

December 9, 2020

Proctorio, Inc.
6840 E. Indian School Road
Scottsdale, AZ 85251

Dear Counsel:

We write in regard to Proctorio, 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.¹ 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 Proctorio’s online proctoring tools. As we set forth in the Complaint, Proctorio’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 Proctorio for violations of the DCCPPA if Proctorio 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.² 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 and other sensitive personal data; audio and video surveillance of their intimate spaces; and opaque AI analysis of their movements, facial expressions, and keystrokes.

¹ 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; 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>.

² 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/>.

We are aware that Proctorio uses a Google Chrome browser extension to collect video, audio, and screen captures and to create a recording of a student's exam session.³ According to Proctorio's website, Proctorio monitors students "by webcam, microphone, browser, desktop, or any other means necessary to uphold integrity."⁴ Proctorio states that it tracks speech, eye movements, mouse clicks, and how long each student took to complete an exam in order to calculate a "suspicion level" for the student.⁵ Proctorio explains that this level is calculated from "the aggregation of frames during the exam which were deemed suspicious and the detection of abnormal behavior."⁶ Proctorio claims, without proof, that its software "eliminates human error [and] bias[.]"⁷

A student enrolled at an institution which uses Proctorio 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 Proctorio has failed to establish a legitimate need for collecting such a vast array of personal data; Proctorio has failed to fully disclose to students the logic, factors, and determinations of its AI; and Proctorio has failed to identify any benefits to consumers or competition that would outweigh the privacy and other harms suffered by students.

Proctorio has also made misleading statements concerning its use of facial recognition software. Although Proctorio claims that it does not employ facial recognition, its proctoring systems use tools that meet the FTC's definition of facial recognition. Proctorio contends that, rather than using facial recognition, it employs "facial detection," which "is used to see if a test taker is looking away from the screen for an extended period of time, if there are other people present in the test-taking environment, or if the test taker has left the exam for any reason."⁸ Proctorio also states that it uses "gaze detection,"⁹ which "can identify where a person is looking but cannot identify what they are looking at."¹⁰ But as the FTC explained in a 2012 report, facial detection *is* facial recognition—not a separate technology. As the FTC wrote: "[C]ompanies are deploying facial recognition technologies in a wide array of contexts, reflecting a spectrum of increasing technological sophistication. *At the simplest level, the technology can be used for facial detection; that is, merely to detect and locate a face in a photo.*"¹¹

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 Proctorio by the Attorney General for the District of

³ *Support for Test-Takers*, Proctorio (2020), <https://proctorio.com/support>.

⁴ Harwell, *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ Proctorio (2020), <https://proctorio.com/>.

⁸ *Frequently Asked Questions*, Proctorio (2020), <https://proctorio.com/frequently-asked-questions>.

⁹ *Why Proctorio Does Not Use Facial Recognition*, ProctorioBlog (Aug. 16, 2020), <https://blog.proctorio.com/why-proctorio-does-not-use-facial-recognition/>.

¹⁰ *Id.*

¹¹ *Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies*, Fed. Trade Comm'n (Oct. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facialechrpt.pdf> (emphasis added).

Columbia.¹² These practices also constitute violations of Section 5 of the FTC Act,¹³ exposing Proctorio to potential FTC enforcement proceedings.

In order to avoid litigation between EPIC and Proctorio and to protect the privacy of Proctorio test-takers, EPIC hereby demands that Proctorio 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 Proctorio collects from test-takers, how Proctorio uses such data, and how long Proctorio 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 Intelligence¹⁴ and Universal Guidelines for Artificial Intelligence;¹⁵ and
7. Submit to an annual audit by an independent third party of Proctorio's privacy, data collection, and AI practices, the results of which shall be publicly reported.

If Proctorio does not comply with the requests set forth in this letter, EPIC reserves all rights and remedies, including legal action. Accordingly, EPIC requests that Proctorio takes 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 Proctorio 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.

¹² D.C. Code § 28–3905(i)(3)(B).

¹³ 15 U.S.C. § 45(a).

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

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

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