologyreview.com/2020/08/07/1006132/software-algorithms-proctoring-online-tests-ai-ethics/>.

and other sensitive personal data; audio and video surveillance of their intimate spaces; and opaque AI analysis of their movements, facial expressions, and keystrokes.

We are aware that ProctorU, which has proctored over 2 million tests from more than 750,000 students last year<sup>3</sup> and has “expanded rapidly” during the pandemic,<sup>4</sup> offers several remote proctoring tools. One in particular, Review+, offers what ProctorU calls a “live proctored launch, end-to-end recording solution with artificial intelligence, professional review and incident reporting.”<sup>5</sup> ProctorU requires each student to “provide [ProctorU] with access to [their] device’s camera and microphone,” “share [their] screen with our proctors,” and “share [their] photo ID on camera[.]”<sup>6</sup> ProctorU states that it uses “biometric facial recognition software” and “biometric keystroke measurement” to authenticate a student’s identity<sup>7</sup> and monitors a student’s screen, camera, and microphone during an exam.<sup>8</sup> ProctorU also states that it uses AI to flag certain occurrences during an exam session such as low audible voices, slight lighting variations, and “other behavioral cues.”<sup>9</sup>

A student enrolled at an institution which uses ProctorU has no choice but to allow the collection of their personal information and to submit to video monitoring and AI analysis in order to complete their required examinations. Yet ProctorU has failed to establish a legitimate need for collecting such a vast array of personal data; ProctorU has failed to fully disclose to students the logic, factors, and determinations of its AI; and ProctorU has failed to identify any benefits to consumers or competition that would outweigh the privacy and other harms suffered by students.

ProctorU has also made misleading statements concerning the personal information it collects from students. Although ProctorU represents that it “does not use any test-taker’s personal information for any purpose other than for facilitating the proctoring of online exams,”<sup>10</sup> CEO Scott McFarland stated that ProctorU maintains a “Hall of Fame” video composed of alleged instances of cheating.<sup>11</sup> Such a video, although clearly unnecessary “for facilitating the proctoring of online exams,” would necessarily include identifiable images of students.

The above-described business practices constitute violations of the DCCPPA, including but not limited to sections 28–3904 (unfair or deceptive trade practices generally), 28-3904(e) (misrepresentation as to a material fact), and 28-3904(f) (failure to state a material fact). Accordingly, EPIC and affected consumers are entitled to injunctive and monetary relief, in addition to any enforcement action taken against ProctorU by the Attorney General for the District of

---

<sup>3</sup> Harwell, *supra* note 2.

<sup>4</sup> *ProctorU Rapidly Expands Capacity to Support Campuses and Test-takers Affected by COVID-19 Concerns*, ProctorU (2020), <https://www.proctoru.com/industry-news-and-notes/proctoru-rapidly-expands-capacity-to-support-campuses-and-test-takers-affected-by-covid-19-concerns>.

<sup>5</sup> *Protect Any Online Exam*, ProctorU (2020), <https://www.proctoru.com/>.

<sup>6</sup> *Privacy Policy*, ProctorU (2020), <https://www.proctoru.com/privacy-policy>; *see also Live+*, ProctorU (2020), <https://www.proctoru.com/services/live-online-proctoring>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *FAQ*, ProctorU (2020), <https://www.proctoru.com/faq>.

<sup>10</sup> *Privacy Policy*, *supra* note 6.

<sup>11</sup> Harwell, *supra* note 2.

Columbia.<sup>12</sup> These practices also constitute violations of Section 5 of the FTC Act,<sup>13</sup> exposing ProctorU to potential FTC enforcement proceedings.

In order to avoid litigation between EPIC and ProctorU and to protect the privacy of ProctorU test-takers, EPIC hereby demands that ProctorU commit in writing to:

1. Strictly limit its collection of students' personal and biometric information;
2. Create, maintain, and publish a detailed log of what types of personal information ProctorU collects from test-takers, how ProctorU uses such data, and how long ProctorU retains such data;
3. Refrain from transferring or providing third parties access to personal data collected from test-takers, including images of students;
4. Provide students with access, correction, and deletion rights with respect to their own data;
5. Make available to students the factors, logic, and determinations of the AI system(s) used to produce assessments of test-takers;
6. Comply fully with the Organisation for Economic Co-operation and Development ("OECD") Principles on Artificial Intelligence<sup>14</sup> and Universal Guidelines for Artificial Intelligence;<sup>15</sup> and
7. Submit to an annual audit by an independent third party of ProctorU's privacy, data collection, and AI practices, the results of which shall be publicly reported.

If ProctorU does not comply with the requests set forth in this letter, EPIC reserves all rights and remedies, including legal action. Accordingly, EPIC requests that ProctorU take steps to preserve all records, communications, and other evidence potentially relevant to such litigation, including but not limited to evidence concerning the collection, use, retention, and disclosure of ProctorU user data and the operation of its AI system(s) used to evaluate test-takers for signs of academic dishonesty.

EPIC would prefer to resolve this matter amicably, and we look forward to your response by December 18, 2020. This letter is not a recitation of all of the facts pertaining to this matter or all of EPIC's possible claims. Accordingly, EPIC is not waiving any of its rights and remedies, all of which EPIC expressly reserves.

---

<sup>12</sup> D.C. Code § 28–3905(i)(3)(B).

<sup>13</sup> 15 U.S.C. § 45(a).

<sup>14</sup> *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.

<sup>15</sup> *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018), <https://thepublicvoice.org/ai-universal-guidelines/>; [thepublicvoice.org/events/brussels18](https://thepublicvoice.org/events/brussels18).

/s/ Alan Butler

Alan Butler  
EPIC Interim Executive Director  
and General Counsel  
butler@epic.org

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald  
EPIC Interim Associate Director  
and Policy Director  
fitzgerald@epic.org

/s/ John Davisson

John Davisson  
EPIC Senior Counsel  
davisson@epic.org

/s/ Sara Geoghegan

Sara Geoghegan  
EPIC Law Fellow  
geoghegan@epic.org

CC: Beth Nolan, General Counsel, George Washington University  
Nancy Morrison O'Connor, General Counsel, Catholic University of America