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PROMETHEUS BOUND: AN HISTORICAL CONTENT ANALYSIS  
OF INFORMATION REGULATION IN FACEBOOK

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**Abstract**

The rise of online social networks has engaged regulators, users' representatives, and social-network service providers in a vibrant regulatory dialogue around shifting privacy norms and laws. Driven by competitive market forces, these social-networking online service providers have introduced new services and opened privacy barriers to allow greater information flow, which, in turn, has created disjunctions between users' desired and achieved levels of privacy. By examining the conflict of values among stakeholders and subsequent technology changes in the context of privacy expectations, norms, market pressures, and laws, this project explores how the regulatory system affects information collection practices of the largest social

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network service provider: Facebook. Specifically, the paper traces Facebook's information collection practices through an historical content analysis of regulatory decisions, users' complaints, and associated legal documents to illuminate the dynamic relationship among stakeholders in a competitive market.

Overall, the paper reveals a unique response to the regulatory interaction: Facebook repeatedly revised its privacy documents, practices, and interfaces in direct response to the complaints made against its services. This relationship reflects a nudging trend in Facebook's behavior – the company changed its platform code and added new services in order to implement its corporate goals for enhanced sharing, yet users and NGOs kept complaining against these actions. Moreover, although Facebook opted for the informal regulation practices that the courts preferred, regulators remained focused only on the privacy policy as the important source of privacy notification. Finally, while regulators were inclined to criticize deceitful notices, users' representatives preferred to claim unfairness following changes in user interfaces.

Undeniably, by adding services and changing privacy settings and notices, online service providers operating in a dynamic and rapidly innovating competitive environment are uniquely able to control their virtual environments and influence users' behavior as part of the competitive process. This project analyzes the approach of the largest social networking service provider in its competition for users' attention and, in turn, how it reacts to other stakeholders. The understandings this paper provides help to yield a better sense of required tools and policies to regulate information collection practices.

### **Introduction: Consumer Information in the Digital Innovation Environment**

The rise of online social networks has engaged regulators, users' representatives, and social-network intermediaries in a vibrant regulatory dialogue around shifting privacy norms and laws. Driven by competitive market forces, these social-networking online intermediaries have introduced new services and opened privacy barriers to allow greater information flow which, in turn, has created disjunctions between users' desired and achieved levels of privacy. On both individual and collective level, social networks influence the social behavior and discourse.<sup>2</sup> On the one hand, as Julie Cohen explains, surveillance has become privatized and commercialized, overall motivating networked individuals to participate through "gamification."<sup>3</sup> This commercial surveillance environment includes an important characteristic, in which personal information is collected during the course of play, partly to deliver rewards through games, and partly for targeted marketing.<sup>4</sup> Simultaneously, on the other hand, on a collective level, where repeat players act,<sup>5</sup> while regulators and policy-makers promote notions of users' trust,<sup>6</sup> information processing industries positioned privacy and innovation as two opposing values on the policy-making debate.<sup>7</sup> Yet, the industry considers innovation in

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<sup>2</sup> See Julie E. Cohen, *The Surveillance-Innovation Complex: The Irony of the Participatory Turn*, THE PARTICIPATORY CONDITION 1-2 (Darin Barney et.al eds., forthcoming 2016) (indicating social networking sites have a great influence on social behavior).

<sup>3</sup> See *id.* at 1 (explaining how privatized and commercialized surveillance has enhanced the use of gamification).

<sup>4</sup> See *id.* at 2 (describing the process by which commercial surveillance collects personal information for the purposes of targeted marketing).

<sup>5</sup> See Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, L. & SOC'Y REV. 95, 97 (1974) (defining repeat players as those involved in multiple litigations).

<sup>6</sup> See THE WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (2012) (discussing how Consumer Privacy Bill of Rights will strengthen consumer trust through Federal legislation); see also FED TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012) (emphasizing the Commission's belief that privacy protections will help consumers by building trust in the marketplace).

<sup>7</sup> See Cohen, *supra* note 2, at 8 (explaining that information processing industries have worked to place privacy and innovation as opposed).

information processing as an expression seeking protection, while promoting a narrative, which tells decision-makers that marginalized regulation is preferred.<sup>8</sup>

Meanwhile, over the years, driven by competitive market forces, information processing industries, and specifically social-networking online intermediaries, have introduced new services and opened privacy barriers to allow greater information flow which, in turn, has created disjunctions between users' desired and achieved levels of privacy. Undoubtedly, one of the most enduring social issues associated with information technologies is privacy.<sup>9</sup> One of the first scholars that looked into the regulation of privacy as information flow was the social psychologist Irwin Altman.<sup>10</sup> According to Altman, social interaction is conceived as a continuous "dialect between forces driving people to come together and to move apart."<sup>11</sup> As privacy is an interpersonal bidirectional process moving between two unwanted poles of "intrusion," and "isolation," people implement continually changing levels of desired privacy based on momentary circumstances.<sup>12</sup> In order to achieve privacy balance, Altman claims, people are opening and closing informational boundaries by the use of context-based mechanisms such as verbal cues, non-verbal cues, environmental privacy mechanisms, and norms.<sup>13</sup>

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<sup>8</sup> See Cohen, *supra* note 2, at 8 (observing that the information processing industry promotes marginalized regulation).

<sup>9</sup> See Helen Nissenbaum, *Technology, Values, and the Justice System: Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004) (highlighting the importance of privacy as a social issue).

<sup>10</sup> See Irwin Altman, *Privacy: A Conceptual Analysis*, 8 ENV'T. & BEHAV. 7 (1976) (exploring privacy and its regulation).

<sup>11</sup> See *id.* at 12 (articulating the forces behind social interactions).

<sup>12</sup> See *id.* (describing changing privacy preferences based on momentary circumstances); see also PAOLA TUBARO ET. AL., *AGAINST THE HYPOTHESIS OF THE END OF PRIVACY* 20 (2013) (noting the need for self-disclosure and how it can effect users' privacy). In any case, some degree of self-disclosure is needed to build relationships, but differences exist between closer social circles and more distant ones. *Id.*

<sup>13</sup> See IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, AND CROWDING* 32 (1975) (explaining how people use context-based mechanisms to achieve a privacy balance); see also Altman, *supra* note 10, at 17-20 (describing how verbal and non-verbal cues factor into the privacy balance). In other words, we need to pay attention not only to the way in which we speak (e.g. tone & intensity), but also to our personal spacing, facial expressions, body language, physical gestures, territorial behavior, and cultural norms. Altman, *supra* note 10, at 17-20.

As people continue to seek an optimal level of social interaction, opening and closing their information barriers based on context, they dislike any attempt to deviate in either direction of isolation or intrusion.<sup>14</sup> As a matter of fact, Helen Nissenbaum claims that all life circumstances are influenced by “contextual integrity,” which means that all areas of life are governed by *norms of information flow*.<sup>15</sup> This is notably true for media dominated society, where contexts change on a regular basis, and users can, for instance, suddenly discover they are public figures to their Facebook friends.<sup>16</sup> Yet, moving from the physical to the digital world, verbal and non-verbal cues were “easily” replaced with less “richer” cues such as characters, emoticons, and capital letters.<sup>17</sup> At the same time, the way in which we regulate our privacy through our environment not only became digital, but also more influential.<sup>18</sup>

Clearly, given this influential change in the importance of code regulation, it seems appropriate now to look back, analyze, and evaluate the way in which information practices are regulated. This paper explores how the regulatory system affects information collection practices by examining the conflict of values among stakeholders

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<sup>14</sup> See Altman, *supra* note 10, at 13-14 (discussing the optimum control of privacy between intrusion and isolation).

<sup>15</sup> See Nissenbaum, *supra* note 9, at 120 (defining contextual integrity regarding information flow). Actually, two sets of norms create, maintain, and characterize each “sphere of life.” First, norms of appropriateness that tells people which information is fitting to disclose and not to disclose in a particular context. Nissenbaum, *supra* note 9, at 120. Second, norms dealing with flow, distribution, movement, or transfer of information from one party to others. Nissenbaum, *supra* note 9, at 140. As all events occur in a context of either politics, conventions, or cultural expectations, violating one of these sets of norms violates the entire sphere. Nissenbaum, *supra* note 9, at 137.

<sup>16</sup> See *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d. 785, 805 (N.D. Cal. 2011) (holding plaintiffs’ status as subjects of public interest).

<sup>17</sup> See GUSTAVO S. MESCH & ILAN TALMUD, *WIRED YOUTH: THE SOCIAL WORLD OF ADOLESCENCE IN THE INFORMATION AGE* 82-83 (John C. Coleman ed. 2010) (discussing the Computed Mediated Communication theory of *lack of contextual clues*, meaning that different channels of communication transmit different amounts of information. Information for this communication theory “refers not only words *but* also the social context or socially implicit knowledge in that communicated bundle” (italic added).

<sup>18</sup> See Marc Rotenberg, *Preserving Privacy in The Information Society* (INFOethics Papers, Paper No. 10, 1998) (discussing the increased regulation of privacy as a result of increased technology).

and subsequent technology changes.<sup>19</sup> Specifically, this paper focuses on institutions, which are characterized as being repeat players in a world of innovation and information technologies. To be clear, what makes these institutions unique is the strength of their ability to influence individual behavior,<sup>20</sup> either through implementing their values into the technologies they develop or regulate technologies for the wide audience.<sup>21</sup>

Generally, the relevant stakeholders can be mapped into three groups of institutional stakeholders,<sup>22</sup> which are based on concepts of regulatory regimes that encompass norms, decision-making mechanisms, and regulatory actors' networks.<sup>23</sup> Normally, each group of institutional stakeholders are pushing to reach their own goals.<sup>24</sup> The group most influencing policy is probably the regulators.<sup>25</sup> Sharing

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<sup>19</sup> See *infra* Methodology – Historical Content Analysis, ii.

<sup>20</sup> See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 11-12 (1999) (highlighting how the strength of an innovative, technology-based institution can influence behavior). To be clear, though studies have proven a limitation on a person's social network connections, policy problems arise due to "lock-ins" and "externalities." These "lock-ins" and "externalities," which connect giants and governments, make them both influential to the same amount. Both have the ability to influence people outside the network and nudge people inside them without forcing them out. At the same time, once a person chooses which technology to keep the information (or a country when possible), switching to another can be very expensive. Shapiro & Varian referenced economic costs, but costs can also be in time investment or maintaining personal relations. *Id.*

<sup>21</sup> See Mary Flanagan et al., *Embodying Values in Technology: Theory and Practice*, in INFORMATION TECHNOLOGY AND MORAL PHILOSOPHY 322, 330 (Jeroen van den Hoven and John Weckert eds., 2008) (focusing on the implementation of values in technology); see also Batya Friedman, *Value Sensitive Design*, VALUE-SENSITIVE DESIGN, at 17 (1996), archived at <http://perma.cc/EN69-37G9> (reiterating the importance for a set of values in technology); Helen Nissenbaum, *From Preemption to Circumvention: If Technology Regulates, Why Do We Need Regulation (and Vice Versa)?*, 26 BERKLEY TECH. L. J. 1367, 1372-73 (2011) (distinguishing the functions and purposes of analytical and operational systems).

<sup>22</sup> See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 649 (2011) (commenting on the various groups of institutional stakeholders).

<sup>23</sup> See David Levi-Faur, *Regulation & Regulatory Governance* 15-17 (Jerusalem Papers in Regulation & Governance, Working Paper No. 1, 2010) (outlining the normal workings of a regulatory regime).

<sup>24</sup> See Cohen, *supra* note 2, at 3 (articulating self-interested drive of most institutional leaders).

<sup>25</sup> See Cohen, *supra* note 2, at 8 (stating that regulators in this industry have strong influence on policy creation and implementation).

the information “regulatory space”<sup>26</sup> in the U.S. are the Federal Trade Commission (FTC) and the State and Federal courts.<sup>27</sup> The second group of collective actors is composed of intermediaries such as Facebook.<sup>28</sup> Specifically, as Facebook is one of the largest social networks in the world, and one of the organizations that influence users on a daily basis,<sup>29</sup> Facebook will be the focus of this paper. Finally, though users comprise the third group, collectively, users are usually represented by either repeat actors such as privacy and civil liberties organizations or “one-shot” class-action litigators.<sup>30</sup> Importantly, these two sub-groups initiate many of the regulatory processes.<sup>31</sup>

This paper will include a survey of the stakeholders’ discourse and its narratives, between 2007 and 2013 as a basis for the more recent events, as the stakeholders discuss among themselves how to regulate Facebook.<sup>32</sup> The goal of this survey is to better shed light on how the three groups of stakeholders regulate privacy in social media, and in particular, online social networks.<sup>33</sup> The argument proceeds as follows: the next chapter describes the research methodology and the scholarly contribution of this project.<sup>34</sup> Then, in the

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<sup>26</sup> See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1133 (2012) (asserting the process and problems that come with assigning shared regulatory spaces to various government agencies).

<sup>27</sup> See *id.* at 1146 (identifying specific agencies that share regulatory space). While the FTC regulates through its authority to define unfair or deceptive practices, the courts regulate by interpreting what is considered a privacy harm. *Id.*

<sup>28</sup> See KARINE PERSET, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES* 15 (2010) (defining the role of internet intermediaries).

<sup>29</sup> See Marco Della Cava, *How Facebook Changed Our Lives*, USATODAY (Feb. 22, 2014), archived at <http://perma.cc/PFF7-95GB> (discussing the influence and impact of Facebook on society).

<sup>30</sup> See 28 U.S.C. § 1332 (2014) (explaining diversity jurisdiction); see also FED.R.CIV.P. 23. (stating the prerequisites for a class action lawsuit); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d. 785 (N.D. Cal. 2011) (providing information on plaintiffs and size of class action); Elec. Privacy Info. Ctr., *In re Facebook II*, ELECTRONIC INFORMATION PRIVACY CENTER, archived at <http://perma.cc/M65M-RW5B> (describing lawsuit and organizations who were parties to the lawsuit).

<sup>31</sup> See BAKERHOSTETLER, BAKERHOSTETLER 2012 YEAR-END REVIEW OF CLASS ACTIONS (AND WHAT TO EXPECT IN 2013) 30, 34 (2012) (discussing trends in privacy litigation and highlighting Facebook class action).

<sup>32</sup> See *infra* Chapter Methodology—Historical Content Analysis and Chapter Case Study Analysis—Privacy Controls through the Lens of Facebook.

<sup>33</sup> See *infra* Chapter Case Study Analysis—Privacy Controls through the Lens of Facebook.

<sup>34</sup> See *infra* Chapter Methodology—Historical Content Analysis.

second chapter, I analyze Facebook as a case study to reveal the dynamic relationship between the stakeholders as they correspond to one another in the shadow of privacy laws.<sup>35</sup> The conclusion maps trends in on-the-ground behavior of the stakeholders in order to allow the development of robust policy to facilitate rational trade-offs among stakeholders.<sup>36</sup>

### **Methodology—Historical Content Analysis**

Looking at regulatory discourse requires a systematic examination of case studies.<sup>37</sup> In order to better understand the “privacy on the ground” and the stakeholders’ narratives,<sup>38</sup> this research aims to follow the digitalization of information and the dynamic automation of opening users’ information barriers to share this information. However, given the high pace of updates occurring online, it would be a difficult task to qualitatively mention each and every one of those changes.<sup>39</sup> Rather, we can put emphasis on the few “hard cases” that caused users’ representative to leave their “safe-zone” of creating more information through their blogs and the media and instead complained to regulators in search of injunctive relief.<sup>40</sup> These “extreme” occurrences, although less frequent than regular updates to

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<sup>35</sup> See *infra* Chapter Case Study Analysis—Privacy Controls through the Lens of Facebook.

<sup>36</sup> See *infra* Conclusions.

<sup>37</sup> See Bruno Latour, *Where Are the Missing Masses? The Sociology of a Few Mundane Artifacts*, in SHAPING TECHNOLOGY/BUILDING SOCIETY: STUDIES IN SOCIOTECHNICAL CHANGE 151 (Weibe E. Bijker & John Law eds., 1992) (examining the actor network approach when resolving the technological determinism in technology studies on how sociotechnical systems are developed). To implement a systematic and rigorous methodology, one must follow a sociotechnical research methodology. *Id.* The aim of such research, termed also as re-inscription, is to follow the dynamic transformation and delegations of human work to non-humans. *Id.* at 168. Expanding on the notion that technology embodies values, the “actor network approach” states that sociotechnical systems are developed through negotiations between people, institutions, and organizations. *Id.* at 151.

<sup>38</sup> See Kenneth A. Bamberger & Deidre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 253 (2010) (explaining concept of privacy “on the ground” as it relates to consumers’ expectations).

<sup>39</sup> See *id.* (discussing difficulty of consent with rapidly changing technology).

<sup>40</sup> See *id.* at 276-78 (explaining what it means to do privacy “well” in the context of closing consumer consent gaps).

the interface, foretell the interesting story of the regulation of Facebook.<sup>41</sup> To be clear, although the findings will be specific to Facebook's case study, yet the systematic approach will be able to map the narratives and the trends of the discourse based on the particular social network interface.

Readers might ask themselves, why is a systematic approach of looking in extreme cases is preferred over looking at the relevant platform as a whole? Bruno Latour can provide one explanation.<sup>42</sup> Latour argues, amongst others, that even the common technologies can shape the way in which people are moving through the world.<sup>43</sup> Certainly, if technologies embody trade-offs between contradictory stakeholders' values, law and regulation have an important role in effecting these trade-offs.<sup>44</sup> Nonetheless, given Lawrence Lessig's theorem explaining that norms and markets are also modalities of regulation at work, as this research project concentrates merely on law and code, this paper does not claim to present full causation among the events described.<sup>45</sup> Rather, the goal of the paper is to find and highlight the repeated narratives and trends. The following paragraphs will describe the methodology of combining document analysis with a re-inscription approach.

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<sup>41</sup> See *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, FEDERAL TRADE COMMISSION (Nov. 29, 2011), archived at <http://perma.cc/V2GV-YGXQ> (summarizing FTC complaint against Facebook).

<sup>42</sup> See Latour, *supra* note 37, at 151 (highlighting why a systematic approach is preferred).

<sup>43</sup> See Latour, *supra* note 37, at 151 (explaining that technology no matter how commonplace, shapes how people operate in the world).

<sup>44</sup> See Nissenbaum, *supra* note 9, at 124 (emphasizing the importance of law and regulation in the field of technology).

<sup>45</sup> See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999) (explaining how cyberspace encourages looking beyond laws, regulations, and norms); see also Lawrence Lessig, *The Law of the Horse: What Cyberspace Might Teach*, 113 HARV. L. REV. 501, 507 (1999) [hereinafter Lessig, *The Law of the Horse: What Cyberspace Might Teach*] (discussing various types of social norms and their constraints both in the physical world and in cyberspace). The four modalities are: Law, Code, Social Norms, and the Market. All of those modalities co-exist and operate in their regulation together. Law can be used to regulate the other three, but those other three will remain influential on affecting one another. *Id.*

### **i. Background: Opening the Virtual Black Box**

Sociotechnical methodologies offer many methods to study technological artifacts, mechanisms, and complicated systems.<sup>46</sup> Some scholars look inside the complex mechanism and code in order to understand its complexity.<sup>47</sup> Other scholars simplify these systems, usually by drawing a “black box” around the technology, and then the scholars need to know only the box’s inputs and outputs.<sup>48</sup> In contrast, instead of trying to figure out and analyze the “black box” of social influences and biases, the historical content analysis offered by Bruno Latour goes backwards from final product to its production.<sup>49</sup> This method requires following the controversies while examining technology in the making.<sup>50</sup> Indeed, technologies re-inscribed contrary specifications, and in the case of privacy regulation in online platforms the designer of the platform can choose the amount of control and choice to provide his service users.<sup>51</sup> This is especially true when the designer tries to respond to objections made by regulators or users.<sup>52</sup>

One of the legal scholars that studied the effect of legal controversies on changes in code was Harvard Law School’s Jonathan

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<sup>46</sup> See Steve Sawyer & Mohammad Hossein Jarrahi, *Sociotechnical Approaches to the Study of Information Systems*, in *COMPUTING HANDBOOK: INFORMATION SYSTEMS AND INFORMATION TECHNOLOGY 5-4* (Allen Tucker & Heikki Topi eds., 3rd ed. 2014) (exemplifying different sociotechnical methodologies).

<sup>47</sup> See *id.* at 5-13-5-14 (discussing the complexities of technological artifacts).

<sup>48</sup> See BRUNO LATOUR, *SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY* 166-67 (1987) (highlighting fundamental defects in the distribution of scientific roles used in the diffusion model to measure the scale of technoscience).

<sup>49</sup> See *id.* at 21 (stating how the author goes from final product to production by moving from cold stable objects to warmer and unstable ones).

<sup>50</sup> See *id.* at 4 (explaining how the author goes through the back door of science in the making rather than entering through ready made science).

<sup>51</sup> See Latour, *supra* note 37, at 166-68 (explaining how the designer of the platform can dictate the amount of clout given to his service users). Or as Latour nicely explained, “If you study a complicated mechanism without seeing that it re-inscribes contradictory specifications, you offer a dull description, but every piece of an artifact becomes fascinating when you see that every wheel and crank is the possible answer to an objection.” See Latour, *supra* note 37, at 168.

<sup>52</sup> See Latour, *supra* note 37, at 168 (explaining how “every wheel and crank” is a potential response to an objection).

Zittrain.<sup>53</sup> Looking at “perfect enforcement” questions in copyright, Zittrain claimed the term “tethered appliances” to the concept of “software as service.”<sup>54</sup> According to Zittrain, in internet-based products and services, a vendor can update the products from afar, long after the devices or software have left their warehouses or gone online.<sup>55</sup> By ordering remote updates to these smart appliances and products, regulators, courts, and other stakeholders have the ability to exercise meaningful enforcement over users’ behavior and to dramatically change the way users experience the technology.<sup>56</sup> Certainly, in some of the cases presented by Zittrain the controversies and injections followed litigation in court, but it is possible to imagine other stakeholders influencing code though they are not legislators, the courts, or the software providers.<sup>57</sup>

The following paragraphs offers to provide the ability to understand how stakeholders—regulators, intermediaries and users’ representatives—handle the risks that users face as they try to decide how far to open or close users’ privacy and information barriers to allow information flow. As explained earlier, the decision of how to open the barriers to allow information flow is sometimes done for the

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<sup>53</sup> See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 101-05 (2008).

<sup>54</sup> See *id.* at 101-05 (referencing how author discussed tethered appliances to how software operates).

<sup>55</sup> See *id.* at 106 (describing the “tethered” nature of vendors’ products and services).

<sup>56</sup> See *id.* at 106-09 (discussing how remote updates provide enforcement over users’ behavior and experience with technology). As explained by Jonathan Zittrain, having control over code allows regulators to control users’ behaviors in three ways: preemption, specific injunction, and surveillance. Preemption is more commonly featured in the scholarly literature, as it deals with designing technologies to prevent or thwart undesirable conduct before it happens. Specific injunctions, on the other hand, utilize the communications between a product and its manufacturer. At a later point in time, when the product is in the consumer’s hands, updates can be sent to the device to allow or to change behavior. Finally, and what is probably most important in relation to this paper, regulation can use surveillance. As a secondary intervention, surveillance allows the manufacturer, based on his own discretion or if ordered by a specific injunction, to send information back to the manufacturer. As with specific injunctions, surveillance can be processed through the automatic updates. *Id.*

<sup>57</sup> See Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules through Technology*, 76 TEX. L. REV. 553, 582 (1998) (discussing the benefits of Lex Informatica in regards to enforcing policies on a customizable basis). One of the first legal scholars to recognize the importance of code for enforcement of legal rules was Joel Reidenberg. *Id.*

users with the introduction of new products and services.<sup>58</sup> Consequently, the contribution of this research comes from looking at the relevant case study to reveal the dynamic relationship between the stakeholders in the shadow of privacy laws.<sup>59</sup> With the goal of developing a better understanding of information collection practices in action, this research focuses on Facebook. This research systematically presents Facebook's information collection practices through a historical document analysis of regulatory decisions, users' representatives' complaints, and Facebook's legal documents.

Moreover, the contribution of this methodology is thus threefold. First, the methodology highlights the embedded values. Second, by presenting the trends in the intermediaries' behavior and the stakeholders' narratives, this research allows building robust policy methods for the future. And third, this methodology sets the groundwork for future research in the field. To summarize in information regulation terms: given the explained information overload, the role of this research is same as the role of the information production by retailers: to locate, filter, and communicate what is useful to the regulators, the intermediaries, and most importantly, the users.

## **ii. Research Contributions: mapping the trend in social media regulation**

To understand the significance of how different stakeholders explained technology changes according to different laws, it is better to break apart this question for each stakeholder's perspective. The first perspective is how users' representatives described the services offered as part of the social media technology.<sup>60</sup> Because this research looks at the 'extreme' changes to the interface and information collection practices, it is important to understand what was unique about these changes that they made users' representatives complain

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<sup>58</sup> See ZITTRAIN, *supra* note 53, at 107 (discussing use of products to control regulation of information to the public).

<sup>59</sup> To remind us, the stakeholders are the courts and the FTC, the regulators in the story; Facebook, the intermediary this case study looks at; and advocacy groups and class action law-suit representatives, representing users. For clearer explanation see "relevant stakeholder: regulators, information collectors and users' representatives" above.

<sup>60</sup> See Latour, *supra* note 37, at 151 (explaining different theories regarding social media technology).

to regulators.<sup>61</sup> The second perspective is how the technology was presented by the service provider. Here, it is important to consider how Facebook tried to take the “sting” out from what users considered an extreme harm to their privacy, a harm worth addressing through formal proceedings. The third perspective is how the relevant regulator thought this technology should be presented and what he decided on the matter.<sup>62</sup>

In answering how the regulators and Facebook acted in accordance to these complaints, the hypothesis goes, can result with two significant discoveries. First, we need to be clear whether there is a trend to the behavior of the intermediary when replying to complaints. This perspective will reveal what changed in response to the privacy notices users received. The second discovery will come from answering what were the changes in the service’s interface in regard to the information collection practices. Answering these two questions in turn will assist in answering the larger question of whether and to what extent Facebook changed its information collection practices.

### **iii. Content Analysis of Facebook’s Privacy Policies**

Building upon the analysis described above, the research approach is descriptive content analysis of documents telling the narrative story of Facebook between 2007 and 2013 leading to the more recent events. To allow a systematic approach based on the re-inscription research approach, the following content analysis reconstructs events based on two methods. The first method of reconstruction is looking at documents specially created as a result of incidents

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<sup>61</sup> See FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 7 (2012) (citing consumer comments and complaints as reasons for push for privacy reform and self-regulation).

<sup>62</sup> See *Facebook settles privacy complaints with US Regulator*, OUT-LAW.COM (Nov. 30, 2011), archived at <http://perma.cc/HK78-3LNG> (explaining what Facebook intends to present to consumers involving privacy).

following the introduction of a new service to the market.<sup>63</sup> The second method looks for such statements that the product is conveying to users.<sup>64</sup>

The role of these statements is highly important as part of informational regulation procedures.<sup>65</sup> Explored above, the main method of regulating people's behavior is by receiving their informed consent by notification.<sup>66</sup> Meanwhile, the basic underlying method of regulation is through transparency, allowing the public, regulators, and advocacy groups to have access to information about how the corporation behaves.<sup>67</sup> The leading methods of this market-based approach are "Terms-of-Use," "Privacy Policy," notices next to the privacy settings, and notifications in the form of pop-up messages.<sup>68</sup> Similarly, the regulator uses transparency to notify people about the law, relevant regulation, the liability rules and their interpretations, and the regulator's actions.<sup>69</sup> Unlike laws and court decisions that are published in the official journals, regulators today usually use an official website or social media to notify the public and the media about their actions.<sup>70</sup> Last, most third party NGOs also use their official websites for notifying and warning users.<sup>71</sup> As the second method of

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<sup>63</sup> See Latour, *supra* note 37, at 156 (discussing the two methods and philosophies behind the delegation gathering information, using a groom as a metaphor).

<sup>64</sup> See Latour, *supra* note 37, at 157-58 (explaining how coding can be influenced by language).

<sup>65</sup> See, e.g., Bamberger & Mulligan, *supra* note 38, at 250 (pointing to the role of consent as an example of information regulation).

<sup>66</sup> See Bamberger & Mulligan, *supra* note 38, at 270 (recalling informed consent as a method to regulate people's behavior).

<sup>67</sup> See Bamberger & Mulligan, *supra* note 38, at 309 (emphasizing the role of transparency in maintaining consumer protection).

<sup>68</sup> See Bamberger & Mulligan, *supra* note 38, at 254-55 (highlighting the market-based approach within the corporate sector).

<sup>69</sup> See Bamberger & Mulligan, *supra* note 38, at 276 (emphasizing regulators' roles in public notification requirements).

<sup>70</sup> See, e.g., *News & Events*, FED. TRADE COMM'N (Oct. 26, 2015), *archived at* <http://perma.cc/694Z-38Y7> (featuring current trade news and events); see also *Briefing Room*, DEP'T OF JUSTICE (Nov. 12, 2015), *archived at* <http://perma.cc/9542-EZ8L> (highlighting justice news); *Newsroom*, SEC. & EXCH. COMM'N, *archived at* <http://perma.cc/TVQ9-NSYZ> (reporting news on securities law). Each of these government agencies uses their websites as the primary publication of news and notification of legal action. Each agency also has its own Twitter handle: @FTC, @SEC-News, and @TheJusticeDept, respectively.

<sup>71</sup> See *Privacy Policy for .ngo & .ong TLDs and OnGood*, PUB. INTEREST REGISTRY, *archived at* <http://perma.cc/3F4N-XKGP> (describing how third-party NGOs warn users about protecting their personal data).

reconstruction portrays, having distinct methods of notification and transparency mechanisms lead people, ironically, to feel overwhelmed by the amount of information. This problem of information overflow is discussed by the stakeholders through the first method of reconstruction in the form of the legal documents they convey to one another while discussing their practices.<sup>72</sup>

Largely, looking back at the stakeholders' claims can allow the creation of a historical analysis of their narratives of their discourse, in turn explaining which actions by other stakeholders may have affected Facebook's behavior.<sup>73</sup> The unit of analysis for the case study is composed of information practices claims relevant to Facebook.<sup>74</sup> According to the hypothesis, if we are to reveal the trends in the changes to Facebook's privacy collection practices, each unit of analysis in that trend are comprised of three events: a new service or technology dealing with information (internal to Facebook), a legal regulatory event (external to Facebook) and a change in privacy practices (internal to Facebook).<sup>75</sup> Internal events in Facebook were analyzed using information from two changes: privacy policies changes

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<sup>72</sup> See *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d. at 792 (stating the claims of the plaintiffs).

<sup>73</sup> To keep this exploratory descriptive analysis systematic, "the timeline" is important. Usually in a statistical survey, randomizing the population can blur the importance of occurrence of events. In this research on the other hand, the occurrences of events are important to maintain the systematic process.

<sup>74</sup> See Richard D. Waters & Kevin D. Lo, *Exploring the Impact of Culture in the Social Media Sphere: A Content Analysis of Nonprofit Organizations' Use of Facebook*, 41 J. INTERCULTURAL COMM. RES. 297, 299-300 (2012) (discussing how Facebook offers various features which expand beyond the functionality of a typical social media site).

<sup>75</sup> The underlying assumption is that a legal event does not happen by itself, but rather it is a reply to internal change of behavior.

would be discovered from the Facebook website,<sup>76</sup> while new services would be learned only from the regulatory/court documents.<sup>77</sup> Meanwhile, when dealing with the “external” regulatory events, it is important to differentiate between complete events and incomplete events.<sup>78</sup> The external “complete” events were analyzed using two types of regulatory events: court decisions and FTC regulatory framework.<sup>79</sup> In contrast, “incomplete regulatory events” are those events where users complained, but the intermediaries reacted without the need for actual injunctive relief or regulatory action by either court or the FTC.<sup>80</sup> Based on this research approach, it is possible to answer the above questions by presenting the events in a systematic analysis.<sup>81</sup> Consequently, as the research moves to present the data, the

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<sup>76</sup> See *Facebook Site Governance*, FACEBOOK (Jan. 30, 2015), archived at <https://perma.cc/GUM9-ZSFD> (stipulating the basic community guidelines of Facebook usage). As explained earlier, the role of privacy policies is to explain information collection practices to users and regulators. As Facebook’s privacy policy presents only the most recent document, to address the lack of documentation, the collected privacy policies were collected from Facebook’s Official Governance pages. On Facebook’s Governance Page, the company posts changes to Facebook’s Terms-of-Use and Privacy Policies and also posts proposed changes for comments. Though each change is not the final official version of the Privacy Policies, as these documents are posted on one of Facebook’s official pages, they can be used to replace the lack of previous versions. Since May 2009, Facebook published used its Governance Page to post only six versions, though in general there were around nine. *Id.*

<sup>77</sup> See *id.* (highlighting the different sources as to where Facebook policies can be reviewed).

<sup>78</sup> See *Fraleley*, 830 F. Supp. 2d. at 815 (deciding that there was a cause of action for unjust enrichment); see also *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012) (affirming the district court’s decision that settlement was fair). *But see* *Cohen v. Facebook*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (stating that the plaintiffs did not sufficiently show they had suffered an injury; see also *infra* pp. 19, note 185 (declaring that the Federal Trade Commission has issued a complaint against Facebook)).

<sup>79</sup> See *Fraleley*, 830 F. Supp. 2d. at 815 (declaring that the plaintiffs had a case). *But see* *Cohen*, 798 F. Supp. 2d. at 1097 (stating that the plaintiffs did not have a case). See *Lane*, 696 F.3d at 812 (stating that an agreement had been sufficiently reached); see also *infra* pp. 2, 19, note 185 (issuing a formal complaint).

<sup>80</sup> See *Facebook Site Governance*, *supra* note 76 (creating new policies in order to avoid litigation).

<sup>81</sup> See *infra* Introduction (stating how these events will be used to analyze a unique singular process which has developed quickly through social media).

important narratives of the stakeholders' discourse will be presented to reach the policy conclusions.<sup>82</sup>

### **Case Study Analysis—Privacy Controls through the Lens of Facebook**

The goal of the following chapter is to present, based on the explained methodology, Facebook's case study. Starting with the history and structure of online social networks, this case study will enable readers to better understand how risks are handled by the different stakeholders as they are pushing to open and close the users' privacy barriers in order to share information.

#### **i. Online Social Networks: Social Interface and History**

Before looking at the actual case study, first it is crucial to understand the history and social interfaces of social networks to highlight the history of the stakeholders' attempts to regulate social networks. While the internet provides a great variety of social interactions,<sup>83</sup> resulting in a variety of social networks, the key technological features of social networks are mostly consistent.<sup>84</sup>

There are different definitions of online social networks.<sup>85</sup> The leading regulatory definition of social networks is the one given by the European Article 29 Data Protection Working Party.<sup>86</sup> Schol-

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<sup>82</sup> See *infra* Introduction (discussing the transformation of stakeholder's discussions into policy decisions).

<sup>83</sup> See Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA. & ENT. L.J. 741, 747 (2008) (assessing various forms of social interactions available to network users).

<sup>84</sup> See *id.* at 749 (describing key technological traits of social networks).

<sup>85</sup> See *id.* at 747 (explaining different meaning of social networks). Some have described social network sites as allowing one to maintain pre-existing real world social networks, while others describe those sites as allowing one to create new connections with strangers. Put differently in societal terms, social networks can maintain close social ties, but can also facilitate interactions among weak social ties among strangers who have shared interests, political views, or activities. *Id.*

<sup>86</sup> See Working Party, Opinion 5/2009 on online social networking 1-13 (Article 29 Data Protection Working Party, Working Paper 163, 2009) (defining social network services and documenting the services they provide to users). The Working Party has defined "Social Network Services" as having three characteristics. First,

arly literature has also tried to describe the phenomena of social networks.<sup>87</sup> Both legal and social science criteria put emphasis on creating a user profile.<sup>88</sup> Yet, while some literature emphasizes user-generated content, other media-related literature emphasizes visualizing the users' social network.<sup>89</sup> This visualization presents to users specific lists of friends and allows them to browse their and other users' lists of friends.<sup>90</sup> Given the importance of both two criteria to the governance of social media, further exploration is in order.

*a. Online Social Networks' Interfaces: Social structure*

Online social networks are unique since they enable users to visualize and experience their social connections.<sup>91</sup> This visualization is unique to each online social network, which in turn allows the social network to set different rules for profile visualization to non-friends and third parties.<sup>92</sup> Designing an interface, online social networks have to decide on how to publicly set the connections among users, which in turn enables users to browse the network by going

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users provide personal details to create a descriptive profile. Second, the service allows users to interact by providing each user with a list of friends. Third, the service provides users with tools to post their own content. The Social Network then maintains itself through ads based revenue. *Id.*

<sup>87</sup> See danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210 (2008) (explaining how scholars are documenting use of social media within academia).

<sup>88</sup> See *id.* at 211-13 (explaining function and attributes of a user profile). Usually, the first step in creating a social network profile is to answer a series of questions. This in turn allows the system to create the initial user profile. Sometimes the user will also be asked to include a profile picture. *Id.*

<sup>89</sup> See *id.* at 216 (stating how user-generated content has grown with social media websites).

<sup>90</sup> See *id.* at 213 (highlighting process of building user network). Nicole Ellison and danah boyd define social networks sites as web-based services having three unique aspects. Other than allowing users to create their own profiles, a common second step to most social networks is to ask users to identify other users in the system with whom they have a connection. *Id.*

<sup>91</sup> See *id.* at 211-13 (articulating what makes social networks unique). More importantly, in most of the large social networks, users are not looking to make new connections, but rather are trying to communicate with "latent ties," people whom are already part of their extended social network. *Id.*

<sup>92</sup> See *id.* at 213 (discussing the approaches social media sites take regarding visibility by third parties). One method is by deciding on the different variations around visibility and amount of access to users' profiles. *Id.*

through each user's list of friends as presented by the platform.<sup>93</sup> As we will see, like most social networks, Facebook requires bi-directional confirmation among friends.<sup>94</sup> The public display of connections is crucial to social networks, and it allows the social networks to distinguish among themselves.<sup>95</sup> Finally, by allowing users to message friends or post comments on their virtual walls, social networks visually link users' profiles in a variety of ways.<sup>96</sup> Historically, online social networks were available to users since 1997.<sup>97</sup> Back then, social networks offered early adopters very little to do, other than looking at their social connections.<sup>98</sup> Equally important at that time, most users simply did not want to meet people online that they did not know well in person.<sup>99</sup> Nevertheless, as time progressed, social networks began integrating more services into their interfaces, bridging over the unfamiliarity gap by offering personal, private, and dating profiles.<sup>100</sup> Starting in 2003, social networks became more popular,<sup>101</sup> and many user-generated content websites such as YouTube and Flickr began incorporating social network features into their interfaces.<sup>102</sup> At this point in time, when Facebook was

<sup>93</sup> See boyd & Ellison, *supra* note 87, at 213 (detailing the process by which users of social networks set their connections).

<sup>94</sup> See boyd & Ellison, *supra* note 87, at 213 (outlining the requirements for Facebook friendship). On the other hand, Google, for instance, decided for its social networks on one-directional ties among what they call "followers." *Id.*

<sup>95</sup> See boyd & Ellison, *supra* note 87, at 213 (highlighting the importance of public display of connections).

<sup>96</sup> See boyd & Ellison, *supra* note 87, at 213 (explaining how users can communicate on social network sites). This characteristic of messages is not universally available in all social networks and sometimes is limited by privacy settings. *Id.*

<sup>97</sup> See boyd & Ellison, *supra* note 87, at 214 (noting the launch of the first social network site).

<sup>98</sup> See boyd & Ellison, *supra* note 87, at 214 (indicating the lack of features of early social network sites).

<sup>99</sup> See boyd & Ellison, *supra* note 87, at 214 (acknowledging users' disinterest in connecting with strangers online).

<sup>100</sup> See boyd & Ellison, *supra* note 87, at 214 (describing the integration of dating and personal profiles on social network sites).

<sup>101</sup> See Clay Shirky, *People on Page: YASNS...*, CORANTE'S MANY-TO-MANY (May 13, 2003), archived at <https://perma.cc/8CUQ-2X6Z> (naming this phenomena YASNS: Yet Another Social Network Service); see also JOHN G. BRESLIN ET AL., THE SOCIAL SEMANTIC WEB 168 (2009) (discussing the increase in the number of social network sites in recent years).

<sup>102</sup> See Julie Blakely, *Using Consumer-Generated Content to Fuel Marketing Campaigns*, POSTANO (May 16, 2013), archived at <http://perma.cc/3BGF-FSLA> (addressing how user-generated websites utilize social media features).

founded, an understanding of why this mixture of social networks with user-generated content is important.<sup>103</sup>

*b. Online Social Networks' Interfaces: User generated content*

While some of the literature emphasizes the social and structural aspects of social networks, as explained, some literature emphasizes the User Generated Content (UGC) aspect of social media.<sup>104</sup> This era of UGC is part of a bigger concept known as Web 2.0, which in turn refers to phenomena like social networks and social media sites, among others.<sup>105</sup> To be sure, Web 2.0 is actually not a new phenomenon, but rather the successful incorporation of UGC into social media.<sup>106</sup> Given that users can easily communicate with one another, they become less dependent on classical media sources.<sup>107</sup> As a result, users have an alternative to commercial media and become active participants in producing their culture.<sup>108</sup> This, in turn, creates new economic models in which users create the content that they find interesting or that users believe others would find interesting.<sup>109</sup>

Although this may be true, and UGC is increasing alongside the industrial production of content, UGC is also creating new governance challenges.<sup>110</sup> True, users could now post self-made content and share information without intervention,<sup>111</sup> yet online intermediar-

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<sup>103</sup> See Kaifu Zhang & Miklos Sarvary, *Social Media Competition: Differentiation with User-Generated Content* (Sept. 1, 2011) (unpublished paper, INSEAD) (stating the importance of combining user-generated content sites with features of social network sites).

<sup>104</sup> See Niva Elkin-Koren, *User-Generated Platforms*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 111-12 (Rochelle C. Dreyfuss et al. eds., 2010) (introducing the impact of User Generated Content on social media platforms).

<sup>105</sup> See *id.* (explaining the connection between Web 2.0 and social media).

<sup>106</sup> See *id.* at 113-14 (extrapolating on relationship between Web 2.0, UGC, and social media).

<sup>107</sup> See *id.* at 117 (explaining the shift from traditional to newer media sources by commercial players).

<sup>108</sup> See *id.* at 117 (describing the transition to alternative media sources).

<sup>109</sup> See *id.* at 119 (identifying methods in which individuals compete with commercial players for users' attention).

<sup>110</sup> See Elkin-Koren, *supra* note 104, at 128 (describing challenges involving copyright law in the UGC environment).

<sup>111</sup> See Elkin-Koren, *supra* note 104, at 114 (explaining how UGC allows individuals to publish without editorial intervention).

ies have a strong incentive to direct users' attention to the consumption of the intermediary's own services and goods, along with the products of their advertising partners.<sup>112</sup> Indeed, users have become "Prosumers."<sup>113</sup> Simultaneously, while social media platforms themselves do not engage in the mass production and distribution of users' content, social networks enable users to share their content with one another.<sup>114</sup> On the contrary, in order to attract more users to their social networks, social media platforms encourage users to dissolve barriers to access and promote the free exchange of information as much as possible.<sup>115</sup>

Most of all, social media platforms are seeking to use the internet architecture to nudge their users into "planned communities of consumerist experience, to shelter end users into a world that combines everyday activities of communication seamlessly with consumption and entertainment."<sup>116</sup> In other words, though users are creating the content, the environment is for profit.<sup>117</sup> Platforms not

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<sup>112</sup> See Elkin-Koren, *supra* note 104, at 116 (using Google as an example of the incentives of online intermediary's advertising service). As we have already seen earlier, the social media is characterized by lock-ins and high switching costs. See Elkin-Koren, *supra* note 112, at 116. See SHAPIRO & VARIAN, *supra* note 20, at 12 (mentioning the barriers users face due to "lock ins" and "switching costs"). Those lock-ins and switching costs make it difficult to transfer valuable information as personal contacts, personal histories and posts to another service. See SHAPIRO & VARIAN, *supra* note 20, at 12.

<sup>113</sup> See Elkin-Koren, *supra* note 112, at 104 (defining "prosumers"). The term "Prosumers" is a combined word defining people as both the producers and the consumers of content in social networks. See Elkin-Koren, *supra* note 112, at 104. See ALVIN TOFFLER, *THE THIRD WAVE: THE CLASSIC STUDY OF TOMORROW* 283 (1984) (expanding on concept of "prosumers").

<sup>114</sup> See Elkin-Koren, *supra* note 112, at 104 (explaining users' ability to share their content with one another). This emphasis is important as the online social networks of today are characterized as two-sided markets. *Id.* See also Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUROPEAN ECON. ASS'N 990 (2003) (describing platform competition in two-sided markets).

<sup>115</sup> See Elkin-Koren, *supra* note 112, at 104 (explaining how social media platforms are seeking to dissolve barriers through their terms of service).

<sup>116</sup> Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 22-23 (2004) (discussing the use of the Internet as a means of ushering in a new online consumer experience).

<sup>117</sup> See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 121-22 (2008) (demonstrating how users' creations are for profit).

only have to maintain the system, they are also looking at online marketing, protection against liability, and making profit.<sup>118</sup> Undoubtedly, the platforms' main asset for creating value is the users—the stronger the users' community becomes, the higher the value of the platform becomes.<sup>119</sup> To maintain a high value, platforms have to maintain an engaged community.<sup>120</sup>

It is clear that social networks introduce new opportunities for users to share and interact, but in reality, the moment users go online, they disclose a great deal of information.<sup>121</sup> This social online world mediated by information technologies enables social interaction and eliminates some of the real world physical, psychological, and social cues people rely on to enable personal communication.<sup>122</sup> As people create more data to replace the lack of personal cues, the data become “data trails” that are collected, aggregated, and analyzed.<sup>123</sup> With social media's increasing popularity, the governance questions arising from the following analysis are important.<sup>124</sup>

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<sup>118</sup> See Elkin-Koren, *supra* note 104, at 117 (explaining platforms' burdens from producing content).

<sup>119</sup> Compare Balkin, *supra* note 116, at 22 (describing the power that consumers have that is unique to new technology), with Christopher S. Yoo, *When Antitrust Met Facebook*, 19 GEO. MASON L. REV. 1147, 1160 (2012) (contrasting a scenario of unlimited freedom of content by describing a content-based lawsuit between Facebook and Power.com). On the one hand, it seems that encouraging interactivity among users on the terms set by the companies might be problematic. On the other hand, a court ruled that just because third party websites allow Facebook to access their databases does not oblige Facebook to give to the third party websites unfettered access to its own databases and services. *Id.*

<sup>120</sup> See Elkin-Koren, *supra* note 104, at 127 (reiterating that the economic value of new social media is completely created by participating users rather than the platform itself).

<sup>121</sup> See Ira S. Rubenstein & Nathaniel Good, *Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents* 28 BERKELEY TECH. L.J. 1333, 1371 (2013) (explaining that there is no real anonymity on the Internet).

<sup>122</sup> See *id.* (contrasting between actual human interpersonal interactions and communicating online).

<sup>123</sup> See *id.* (highlighting how the usage of the internet causes anonymity on the internet to become less likely).

<sup>124</sup> See Zarsky, *supra* note 83, at 747 (noting the increase in popularity of social media and the problems that follow).

## ii. Facebook: Pushing the Limits on People's ability to connect

Facebook was created in 2004 as a university-based social network.<sup>125</sup> This in turn kept the online social network relatively close-knit, providing users with some intimacy and privacy.<sup>126</sup> Be that as it may, from September 2005, Facebook began serving more users, expanding to groups including high school students, professional networks, and finally everyone else who wanted to join.<sup>127</sup> However, Facebook still offered its users the ability to be part of the original closed networks.<sup>128</sup> In fact, while different social networks use different variations of users' visibility, Facebook originally took a different approach.<sup>129</sup> Facebook decided users can be visible only to other users of the same "network."<sup>130</sup> This approach changed dramatically along the years.<sup>131</sup> By its tenth birthday, Facebook has grown from one million monthly visitors in 2004, to 1.23 billion monthly users.<sup>132</sup> Out of those users, 757 million log into Facebook each day.<sup>133</sup>

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<sup>125</sup> See Sarah Philips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007), archived at <http://perma.cc/ZW8M-3PWZ> (recalling the beginning of Facebook). While Harvard students were Facebook's first users, even when Facebook expanded its reach to other schools, users at Facebook's early stages needed to have a university-based email (usually ending with the suffix .edu). *Id.*

<sup>126</sup> See Zarsky, *supra* note 83 at 747 (illustrating the privacies provided to the users).

<sup>127</sup> See boyd & Ellison, *supra* note 87, at 218 (depicting the expanding user base for social media).

<sup>128</sup> See boyd & Ellison, *supra* note 87, at 218 (discussing how Facebook's change to open sign ups did not lead to new users accessing closed networks).

<sup>129</sup> See Bianca Bosker, *Visual Guide To Facebook's Privacy Changes Over Time*, THE HUFFINGTON POST (May 25, 2011), archived at <http://perma.cc/9YZ8-CD9F> (describing access to profiles in 2005).

<sup>130</sup> See boyd & Ellison, *supra* note 87, at 213 (explaining how by default, Facebook allows users who are a part of the same network to view each other's profiles unless the user denied permission to users in that specific network).

<sup>131</sup> See Bosker, *supra* note 129 (illustrating changes to Facebook privacy over the years).

<sup>132</sup> See Ami Sedghi, *Facebook: 10 Years of social networking, in numbers*, THE GUARDIAN (Feb. 4, 2014), archived at <http://perma.cc/S5M5-9FHT> (showing Facebook's growth to the 1.23 billion users).

<sup>133</sup> See *id.* (providing statistics on Facebook's growth).

Likewise, while many users of other online social networks suffered from the lack of activities after they registered, Facebook offered a new feature: applications.<sup>134</sup> As third-party developers offered different services and games, users in turn could personalize their profiles, play games, and perform other socially oriented tasks.<sup>135</sup> As time progressed, users were able to share a wider variety of content and information, evolve their online personas, and interact better with friends. Since its early days, Facebook kept evolving by updating its interface and offering new services.<sup>136</sup> The first known case of users complaining of unwanted changes was in September 2006, as users found that Facebook shared their marital and dating status without their knowledge or consent.<sup>137</sup> Replying to users' complaints, Mark Zuckerberg explained that "they messed this one up" and "did a bad job of explaining what the new features were and an even worse job of giving [the users] control over them."<sup>138</sup>

The next few cases, each focusing on a separate formal complaint made with either the FTC or a state court, will detail how each complaint was presented, responded to, and acted upon by different stakeholders.

*a. November 2007: Facebook Beacon*

Think of buying an amazing gift for a family member as a surprise. You are buying this gift online at one of the well-known retailers. This is a gift you are planning to give at Christmas, but you discover that all your Facebook friends suddenly know about the gift, including the recipient of the gift. This is what happened to Sean

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<sup>134</sup> See boyd & Ellison, *supra* note 87, at 218 (explaining how Facebook became differentiated from other SNSs by offering developers to build applications).

<sup>135</sup> See boyd & Ellison, *supra* note 87, at 218 (describing how Facebook offered its users a new personalized application feature that helped personalize their profiles and perform other socially oriented tasks).

<sup>136</sup> See Chloe Albanesius, *10 Years Later: Facebook's Design Evolution*, PCMAG (Feb. 4, 2014), archived at <http://perma.cc/D8VY-3ZCH> (describing changes to Facebook over the years).

<sup>137</sup> See Michael Arrington, *Facebook Users Revolt, Facebook Replies*, TECHCRUNCH (Sept. 6, 2006), archived at <http://perma.cc/7M8G-UGHZ> (discussing Facebook user frustration with the new changes).

<sup>138</sup> See Mark Zuckerberg, *An Open Letter from Mark Zuckerberg*, FACEBOOK (Sept. 8, 2006), archived at <http://perma.cc/69Y2-6JNE> [hereinafter Zuckerberg, *An Open Letter*] (detailing Mr. Zuckerberg's apology to his Facebook users in regards to their complaints concerning privacy issues).

Lane.<sup>139</sup> In November 2007, Facebook introduced a service called “Beacon”.<sup>140</sup> By publishing posts on users’ profiles, Facebook branded the service as allowing users to share their actions on Facebook.<sup>141</sup> To calm down service providers’ and users’ worries, Facebook explained it would alert users, allowing them to opt-out before the story is automatically sent to Facebook and would alert the users again when signing into Facebook.<sup>142</sup>

Promises aside,<sup>143</sup> Beacon, in action, worked differently. After an Affiliate’s website decided to use Beacon, every visit to the service provider’s website activated the Beacon script and notified Facebook of the login and chosen actions.<sup>144</sup> Additionally, the promised notice was presented to Facebook users for no longer than 10 seconds, and Facebook considered any inaction for any reason by the user as consent to publish the post.<sup>145</sup> Primarily, as Beacon worked

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<sup>139</sup> See *Lane*, 696 F.3d at 816-17 (explaining the plaintiff’s allegations of privacy violations).

<sup>140</sup> See *Leading Websites Offer Facebook Beacon for Social Distribution*, FACEBOOK NEWSROOM (Nov. 6, 2007), archived at <http://perma.cc/KX9W-UJ3M> (summarizing announcement of new advertising technology).

<sup>141</sup> See *id.* (explaining that user profiles are a means to provide advertising information to major companies). According to Facebook, the benefit for advertisers would be based on a “word-to-mouth” promotion, as friends interested in the same service would learn of it through the post. Posted actions included purchasing a product, signing up to a service, or adding an item to a wish list. The users’ actions were distinct to each affiliate, but included actions such as buying, queuing, signing up, bidding, commenting, designing, downloading, joining, playing, posting, rating, subscribing, watching, voting, etc. *Id.*

<sup>142</sup> See *id.* (ensuring users that they would still have control over the private information they did not want shared).

<sup>143</sup> See *id.* (detailing the ways in which Beacon would change advertising via social media).

<sup>144</sup> See *id.* (describing measures used to eliminate privacy concerns). Beacon worked whether or not the visitor was a Facebook user. If the user was a Facebook member, which Facebook knew by a special cookie, Facebook generated a pop-up message notifying the user that the action was sent to Facebook. If the user was not a Facebook member, Facebook still obtained the notification, but this time the pop-up message was transparent. A non-Facebook member was not told their every transaction was communicated to an unknown third party, Facebook. In regard to Facebook’s users, it was alleged that Facebook conducted sufficient attempts to receive the needed consent. *Id.*

<sup>145</sup> See *Lane*, 696 F.3d at 827 (describing users’ lack of notice regarding acceptance to new privacy terms). According to users’ representatives, users could miss the notice for such reasons as looking in the wrong direction or looking at another website. *Id.*

on other websites and not Facebook, Facebook's privacy policy did not reference the service.<sup>146</sup> As a result, two class action lawsuits were filed.<sup>147</sup>

The first class action was in Texas, represented by Catheryn Elaine Harris and was filed in 2008 against Blockbuster,<sup>148</sup> for the violation of the Video Privacy Protection Act.<sup>149</sup> On April 15, 2009 the District Court for the Northern District of Texas found that Blockbuster's "Terms and Conditions" were unenforceable as they prohibited users from initiating class actions and gave the company too much discretion.<sup>150</sup> Though Blockbuster appealed, in February 2010 a settlement was reached giving the plaintiffs \$22,500 for the dismissal of the case without prejudice.<sup>151</sup> Furthermore, the plaintiffs agreed both not to object to the proposed Californian class action settlement and to encourage others to support it.<sup>152</sup> Blockbuster agreed to cease using Beacon, and rewrite its privacy policy.<sup>153</sup>

The second class action was filed against Facebook, Blockbuster and 46 other corporations for not seeking users' consent to collect information, as required by different privacy-related laws.<sup>154</sup> The

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<sup>146</sup> See *id.* (listing the use of Beacon by other websites). The privacy policy covered the use of cookies by Facebook, but did not cover actions by its advertisers. *Id.*

<sup>147</sup> See *id.* at 816 (explaining how the class action suit came before the court); see also *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396, 397 (N.D. Tex. 2009) (illustrating the reasons for the plaintiffs' claims against Blockbuster).

<sup>148</sup> See *Harris*, 622 F. Supp. 2d at 400 (ruling that the arbitration agreement was unenforceable and the parties needed to move forward with the plaintiffs' action).

<sup>149</sup> See Video Privacy Protection Act, 18 U.S.C. § 2710 (2013) (prohibiting the disclosure of rental video information without a written consent); see also *Harris*, 622 F. Supp. 2d at 397 (explaining which law the plaintiff was accusing Blockbuster of violating); Julianne Pepitone, *New video law lets you share your Netflix viewing on Facebook*, CNN MONEY (Jan. 10, 2013), archived at <http://perma.cc/T7DL-7DHP> (following a change pushed by Facebook and Netflix, Congress amended the law to allow U.S. citizens to opt-out from coverage of the law).

<sup>150</sup> See *Harris*, 622 F. Supp. 2d at 399-400 (listing the reasons that Blockbuster's arbitration clause was unenforceable).

<sup>151</sup> See Settlement Agreement at 2, *Harris v. Blockbuster, Inc.*, 622 F.Supp.2d 396 (2009) (No. 3:09-cv-217-M) (describing the damages required to be paid by Blockbuster).

<sup>152</sup> See *id.* at 1-2 (listing the agreements made by the plaintiffs).

<sup>153</sup> See *id.* at 3 (explaining the agreements Blockbuster made in the settlement).

<sup>154</sup> See Video Privacy Protection Act, 18 U.S.C. § 2710 (2013) (declaring that video tape service providers were prohibited from disclosing any personally identifiable information about a customer); see also Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2008) (prohibiting the misuse of private information stored on computers);

complaint had two bases: one, although the plaintiffs acknowledged the notice given to users, they found this notice to be inadequate, uninformative, misleading, untimely, and deceptive.<sup>155</sup> According to the lawyers' representing the users, reading the terms of use was also to no avail.<sup>156</sup> Not only were the terms 27,977 words long,<sup>157</sup> but these documents were also contrary to both Facebook's and the affiliates' terms of use.<sup>158</sup>

The second complaint basis dealt with the information flow barriers and privacy settings.<sup>159</sup> Users' representatives alleged that the notice failed to explain how and through which means Beacon broadcasted information back to Facebook, and the implied control over the shared information was misleading and irrelevant, as the pop-up message appeared after Beacon already sent the information to Facebook.<sup>160</sup> In fact, it seems the biggest problem users found with Beacon was the inability to opt-out from sharing the information by default.<sup>161</sup> Equally important, when Facebook finally offered users the ability to opt-out *separately* from each and every one of the more than forty beacon partners, the plaintiffs still found the solution to be problematic as any additional service added required a separate

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Stored Communications Act, 18 U.S.C. §§ 2701-2712 (2002) (listing the regulations of internet service providers when disclosing consumer information).

<sup>155</sup> See Complaint at 28-29, *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012) (No. C08 03845) (explaining Plaintiff's grounds for a class action lawsuit against Facebook).

<sup>156</sup> See *id.* at 21 (describing the circular nature of having to agree to the terms prior to having the opportunity to read them).

<sup>157</sup> See *id.* at 22 (listing word counts of types of terms within Facebook's agreement policies). According to the plaintiffs the word count was as follows: privacy policy, 3,716 words; terms of use, 6,495 words; code of conduct, 719 words; copyright policy, 847 words; terms of sale, 2,699 words; marketplace guideline, 1,381 words; platform application guidelines, 1,165 words; application terms of use, 1,700 words; developer terms of use, 9,255 words. *Id.*

<sup>158</sup> See *id.* at 23 (suggesting that privacy policies of Facebook and its affiliates also using Beacon were deceptive).

<sup>159</sup> See *id.* at 22-23 (explaining the lack of consent Beacon asked for before sending personal information to Facebook from affiliate sites).

<sup>160</sup> See *id.* at 23 (noting that the pop-up message alerted the user that his/ her information was sent to Facebook even though the user did not authorize this action).

<sup>161</sup> See Complaint at 23, *Lane v. Facebook, Inc.*, 696 F.3d 811 (No. C08 03845) (declaring a lack of the ability to opt-out).

opt-out.<sup>162</sup> Consequently, according to the plaintiffs, Facebook designed Beacon to be difficult, cumbersome, and time-consuming to block.<sup>163</sup>

Due to various complaints, on December 2007 Mark Zuckerberg apologized for the mistakes with the new feature, namely in regard to the correct balance of information sharing and how Facebook handled these mistakes.<sup>164</sup> Henceforth, Mark Zuckerberg explained the idea was to create a product that would allow users to share information that is not on Facebook, but the service should have a light-weight touch so it would not intervene with users' other actions.<sup>165</sup> Mark Zuckerberg explained the success of Facebook and Beacon depends on the explicit users' ability to decide what to share, a decision that requires having the ability to turn off Beacon completely.<sup>166</sup> Consequently, following the complaint, Facebook changed Beacon's defaults to opt-in and created a privacy settings that allowed users to shut the service down completely.<sup>167</sup> In both cases, information would still be sent to Facebook but would not be stored.<sup>168</sup>

Eventually, in March 2010 the court accepted a settlement between the plaintiffs and Facebook.<sup>169</sup> According to the settlement, \$9.5 million dollars would be directed to the creation of a privacy

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<sup>162</sup> See *id.* (requiring that users opt-out from programs individually, and denying users the ability to opt out all at once).

<sup>163</sup> See *id.* at 22-23 (noting that the Beacon program is intentionally not user-friendly); see also Wendy Davis, *Privacy Suit Against Facebook Faces Hurdles*, MEDIAPOST (Aug. 15, 2008), archived at <http://perma.cc/Y6WD-VJ26> (quoting the language of the complaint).

<sup>164</sup> See Complaint at 25-27, *Lane v. Facebook, Inc.*, 696 F.3d 811 (No. C08 03845) (describing a plaintiff's activities on Named Affiliate's websites and how that initiated Beacon Triggered Activities).

<sup>165</sup> See *id.* at 33 (explaining how the goal of Beacon was to form a simple product to share information).

<sup>166</sup> See *id.* at 22 (addressing how the Beacon program would allow more content and control for users to decide whether to share).

<sup>167</sup> See *id.* (acknowledging Facebook's mistake as to requiring and opt-out instead of an opt-in before Beacon went ahead and shared user's information).

<sup>168</sup> See Mark Zuckerberg, *Announcement: Facebook Users Can Now Opt-Out of Beacon Feature*, FACEBOOK NEWSROOM (Dec. 6, 2007), archived at <http://perma.cc/DX7W-HWRM> [hereinafter Zuckerberg, *Opt-Out of Beacon*] (reiterating that if a user opts-out of Beacon, then Facebook will not store those actions).

<sup>169</sup> See Order Approving Settlement at \*3, *Lane v. Facebook, Inc.*, (N.D. Cal. Mar. 17, 2010) (No. C 08-3845 RS), 2010 WL 9013059 (detailing the settlement for the Settlement Class).

foundation that other than compensating the plaintiffs, will have sole management of the money.<sup>170</sup> Furthermore, Facebook had to terminate Beacon altogether.<sup>171</sup> In spite of the court approval, the Electronic Privacy Information Center (EPIC) and other online advocacy groups criticized this settlement on four accounts for failing to adequately represent the class's interests.<sup>172</sup> First, Facebook denied all wrongdoing.<sup>173</sup> Second, based on the users' representatives' calculation, Facebook would have been exposed to \$875 million dollar in liquidated damages, but in practice the foundation was left only with \$6 million dollars.<sup>174</sup> Third, according to the advocacy groups, because one of the three foundation's directors is from Facebook, the foundation would enjoy limited independence.<sup>175</sup> And finally, given that the basis of the complaint resulted from Facebook's information privacy collection practices and not those of the users', the foundation's basic purpose of teaching users seems inappropriate.<sup>176</sup> The advocacy groups recommended changes to reflect users' interests.<sup>177</sup> Though Beacon was officially deleted from the privacy policy in the March 2010 proposal,<sup>178</sup> only after two appeals to the ninth circuit,

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<sup>170</sup> See *id.* at \*4 (explaining how the settlement money going to the Privacy Foundation is related to the Class Members' interest).

<sup>171</sup> See *Lane*, 696 F.3d at 828 (detailing the settlement where the parties agreed to end Beacon).

<sup>172</sup> See Letter from Marc Rotenberg, President, EPIC, to Judge Seeborg, N.D. Cal S.F. Courthouse (Aug. 20, 2012) [hereinafter Letter from Rotenberg to Judge Seeborg] (explaining how groups criticized Facebook for failing to represent class interests).

<sup>173</sup> See David Kravets, *Facebook Denies 'All Wrongdoing' in 'Beacon' Data Breach*, WIRED (Feb. 11, 2010), archived at <http://perma.cc/N8K4-SQEB> (stating how Facebook is unwilling to take responsibility).

<sup>174</sup> See Wendy Davis, *Privacy Groups Question Beacon Settlement, Facebook's Control Over Foundation*, MEDIAPOST (Jan. 26, 2010), archived at <http://perma.cc/VU97-EQB5> (explaining how the groups calculated how Facebook would have been exposed to \$875 million in damages if there was no settlement).

<sup>175</sup> See *id.* (explaining how the foundation is so dependent on Facebook).

<sup>176</sup> See *id.* (stating Facebook's approach to remedy privacy concerns is unlikely to benefit consumers).

<sup>177</sup> See Letter from Rotenberg to Judge Seeborg, *supra* note 172 (urging Court to enforce previous settlement agreement requiring Facebook to tighten privacy controls). Such as by directly distributed to non-profits or that the foundation should be reconstructed to protect users' interests. See Letter from Rotenberg to Judge Seeborg, *supra* note 172.

<sup>178</sup> See Barbara Ortutay, *Facebook To End Beacon Tracking Tool In Settlement*, THESTREET (Sept. 21, 2009), archived at <https://perma.cc/5S4B-KYTW> (noting

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and the Supreme Court, did the story of Beacon end in November 2013.<sup>179</sup>

To conclude, users complained that while the information they looked for was not in the privacy policy, the information was presented only for a short period of time in a 10 second pop-up message.<sup>180</sup> Beacon was also misleading. Facebook promised users would receive control, yet in practice notices appeared only briefly and the information was already sent to Facebook.<sup>181</sup> Even when users finally received an opt-out option, this service was time-consuming and unfair as every new service required a new opt-out.<sup>182</sup> Consequently, Beacon was the first time users complained to the regulators, and ask to change Facebook behavior.<sup>183</sup> True, Facebook changed its practice on its own account, resulting in different opt-out and opt-in options for users, but it was the court's intervention that made the service disappear.<sup>184</sup>

*b. February and December 2009: Advocacy groups first complaint to the FTC*

In February 2009, Facebook revised its terms of service to assert broad, permanent, and retroactive rights to users' personal information.<sup>185</sup> Facebook asserted that it could make public a user's "name, likeness and image for any purpose, including commercial or

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Facebook's public removal of Beacon from privacy policy due as mandated in settlement agreement).

<sup>179</sup> See *Lane v. Facebook, Inc.*, 709 F.3d 791 (9th Cir.), *cert. denied*, 134 S. Ct. 8 (2013) (denying rehearing and affirming \$9.5 million settlement); see also Brent Kendall, *Facebook's Settlement on 'Beacon' Service Survives Challenge*, WALL ST. J. (Nov. 4, 2013), archived at <http://perma.cc/K2KP-9ZGB> (asserting that the Supreme Court denied the review of the settlement).

<sup>180</sup> See Complaint at 27-29, *Lane v. Facebook, Inc.*, 696 F.3d 811 (No. C08 03845) (explaining issue with Beacon's opt-out pop-up message).

<sup>181</sup> See *id.* at 29 (furthering the notion that Facebook's opt-out practices were unfair and misleading).

<sup>182</sup> See *id.* (explaining the difficulties with the Beacon program).

<sup>183</sup> See *id.* at 29-30 (demonstrating users' initial demand for Facebook to change behavior).

<sup>184</sup> See *id.* at 33-34 (announcing Beacon's shift from an opt-out to opt-in system).

<sup>185</sup> See Complaint at 7, *In the Matter of Facebook, Inc.* (F.T.C. Dec. 17, 2009) (explaining changes in Facebook's Terms of Service).

advertising.”<sup>186</sup> On the eve that EPIC submitted an official complaint, Facebook retracted its actions.<sup>187</sup> During November and December 2009, Facebook changed its privacy policy once more.<sup>188</sup> Before the changes, only a user’s name and network were publicly available.<sup>189</sup> Likewise, the Facebook Principles – a non-legal document published by Facebook stating “the foundation of the rights and responsibilities of those within the Facebook Service”<sup>190</sup> – told users that while sharing information should be easy, users should have easy control over their personal information.<sup>191</sup> Users should practice and act upon this control using privacy tools necessary to allow users to choose among options, while limiting information displayed on the user’s profile only to his networks using the privacy settings.<sup>192</sup>

Yet, following privacy policy changes, the definition of “public information” was broadened to include more information traits such as profile pictures, the user’s “list of friends,” pages of which the user is a fan, the user’s gender, and geographic regions the user visited.<sup>193</sup> Coupled with a privacy settings change, Facebook could now share this newly defined public information to internet users, search engines, and such other third parties such as applications and websites.<sup>194</sup>

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<sup>186</sup> See *id.* at 7 (quoting a Facebook statement regarding users’ name, likeness, and image in advertising).

<sup>187</sup> See *id.* (demonstrating Facebook’s reversal of its actions).

<sup>188</sup> See *id.* at 7-8 (referring to other changes in the Facebook privacy policy).

<sup>189</sup> See *id.* at 8 (describing publicly available information prior to the changes).

<sup>190</sup> See *Facebook Principles*, FACEBOOK.COM, archived at <http://perma.cc/Q8BW-QWZT> (establishing Facebook’s Principles as the rights and responsibilities).

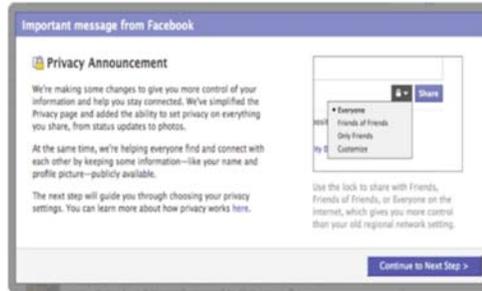
<sup>191</sup> See Complaint at 4, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (encouraging consumers to control their personal information).

<sup>192</sup> See *id.* at 9 (explaining Facebook’s privacy tools). Facebook gave users this control through the “Privacy Settings,” allowing them to choose if people could see other information traits and options. *Id.* Those traits and options included users’ profile photo, their friend list, the pages of which they were a fan, and the direct option to add them as friend or send them message. *Id.* A different option allowed users to decide whether they could be found on search engine indexing. *Id.*

<sup>193</sup> See *id.* at 8, (categorizing “publicly available information”). To better understand the importance of the change, one can think how much a person’s “followed pages” can tell about himself or how true is the phrase, “tell me who your friends are, and I will tell you who you are.” See *id.*

<sup>194</sup> See *id.* at 8 (explaining the capabilities of indexing a user’s personal information). This was true, whether the specific user connected with those sites or not. See *id.*

Another important aspect of this change was the way Facebook communicated the changes to users.<sup>195</sup> In an “important message from Facebook,” Facebook notified users of the changes that gave them more control over information.<sup>196</sup> As explained, the underlying goal was to help users stay connected by simplifying the privacy page and allowing users to set the privacy levels on *everything* they share.<sup>197</sup> The pop up message, which Facebook presented to all users, guided and nudged users to change their privacy settings.<sup>198</sup>



On December 2009, EPIC and nine other online consumer advocacy organizations submitted an official complaint to the FTC.<sup>199</sup> The advocacy groups worried about Facebook’s growing size, and presented three main claims in their complaint.<sup>200</sup> The first and second claims dealt with the abovementioned changes.<sup>201</sup> The third claim was against another interesting change, which was introduced

<sup>195</sup> See *id.* at 10 (demonstrating Facebook’s notification of privacy changes).

<sup>196</sup> See *id.* (announcing users’ increase of control in managing their own privacy settings).

<sup>197</sup> See Complaint at 15, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (providing examples of how users can set their privacy levels). Thus, Facebook presented the change as helping users connect with each other by keeping some information public. See *id.*

<sup>198</sup> See *id.* (showing how changes in privacy settings caused users to have more options in determining what they share with apps and users).

<sup>199</sup> See *id.* at 1 (exhibiting EPIC’s argument in the Complaint); see also Brad Stone, *Privacy Group Files Complaint on Facebook Changes*, N.Y. TIMES (Dec. 17, 2009), archived at <https://perma.cc/4XQ5-LA2B> (highlighting a complaint filed with the FTC regarding Facebook’s changes to its privacy policies).

<sup>200</sup> See *id.* at 6 (indicating that Facebook reached an unparalleled size among social networks); see also *Fraley*, 830 F. Supp. 2d. at 800 (citing *Cohen v. Facebook, Inc.*, No. C10-5282 RS 2011 U.S. Dist. LEXIS 124506, at \*2 (N.D. Cal. Oct. 27, 2011)) (summarizing the plaintiffs’ concerns of their information being utilized to create monetary growth for Facebook); Complaint at 10, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (introducing the claims regarding the privacy policy).

<sup>201</sup> See Complaint at 12, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (stipulating the requirements of the Facebook’s disclosure policy).

in May 2007.<sup>202</sup> “Facebook Platform” was an Application Programming Interface (API) that allowed third parties to access basic user information at the moment the users accessed their application or website, and allowed additional information at the moment the user connected with the third party or authorized it to do so.

Prior to the change that prompted the complaint, Facebook gave users a “one-click” opt-out button to prevent entirely the transfer of their information over the API.<sup>203</sup> Following the change, however, Facebook updated the “one-click” button in two important ways.<sup>204</sup> First, as explained earlier, Facebook extended the definition of public information, thus allowing more information to be constantly shared with third parties as a standard practice.<sup>205</sup> Users could only notice these changes, which included major updates in the API, by looking at the privacy policy.<sup>206</sup> Second, instead of the “one-click” opt-out, Facebook allowed users to extend further the information shared with applications that their friends used, whether or not the user actually used the application.<sup>207</sup> Following the change, according to the notice alongside the new privacy settings, even if a user decided to uncheck all boxes, the applications were still able to

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<sup>202</sup> See *id.* (concerning the amount of sharing in light of Facebook’s policy settings restrictions).

<sup>203</sup> See *Advertiser Help Center*, FACEBOOK, archived at <https://perma.cc/HHQ9-4KUQ> (explaining how users could click out of unwanted ads).

<sup>204</sup> See Robert Bodle, *Regimes of Sharing: Open APIs, Interoperability, and Facebook*, 14 INFO. COMM. & SOC’Y 320, 330 (2011) (detailing the updates to API which allowed more information to be accessed by third parties); see also Complaint at 15, *In the Matter of Facebook, Inc.* (F.T.C. Dec. 17, 2009) (describing changes to privacy settings, eliminating the one-click option).

<sup>205</sup> See *id.* (exposing the use of Open Stream, another API which took Facebook user information and distributed it to third parties). Furthermore, the advocate groups claimed that Facebook changed certain types of information from users’ posts that were defined as private to public. See *In re Facebook*, ELECTRONIC PRIVACY INFORMATION CENTER, archived at <https://perma.cc/X5FN-G56D> [hereinafter *In re Facebook*, ELECTRONIC PRIVACY INFORMATION CENTER] (explaining changes to Facebook’s privacy policy that allowed user tracking without user consent).

<sup>206</sup> See Complaint at 1, *In the Matter of Facebook, Inc.* (F.T.C. Dec. 17, 2009) (alleging misleading changes to the privacy settings and privacy policy).

<sup>207</sup> See *id.* at 15 (describing how Facebook eliminated a one-click option for user’s privacy and replaced it with an option that leads users to provide more information to application developers).

access the publicly available information.<sup>208</sup> Moreover, according to the notice, if a user decided previously to define a particular post as private, this change resulted with a privacy setting that overrode the user's privacy settings.<sup>209</sup>

In their complaint, the advocacy groups referenced the privacy policy, which at that time told users they can opt-out from the platform and Facebook altogether.<sup>210</sup> As explained in the complaint, many users and experts complained about the changes.<sup>211</sup> Thousands of blog posts were written, and more than 500 Facebook groups were created, the biggest of which, requesting Facebook to stop invading their privacy, had 74,000 members.<sup>212</sup> Claiming the aforementioned actions were unfair and deceptive, the advocacy groups explained that Facebook misrepresented to users that they have extensive and precise controls.<sup>213</sup> Accordingly, Facebook's actions caused users to believe falsely that they have full control over their information and undermined users' ability to efficiently make use of Facebook's promises of privacy protections.<sup>214</sup> As such, the advocacy groups requested the FTC to order Facebook to make the privacy policy clearer and to restore two of its previous privacy settings – regarding the disclosure of public information and opting out of revealing information to third-party developers.<sup>215</sup>

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<sup>208</sup> *See id.* at 16 (explaining how applications will always be able to access a user's publicly available information regardless of the user unchecking all boxes).

<sup>209</sup> *See id.* (stating that Facebook's "Everyone" setting prevails over the user's choices to limit access by third parties).

<sup>210</sup> *See id.* at 15 (stating that Facebook represented that its policy settings allowed users to opt-out of Facebook Platform and Facebook Connect altogether).

<sup>211</sup> *See id.* at 16-17 (explaining how there was wide opposition by users, commentators and advocates to the new Facebook's privacy settings).

<sup>212</sup> *See* Complaint at 16-17, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (addressing the number of groups and posts Facebook users created to oppose the changes to the privacy settings).

<sup>213</sup> *See id.* (explaining how various users were unsatisfied with Facebook's misrepresentation about the lack of control they possessed).

<sup>214</sup> *See id.* (describing further the disgust of users in realizing Facebook's deceptive privacy protection settings). Moreover, based on FTC's previous cases, the advocacy groups claimed that users need real transparency and warned against applying the privacy policy retroactively. *Id.*

<sup>215</sup> *See id.* at 28-29 (requesting the FTC to require Facebook to restore its privacy settings).

It is important to realize some implicit aspects of this Complaint.<sup>216</sup> First, as previously explained, Facebook started placing notices in different positions along their interface.<sup>217</sup> One way of looking at these Facebook notifications is that while users were concentrating on the privacy policy, Facebook used different methods on its platform interface to notify users.<sup>218</sup> Yet, Facebook failed to update the privacy policy to fit those notices.<sup>219</sup> Similarly, while in some instances Facebook notified users through its privacy policy on its information collection practices, when push comes to shove Facebook's interests led to the use of a "setting wizard" that guided users as they changed their privacy settings. This practice of using a wizard to guide users as they are changing their information sharing settings was not only misleading, but also considered as unfair. Users' information became public, and Facebook began sharing public information through users' friends, as users were nudged to accept the change.

In Facebook's March 2010 privacy policy proposal, the "deceit-claimed" statement notifying users of the ability to opt-out from Facebook Platform was removed.<sup>220</sup> Likewise, Facebook started using categories to explain how information was collected and used.<sup>221</sup> While this change included better explanation about the types of information categories, dealing with issues raised in the complaint,

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<sup>216</sup> See *id.* at 12-23 (setting forth the material changes to Facebook's privacy settings).

<sup>217</sup> See Eric Eldon, *Analysis: Some Facebook Privacy Issues Are Real, Some Are Not*, ADWEEK (May 11, 2010), archived at <http://perma.cc/6YZZ-9F4A> (describing alternative methods of notifying users of policy changes).

<sup>218</sup> See *id.* (discussing the new communication methods that Facebook introduced within its own interface).

<sup>219</sup> See *id.* (exemplifying how Facebook failed to adequately inform its users about changes to their privacy).

<sup>220</sup> See Complaint at 17-20, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (summarizing the Facebook misrepresentation by removing the opt-in feature from its platform).

<sup>221</sup> See Complaint at 15, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (describing how Facebook broke down the categories of information that qualified as publicly available and how Facebook shared this kind of information). Such information includes the following: name and profile picture; contact information; personal information; recommendations on friend of friend settings; posts by me; privacy settings; connections and the duality nature of them; and finally, age and gender. *Id.*

only name and profile picture were defined as public.<sup>222</sup> Similarly, the paragraph explaining which types of information that are defined as public was removed from the policy.<sup>223</sup> Public information means there is no privacy settings affecting and limiting information sharing.<sup>224</sup> Consequently, a user could have expected the remaining items on the list to fall under the privacy settings control.<sup>225</sup> Though some categories such as gender and age were still sometimes considered mandatory to add to one's profile, users were told they could hide them.<sup>226</sup> Moreover, Facebook made clear the settings of "everyone" and added under the topic of "Information You Share with Third Parties," a clear and long explanation on "Connecting with an Application or Website."<sup>227</sup> More specifically, in relation to the complaint, users were told that while connecting with an application or website, the third party would have access to users' general information.<sup>228</sup> Finally, a second paragraph was added to explain users' ability to use privacy settings to block access to information by deciding which information would no longer be visible to everyone. The importance of

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<sup>222</sup> See Complaint at 14, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (listing users' publicly available information via Facebook). Facebook easily allowed users to delete relationships with friends with whom they felt uncomfortable sharing their profile picture with. *Id.* at 18. Meanwhile, with other Personal Information, Facebook's settings were more complex when sharing "friends of friends" settings. *Id.* at 22.

<sup>223</sup> See *Statement of Rights and Responsibilities*, FACEBOOK, archived at <http://perma.cc/8GE5-BRZ2> (stipulating the conditions and community guidelines of Facebook membership). The paragraph removed included the explanation on "name, profile photo, list of friends and pages you are a fan of, gender, and networks you belong to." See also LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID 127 (2012) (elucidating Facebook's previous privacy policy). As explained, out of this list, only name, profile photo, and list of friends were defined as public information. *Id.*

<sup>224</sup> See *Statement of Rights and Responsibilities*, *supra* note 223 (reiterating that any posted publicly by the user can be freely disseminated).

<sup>225</sup> See Complaint at 15, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (listing what could be sensitive information to a user to have publicly disseminated without his or her consent).

<sup>226</sup> See *id.* at 15 (listing more information about a user which could be publicly disseminated).

<sup>227</sup> See *id.* at 18 (revealing that a user's privacy settings automatically allowed third party software to see a user's information unless the user deselected the option).

<sup>228</sup> See *id.* at 19 (clarifying that third parties would have access to information on user's page). This general information included the users and his friends' names, profile pictures, gender, user IDs, connections, and any information defined by the privacy settings as set to "everyone." *Id.*

this complain in presenting narratives is without a doubt.<sup>229</sup> As will be discussed later, changing which information the platform defined as public information, whether users have opting out options, and what is the purpose of the guiding wizards, all fall under the influence of the platform interfaces on users' ability to control information flow.<sup>230</sup>

*c. January 2010: Advocacy groups supplementary complaint to the FTC*

Following their original complaint, the advocacy groups sent a supplementary complaint.<sup>231</sup> Like in the main complaint, the supplemental complaint included three counts. According to the first unfairness practice claim, while Facebook allowed users to enter their credentials in other services to find users, Facebook did not allow third-party applications to help users delete their information.<sup>232</sup> This claim will return while dealing with *Cohen v. Facebook* and Friend Finder service.<sup>233</sup>

The second claim dealt with "Facebook Connect."<sup>234</sup> This platform allows users to login to third-party websites using their Facebook credentials, and in return, the websites receive information on the user.<sup>235</sup> The advocacy groups explained that Facebook gave users conflicting notices, especially regarding the amount of control users have over information posted on their "walls."<sup>236</sup> Additionally, while on their wall, users can choose an audience, but when posting through third party websites using "Facebook Connect," users could

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<sup>229</sup> See *id.* at 28 (offering the results of a poll which showed that users were against Facebook's actions).

<sup>230</sup> See *id.* at 1 (stating the aim of several interest groups to urge both the FTC to investigate Facebook for unfair and deceptive trade practices).

<sup>231</sup> Supplemental Complaint, In the Matter of Facebook, Inc. (F.T.C. Jan. 14, 2010).

<sup>232</sup> In retaliation, Facebook took legal actions claiming these companies violate Facebook's terms-of-use. See also *Cohen*, 798 F. Supp. 2d at 1090-92 (introducing how Facebook jeopardizes personal privacy interests).

<sup>233</sup> See *id.* at 1090 (citing the class action law suit against Facebook with regards to the "Friend Finder" feature).

<sup>234</sup> See Supplemental Complaint at 5, In the Matter of Facebook, Inc. (F.T.C. Jan. 14, 2010) (describing the defects in the privacy settings of "Facebook Connect").

<sup>235</sup> See *id.* (stating that third parties can access personal information via "Platform Application" websites). This information included the user's identity, events, social graph, the user's friend list, posting streams, and more. *Id.*

<sup>236</sup> See *id.* (alleging that Facebook Connect automatically posted to users' walls).

only choose between two options of sharing: either everyone or no one.<sup>237</sup> As a reminder, this was at a time when according to the original complaint, the privacy policy told users they have full control over the posts on their walls.<sup>238</sup>

The third part of the complaint was against Facebook's iPhone syncing application.<sup>239</sup> At first look, this seems as a claim against an iPhone orientated interface.<sup>240</sup> Yet, a closer look reveals otherwise.<sup>241</sup> Version 3.1 of Facebook application allowed users to search their iPhone contacts list for Facebook friends.<sup>242</sup> The problems were twofold.<sup>243</sup> First, the app disclosed it was sending information to Facebook and of the need of users to ask their friends' permission, only after the users already decided they were willing to sync the information.<sup>244</sup> Second, though users might have decided not to share the specific contact information such as their phone number with Facebook, still the app linked the contact information from their friend's iPhone with their own Facebook profile.<sup>245</sup> Moreover, sometimes the app made this connection with users' profiles incorrectly, thus providing wrong contact information with users.<sup>246</sup> To put differently, whether the additional information was connected

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<sup>237</sup> See *id.* at 6 (explaining users' lack of control in sharing information due to Facebook Connect). In other words, unlike on its interface, Facebook acted unfairly by not allowing the users to choose their audience. *Id.*

<sup>238</sup> See *id.* at 1 (offering additional facts as they pertain to Facebook's unfair and deceptive trade practices).

<sup>239</sup> See *id.* at 7 (introducing the subject of iPhone syncing in the supplemental complaint).

<sup>240</sup> See Supplemental Complaint at 7, In the Matter of Facebook, Inc. (F.T.C. Jan. 14, 2010) (examining the function of the Facebook app which syncs contacts on an iPhone to Facebook users).

<sup>241</sup> See *id.* at 9 (noting that sync functionality fails to disclose certain information regarding the syncing of contacts).

<sup>242</sup> See *id.* (describing the syncing function which allowed Facebook to match phone numbers to Facebook users).

<sup>243</sup> See *id.* (highlighting the when the sync function occurs, the alert function fails to disclose to the user that it will transfer the user's iPhone contact list to Facebook, nor does it disclose the disseminating of photos).

<sup>244</sup> See *id.* (stipulating that enabling this feature would result in contact information being sent to Facebook).

<sup>245</sup> See *id.* (exposing that Facebook would transfer information without knowledge or consent of users).

<sup>246</sup> Supplemental Complaint at 9, In the Matter of Facebook, Inc. (F.T.C. Jan. 14, 2010) (highlighting the downfalls of the app).

with the right or wrong information, the information was added to users' profiles through their friends using app without the knowledge or consent.<sup>247</sup> As such, the advocacy groups explained that unless the iPhone user personally notifies his contacts, users' contacts would not know their information was shared.<sup>248</sup> Meanwhile, neither the users nor their friends were able to use opt-out settings that will enable them from sharing information through either Facebook or its iPhone application.<sup>249</sup>

As explained earlier, in March 2010 Facebook offered a new privacy policy, placing it for the first time on the Governance page so users could offer comments section by section.<sup>250</sup> Importantly, Facebook decided to change a topic in the privacy policy from "Information You Share with Third Parties" to "Sharing information on Facebook."<sup>251</sup> By doing so, Facebook signaled users of the direction of its information practices to include further parties, and made sure to better explain to users beneath this title on the use of privacy settings and how user information is shared. Facebook also told users that they should always consider their privacy settings before sharing information.<sup>252</sup> At the same time, Facebook told users that they can

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<sup>247</sup> See *id.* (stressing that Facebook users have reported that application matched wrong pictures with phone contacts, and therefore Facebook users' photos are being downloaded onto iPhones without their knowledge or consent).

<sup>248</sup> See Complaint at 20, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (delving into the Instant Personalization function of Facebook and how the 'Block Application' function was required for each individual contact). According to the message presented to the users, Facebook passed on to the iPhone user the role of notifying the friend whose information was shared. *Id.*

<sup>249</sup> Supplemental Complaint at 11, In the Matter of Facebook, Inc. (F.T.C. Jan. 14, 2010) (noting that there was no privacy setting on Facebook which allowed users to prevent their information from being shared this way).

<sup>250</sup> See Matt Hicks, *Another Step in Open Site Governance*, FACEBOOK (March 26, 2010), archived at <https://perma.cc/DM8K-75LY> [hereinafter Hicks, *Open Site Governance*] (showing that as of October 2015, over 2,000 Facebook users "liked" this comment; responses were unavailable). On the post itself almost 2000 users liked and more than 1600 users commented. Three thousand users have liked and another one thousand commented on the notice of end of the comment period. *Id.*

<sup>251</sup> See *Facebook Site Governance*, FACEBOOK (2010), archived at <https://perma.cc/GUM9-ZSFD> (showing that Facebook changed the titles of the policies along with the policies themselves).

<sup>252</sup> See *Privacy Basics*, FACEBOOK, archived at <http://perma.cc/ZB9S-YMVR> (detailing the step-by-step process that a user may take in securing the privacy of his profile).

choose who see their posts, yet users were also cautioned about posting on third party websites, as they can possibly hold different sharing settings.<sup>253</sup> Finally, Facebook also added explanations about “When your friends use Platform,” the “Pre-Approved Third-Party Websites and Applications,” and that Facebook gives the user a number of tools to control sharing information.<sup>254</sup>

Following the comments period, Barry Schnitt, Facebook’s Director of Communication and Public Policy, posted a response to users’ comments.<sup>255</sup> Schnitt explained that information is not shared with third parties advertisers, unless the users tell Facebook to do so, “period.”<sup>256</sup> In sum, Facebook’s actions are a mix between unfairness and spreading notices regarding Facebook’s information practices in different places around its platform interface.<sup>257</sup> Facebook conflictingly promised users control over information, but in practice, either offered two different mechanisms to post content, or posted notices after the information was already on its way to its destination.<sup>258</sup> This time with the March 2010 privacy policy proposal, on the other hand, Facebook decided to use a pop-up message, but this message was disconnected from actual control.<sup>259</sup> In contrast, when Facebook wanted to make sure to receive justification for the changes, Facebook decided to split the privacy policy into sections to allow users to

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<sup>253</sup> See *Facebook Site Governance*, FACEBOOK (2010), archived at <https://perma.cc/GUM9-ZSFD> (explaining that if the user decided not to set a different setting at the time of the posting, the post’s settings will be consistent with the general privacy settings of the website).

<sup>254</sup> See *id.* (including specific explanations about limiting the information shared by the user’s friends, blocking particular applications, and limiting which information is set to everyone).

<sup>255</sup> See Barry Schnitt, *Responding to Your Feedback*, FACEBOOK (Apr. 5, 2010), archived at <https://perma.cc/6873-JP46> (announcing a positive response to the amount of feedback received). According to the post, this was the fifth time Facebook previewed the proposed policies and asked for feedback. Facebook received more than 4000 comments. *Id.*

<sup>256</sup> See *id.* (explaining the language in the newly added statement in the privacy policy about Facebook’s plans to start working with “carefully selected partners” to provide express personalization on their sites).

<sup>257</sup> Cf. *Cohen*, 798 F. Supp. 2d at 1094 (depicting Facebook’s carefree use of user content and loose notices).

<sup>258</sup> See *id.* (explaining clashing of Facebook privacy promises for its users).

<sup>259</sup> See Hicks, *Open Site Governance*, *supra* note 250 (describing privacy policy proposals regarding control of user connection).

read and comment separately.<sup>260</sup> Facebook turned back from their actions, added clarity to the terms of use, but did not retrace from introducing their new services to users and the market.<sup>261</sup>

*d. May 2010: Advocacy groups secondary complaint to the FTC*

Following several new changes in Facebook information collection practices, in May 2010 EPIC and 14 other digital advocacy rights groups made their second complaint to the FTC.<sup>262</sup> According to the complaint, Facebook violated more than 115 million American users' expectations,<sup>263</sup> diminished their privacy, and misrepresented its terms of use.<sup>264</sup> Same as before, the advocacy groups complained on three new practices of Facebook, all of which dealt with changing the code of publicly accessible information and nudging users about this information.<sup>265</sup>

During their previous visits to Facebook, users added many pieces of information to their profiles, and kept the information restricted.<sup>266</sup> Thus, the complaint started with a new Facebook practice requiring users to either link personal information to such publicly

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<sup>260</sup> See Hicks, *Open Site Governance*, *supra* note 250 (declaring the changes Facebook made regarding its privacy policy).

<sup>261</sup> See Doug Gross, *Facebook Clarifies Changes to its Terms of Use*, CNN (Apr. 20, 2012), archived at <http://perma.cc/PHZ6-X7YP> (clarifying changes to Facebook's terms of use); see also Larry Magid, *Facebook Clarifies Policies on Nudity, Hate Speech and Other Community Standards*, HUFF POST TECH: THE BLOG (May 16, 2015), archived at <http://perma.cc/S7JM-QFSQ> (illustrating updates to community standards on Facebook).

<sup>262</sup> See Complaint at 3-6, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (listing the fourteen other entities who brought a complaint to the Federal Trade Commission along with the Electronic Privacy Information Center); see also *Social Networking Privacy*, ELECTRONIC PRIVACY INFORMATION CENTER, archived at <https://perma.cc/MU3N-MEHF> (mentioning that the Electronic Privacy Information Center brought a second complaint against Facebook in May 2010).

<sup>263</sup> See Complaint at 1, 8, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (explaining that Facebook was the most visited website in America).

<sup>264</sup> See *id.* at 1 (illustrating how Facebook, without their consent, divulged users' personal information to the public by using unfair and deceptive business practices).

<sup>265</sup> See *id.* at 15 (detailing how the changes to the privacy settings of users' Facebook profile page disclosed information to third party websites).

<sup>266</sup> See *id.* at 9 (citing how Facebook users previously added personal information to their profiles that they were able to keep private).

available pages as “links,” “pages,” or “connections,” or delete the information all together.<sup>267</sup>

This was a nudge towards limiting users’ choices.<sup>268</sup> At the first stage, Facebook gave users a light nudge.<sup>269</sup> At first, users were offered a pop-up message appearing on their screen asking if they

wanted to link their profiles to specific pages, which Facebook selected based on existing users’ content.<sup>270</sup> This pop-up message was in front of the regular Facebook main inter-



face and stopped users from continuing to the next Facebook page.<sup>271</sup> In its notice, Facebook notified users of the possibility to link the information to pages instead of a regular simple list and *reminded* users that pages are set as public information.<sup>272</sup> At this point, users could choose between selecting all pages, some of them, or to return to this selection later by choosing the “Ask Me Later” option.<sup>273</sup>

<sup>267</sup> See *id.* at 13 (stating that Facebook users were required to make certain personal information linkable and if they did not, users would have to delete the personal information).

<sup>268</sup> See *id.* at 15 (inferring that requiring Facebook users to choose between linking personal information or deleting it did not leave users much choice).

<sup>269</sup> See Complaint at 13, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (suggesting that users had a choice in the first stage to forgo linking their page).

<sup>270</sup> See *id.* at 13 (highlighting that other users did not receive the pop-up messages but were presented with announcements in their profile on suggested pages).

<sup>271</sup> See *id.* at 10-12 (showing that Facebook users were more or less forced to deal with pop up messages before being able to use their pages).

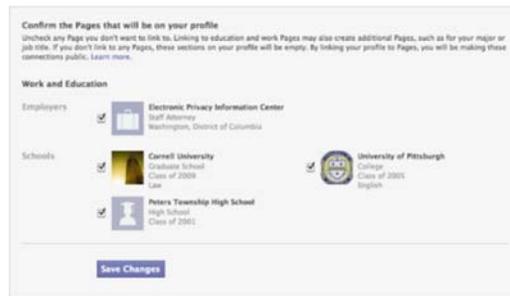
<sup>272</sup> See *id.* at 11 (focusing on the user’s ability to click a box titled “choose individually” which would provide the user with the ability to deselect pre-checked boxes).

<sup>273</sup> See *id.* at 10-12 (discussing how users were forced to deal with pop-ups as opposed to experiencing a more streamlined social media service). While choosing pages linked the pages to the users, selecting the option “Ask Later” allowed the user to continue to the next Facebook page. *Id.*

The more problematic nudge the advocacy groups noticed started in the secondary stage, when the user returned to Facebook and as the nudge became stronger in strength.<sup>274</sup> That second time, when presented with the message to choose pages, the user was no longer offered the option of delaying the task.<sup>275</sup> Rather, Facebook presented users with two options: either to approve all pages chosen for them or to choose some of them.<sup>276</sup>



This nudging did not end with this screen.<sup>277</sup> If the user decided to continue to choose pages individually, the boxes were already pre-checked as a default.<sup>278</sup> According to the notice on the “Choose Individually” page, for some occurrences, Facebook also revealed to the user that he could add additional information, such as job title and education major.<sup>279</sup>



To be clear, unchecking all the boxes was of no avail.<sup>280</sup> Deciding to uncheck all the boxes presented a secondary message on the

<sup>274</sup> See *id.* at 11-12 (highlighting the forcefulness of Facebook returning users to checked boxes they had previously unchecked).

<sup>275</sup> See Joe Brodtkin, *Consumer Groups Hammer Facebook Privacy Violations in Federal Complaint*, PCWORLD, archived at <http://perma.cc/RZ2A-MKR2> (elaborating on the persistence of Facebook to glean information from the user).

<sup>276</sup> See *id.* (reiterating that users were limited in their options to maintain their privacy).

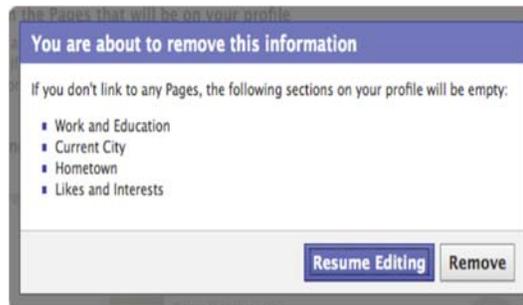
<sup>277</sup> See *id.* (stating that there was no simple “opt-out” system to the policy).

<sup>278</sup> See Complaint at 23, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (discussing how extra effort was necessary to avoid having private information shared).

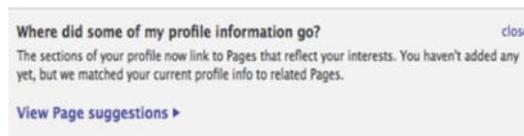
<sup>279</sup> See *id.* at 11-12 (explaining that the user was unable to move on without linking to any pages).

<sup>280</sup> See *id.* (elaborating that attempting to opt-out was an arduous process for the user).

screen telling users that parts of their information, including work, education, hometown, and “likes” would become empty, or in other words, simply deleted.<sup>281</sup> In particular, this message also did not allow users to continue browsing the social network, but rather demanded that users either resume editing *or* remove key pieces of information from their profile.<sup>282</sup> Though this step was still on the level of nudging the users, it basically forced users to make a decision.<sup>283</sup>



At the same time, if a user made the decision to delete information, Facebook made sure to give the user another nudge, reminding them that though the infor-



information disappeared, the user can refill the information by linking it to the relevant page.<sup>284</sup> As Facebook set pages by default to be publicly accessible, advocacy groups considered this practice as unfair due to the lack of opportunity to make changes to the privacy settings.<sup>285</sup>

The second part of the complaint raised was for misleading users to believe they had control over personal information through their privacy settings.<sup>286</sup> The problem started when these settings only affected what other users navigating to the website could see, rather than what users could understand as they looked at pages, third-

<sup>281</sup> See *id.* at 10-12 (reiterating that pop-ups continually appeared when the user attempted to opt-out of page selection).

<sup>282</sup> See *id.* at 11-12 (holding that the user would once again be forced to check boxes or be forced to opt-out and lose information).

<sup>283</sup> See *id.* at 10-12 (showing that the user would be inundated with requests from Facebook to link Pages).

<sup>284</sup> See Complaint at 12, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (displaying a box which would pop up warning the user if they removed information, certain sections on their profile would be empty).

<sup>285</sup> See *id.* at 14-15, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (stating that the user's default settings were public).

<sup>286</sup> See *id.* at 15 (stating that Facebook deliberately deceived users into believing that they had complete control over their personal information on the site).

party websites, and other third party applications.<sup>287</sup> Most of all, non-Facebook users could see the users' information as they looked at these third-party websites and applications.<sup>288</sup> Of interest, it seems that while Facebook had already offered a new privacy policy, the advocacy groups referenced the 2009 version.<sup>289</sup>

The third complaint dealt with a new Facebook service, which, according to advocacy groups, was designed to mislead users in order to allow easy sharing of information.<sup>290</sup> The complaint split the service into two: "Social Plugins," and "Instant personalization."<sup>291</sup> "Social Plugins" is a service that creates boxes located on third party websites and prompt users to comment and like content on third party websites.<sup>292</sup> Yet, unlike Facebook Beacon before, this time "Social Plugins" require users to opt-in to the posting of a "like" or comment on his wall.<sup>293</sup> Meanwhile, the advocacy groups did not repeat the "older" Beacon claims that sending information to Facebook is problematic; rather the groups complained that the "Social Plugins" revealed users' personal information to third party websites.<sup>294</sup> Mainly, according to the advocacy groups, "Social Plugins"

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<sup>287</sup> See *id.* at 15-16 (discussing how Facebook required users to enter personal information).

<sup>288</sup> See *id.* (exposing how even if users chose privacy settings to make their personal information hidden on Facebook, the information would still be available elsewhere).

<sup>289</sup> Compare Complaint at 15-16, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) with Complaint at 8, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (stating the categories of information Facebook began making publicly available). At the same time, while the privacy policy did explain that some information was going to be sent to third parties, EPIC referenced changes that were covered in the first claim. Those traits of information were now publicly available. The privacy policy as above mentioned though only described three categories of public information. Thus, the foretold explanation was noticed in the pop-up notices, rather than the privacy policy. *Id.* at 7.

<sup>290</sup> See Complaint at 15, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (stating that Facebook mislead users by the manner in which they shared information).

<sup>291</sup> See *id.* (describing Facebook's method of disclosing personal information).

<sup>292</sup> See *id.* at 16 (defining "social plugins").

<sup>293</sup> See *id.* (explaining how third-party websites make use of the "like" and "recommend" features). After clicking on the like or posting a comment, Facebook reveals the action to the user's friends by posting it on the user's wall. *Id.* If the user comments on an issue, this comment is recorded on the website, is visible to all, and is associated with the user. *Id.*

<sup>294</sup> See *id.* at 16-17 (specifying how Facebook discloses personal information to third parties). Accordingly, while Facebook indicated that none of users' information was shared with sites they visited through the plugin, Facebook did not

allows third parties to access Facebook's "Open Graph."<sup>295</sup> Consequently, third parties were now able to access users' information and be included on Facebook's search and analytics through Facebook's Insights.<sup>296</sup> This in turn violated user expectations as Facebook told users that their information is not shared unless they perform an action like "like" or "recommend."<sup>297</sup>

Furthermore, Facebook failed to explain to users interacting with "Social Plugins" which information was shared to the third parties.<sup>298</sup> To clarify, the advocacy groups complained that the information was incomplete and unfairly disseminated between different sources, thus sharing users' information without actual consent.<sup>299</sup> Referencing *the help center*, and not the privacy policy, Facebook explained that users' information is shared with users' friends but failed to tell what information is disclosed to the third-party website.<sup>300</sup> Meanwhile, the advocacy groups mentioned that though *the privacy policy* specified that removing posts would take down the post from the user's profile, the posts would remain visible on websites.<sup>301</sup> Websites that are not covered by Facebook's privacy policy. In addition, the *privacy policies* issued in March and December 2010 revealed a clear statement by Facebook that users should check whether an external source or third party set the post's privacy settings.<sup>302</sup>

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clearly indicate in the privacy policy when users' information is actually given to these third parties. *Id.*

<sup>295</sup> See *id.* (describing the concept of Facebook's "open graph").

<sup>296</sup> See Ethan Beard, *A New Data Model*, FACEBOOK DEVELOPERS BLOG (Apr. 21, 2010), archived at <http://perma.cc/6JKT-PY56> (explaining how data is backed by simpler data policies).

<sup>297</sup> See Complaint at 17, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (noting Facebook's representations to its users regarding public expression of interest in content).

<sup>298</sup> See *id.* (demonstrating Facebook's failure to explain what information is disclosed to third party websites). Facebook did tell users that the "like" and "recommend" buttons allow users to publicly express their interest with a simple action that makes a public connection to that page. *Id.*

<sup>299</sup> See *id.* at 1 (expanding on the scope of Facebook's unfair practices regarding sharing users' information).

<sup>300</sup> See *id.* at 16 (juxtaposing Facebook's failure to disclose what content was revealed to third parties with the advocacy groups' desire to not reveal this information).

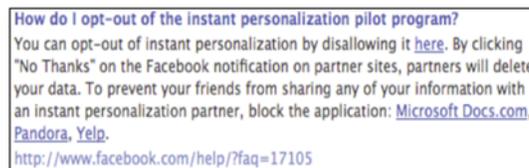
<sup>301</sup> See *id.* at 12-14 (elucidating Facebook's "remove" feature).

<sup>302</sup> See *Statement of Rights and Responsibilities*, *supra* note 223 (explaining that users should check privacy settings of third party posts).

The secondary service offered alongside “Social Plugins” was “Instant Personalization,” which allowed third parties to personalize content based on Facebook profiles and public information.<sup>303</sup> Advocacy groups complained first that friends’ information was sent to third parties without the friends’ consent, and second, that Facebook unfairly nudged users.<sup>304</sup> Facebook initially nudged users by automatically setting Instant Personalization to Allow, thus forcing users to share information.<sup>305</sup> Checking off the “Allow” button results in Facebook telling users that the information collected by third parties would be deleted.<sup>306</sup> Nevertheless, the complaint stated that by allowing access through users’ friends, Facebook gave false hope of control as information that was blocked by users in truth and in fact was still accessed through users’ friends that did not block the same option for their own profiles and friends.<sup>307</sup> To summarize in simple terms, in order to completely block information sharing, the user and all of his friends needed to uncheck the “Allow” option.<sup>308</sup>



Following April 23, 2010, users had to opt-in to the service by checking the “allow box” option, but users’ information might be still available to third parties through their friends who decided to allow this option.<sup>309</sup> In other words, the settings of the nudge were gentler, but



<sup>303</sup> See Complaint at 16-17, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (describing Facebook’s use of Instant Personalization).

<sup>304</sup> See Ian Paul, *Advocacy Groups Ask Facebook for More Privacy Changes*, PCWORLD, archived at <http://perma.cc/DV8G-XMRS> (identifying the ways in which Facebook tracks its users).

<sup>305</sup> See *id.* (stating Facebook originally required its users to enroll automatically in their Instant Personalization feature).

<sup>306</sup> See Complaint at 18, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (citing Facebook’s use of Instant Personalization prior to April 2010).

<sup>307</sup> See *id.* at 19 (cautioning users about information access through users’ friends).

<sup>308</sup> See *id.* (reiterating the process users’ must follow to completely block information sharing).

<sup>309</sup> See *id.* (highlighting the policy change involving Instant Personalization).

according to the advocacy groups, Facebook still concealed users' ability to fully disabled instant personalization.<sup>310</sup> As users' information was still shared through their friends that did not disable the feature, Facebook required users to go to each page separately and block the application's access to the distribution of information to third parties.<sup>311</sup>

Following these claims, the advocacy groups also raised two additional smaller claims based on the new Facebook Social Interface.<sup>312</sup> First, Facebook for the first time told third party developers that they do not need to delete the information collected on users after 24 hours.<sup>313</sup> Second, this is also the point at which both Facebook and the third parties took the first step towards collecting recognizable information that risked online anonymity.<sup>314</sup> Following these claims, advocacy groups explained that while Facebook said users want to have the choice to limit the sets of information available to "outside entities,"<sup>315</sup> the privacy settings no longer covered the newly defined "publicly available information."<sup>316</sup> Thus, Facebook "forced" users to reveal personal information that they did not want

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<sup>310</sup> See Paul, *supra* note 304 (implying Instant Personalization cannot be fully disabled).

<sup>311</sup> See Complaint at 19-21, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (discussing how Facebook can still share your information even if you do not allow Instant Personalization). Another option Facebook gave users is to go to each pre-approved website and select the "no thanks" option on the Facebook banner. Different advocacy groups, NGOs, and the media wrote different blog posts and users guides in order to allow users to effectively protect themselves. Yet, instead of explicitly advocate for changing Facebook's practices and code, these guides were only helpful in notifying users. *Id.*

<sup>312</sup> See Eldon, *supra* note 217 (pointing to the advocacy's claims involving Social Interface).

<sup>313</sup> See Complaint at 22, 37, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (asserting the advocacy group's request for Facebook to delete information collected after 24 hours).

<sup>314</sup> See *id.* at 37 (maintaining that third parties and Facebook need further protection for online anonymity).

<sup>315</sup> See Testimony of Chris Kelly at \*4, *Hearing Before the U.S. H.R. Committee on Energy & Committee, Subcommittee on Commerce, Trade, & Consumer Protection Subcommittee on Commerce, Technology, & the Internet* (2009) (statement of Chris Kelly, Chief Privacy Officer, Facebook) (noting that Facebook users want more protections against outside entities regarding their information).

<sup>316</sup> See Complaint at 36, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (declaring that the new privacy settings left out publicly available information).

to make public and in turn allowed third parties access to that information.<sup>317</sup>

To summarize, the aforementioned change in Facebook's code, nudging users in a way that made it difficult and deceptive to maneuver opt-out features, violated user expectations and was contrary to earlier claims made by Facebook.<sup>318</sup> The need to opt-out separately from each service was unfair, as it discouraged users from exercising privacy controls.<sup>319</sup> Furthermore, what advocacy groups considered as misleading privacy policies resulted in requesting the FTC for an injunction that would have the effect of undoing Facebook's code and nudging changes.<sup>320</sup> Lastly, this complaint clearly presents different methods in which Facebook notified users.<sup>321</sup> These notices are spread around the interface of Facebook and sometimes on other third parties' websites, leaving users to put together different pieces of notices into the complete information collection practices in order to give full consent.<sup>322</sup>

*e. September 2010 – May 2011: Facebook privacy policy changes and re-imagination*

In Mid-September 2010, Facebook started offering new changes to its governing documents.<sup>323</sup> First came the changes to the Statement of Rights and Responsibilities, which makes sure people

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<sup>317</sup> See *id.* (stressing how Facebook forced users to reveal personal information that was previously protected). This time groups opposing the new privacy policy were able to reach more users. One group reach the millions, but most groups were still in the amount of hundreds. *Id.*

<sup>318</sup> See *id.* at 12-15 (summarizing the changes in Facebook's privacy settings and how they have affected users).

<sup>319</sup> See *id.* at 37 (suggesting that the opt-out feature was unfair to users).

<sup>320</sup> See *id.* (summarizing the requests for relief). EPIC requested to compel Facebook to reset the publicly disclosed information to restore the 24 hours retained information policy to third party developers, and to make the privacy policy clearer. *Id.*

<sup>321</sup> See *id.* at 10 (listing ways in which Facebook provided notification to the website's users).

<sup>322</sup> See Complaint at 16, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (noting user's frustration with new privacy practices and inability to give complete consent).

<sup>323</sup> See Josh Constine, *Facebook Proposes Minor Changes to Its Governing Documents*, ADWEEK (Sept. 17, 2010), archived at <http://perma.cc/TC7W-AWR2> (noting changes to governing documents).

understand that they have better control over their information.<sup>324</sup> Several months later, on December 15, Facebook offered additional privacy policy amendments, in which the company decided to remove the paragraph dealing with users' "connections."<sup>325</sup>

Second, the updated privacy policy explained that users could now "block all platform applications and websites *completely* or block *specific* applications from accessing user information."<sup>326</sup> Also, the new policy expressly explained that users can block completely or specifically the information shared by their friends, thus giving back some of the control and lowering the strength of the nudge.<sup>327</sup> Finally, an additional sentence was added to explain that

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<sup>324</sup> See *Statement of Rights and Responsibilities*, *supra* note 223 (explaining the responsibilities and rights of the website's users). Facebook also mentioned that TRUSTe certify their practices. See Tom Foremski, *TRUSTe Responds to Facebook Privacy Problems*, ZDNET (Oct. 18, 2010), archived at <http://perma.cc/LS8H-X6LN> (elucidating the relationship between TRUSTe and Facebook). In October, Facebook explained they are updating their TRUSTe certification section to better explain that they do not share personally identifiable information with advertisers without user's consent. *Id.*

<sup>325</sup> See *Data Policy*, FACEBOOK (2010), archived at <http://perma.cc/GJC5-3WUE> (setting out new policies relating to privacy settings); see also Hicks, *Open Site Governance*, *supra* note 250 (discussing the connections paragraph). Other than explaining that friendships in Facebook are bi-directional, the paragraph was important because it explained that the privacy policy only controls who can see the connection. *Id.* See *Facebook Site Governance*, FACEBOOK (Dec. 22, 2010), archived at <http://perma.cc/V25U-6XUS> (offering an opportunity for public feedback). More than 892 people commented on the post, and more than 2000 people liked it. *Id.* See Kurt Opsahl, *Six Things You Need to Know About Facebook Connections*, ELECTRONIC FRONTIER FOUNDATION (May 4, 2010), archived at <http://perma.cc/SA9X-TUGG> (extrapolating on changes in the Facebook privacy policy).

<sup>326</sup> See *Facebook Site Governance*, FACEBOOK (2010), archived at <https://perma.cc/GUM9-ZSFD> (relaying information about changes to the privacy policy; the source of the quotation on the webpage, the Notes section, is no longer available); see also Barbar Bhatti, *Cyber Security and Privacy in the Age of Social Networks*, in *CYBER CRIME: CONCEPTS, METHODOLOGIES, TOOLS AND APPLICATIONS* 1718 (Information Resources Management Association ed. 2012) (commenting on changes to the 2010 Facebook privacy policy).

<sup>327</sup> See generally Bhatti, *supra* note 326. (explaining how users can block their information from third parties). Both were blocked either through the Application and Website Privacy setting, or the specific applications "About" page. Also, the mentioned explanations were added specifically for the instant personalization of the pre-approved websites and applications. *Id.*

Facebook practice is not to share any information with any advertisers, unless given permission by the user.<sup>328</sup>

By February 2011,<sup>329</sup> Facebook decided to re-imagine the privacy policy for users, replacing the 5,830 word policy written for “regulators and privacy advocates.”<sup>330</sup> Though it is not clear that this “re-imagination” is the result of the previous complaints, the goal of the new privacy policy was to simplify the privacy policy and settings for users.<sup>331</sup> More than give better controls, Facebook thought users should better understand how their information is used, and what the user’s choices are.<sup>332</sup> According to Facebook, due to the feedback received by users, it decided the policy should be easy to understand, should be visual and interactive, and should be based on commonly asked questions.<sup>333</sup>

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<sup>328</sup> See *id.* (prescribing limits on third parties).

<sup>329</sup> See Mark Hachman, *Facebook Trying Out Simpler Privacy Policy*, PC MAGAZINE (Feb. 25, 2011), archived at <http://perma.cc/59LE-X5WW> (articulating Facebook’s new privacy policy in 2011). Facebook around this time also started offering a picture tagging recommendation service. See Matt Hicks, *Making Photo Tagging Easier*, FACEBOOK (Jun. 30, 2011), archived at <http://perma.cc/W2UE-6JD3> (explaining Facebook’s new photo tagging feature). In the privacy policy proposal, Facebook told users that if a user’s friends uploaded a picture, Facebook would recommend the friend to tag the user in the picture. *Id.* This would be made based on comparison of information put together from previous tagged pictures. *Id.* This explanation included the ability to use the privacy settings to prevent a non-friend user from finding the user or tagging the user in pictures. *Id.* This would be conducted through the privacy settings. *Id.*

<sup>330</sup> See Nick Bilton, *Price of Facebook Privacy? Start Clicking*, N.Y. TIMES (May 12, 2010), archived at <http://perma.cc/NSN2-RGLJ> (declaring that as of 2010 Facebook’s Privacy Policy was alone a 5,830 word document).

<sup>331</sup> See Hachman, *supra* note 329 (describing changes made to privacy policy in order to improve user understanding).

<sup>332</sup> See Hachman, *supra* note 329 (articulating Facebook’s position regarding the importance of user’s understanding of how personal information is used). The post explained “the privacy team took on a new project and applied Facebook’s unconventional innovative spirit to develop a new privacy policy written for regular people.” *Id.*

<sup>333</sup> See Hachman, *supra* note 329 (noting Facebook’s reasons for revising the privacy policy).

*f. May 2011: In re Facebook privacy litigation*

During 2011, different plaintiffs started a series of class action lawsuits against Facebook in the Northern District of California.<sup>334</sup> First among these class action lawsuits was *In re Facebook Privacy Litigation* where plaintiffs complained about the alleged Facebook practice to submit users' Facebook ID numbers to advertisers.<sup>335</sup> Though the Facebook governing documents prohibit the revelation of users' identities, the plaintiffs claimed that the unique ID numbers are important due to the ability recognize a user based on the ID and access his profile, including public information.<sup>336</sup> The plaintiffs claimed Facebook violated eight federal and Californian laws.<sup>337</sup> The court found the Plaintiffs' alleged facts were sufficient to establish that they had suffered injuries and to be granted initial standing.<sup>338</sup> Following the finding of sufficient injuries, the court looked at each claimed privacy harm injury based on different laws but ultimately decided to dismiss the claims.<sup>339</sup> Following the right

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<sup>334</sup> See Brian Prince, *Facebook Class Action Lawsuit Seeks \$15 Billion for Privacy Violations*, EWEEK (May 18, 2012), archived at <https://perma.cc/A9YD-CS5J> (articulating nature and magnitude of class actions against Facebook).

<sup>335</sup> See *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705, 708-09 (N.D. Cal. 2011) (introducing the primary issues in the litigation). This unique identifier, which represents each and every user, was sent along with the website the user was looking at. *Id.*

<sup>336</sup> See *id.* at 705-09 (setting out the facts of the case and opining on the true nature of the "Referrer Header" function). According to the Plaintiff, Facebook caused the web-browser to send a "Referrer Header" the specific webpage address the user was looking at prior to clicking on an advertisement. *Id.* As such, the receiver of the header received identifiable information on the user. *Id.*

<sup>337</sup> See *id.* at 709 (listing the specific allegations). The allegedly violated statutes include: (1) the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2510, et seq.; (2) the Stored Communications Act, 18 U.S.C. §§ 2701, et seq.; (3) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq.; (4) California's Computer Crime Law, Cal. Penal Code § 502; (5) the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, et seq.; (6) Breach of Contract; (7) Violation of Cal. Civ. Code §§ 1572, 1573; and (8) Unjust Enrichment. *Id.*

<sup>338</sup> See *id.* at 713 (finding sufficiency in the Plaintiffs' claim of injury).

<sup>339</sup> See *id.* at 711-18 (reviewing the merits of Plaintiffs' injury claims). In particular, the Court found that although both the Wiretap Act and the Stored Communication Act had two possible interpretations, neither of them helped the Plaintiffs. *Id.* at 712-14. Either Facebook was the receiver of the communication, or the advertisers were the receivers of the communication. *Id.* The Court found that according to both interpretations, the Plaintiffs failed to state a claim, since Facebook was the

to amend, the court accepted Facebook's request to dismiss the class action without prejudice.<sup>340</sup> The court also decided that no breach of contract occurred.<sup>341</sup> While the plaintiffs alleged they suffered actual and appreciable damage deriving from the harm in value of their personal identifiable information, the court rejected the theory that their personally identifiable information has value or that fraud had occurred.<sup>342</sup>

*g. June 2011: Cohen v. Facebook*

The second class action filed was against Facebook's "Friend Finder" service.<sup>343</sup> According to the complaint, Facebook's Friend Finder service allowed Facebook to access users' non-Facebook third party services, and compare contact lists.<sup>344</sup> If the contact was a Facebook user, Facebook would present the user with a notification offering to "friend" him.<sup>345</sup> If the contact was not a Facebook user, Facebook generated an invitation to that contact to join Facebook.<sup>346</sup> The discord came down to Facebook's promotion of the availability of the service: by periodically placing notifications on users' home

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recipient and was allowed to divulge the information to the advertisers as long as Facebook had its own "lawful consent." *Id.* If the advertisers were the recipients, then Facebook was permitted to divulge the information as well. *Id.* Furthermore, the Court gave the Plaintiffs leave to amend based on the claim of breach of contract and fraud. *Id.* at 718. Meanwhile, the Court ruled that as the Plaintiffs claimed there was a contract, they could not have claimed unjust enrichment. *Id.*<sup>340</sup> *See id.* at 718 (demonstrating how the Court accepted Facebook's motion to dismiss the class action). In regard to the claims relating to the Stored Communication Act, the Court found that the Plaintiff failed to state a claim that settled the contradiction discussed in the May 2010 order. *Id.* at 713-14. Furthermore, the Court did not find any possibility for a claim under Section 502 of the Cal. Penal Code, which creates liability for any person who "knowingly introduces any computer contaminant into any computer, computer system, or computer network." *Id.* at 715. *See* CAL. PENAL CODE § 502(c)(8) (2012) (describing crime).

<sup>341</sup> *See In re Facebook Privacy Litigation*, 791 F. Supp. 2d. at 717 (holding that the Plaintiff failed to state a viable breach of contract claim).

<sup>342</sup> *See id.* (deciding that the Plaintiff's claim did not meet the elements of fraud under California law).

<sup>343</sup> *See Cohen*, 798 F. Supp. 2d at 1092 (describing second class action suit as dealing with issues stemming from the "Friend Finder" service).

<sup>344</sup> *See id.* (explaining how the "Friend Finder" service interfaces with third-party email accounts).

<sup>345</sup> *See id.* (delineating how "Friend Finder" sends notifications to existing users).

<sup>346</sup> *See id.* (describing how "Friend Finder" generates emails to contacts who are not on Facebook).

page and by presenting users with names and profile pictures of their friends who already utilized the service, the notifications encourage users “to give [Friend Finder] a try!”<sup>347</sup>

According to the plaintiffs, Facebook used users’ names and pictures without knowledge or consent, and in some instances, users whose names and pictures were used did not even use the service.<sup>348</sup> As the pictures were uploaded by the users on a regular basis, but not specifically for the service, the plaintiffs alleged that Facebook misappropriated both their names and their likenesses for their own commercial purposes.<sup>349</sup>

The first issue the court started with was that of receiving users’ consent.<sup>350</sup> Mainly, the court has questioned the various legal documents, their versions, and the extent to which Facebook presented a particular version to users.<sup>351</sup> Furthermore, the court dealt with issues relating to changes in documents and to the extent to which they bound all the plaintiffs.<sup>352</sup> In particular, the court stated that Facebook did not prove that the terms are sufficient to prove consent, as a

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<sup>347</sup> See *id.* (articulating how Facebook promoted the availability of “Friend Finder”).

<sup>348</sup> See *Cohen*, 798 F. Supp. 2d at 1097 (arguing that this injury is a *sine qua non* cause of action).

<sup>349</sup> See *Newcombe v. Adolf Coors Co.*, 157 F3d. 686, 691-92 (9th Cir. 1997) (discussing liability in regards to the misappropriation of someone’s image without his consent). The claim was of violating the common law tort of misappropriation and the California Civil Code §3344. *Id.* The civil code complements but “neither replaces nor codifies the common law cause of action.” *Id.* at 692. See also *Cohen*, 798 F. Supp. 2d at 1093-94 (citing *Newcombe*, codifying the elements which the plaintiff must satisfy to have a misappropriation claim). The Court in *Cohen* summarized what the Plaintiff needs to allege: On both accounts together, the Plaintiffs must allege “(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Id.* at 1093-94. For a claim under Civil Code §3344, plaintiffs must additionally allege “(1) a 'knowing' use; (2) for purposes of advertising, and (3) a direct connection between the use and the commercial purpose.” *Id.* at 1094.

<sup>350</sup> See *Cohen*, 798 F. Supp. 2d at 1094 (reiterating the Plaintiff’s allegations that images taken without their consent is an element of misappropriation).

<sup>351</sup> See *id.* (indicating that a motion to dismiss under Rule 12(b)(6) must be evaluated based on certain factors, one of which is the production of relevant documents).

<sup>352</sup> See *id.* (discussing the issues to be addressed surrounding the Terms documents). “It is far from clear that it would be proper to rely on the Terms documents to dismiss plaintiffs’ claims at this juncture. Even assuming it is permissible to take judicial notice of the contents of websites under some circumstances and for some

result solving the issue of whether the previous versions have existed in substantially similar form, thus making them binding to users.<sup>353</sup> Furthermore, the court also rejected a Facebook interpretation of its Statement of Rights and Responsibilities as being no more than an ambiguous *copyright* clause, subjecting only the users' pictures and not the users' names to the privacy settings chosen by users.<sup>354</sup>

More particularly, the court mentioned that the gravamen of the complaints regarding the documents did not constitute a clear consent by users to have their names or their pictures used in a manner that disclosed which services they utilized, or to endorse those services.<sup>355</sup> True, the court explained, the privacy policy did make it clear that users cannot expect complete privacy, but this was consistent with the common law and statutory misappropriation laws, which did not protect against the *disclosure* of names and likeness, but rather their usage.<sup>356</sup> Users might agree to disclose those information traits to their friends, and maybe even all of the Facebook community, but not for the particular utilization as part of the friend

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purposes, substantial questions would remain in this instance as to when various versions of the documents may have appeared on the website and the extent to which they necessarily bound all plaintiffs." *Id.*

<sup>353</sup> *See id.* (noting that "Substantial questions . . . remain in this instance as to when various versions of the documents may have appeared on the website and the extent to which they necessarily bound all plaintiffs").

<sup>354</sup> *See id.* at 1094-96 (holding that the plaintiff's claim is justified as they did not consent to Facebook using their information in certain ways). The Statement of Rights and Responsibilities explained to a user that he "unambiguously gives Facebook the right to use any photos, including the Plaintiffs' profile pictures, in *any* manner on Facebook subject to the Users' privacy and application settings," while the privacy policy clearly stated that profile pictures and names do not have privacy settings (*Italic added*). *Id.* The court stated that the Statement of Rights and Responsibilities gave Facebook a worldwide license to reproduce the pictures or texts posted by the user, subject to the privacy settings, making it a copyright clause. *Id.* Moreover, though the term "any" was not defined in the governance documents, it should not be read as to allow any use to Facebook, rather that this provision is ambiguous. *Id.* at 1096. At that stage, the Statement of Rights and Responsibilities stated that users grant Facebook Intellectual Property rights to use the photos. *Id.* At the same time, the Privacy Policy stated that the name and profiles do not have privacy settings, and that users can delete the pictures if they do not want them to be shared. *Id.* at 1094-95.

<sup>355</sup> *See id.* at 1095 (highlighting that Facebook's usage of the names and pictures was represented as an implied endorsement, rather than a mere display).

<sup>356</sup> *See Cohen*, 798 F. Supp. 2d at 1096 (distinguishing between the conditions of the terms and conditions, and the failure to disclose to a user the appropriation of his image).

finder endorsement.<sup>357</sup> This endorsement is what put a well-known Facebook service in violation of the consent requirement of the misappropriation laws.<sup>358</sup> While there is a clear misappropriation claim, to some extent there is an implicit unfairness claim in utilizing users' pictures.<sup>359</sup>

Following the discussion on consent, the court looked at whether Facebook used "Friend Finder" to its own advantage.<sup>360</sup> The court accepted users' complaints of Facebook trying to extend the networks of "friends," and explained that as the ability of Facebook to make value is dependent on the size and involvement of its users, the presentation of the users' names and pictures as part of the "Friend Finder" promotion was to Facebook's advantage.<sup>361</sup> Nevertheless, the court found that as users are "non-celebrities," they did not present sufficient proof of how the disclosure of employing a "Friend Finder" service to their friends resulted with a cognizable harm.<sup>362</sup>

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<sup>357</sup> *See id.* at 1095 (reaffirming that there is a distinct difference between choosing to share information and being signed up to endorse a service without his awareness). The only statement in the privacy policy told the users that the information collected would be used to provide services and features to users themselves not to their friends. *Id.*

<sup>358</sup> *See id.* at 1096 (stating that the plaintiffs have satisfied the element of consent in regards to their claim against Facebook).

<sup>359</sup> *See id.* at 1097 (citing the Lanham Act which is the relevant statute for protection of persons against unfair competition). This was not the first time advocacy groups officially claimed Facebook allegedly acted unfairly in relation to willingness of users to use credentials from one service to get access to another service. As a reminder, back in January 2010 the advocacy groups also alleged unfairness when users could not delete their information with third parties. *See supra* notes 240-48 and accompanying text.

<sup>360</sup> *See Cohen*, 798 F. Supp. 2d at 1096 (stating the plaintiffs alleged that Facebook's intent was to appropriate users' names and likenesses).

<sup>361</sup> *See id.* at 1096 (citing *Newcombe v. Adolf Coors Co.*, 157 F.3d at 693) (discussing Facebook's argument that a direct benefit has to be present in order to constitute an advantage). Alternatively, the court explained that in this case Facebook was more like a beer company that placed the advertising on a journal, rather than being the actual journal. *Id.*

<sup>362</sup> *See Cohen*, 798 F. Supp. 2d at 1097 (citing *Miller v. Collector's Universe, Inc.*, 72 Cal. Rptr. 3d 194, 207 (Cal. Ct. App. 2008) (pointing to the standard that unless you are a "famous," one must prove that he suffered mental anguish in order to establish a prima facie case). As the users are non-celebrities, they need to present mental anguish as a result of the misappropriation, which they did not show. *Id.*

As the court dismissed the misappropriation claim, the court continued to deal with the Lanham Act claim.<sup>363</sup> Based on the role of the Lanham Act to protect consumers from unfair competition, the court explained the plaintiffs failed to allege commercial interest in their names and likenesses.<sup>364</sup> Moreover, the court explained in dicta that while there are instances in which a plaintiff might be a non-celebrity and still have a reputation among an identifiable group to create economic interest, the mere fact that the plaintiffs are known to their friends does not reach to that level.<sup>365</sup> In *Fraleley*, the court would expand further on this issue.<sup>366</sup>

Later, in October 2011, the court issued a secondary order granting motion to dismiss without leave to amend.<sup>367</sup> Judge Richard Seeborg explained the previous proposition that non-celebrities may recover misappropriation only if they plead they suffered mental anguish.<sup>368</sup> The court explained that nothing in the previous “May Order” or any other court rulings have prevented economic loss claims.<sup>369</sup> In particular, Facebook itself acknowledged that non-celebrities *may* pursue economic damages, but the question is how

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<sup>363</sup> See *id.* at 1097-98 (addressing the Lanham Act as the second topic in the court’s discussion). The Lanham Act creates legal liability for the use in commerce of words or names that can cause confusion or deceive people. See 15 U.S.C. § 1125(a)(1). According to the court, the law protects for the use of “any word, term, name . . . or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of [one person’s] goods, services, or commercial activities by another person.” *Cohen*, 798 F. Supp. 2d at 1097.

<sup>364</sup> See *Cohen*, 798 F. Supp. 2d at 1097-98 (explaining the court’s reasoning for denying the Plaintiff’s claim for unfair and deceptive business act under the Lanham Act since the Plaintiffs were unable to show their interest in others knowing their Facebook friends did not amount to a protection for identities similar to a trademark).

<sup>365</sup> See *id.* at 1098 (discussing the issue of unfair business competition versus competing with other Facebook users). The court also dismissed plaintiffs’ claims in regard to unfair competition, based on the California Business and Professions Code §17200. *Id.*

<sup>366</sup> See *Fraleley*, 830 F. Supp. 2d at 811 (indicating that the plaintiffs did not assert there was any inherent economic value to their personal information in itself).

<sup>367</sup> See *Cohen*, 798 F. Supp. 2d at 1097 (holding that the plaintiffs could not amend their case).

<sup>368</sup> See *Cohen v. Facebook, Inc.*, No. C10-5282, 2011 U.S. Dist. LEXIS 124506, at \*5 (N.D. Cal. Oct. 27, 2011) (describing the non-celebrity requirement of mental anguish to assert misappropriation).

<sup>369</sup> See *id.* (noting that Plaintiffs had an expectation of statutory damages).

much evidence would be needed to prove economic damages.<sup>370</sup> As the plaintiffs were not in the business of publicity, and Facebook presented their friends' names and pictures both as part of the service and as part of the ordinary use of Facebook, the plaintiffs did not present any clear harm worth of relief.<sup>371</sup>

Though the claims were dismissed, Facebook decided to make changes to the privacy policy in May 2011, which clearly addressed the problems presented in the class action.<sup>372</sup> In the new privacy policy, Facebook gave an explicit example of their use of information which specifically referenced Friend Finder.<sup>373</sup> Moreover, under the new topic of "Some other things you need to know," in order to deal with friends' information uploaded by the user, Facebook offered to help users by not storing the information.<sup>374</sup> Similarly, Facebook explained to users that when inviting these non-users to Facebook, Facebook might present other people's names and pictures, and would allow these non-users to opt-out from those emails.<sup>375</sup> Looking back on the January 2010 complaint, it seems that Facebook tried to also deal with the misappropriation and unfairness claims.<sup>376</sup> As users voluntarily enter their credentials into Facebook, unfairness claims could be raised by third parties, to which Facebook now had access.<sup>377</sup> While Facebook might collect user information through

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<sup>370</sup> See *id.* at \*6 (illustrating the standard of proof in regards to economic damages for celebrities as opposed to non-celebrities).

<sup>371</sup> See *id.* at \*4 (granting motion to dismiss the First Amendment complaint without leave to amend).

<sup>372</sup> See *In re Facebook Privacy Litigation*, 791 F. Supp. 2d at 708-09 (discussing Facebook's changes to the privacy policy to combat class action lawsuits).

<sup>373</sup> See Joint Stipulation Regarding Judicially Noticeable Documents, Ex. D at 4, *Campbell v. Facebook*, 77 F. Supp. 3d 836 (N.D. Cal. 2014) (No. C13-05996 PJH) (explaining the purpose of this suggestion tool is to encourage the user to access this tool as well).

<sup>374</sup> See *id.* at 14 (providing the option opt out of information storage by accessing Facebook's website).

<sup>375</sup> See *id.* (expounding on its invitation policy). "Invitations: When you invite a friend to join Facebook, we send a message on your behalf using your name, and up to two reminders. We may also include names and pictures of other people your friend might know on Facebook. The invitation will also give your friend the opportunity to opt out of receiving other invitations to join Facebook." *Id.*

<sup>376</sup> See *Cohen v. Facebook, Inc.*, No. C10-5282, 2011 U.S. Dist. LEXIS 124506, at \*6 (N.D. Cal. Oct. 27, 2011) (discussing Facebook's acknowledgment of ability of plaintiffs to pursue economic damages claims).

<sup>377</sup> See G.S. Hans, Note, *Privacy Policies, Terms of Service, and FTC Enforcement: Broadening Unfairness Regulation for a New Era*, 19 MICH. TELECOMM. & TECH.

other contacts, users now were able to opt-out.<sup>378</sup> Meanwhile, other third party services might have raised the unfairness claims, or taken extreme actions such as preventing Facebook from reaching their databases, mimicking Facebook actions from January 2010.<sup>379</sup> To summarize, moving to *Fraley*, the role of *Cohen* is influential to the decision the court reaches.<sup>380</sup> Certainly, *Cohen* is important as it set the basis for key issues as the connection between submitted documents to the court and consent, and the issue of users and their friends as non-celebrities.<sup>381</sup>

*h. December 2011: Fraley v. Facebook*

Think of the last advertisement you watched on TV. How the presenter was a professional actor or a celebrity trying her best to sell the product on display. How much you thought the commercial was funny, noticeable, or how memorable it was. With a TV advertisement, you could always look aside or disregard it. But what if instead of a random actor, your best friend was presenting the advertisement? Could you disregard that ad? The third class action directly dealt with this question and examined Facebook's advertising service, "Sponsored Stories."<sup>382</sup>

Since January 2011, Facebook presented users with a post on their news feed, typically consisting with one of their friends' name,

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L. REV. 163, 186 (2012) (describing the ability for third party apps to gain access to information through a friends use of said app).

<sup>378</sup> Cf. Complaint at 23-24, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (raising an interesting question in regard to Facebook users that decided not to share specific contact information and now Facebook had new information shared on them automatically); see also Supplemental Complaint at 6-12, In the Matter of Facebook, Inc. (F.T.C. Jan. 14, 2010) (noting that this claim was previously raised in the January 2010 complaint).

<sup>379</sup> See Jason Kincaid, *Google To Facebook: You Can't Import Our User Data Without Reciprocity*, TECHCRUNCH (Nov. 4, 2010), archived at <http://perma.cc/QR7B-JJCB> (explaining that this is what Google did in November 2010; blocking Facebook's access to it databases).

<sup>380</sup> See *Fraley*, 830 F. Supp. 2d at 800 (holding that the *Cohen* decision was the only case brought forward by the defendant that was applicable).

<sup>381</sup> See *id.* at 800 (describing Facebook's tactic of convincing users to try out its "Friend Finder" by advertising that the user's friends were already using it).

<sup>382</sup> See *id.* at 790 (identifying Facebook's use of "Sponsored Stories" as the issue before the court).

profile picture, and assertion that the person engaged with the Facebook page, app, or event.<sup>383</sup> These stories were paid to be highlighted in users' news feeds.<sup>384</sup> More importantly, Facebook turned on the service to all users as default.<sup>385</sup> As a result, the plaintiffs alleged that users were unaware that by pressing the "like" button, Facebook would potentially publicize their actions and liked pages as endorsements.<sup>386</sup> Meanwhile, users mentioned that the Statement of Rights and Responsibilities told them that they could alter their privacy settings to limit how their picture and name are associated with commercial and sponsored content, but nowhere in the privacy settings were users able to opt-out altogether from the service.<sup>387</sup> As a result, users claimed they could not have known about the service when they signed into Facebook, nor were they asked to review or reaffirm the privacy policies upon introduction of the service.<sup>388</sup>

A. *The dissemination of information: the court disliking a practice*

On December 16, 2011, Judge Lucy H. Koh from the District Court for the Northern District of California accepted most of Facebook's motions to dismiss the case, but a closer analysis is in order.<sup>389</sup> First, Facebook wanted to prove users consented to the service and that Facebook had not acted unfairly, unlawfully, or

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<sup>383</sup> See *id.* at 790 (illustrating the way "Sponsored Stories" were used by Facebook).

<sup>384</sup> See Emma Barnett, *Facebook advertises now in news feeds*, THE DAILY TELEGRAPH (Jan. 11, 2012), archived at <http://perma.cc/6K3E-JKAQ> (detailing how "Sponsored Stories" would advertise pages, apps, events, businesses, or organizations with the names of the users' friends who had previously "liked" those same pages to promote users seeing those stories or ads).

<sup>385</sup> See Andrea Vahl, *5 Facebook Ad Tips to Maximize Your Facebook Campaigns*, SOCIAL MEDIA EXAMINER (Jan. 15, 2013), archived at <http://perma.cc/PPE5-ZUGN> (indicating that the "Sponsored Stories" feature is a default setting for users).

<sup>386</sup> See *Fraley*, 830 F. Supp. 2d. at 792 (mentioning that users have many reasons for "liking" something: to get discounts, support social causes, to see humorous pictures, etc.).

<sup>387</sup> See *id.* (clarifying that even though users were informed that they were able to adjust their privacy settings, they could not completely opt out of "Sponsored Stories").

<sup>388</sup> See *id.* (pointing out that when "Sponsored Stories" were instated users were not notified of any changes regarding their privacy).

<sup>389</sup> See *id.* at 814 (dismissing some of the complaints brought before the court for a number of different legal reasons).

fraudulently.<sup>390</sup> To do so, Facebook presented the court with a group of six documents and screen shots.<sup>391</sup> Criticizing this practice and repeating the notion raised previously in *Cohen v. Facebook*, the court questioned whether a submitted webpage was “even in existence at the time Facebook first launched the Sponsored Stories Feature or at the time Plaintiffs took the actions that rendered them subject to Sponsored Stories.”<sup>392</sup>

Second, the court explained that though the plaintiffs presented only one Help Center page, it does not follow that Facebook users would necessarily see the other Help Center pages Facebook submitted to the court.<sup>393</sup> Put differently, the court referenced the problem of information overflow, saying it could not use the documents Facebook submitted.<sup>394</sup> In particular, the court emphasized implicitly Facebook’s practice of information dissemination and violation of the manner in which information is presented to users.<sup>395</sup>

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<sup>390</sup> See *id.* at 794, 805 (showing how Facebook users consented to the Terms of Use, also citing their Statement of Rights and Responsibilities).

<sup>391</sup> See *id.* at 794 (using screenshots to support their contentions).

“(1) Facebook’s Statement of Rights and Responsibilities; (2) a screenshot of a page from Facebook’s website entitled “Where can I view and edit my privacy settings for sponsored content? -- Facebook Help Center,” accessed on July 1, 2011; (3) a screenshot of a page from Facebook’s website entitled “How can I control what my friends see in their News Feeds? -- Facebook Help Center,” accessed on July 1, 2011; (4) a screenshot of a page from Facebook’s website entitled “How can I control who can see things I post (for example: status updates, links, videos)? -- Facebook Help Center,” accessed on July 1, 2011; (5) a screenshot of a page from Facebook’s website entitled “How do I create Sponsored Stories? -- Facebook Help Center,” accessed on July 1, 2011; and (6) a screenshot of a page from Facebook’s website entitled “How do I unlike something? -- Facebook Help Center,” accessed on July 1, 2011. ECF No. 31 at 2 & Exs. A through F.”

*Id.*

<sup>392</sup> See *Fraleigh*, 830 F. Supp. 2d. at 795 (questioning whether the webpages which Facebook relied upon in their brief was even actually in existence yet). The court analyzed this claim based on the Federal Rules of Civil Procedure 12(b)(6) as to failure by the plaintiffs to state a claim. *Id.*

<sup>393</sup> See *id.* (noting that Facebook members would not necessarily see all the submissions).

<sup>394</sup> See *id.* (referencing how Facebook submitted extra documents that were not necessarily relevant).

<sup>395</sup> See *id.* at 814 (noting that the court was displeased with the way in which Facebook shared users’ information).

*B. The advertisement of non-celebrities: the holy grail of advertising*

Looking at the question of injury, the court found that the plaintiffs not only alleged concrete and particularized commercial misappropriation, but also managed to articulate a coherent theory of how they were economically injured.<sup>396</sup> To be clear, users' content was misappropriated without their consent for paid commercial endorsement targeted not at themselves, but at *other* consumers.<sup>397</sup> To differentiate themselves from *Cohen*,<sup>398</sup> in *Fraleley* the plaintiffs quoted Facebook's CEO and COO to prove that friends' endorsements have value in generating advertisement.<sup>399</sup> Based on this no-

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<sup>396</sup> See *id.* at 797 (presenting how Plaintiffs were able to show that their injury was "concrete and particularized").

<sup>397</sup> See *id.* (noting that the alleged commercial misappropriation was concrete and particularized). This endorsement has provable and concrete value in modern society and can be measured by the additional profit Facebook would earn from selling advertisements for the service in comparison with regular advertisements that users' friends are not part of. *Id.* at 799.

<sup>398</sup> See *Cohen*, No. C10-5282, 2011 U.S. Dist. LEXIS 124506, at \*4 (stating the central question of the case and the court's findings). Recall that in *Cohen*, the court denied the claim that Facebook's use of users' names and likenesses can serve a commercial purpose undertaken with the goal of achieving growth in user base. *Id.*

<sup>399</sup> See *Fraleley*, 830 F. Supp. 2d. at 792 (providing the specific quotes of Mark Zuckerberg and Sheryl Sandberg regarding friend recommendation's marketing value). Mark Zuckerberg stated that "[n]othing influences people more than a recommendation from a trusted friend. A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising." *Id.* Likewise:

"Facebook's COO Sheryl Sandberg similarly explaining that: '[m]arketers have always known that the best recommendation comes from a friend. . . . This, in many ways, is the Holy Grail of marketing. . . . When a customer has a good experience ... on Facebook, the average action is shared with the average number of friends, which is 130 people. This is the elusive goal we've been searching for, for a long time; [m]aking your customers your marketers. On average, if you compare an ad without a friend's endorsement, and you compare an ad with a friend's [Facebook] 'Like,' these are the differences: on average, 68% more people are likely to remember seeing the ad with their friend's name. A hundred percent—so two times more likely to remember the ad's message; and 300% more likely to purchase."

*Id.* at 808.

tion of advertising value raised by Facebook management, “the plaintiffs managed to allege concrete, measureable, and provable value in the economy at large” which distinguished them from the plaintiffs in *Cohen* and other previous cases.<sup>400</sup>

Moreover, the court did not find it necessary to impose a higher standard between non-celebrities and celebrities, stating that in a media dominated society, even an obscure person’s name and likeness can have economic value.<sup>401</sup> As a result, there is a new increasing interest by advertisers to exploit non-celebrity’s likeness.<sup>402</sup> While the non-celebrity has little weight in the economy at large, the plaintiffs’ allegations referenced the ability to conduct valuable targeted marketing through friends’ endorsements to the same extent as celebrities.<sup>403</sup>

Before moving on to the court’s next order of business, it is important to look at another interesting social point raised by the court. Following this lack of distinction between celebrities and non-celebrities users’ friends, Facebook claimed the Sponsored Stories should enjoy the newsworthiness exception.<sup>404</sup> According to Facebook, users’ actions are newsworthy for two main reasons: Facebook

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<sup>400</sup> See *id.* at 800 (distinguishing the plaintiffs’ claim in *Fraleley* from the plaintiffs’ claim in *Cohen*). The court mentioned that the plaintiffs managed to present a “direct, linear relationship between the value of their endorsement of third-party products, companies, and brands to their Facebook friends, and the alleged commercial profit gained by Facebook.” *Id.*

<sup>401</sup> See *id.* at 807 (articulating the court’s decision to not impose a higher standard on non-celebrities than on celebrities). According to the court, “[i]n a society dominated by reality television shows, YouTube, Twitter, and online social networking sites, the distinction” among the non-celebrities and celebrities became an arbitrary one. *Id.* at 808. While traditionally the endorsement value of non-celebrities was too small to affect the economy, the plaintiffs proved to the court that the friends’ endorsement are valuable marketing tools, worth two to three times the value of a traditional advertisement. *Id.* at 807-808.

<sup>402</sup> See *id.* at 809 (explaining how friend endorsements have become a valuable marketing tool similar to celebrity endorsement).

<sup>403</sup> See *id.* at 811 (describing the plaintiff’s allegations regarding their friend endorsement economic value).

<sup>404</sup> See *Fraleley*, 830 F. Supp. 2d at 804-05 (illustrating how the newsworthiness exception, in which consent is not required, applies to Facebook’s Sponsored Stories). Other than cases where information is shared on unidentified people, the newsworthiness exception allows to share information on identified people as long as that information is newsworthy. In California, the exception is coded in California Civil Code § 3344(d). *Id.* at 805.

claimed that not only expressions of consumers' opinions are generally newsworthy, but also based on the abovementioned non-celebrity understandings and the *Cohen* decision, users are considered "public figures" to their friends.<sup>405</sup> Through criticism directed at the plaintiffs, the court explained that the users "cannot have it both ways."<sup>406</sup> In different terms, users cannot assert being "celebrities" to their friends to benefit from suffering economic injury, while also denying they are public figures to these same friends for newsworthiness purposes.<sup>407</sup> Nonetheless, the court concluded there is no need to dismiss the case under the newsworthiness exemption, as the purpose of the publication was commercial and not for news purposes.<sup>408</sup>

Though the claim of unfairness was not explicitly mentioned in *Fralely*, it seems that users felt uncomfortable with the use of their name for advertising purposes for the economic benefit of Facebook, but could not yet comprehend the idea of being public figures in their own social network.<sup>409</sup> The three class actions mentioned demonstrate that User-Generated Content has an interesting and important purpose in the economy of social media, but it is unclear yet to what extent.<sup>410</sup>

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<sup>405</sup> See *id.* at 804 (detailing Facebook's argument how plaintiffs' actions are newsworthy).

<sup>406</sup> See *id.* (stating the courts argument that Plaintiffs' cannot claim they are celebrities to assert a claim for injury, but not public figures to prevent the exception to the rule).

<sup>407</sup> See *id.* (explaining the courts argument that Plaintiffs' cannot claim they are celebrities, but not public figures).

<sup>408</sup> See *id.* at 805 (detailing the *Abdul-Jabbar* courts analysis); see also *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (describing how a person's newsworthy acts may not necessarily make §3344(d) applicable due to their commercial purpose).

<sup>409</sup> See *Fralely*, 830 F. Supp. 2d at 805 (observing Facebook's use of users names for advertising purposes).

<sup>410</sup> See *id.* at 808 (showing Facebook's argument that there is an economic benefit to disseminating user information to third parties); see also *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (pointing to implications of User-Generated Content).

C. The making of a social-advertisement: the trade-offs of not giving control

The third issue discussed in *Fraleley* was whether the Communication Decency Act's provided immunity protected Facebook from liability.<sup>411</sup> Implementing the *Fair-Housing* rule,<sup>412</sup> the court decided that by utilizing users' content into advertisements, Facebook helped "develop" at least "in part" the information posted, thus making Facebook *also* an information content provider.<sup>413</sup> As "the party responsible for putting information online may be subject to liability, even if the information originated with a user,"<sup>414</sup> the fact that the control over posting a Sponsored Story was maintained solely by Facebook,<sup>415</sup> Facebook enjoyed no immunity in this case.<sup>416</sup> Put differently, as Facebook gave users no control over the way in which their information is shared and utilized, leads to the conclusion that Facebook actions not only go beyond the traditional editorial functions, but also makes Facebook the actual content provider, a characteristic the company never claimed to have.<sup>417</sup>

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<sup>411</sup> See *Fraleley*, 830 F. Supp. 2d at 790-91 (using the Communications Decency Act as part of the grounds for Facebook's motion to Dismiss).

<sup>412</sup> See *Roommates.com, LLC*, 521 F.3d at 1157, 1162-63 (outlining the application of the Fair-Housing Rule).

<sup>413</sup> See *Fraleley*, 830 F. Supp. 2d at 801-02 (observing how Facebook contributes to the development of the Sponsored Story).

<sup>414</sup> See *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003) (discussing liability regarding unforeseen publications).

<sup>415</sup> See *Fraleley*, 830 F. Supp. 2d at 791 (defining Facebook's sponsored stories). To be clear, later while dealing with the question of consent, Facebook did mention that users were given some form of control to replace the lack of opt-out. According to Facebook, not only that friends were shown Sponsored Stories, users were able to prevent a story from becoming sponsored by clicking the 'X' button displayed in the upper right corner of the story. This control might have not been to opt-out, but it did allow users to decide whether to *take actions* that could later become Sponsored Stories, whether *those stories would be republished* as a Sponsored Story, and who the *precise audience* of the Sponsored Story would be. *Id.* at 805-06.

<sup>416</sup> See *id.* at 805-806 (stating Facebook is not entitled to immunity because of its commercial use in Sponsored Stories). Meanwhile, the court was not persuaded by Facebook's arguments that users gave clear consent to use their names and pictures in relation to services Facebook utilized. *Id.*

<sup>417</sup> See *id.* at 802 (claiming Facebook exceeds its traditional editorial functions in creating Sponsored Stories).

Furthermore, unlike previous claims, the “control” discourse was structured in a new construct.<sup>418</sup> While users previously looked for the opt-out option, Facebook took a different route altogether.<sup>419</sup> For starters, by claiming the 230 CDA immunity, Facebook discovered that the lack of control through privacy settings made Facebook a content provider, which does not enjoy the immunity of the 230 CDA.<sup>420</sup> Furthermore, the second claim made is also interesting as it goes along two basic notions: obscurity and unfairness.<sup>421</sup> Unless users actively decide otherwise by clicking “X,” every post or like users make, is a possible Sponsored Story.<sup>422</sup> The result is unfair as it requires users to maneuver across the entire Facebook disseminated interface to control how Facebook uses their information.<sup>423</sup>

*D. Additional subject matters: unfair competition and unjust enrichment*

To mention shortly, the fourth issue dealt with the allegation that Facebook violated California’s Unfair Competition Law.<sup>424</sup> The court agreed that the plaintiffs alleged both sufficient standing based on the compensation loss, and that Facebook’s commercial misappropriation can be characterized as a business practice.<sup>425</sup> According to the court, this business practice was not only unfair, but most of all

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<sup>418</sup> See *id.* at 801-02 (describing the structure of Facebook’s control over Sponsored Stories).

<sup>419</sup> See *id.* at 805 (describing how the Sponsored Stories feature operated on an opt-out basis).

<sup>420</sup> See *id.* at 801-02 (elaborating on the application of CDA immunity in Facebook’s case).

<sup>421</sup> See *Fraley*, 830 F. Supp. 2d at 803 (introducing the individual causes of action against Facebook).

<sup>422</sup> See *id.* at 805 (explaining how a user must make a specific action to opt-out of the Sponsored Story feature).

<sup>423</sup> See *id.* at 805 (elucidating the plaintiffs’ overriding concern regarding Facebook’s control over their information).

<sup>424</sup> See *id.* at 810 (setting out the plaintiffs’ allegation that Facebook violated California’s Unfair Competition Law). Unfair competition is broadly defined as “any unlawful, unfair or fraudulent business act or practice.” *Id.*

<sup>425</sup> See *id.* at 811 (refusing to dismiss the plaintiff’s claims on the issues of compensation loss and misappropriation).

can be perceived as fraudulent for many reasons.<sup>426</sup> First, while the privacy policy told a user she “can control exactly who can see [your posts] at the time you create them,” in action, the user lacked the option to opt-out.<sup>427</sup> Second, the instructions of how to prevent a post from appearing as a Sponsored Story was buried in a help center page, unconnected by any link within the governing documents.<sup>428</sup> Third, users alleged that this false belief of control led them “to engage with Facebook in ways that rendered them unwitting commercial spokespersons without compensation,” against their right of publicity.<sup>429</sup> Alternatively, the court found that if Facebook modified the governing documents at a later time to truthfully represent the inability to opt-out, these changes were fraudulent as Facebook knowingly and intentionally failed to seek users’ consent.<sup>430</sup>

Unlike previous cases claiming unfairness and obscurity, Facebook in this case acted deceptively or fraudulently.<sup>431</sup> This deceit was not only on the level of how users were noticed, but more on the point of how Facebook deceived users to believe they have control.<sup>432</sup> Combined with the previous users’ claim that they received no real control, users discovered that in practice the promise of control was not true, and as a result, made users unwilling Facebook spokespersons.<sup>433</sup>

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<sup>426</sup> See *id.* at 814 (holding that the plaintiffs alleged unlawful, unfair, and fraudulent conduct on Facebook’s part). A reasonable Facebook user was likely to be *deceived* of having full control to prevent his appearance in “Sponsored Stories.” *Id.* In practice, users’ representatives alleged users lack such control. *Id.*

<sup>427</sup> See *Fraley*, 830 F. Supp. 2d at 814 (quoting direct statements from Facebook’s policies).

<sup>428</sup> See *id.* at 814 (explaining how disabling individual posts from appearing as a Sponsored Story are only available on the Help Center page).

<sup>429</sup> See *id.* at 814 (describing impact of Plaintiffs’ false belief of control).

<sup>430</sup> See *id.* at 814 (highlighting alleged fraudulent nature of Facebook’s policy changes). Meanwhile, the court did grant the motion to dismiss the unjust enrichment allegations. *Id.* at 815.

<sup>431</sup> See *Fraley*, 830 F. Supp. 2d at 814 (holding that Plaintiffs sufficiently alleged Facebook’s fraudulent conduct).

<sup>432</sup> See *id.* (articulating how Facebook deceived users regarding Sponsored Story advertisements).

<sup>433</sup> See *id.* (noting Facebook users’ lack of control).

*E. Settling the complaint: a first attempt failure.*

In May 2012, a week before the hearing regarding the motion for class certification, the plaintiffs and Facebook reached a settlement.<sup>434</sup> The first settlement proposed contained three parts.<sup>435</sup> First, Facebook had to create a fund of \$10 million dollars in the form of *cy pres* payments to be allocated between 10 non-profits organization dealing with privacy.<sup>436</sup> Second, the plaintiffs' attorneys would be able to seek court approval of \$10 million in fees without Facebook opposition.<sup>437</sup> Third, the settlement foretold interface changes Facebook agreed to make that would allow user to have more information and control over their name and likeness in connection with Sponsored Stories.<sup>438</sup>

Finding there are sufficient questions on issue, Judge Seeborg explained on August 10, 2012, that it would be inappropriate to approve the settlement.<sup>439</sup> The court found that it would be difficult to distribute the proposed \$10 million dollars among the members of the class, especially since it was defined to be more than 70 million individuals across the U.S.<sup>440</sup> Also, the court found a problem with the

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<sup>434</sup> See Venkat Balasubramani, *Facebook Sponsored Stories Settlement Approved – Fraley v. Facebook*, TECHNOLOGY & MARKETING BLOG (Sept. 10, 2013), archived at <http://perma.cc/M9T8-XHBP> (discussing the outcome of the *Fraley* case); see also Barbara Ortutay, *Facebook IPO Date: 'FB' Set To Begin Trading May 18 After \$16 Billion Offering*, THE HUFFINGTON POST (May 18, 2012), archived at <https://perma.cc/S3EV-346J> (noting the progress of Facebook's shares on the first day of public sales). The date of the settlement is also important as on May 18, 2012, Facebook started selling its shares to the public. *Id.*

<sup>435</sup> See Balasubramani, *supra* note 434 (declaring the conditions of Facebook's contributions to the settlement).

<sup>436</sup> See Balasubramani, *supra* note 434 (delving into the distribution of monies).

<sup>437</sup> See *Fraley v. Facebook, Inc.*, No. C-11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at \*11 (N.D. Cal. Aug. 17, 2012) (discussing the amount demanded by attorneys from Facebook).

<sup>438</sup> See *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 945 (N.D. Cal. 2013) (stating that the usage of Sponsored Stories on Facebook will be more transparent).

<sup>439</sup> See *Fraley*, No. C-11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at \*3 (stating that approval would not been appropriate although the legal standard that was applicable was considered liberal); see also DMLP Staff, *Fraley v. Facebook*, DIGITAL MEDIA LAW PROJECT (Jan. 4, 2012), archived at <https://perma.cc/KXC4-FS6H> (following Judge Koh's decision to recuse herself from the case, Judge Seeborg was reassigned to the settlement decision).

<sup>440</sup> See *Fraley, Inc.*, No. C-11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at \*5 (exposing the impracticability of the proposed settlement plan). Merely pointing to the infeasibility of dividing up the agreed sum or the relatively small per-use revenue

*plaintiffs'* claim that the *cy pres* element is a “bonus” to their primary purpose of compelling Facebook to change its practices prospectively.<sup>441</sup>

Furthermore, the court requested to understand more clearly Facebook will be required to do to change their behavior, and the amount of discretion Facebook will have in implementing features or revising their governing documents.<sup>442</sup> Second, according to the court, control over information has more economic value than the value that a third party derives from using the information.<sup>443</sup> Third, the court rejected Facebook’s arguments that the \$10M figure represented a fair estimate calculating the potential recovery subtracting the uncertainties, risks, and costs of the plaintiffs.<sup>444</sup> Most of all, the court was concerned that the “clear sailing” provision would result with counsels bargaining away the interests of the class.<sup>445</sup>

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Facebook derived is insufficient to justify a settlement based solely on *cy pres* payments. *Id.* Also, the court raised an important network scale question: “[c]an a *cy pres*-only settlement be justified on the basis that the class size is simply too large for direct monetary relief? Or, notwithstanding the strong policy favoring settlements, are some class actions simply too big to settle?” *Id.* at \*6.

<sup>441</sup> *See id.* at \*7-8 (declaring that while injunctive relief relates only to future conduct, *cy pres* payments are meant to be used instead of direct distribution of damages). Though the plaintiffs’ main goal was to change Facebook’s behavior, the court as regulator protects *cy pres* payments as being a compensation for alleged wrongdoings. *Id.* As such, the amount of payment is critically important to evaluate the appropriateness of the settlement. *Id.* According to the court, this claim might result with saying that, “*any* payment could be seen as fair, adequate, and reasonable” and that “the injunctive relief relates only to Facebook’s future conduct” while the *cy pres* payments are intended to be in lieu of direct distribution of *damages* (*italic in origin*). *Id.*

<sup>442</sup> *See id.* at \*11 (requesting Facebook to pay “particular attention” to the privacy settings of their features).

<sup>443</sup> *See id.* (discussing the injunctive relief). The court questioned the plaintiffs’ claims that the given control over the degree to which their name and likeness appear in the Sponsored Stories translate to the same amount of value of Facebook’s ability to use users’ name and likeness. *Id.* The court calculated this amount to be worth \$103,200,000. *Id.* at \*12-13.

<sup>444</sup> *See id.* at \*8 (noting that the court believes the amount of the settlement payment is critically important).

<sup>445</sup> *See id.* at \*9-13 (explaining that the plaintiffs did not show that the number represented a reasonable settlement). It also seems the court was worried that any unclaimed portions would be returned to Facebook. *Id.* at \*9.

F. Settling the complaint: the court analyzing the benefits of settlements

Following this decision, the plaintiffs and Facebook amended the settlement.<sup>446</sup> Approving the changes, the court explained that given the class size of tens of millions Americans, it was not plausible that the class could recover the full amount of statutory penalties, as it would threaten Facebook's existence.<sup>447</sup> In hope of better explaining the privacy controls users would receive, Facebook agreed to provide mechanisms whereby users can discover if they appear in Sponsored Stories and prevent future appearances in advertisements by specific advisers.<sup>448</sup> At the same time, *full control* over opt-out was given only to minors and their parents.<sup>449</sup> Finally, the governing documents were changed to inform users that their name and likeness could be used for Sponsored Stories.<sup>450</sup>

Replying to the criticism of those asking for maximum privacy, the court explained that the injunctive relief left much to be desired.<sup>451</sup> The court explained that it would be possible to order Facebook to cancel the service, order Facebook to create "opt-in" defaults, or even demand Facebook to pay users, but that would provide insufficient recognition of three important points.<sup>452</sup> First, the settlement should not be evaluated for perfection, or whether there is possibly a

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<sup>446</sup> See *Fraley*, 966 F. Supp. 2d at 940 (citing the "order granting motion for final approval of settlement agreement" generally). The new settlement jointed together the two \$10 million dollar portions into one \$20 million dollar sum, and removed the "clear sailing" agreement which prohibited Facebook from opposing the fee requests. *Id.* at 943-47. Also, the court accepted the raising of the cash payouts from \$10 to \$15 dollars, and the reduction of the fees, leaving sufficient money in the fund for the *cy pres* component to settle the class action according to the policy favoring settlements. *Id.* This made the settlement fair, reasonable, and adequate. *Id.* at 943.

<sup>447</sup> See *Fraley*, 966 F. Supp. 2d at 940 (requiring Facebook to pay the full amount of statutory penalties would be unreasonable).

<sup>448</sup> See *id.* at 944-48 (depicting Facebook's new method of providing users with control over their personal information).

<sup>449</sup> See *id.* at 948 (describing how opt-out provisions were limited to parents and their children).

<sup>450</sup> See *id.* at 940 (informing users of required changes to the Statements of Rights and Responsibilities).

<sup>451</sup> See *id.* at 944-45 (mentioning the provisions regarding injunctive relief).

<sup>452</sup> See *id.* (stating how the opt-in and opt-out provisions gave users a prophylactic measure against misappropriation).

better result.<sup>453</sup> Rather, the settlement should be evaluated on whether it is fair, adequate, and free from collusion.<sup>454</sup> Second, the users' representatives, who object to the settlement, are presupposing that Facebook violated the law and that any settlement lower than complete vindication cannot be fair, reasonable, and adequate.<sup>455</sup> In addition, Facebook is a platform voluntarily used for *sharing* information, while its costs of operations are high.<sup>456</sup> True, while Facebook does not have unrestricted power to exploit material belonging to its members, neither is Facebook foreclosed to adopt privacy policies that are not as "pro-member" or "pro-privacy" as some might like.<sup>457</sup>

Third, and maybe even in reference to the court's own limitations in ordering Facebook, the court explained that the settlement offers benefits to the class that

would be difficult, if not impossible, ever to obtain through a contested judgment, even if plaintiffs were eventually to prevail on the merits. While a court might have some discretion to craft specific injunctive provisions, the settlement process has resulted in Facebook agreeing to implement various tools and procedures that address plaintiffs' concerns in a more nuanced manner that would likely emerge from any victory at trial.<sup>458</sup>

Summarizing this point, the court says that going forward, Facebook will be more transparent and users will have greater ability to see

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<sup>453</sup> See *Fraley*, 966 F. Supp. 2d at 941 (examining how Rule 23(e) does not require perfection only review of specific criteria).

<sup>454</sup> See *id.* (detailing Rule 23(e) requirement to evaluate as a whole to find the settlement is fair, reasonable, and adequate).

<sup>455</sup> See *id.* at 945 (describing violated users and their assumption that their settlements will be neither fair nor reasonable).

<sup>456</sup> See *id.* (pointing out the benefits and the detriments to Facebook for not charging users any membership fees).

<sup>457</sup> See *id.* (demonstrating Facebook's freedom to employ any policy from pro-member to pro-privacy).

<sup>458</sup> See *id.* (explaining Facebook's agreement to add additional resources to address plaintiff's concerns).

how and when their activities result in a sponsored story, to limit recurrences.<sup>459</sup>

Following the court decision, in the privacy policy change proposed in November 15, 2013, Sponsored Stories was removed as a category from the privacy policy.<sup>460</sup> Facebook incorporated the notion of “word-to-mouth” marketing into other methods, such as with ads that are located on the side bar instead of in news feeds.<sup>461</sup> Sponsored Stories, however, remain part of the help desk.<sup>462</sup> While the settlement was on appeal in Ninth District for a long period of time,<sup>463</sup> on January 2016, the federal court of appeals upheld the settlement agreement.<sup>464</sup> As EPIC is considering the settlement to be unfair, EPIC submitted an amicus brief requesting the court to oppose the settlement.<sup>465</sup> Yet, in the meantime, *Fraleley* should be seen as a ground shaking decision as it not only enabled the court to return to *Cohen* and evolve some of the legal and social issues raised there, but mainly as it set important answers to how the law should handle

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<sup>459</sup> See *Fraleley*, 966 F. Supp. 2d at 945 (predicting the minor sub-class of persons under the age of eighteen will have the possibility to further opt-out).

<sup>460</sup> See Daniel Wilson, *Facebook Finalizes Controversial Privacy Policy Changes*, LAW 360 (Nov. 15, 2013), archived at <http://perma.cc/Z3J3-VWTJ> (describing the changes to the Facebook privacy policy with respect to using, collecting and sharing user data).

<sup>461</sup> See Fidji Simo, *An Update on Facebook Ads*, FACEBOOK NEWSROOM (Jun. 6, 2013), archived at <http://perma.cc/4N9Z-8AHF> (illustrating that Facebook has recognized marketers’ suggestions and streamlined their advertisement services).

<sup>462</sup> See Help Center, *Interacting with Ads*, FACEBOOK (2015), archived at <https://perma.cc/PB3Q-WYVB> (explaining how users can view and edit their privacy settings).

<sup>463</sup> See *Fraleley v. Facebook*, ELECTRONIC INFORMATION PRIVACY CENTER, archived at <https://perma.cc/ZS9T-RU9E> (reviewing amicus brief and case history for *Fraleley v. Facebook* and highlighting the current appeal stage). See also *Fraleley v. Facebook, Inc.*, GARDEN CITY GROUP, LLC (2016), archived at <https://perma.cc/3822-QBBZ> (noticing that “[b]efore any settlement payments can be made, all appeals filed must be resolved).

<sup>464</sup> See *Fraleley v. Batman*, D.C. No. 3:11-cv-01726-RS, 2016 U.S. App. Lexis 518 (N.D. Cal., Jan. 6, 2016) (affirming the settlement agreement); see also *Fraleley v. Facebook*, ELECTRONIC INFORMATION PRIVACY CENTER, archived at <https://perma.cc/ZS9T-RU9E> (reviewing amicus brief and case history for *Fraleley v. Facebook* and highlighting the current appeal stage).

<sup>465</sup> See *id.* (explaining that EPIC’s argument in the amicus brief deems the settlement unfair).

questions such as non-celebrities in social networks, and the role of regulators in the fast pacing role of social media.<sup>466</sup>

*i. November 2011 – August 2012: FTC complaint and the settlement with Facebook*

Following the aforementioned complaints and the class action litigations against Facebook, the FTC initiated its own investigation of Facebook practices.<sup>467</sup> Resulting from the investigation was a complaint that included eight counts alleging violation of section 5(a) of the FTC act, prohibiting deceptive or unfair acts or practices.<sup>468</sup> In the complaint, the FTC made clear Facebook's information collection practices, and its Platform's designed ability to allow third party applications to either access user's information directly through his actions or indirectly through his friends.<sup>469</sup>

*A. The FTC complaint*

The first count repeated old complaints regarding the privacy settings.<sup>470</sup> Alleging the privacy policy was deceptive, the FTC claimed that Facebook's privacy policy gives the notion of providing user control.<sup>471</sup> Meanwhile, the privacy settings did not explain that the settings would not apply to third parties and failed to disclose users' choices being ineffective when friends are using an application.<sup>472</sup>

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<sup>466</sup> See *Fraleay*, 830 F. Supp. 2d at 807 (opining no reason to impose a different pleading standard for non-celebrities than celebrities).

<sup>467</sup> See *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, FEDERAL TRADE COMMISSION (Nov. 29, 2011), archived at <https://perma.cc/MNP5-LX86> (providing details about the Federal Trade Commission's investigation into Facebook's tracking of users and non-users).

<sup>468</sup> See Complaint at 4-19, In the Matter of Facebook, Inc. (F.T.C. Jul. 27, 2012) (No. C-4365) (detailing the counts the FTC filed against Facebook).

<sup>469</sup> See *id.* at 3 (describing the mechanics of Platform Applications).

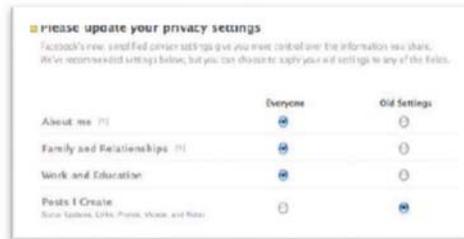
<sup>470</sup> See *id.* at 4-7 (stating the first count of the complaint against Facebook).

<sup>471</sup> See *id.* at 6-7 (revealing that Facebook misrepresented the ability of users to control their privacy settings).

<sup>472</sup> See *id.* at 6 (explaining that the Facebook settings kept changing and highlighting that Facebook's privacy policy continued to indicate to users that they had control over their profile viewers and could restrict access to their profile information).

The second and third counts repeated the earlier advocacy groups' complaint regarding designating information as "publicly available."<sup>473</sup> The FTC found that though users had to go through a Privacy Wizard to set the new settings, in none of the steps did Facebook explain users' inability to restrict access to the newly designated "publicly available" information.<sup>474</sup> Moreover,

while this Privacy Wizard allowed users to choose the option of keeping their old privacy settings, the Privacy Wizard was misleading as the "publicly available" information change was *retro-*



actively implemented for the users.<sup>475</sup> The fact that users were promised more control was considered on two counts: first that it was deceptive by offering no real control and second that it was unfair due to its retroactive effect.<sup>476</sup>

The fourth count criticized Facebook's Platform from a new perspective.<sup>477</sup> This time, the FTC criticized apps' ability to access users' information, though Facebook promised users that applications would only access the information needed to work.<sup>478</sup> The fifth count alleged that while Facebook promised in various statements that it does not share information with advertisers, since September 2008

<sup>473</sup> See *id.* at 9 (describing how Facebook changed its privacy policy without telling users about important changes that would affect their privacy). Recall that Facebook failed to disclose that a user could no longer restrict access to their now public information. *Id.*

<sup>474</sup> See Complaint at 8, In the Matter of Facebook, Inc., (F.T.C. Jul. 27, 2012) (No. C-4365) (indicating that the Privacy Wizard walked users through the updating of their privacy settings but left out critical information about their privacy).

<sup>475</sup> See *id.* at 9 (revealing that users believed their private information was protected when Facebook applied changes retroactively without the users' knowledge).

<sup>476</sup> See *id.* at 7-9 (detailing that Facebook failed to disclose certain privacy changes that provided users with additional control over their personal information and that Facebook unfairly kept users' personal information).

<sup>477</sup> See *id.* at 10-11 (stating that the fourth count against Facebook was a result of Facebook's providing Platform Applications unrestricted access to users' information).

<sup>478</sup> See *id.* at 10-11 (highlighting that as applications collected more information than needed, Facebook misled users, starting in May 2007).

Facebook allegedly designed and operated its website to send users' User ID to advertisers.<sup>479</sup> The sixth count dealt with Facebook's promises that apps would receive Facebook approval as part of Verified Apps Program.<sup>480</sup> The seventh count alleged that while Facebook promised users that photos and videos uploaded and later deleted could be no longer accessed, users and apps were still able to reach them.<sup>481</sup> Finally, Facebook misled users that it was part of the U.S.-EU Safe-Harbor framework.<sup>482</sup>

### *B. Settling the complaint with Facebook*

Following a public comments period, on August 10, 2012, Facebook and the FTC reached an agreement, which was approved by three commissioners with one commissioner dissenting.<sup>483</sup> The consent order had ten parts, dealing with Facebook's misrepresentations and methods of receiving affirmative consent.<sup>484</sup> Mainly, the consent order prevented Facebook from engaging in practices that are either the same or similar to the acts *alleged in the FTC complaint*.<sup>485</sup> In other terms, the complaint does not deal with previous complaints made such as the users' unfairness claims.<sup>486</sup>

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<sup>479</sup> See *id.* at 10-11, 14-15 (according to the FTC, user's level of privacy was misleading, and contrary to their promises, Facebook provided users' private information to advertisers).

<sup>480</sup> See Complaint at 13, In the Matter of Facebook, Inc. (F.T.C. Jul. 27, 2012) (No. C-4365) (detailing that those advertisers were able to take steps to discover the users behind the information and that some applications received User IDs through certain Platform Applications).

<sup>481</sup> See *id.* at 16-17 (disclosing that this was also true for users who deactivated their account, thus being misled that their pictures and videos were also deleted). Facebook promised users that they would not allow access to third parties, but in truth, those third parties could access the information. *Id.*

<sup>482</sup> See *id.* at 17-19 (discussing that as a result of the previous counts, in many instances Facebook had not adhered to the Safe-Harbor Privacy Principles, concluding that Facebook misled users for the seventh time).

<sup>483</sup> See *FTC Approves Final Settlement with Facebook*, FEDERAL TRADE COMMISSION (Aug. 10, 2012), archived at <https://perma.cc/8XA3-UR33> (revealing that Commissioner Rosch dissented and Commissioner Ohlhausen relinquished herself from the decision).

<sup>484</sup> See Agreement Containing Consent Order, In the Matter of Facebook, Inc. (F.T.C. 2011) (No. 0923184) (displaying the ten different parts to the agreement containing consent order).

<sup>485</sup> See *id.* (addressing the concerns listed in the FTC complaint).

<sup>486</sup> See *id.* (omitting any discussion of users' unfairness claims).

Regarding users, Facebook was prohibited from misrepresenting the privacy or security of “covered information.”<sup>487</sup> This misrepresentation included such topics as collection or disclosure of information, extent of control over information, and the extent to which information is accessible to third parties.<sup>488</sup> Furthermore, the consent order required Facebook to provide users with a clear and prominent notice and obtain their “affirmative express consent” before sharing their previously collected information with third parties or in relation with any product or service.<sup>489</sup> While the rest of the complaint dealt with internal Facebook conduct,<sup>490</sup> the consent order did not deal with the question of how this affirmative consent would be reached.<sup>491</sup> Of importance, according to the consent order, Facebook would have to retain documents and statements describing promises

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<sup>487</sup> See *id.* at 3 (ruling that Facebook cannot misrepresent the disclosure or collection of users’ “covered information”).

“Covered information” means information from or about an individual consumer including, but not limited to: (a) a first or last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a mobile or other telephone number; (e) photos and videos; (f) Internet Protocol (“IP”) address, User ID or other persistent identifier; (g) physical location; or (h) any Information combined with any of (a) through (g) above.

*Id.*

<sup>488</sup> See *id.* at 4 (ordering Facebook to maintain the privacy of their personal information and to not misrepresent to whom that information is being distributed).

<sup>489</sup> See *id.* at 5 (establishing the requirement of consent before Facebook can disclose personal information or data).

<sup>490</sup> See Donald S. Clark, *Facebook, Inc.: Analysis of Proposed Consent Order to Aid Public Comment*, No. 233 Vol. 76 FEDERAL REGISTER, 75883, 75883 (Dec. 5, 2011) (referencing the FTC’s Analysis of Proposed Consent Order to Aid Public Comment). These consent-order sections included procedures to ensure inability to access information from deleted accounts. *Id.* at 75884. Furthermore, the order required the establishment and maintenance of comprehensive privacy program to address privacy risks in relation to new products and services, and the confidentiality of covered information. *Id.* at 75885. All of those procedures have to be documented and contain controls and procedures respecting Facebook’s size. *Id.* The fifth section of the consent dealt with the need to obtain for every other year for the next twenty years an assessment report from a qualified, objective and independent third party professional. *Id.* Finally, section VI through X are reporting and compliance provisions. *Id.*

<sup>491</sup> See Agreement Containing Consent Order, In the Matter of Facebook, Inc., (F.T.C. 2011) (No. 092 3184) (omitting how consent must be obtained).

to maintain privacy, documents sufficient to present *each* user's consent, and complaints directed to the company by users.<sup>492</sup>

Following the agreement, the Commission stated that this consent order "advances the privacy interests of nearly one billion Facebook users by requiring the company to live up to its promises and submit to privacy audits."<sup>493</sup> Failure to do so will subject Facebook to civil penalties of up to \$16,000 for each violation.<sup>494</sup> As such, the FTC Commissioners promised to monitor closely the actions of Facebook.<sup>495</sup> To summarize, the FTC had tried to deal with the question of information obscurement, and how information is presented to users.<sup>496</sup> As we have seen, these issues were troubling to the *Cohen* and *Fraleley* courts as well.<sup>497</sup>

Meanwhile, Commissioner Rosch found two reasons for disagreement.<sup>498</sup> First, Commissioner Rosch found it problematic that Facebook "expressly denies the allegations set forth in the complaint."<sup>499</sup> Second, Commissioner Rosch thought that not all allega-

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<sup>492</sup> See *id.* (discussing the required procedures for Facebook to keep user's information secure). In addition, Facebook was required to collect "documents sufficient to demonstrate, on an aggregate basis, the number of users whom each such privacy setting was in effect at any time Facebook has attempted to obtain such consent." *Id.* at 7.

<sup>493</sup> See Statement of the Commission at 1, In the Matter of Facebook, Inc. (F.T.C. Aug. 10, 2012) (No. 092 3184) (stating that the final consent order advances Facebook users' privacy interests).

<sup>494</sup> See *id.* (noting steep penalties for each violation).

<sup>495</sup> See *id.* (warning that the FTC is monitoring Facebook's compliance with the order).

<sup>496</sup> See *id.* (explaining the prohibitions now placed on the way Facebook shares users' information).

<sup>497</sup> See *Cohen*, 798 F. Supp. 2d at 1097 (implying the similar issues faced in tracing user information for the court in *Cohen*); see also *Fraleley*, 830 F. Supp. 2d at 796 (reiterating the similar issues for tracing user's information to third parties in the court in *Fraleley*).

<sup>498</sup> See Statement of the Commission, In the Matter of Facebook, Inc. (F.T.C. Aug. 10, 2012) (No. 092 3184) (describing Commissioner Rosch's two objections in detail).

<sup>499</sup> See *id.* at 1 (explaining the specific denial that Commissioner Rosch opposes); see also Dissenting Statement of the Commissioner J. Thomas Rosch at 1, In the Matter of Facebook, Inc. (F.T.C. Aug. 10, 2012) (No. 092 3184) (stating that Commissioner Rosch found that Section 5 of the FTC Act allows the commissioners to accept consent agreement only where they believed the respondent is engaging in unfair or deceptive acts or practice). If Facebook is allowed to deny all allegations,

tions of deception were covered, especially those about which Facebook knew or should have known.<sup>500</sup> Replying to these remarks, the majority explained that the consent order broadly prohibits any misrepresentations, and as Facebook's entire business model is based on collecting, maintaining, and sharing information, this prohibition touched almost all of its operations.<sup>501</sup> In regard to the denial of liability, the majority stated that it did not diminish the FTC staff's investigation or the commission's ability to find a reasonable basis to finalize a settlement or to enforce an order.<sup>502</sup>

*j. May 2012 & Post-Settlement Issues*

In May 2012, Facebook published a new privacy policy.<sup>503</sup> According to the previous policy, active users needed to approve the change by voting.<sup>504</sup> Out of the more 900 million users, only 342,632 people participated.<sup>505</sup> Roughly 297,883 people wished to keep the existing governing documents.<sup>506</sup> Though almost 90% voted against

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there is a questionable basis for the probability of such misconduct. *Id.* Furthermore, if there is express denial by Facebook, there is either "reason to believe" or "interest to the public." Facebook did accept the jurisdictional facts. *Id.*

<sup>500</sup> See Dissenting Statement of the Commissioner J. Thomas Rosch at 2, In the Matter of Facebook, Inc. (F.T.C. Aug. 10, 2012) (No. 092 3184) (explaining Rosch's concern that the order may not cover all representations about which Facebook should have known).

<sup>501</sup> See Statement of the Commission at 1, In the Matter of Facebook, Inc. (F.T.C. Aug. 10, 2012) (No. 092 3184) (describing the impact of the consent order of Facebook's operations).

<sup>502</sup> See Statement of the Commission at 2, In the Matter of Facebook, Inc. (F.T.C. Aug. 10, 2012) (No. 092 3184) (describing the staff and Commission's efforts and abilities in regards to settlement negotiations).

<sup>503</sup> See Marty Orange, *Facebook Site Governance Vote – Voting Ends Jun 8, 2012 9:00 AM PDT*, FACEBOOK (Jun. 5, 2012), archived at <http://perma.cc/5TAJ-HSUZ> (providing screenshots of voting and results for Facebook's Data Use Policy in May 2012).

<sup>504</sup> See *id.* (offering a tool for people to vote on Facebook's new policy regarding site governance).

<sup>505</sup> See Graeme McMillan, *Facebook Adopts New Data Use Policy Against Wishes of its Users... Well, Those that Spoke Up, Anyway*, DIGITAL TRENDS (Jun. 8, 2012), archived at <http://perma.cc/C6T9-S7L7> (providing the statistics for users that voted on the 2012 policy).

<sup>506</sup> See *id.* (providing the statistics for users who voted against the 2012 policy).

the change,<sup>507</sup> as the policies required 30% of Facebook's active users to participate, Facebook decided to adopt the changes.<sup>508</sup>

Following this change, in November 2012, Facebook looked again into changing its governing documents.<sup>509</sup> Following the complaints, most changes were made with the goal of making the terminology clearer.<sup>510</sup> For starters, Facebook changed the rules in regard to visibility of posts on users' timeline.<sup>511</sup> While users could hide posts on a timeline, users were told that from that instance, any other person in that audience may still be able to see the post.<sup>512</sup> Additionally, and more importantly, Facebook made clearer the explanation on information shared about a user by his friends and other people.<sup>513</sup> At the same time, as users cannot delete these posts but rather only hide them, users were left with the choice either to tell other users they dislike the post or report the post to Facebook.<sup>514</sup> Finally, Facebook made clear that users' information, starting from their Facebook

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<sup>507</sup> See *id.* (indicating only 44,749 voted yes out of the 342,632 users who voted).

<sup>508</sup> See Elliot Schrage, *The Facebook Site Governance Vote*, FACEBOOK (Jun. 1, 2012), archived at <http://perma.cc/6346-B6QT> [hereinafter Schrage, *Site Governance Vote*] (discussing requirements for voting results to be binding); see also McMillan, *supra* note 505 (stating that Facebook decided to adopt the changes). Facebook decided to adopt the policy as it considered it to be better in details and transparency regarding data protection and practices. *Id.*

<sup>509</sup> See Elliot Schrage, *Proposed Updates to our Governing Documents*, FACEBOOK (Nov. 21, 2012), archived at <http://perma.cc/QD6Z-GWU6> [hereinafter Schrage, *Proposed Updates*] (addressing the process for proposed updates to governing documents).

<sup>510</sup> See *Updating Our Terms and Policies: Helping You Understand How Facebook Works and How to Control Your Information*, FACEBOOK, archived at <https://perma.cc/235X-UFTY> [hereinafter *Updating Our Terms and Policies*] (outlining policies implemented by Facebook in response to community complaints).

<sup>511</sup> See Schrage, *Proposed Updates*, *supra* note 509 (discussing alterations to the privacy settings on timelines).

<sup>512</sup> See Schrage, *Proposed Updates*, *supra* note 509 (showing that there was some transparency on behalf of Facebook in regards to showing what appears on a timeline). Also, people were told they can be traced back, through other people and links to users. *Id.*

<sup>513</sup> See Schrage, *Proposed Updates*, *supra* note 509 (indicating information that is visible to other user's and information that can be hidden from timelines).

<sup>514</sup> See Schrage, *Proposed Updates*, *supra* note 509 (stating users cannot delete posts created by others).

registration, can be used for personalized ads and that a user's subscribers were able to receive Sponsored Stories from this particular user.<sup>515</sup>

As explained earlier, according to the then-standing version of the governing documents, changes in them needed to be put to a vote.<sup>516</sup> Though the vote was open to all active users, only 668,872 active participants voted, out of which 589,141 people asked to keep the old version without changes.<sup>517</sup> Again, as the amount of active users that voted did not reach the 30% active users, Facebook adopted the changes.<sup>518</sup> Facebook explained that comments are important to make clarifications and revisions, and that it would keep using its Governance Page to give notice to users on future changes in policy.<sup>519</sup> At the same time, no longer would the changes in privacy policy be put to a vote.<sup>520</sup> Though Facebook made clear the importance of its Governance Page as a page for notifying users about changes in policy and votes thereof, the Governance page is still run as a regular page.<sup>521</sup> Put differently, though it is the main method of notification for Facebook, Facebook did not make users follow this

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<sup>515</sup> See Thorin Klosowski, *How Facebook Uses Your Data to Target Ads, Even Offline*, LIFEHACKER (Apr. 11, 2013), archived at <https://perma.cc/2TEF-TWSB> (arguing that Facebook uses personal information both on and offline). Facebook also made clear that information can now be shared with Facebook's affiliates, meaning companies that become of Facebook's Group. *Id.* See *Understanding Facebook's Sponsored Stories*, FACEBOOK (Jul. 1, 2011), archived at <https://perma.cc/TT5S-HABL> (explaining the way in which advertisers use personal information to target specific users).

<sup>516</sup> See Schrage, *Site Governance Vote*, *supra* note 508 (observing Facebook held its first governance vote in 2009).

<sup>517</sup> See Ann Brown, *Tech Talk: Voting Apathy Shuts Down Future Facebook User Votes, Privacy Policy Changes Go Into Effect*, MADAME NOIR (Dec. 12, 2012), archived at <http://perma.cc/HKK7-4YWM> (outlining percentages of users that voted in the Facebook Governance Vote).

<sup>518</sup> See *id.* (declaring the voting percentage needed in order for users to remain a part of Facebook's future decisions); see also Schrage, *Site Governance Vote*, *supra* note 508 (reinforcing Facebook's policy on user votes).

<sup>519</sup> See Schrage, *Site Governance Vote*, *supra* note 508 (citing Facebook's presentation of policies to their users in order to obtain comments and feedback).

<sup>520</sup> See Brown, *supra* note 517 (acknowledging Facebook will no longer hold voting).

<sup>521</sup> See Schrage, *Proposed Updates*, *supra* note 509 (announcing Facebook's new structure of their governance page).

page by default, but rather users have to decide on their own to follow this page.<sup>522</sup> Furthermore, it is not clear to what extent users are aware of the existence of the Facebook Governance page.<sup>523</sup>

Following the *Fraley* settlement, during September 2013 Facebook introduced again new changes to the privacy policy.<sup>524</sup> The biggest change Facebook introduced dealt with utilizing users' content for advertisement.<sup>525</sup> In retaliation to these changes, the advocacy groups filed a complaint with the FTC, in which they claimed that in clear violation of the consent order, according to the "new" proposed changes, users needed to agree to allow Facebook to use pictures and names without asking for consent.<sup>526</sup> Moreover, according to the advocacy groups, the *Fraley* settlement is at fault for granting Facebook a right that was contrary to its initial policy, making users' names and pictures into advertisements.<sup>527</sup>

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<sup>522</sup> See Brown, *supra* note 517 (noting that many users were unaware of the Governance page and the vote despite Facebook's ability to disseminate information).

<sup>523</sup> See Brown, *supra* note 517 (stating that Facebook users are less aware of the governance page and the voting procedures).

<sup>524</sup> See generally *Facebook and Privacy*, FACEBOOK (August 29, 2013), archived at <https://perma.cc/FR68-5VA9> (highlighting recent changes to the privacy policy as well as links to sources, now removed, explaining the changes in further detail); see also Chris Morran, *FTC Looking Into Recent Change to Facebook Privacy Policy*, CONSUMERIST (Sept. 12, 2013), archived at <http://perma.cc/SX86-HYCG> (describing the changes to Facebook's privacy policy); see also Letter from Marc Rotenberg, Executive Director, Electronic Privacy Information Center, et al. to Edith Ramirez, Chairwoman, Federal Trade Commission, et al. (Sept. 4, 2013) (on file with EPIC.org) [hereinafter Letter from Rotenberg to the F.T.C.] (criticizing Facebook's claim that User names and IDs are the "same thing"). These changes made clear some of Facebook's previous practices such as allowing access to public information through Facebook's services and the results of changing audience settings of commented stories. *Id.* Facebook also explained the difference between users' names and users' IDs. *Id.* at 3.

<sup>525</sup> See Drew Guarini, *Hold Your Gasps, Facebook Is Under Fire for Its Privacy Policy Again*, THE HUFFINGTON POST (Sept. 5, 2013), archived at <http://perma.cc/GKY9-4JJE> (stressing the changes in Facebook's advertisement policy).

<sup>526</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 2 (describing changes in Facebook's new consent order).

<sup>527</sup> See *Fraley v. Facebook*, ELECTRONIC INFORMATION PRIVACY CENTER, archived at <https://perma.cc/ZS9T-RU9E> (detailing terms of a settlement agreement rejected by an advocacy group); see also Letter from Rotenberg to the F.T.C., *supra* note 524, at 1 (explaining increased use of names and likenesses in advertisements as a result of new changes).

Mainly, the advocacy groups explained that the original Statement of Rights and Responsibilities referenced the privacy settings in order to limit associating information with commercial content enhanced by Facebook.<sup>528</sup> Meanwhile, the new version not only removed this limitation, but also explicitly explained that users permit Facebook to receive payments for displaying sponsored stories.<sup>529</sup> Following the change to the Statement of Rights and Responsibilities, the data use policy also expanded dramatically the use of personal information.<sup>530</sup>

As such, the advocacy groups claimed that by circumventing the privacy settings and removing the voting system, Facebook violated the consent order, which demanded receiving users' consent.<sup>531</sup> Importantly, though the advocacy groups raised some interesting points on the clash between the *Fraley* settlement and the consent order, the advocacy groups referenced the consent order as the source of rules that should prevent Facebook from making changes without affirmative consent.<sup>532</sup> Moreover, the advocacy groups lashed out against the *Fraley* settlement.<sup>533</sup> The advocacy groups proclaimed

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<sup>528</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1-4 (providing an advocacy group's interpretation of terms included in Facebook's user agreement).

<sup>529</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1-4 (describing the change in the privacy policy).

<sup>530</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 3-4 (explaining the impact of the change in the privacy policy). This was done by allowing Facebook to infer information and have fewer limitations on information use. See Letter from Rotenberg to the F.T.C., *supra* note 524, at 3.

<sup>531</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1, 4 (indicating how the proposed policy violates the consent order and the revisions to the governing documents to remove the ability for users to vote on proposed changes).

<sup>532</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1-3 (comparing the terms of the settlement to the requirements of the consent order and providing clarity on the terms of the order). Basing their claims on the new FTC-Facebook settlement and the importance of privacy, the advocacy groups did not base their complaints on either unfairness or deceit regarding the new proposed policy changes. See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1-4.

<sup>533</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1-2 (stating proposed changes permit Facebook to bring back programs that were once deemed inappropriate); see also Kate Cox, *Child Protection Advocacy Group Rejects Facebook Privacy Lawsuit Settlement, Asks Court To Reconsider*, CONSUMERIST (Feb. 13, 2014), archived at <https://perma.cc/D5T8-42GH> (noting backlash from different advocacy groups). Although the settlement reclaimed some ground in the war over privacy, it continued to allow users' pictures to be shown as endorsing products on their friends' walls. *Id.*

that the *Frale*y attorneys did not truly represent the interests of Facebook's users.<sup>534</sup> Misrepresenting users' interests and reaching a settlement, Facebook was able to change its practices based on a court-approved settlement.<sup>535</sup> According to the advocacy groups, the main consequence of the misrepresentation and settlement was to bring users' interest full circle back to such unwanted services as Beacon.<sup>536</sup> Though the advocacy groups complained, Facebook released a secondary version of its governing documents, which included no changes in comparison with the early draft.<sup>537</sup> The changes were adopted on November 15, 2013.<sup>538</sup>

The Facebook regulatory story is far from exulting. While writing this paper, Facebook continued changing its interface and privacy policy.<sup>539</sup> Yet, user's representatives were not always willing to go to the regulators to claim Facebook violated users' privacy.<sup>540</sup> In the few cases they did, for instance, EPIC sent the FTC a complaint regarding the acquisition of WhatsApp.<sup>541</sup> Replying to this complaint, the FTC noticed Facebook and WhatsApp to make sure they keep to the promises made to WhatsApp's users through the messages service's privacy policy, and the promises made by Facebook

<sup>534</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1 (implying that the attorneys representing the Facebook users failed to fully represent their interests).

<sup>535</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1-2 (reviewing the settlement giving Facebook the wide parameters to still violate the company's then-current privacy policy).

<sup>536</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 1-2 (arguing that the proposed changes allow Facebook to reintroduce programs similar to Beacon).

<sup>537</sup> See Letter from Rotenberg to the F.T.C., *supra* note 524, at 4 (detailing Facebook's lack of reaction to the concerns of advocacy groups).

<sup>538</sup> See Schrage, *Proposed Updates*, *supra* note 509 (announcing the proposed changes in the Facebook governing documents as of November 2013).

<sup>539</sup> See *Facebook Site Governance*, FACEBOOK (Jan. 30, 2015), archived at <http://perma.cc/GUM9-ZSFD> (providing detail around the historical changes to Facebook's governance policies).

<sup>540</sup> See *In re Facebook*, ELECTRONIC INFORMATION PRIVACY CENTER, *supra* note 205 (listing examples of litigation against Facebook).

<sup>541</sup> See Complaint at 8-10, *In the Matter of WhatsApp, Inc.* (F.T.C. Mar. 6, 2014) (describing the impact on privacy of the proposed acquisition of WhatsApp). The advocacy groups asked the FTC to halt the acquisition of WhatsApp. *Id.* at 14. This complaint deals with WhatsApp's users, not Facebook's own practices. *Id.* at 1-2. EPIC mentioned the November 2012 change to the privacy policy permitting Facebook to share information with such affiliate companies as Instagram. *Id.* at 6. This in turn allowed Facebook to not only buy Instagram, but also incorporate their messages into Facebook. *Id.* The advocacy groups also mentioned other Facebook's practices relevant to users' messages. *Id.* at 5-6.

to the FTC through the consent order.<sup>542</sup> In a different instance, EPIC replied to a Facebook psychological experiment, in which Facebook altered users' news feed in order to elicit positive and negative emotional responses.<sup>543</sup> Yet, at the same time, though the experiment was conducted in January 2012 when the September 2011 privacy policy was in force, and the following changes to the policy occurred in May 2012, EPIC made claims of deceit and breach of the consent order.<sup>544</sup> And, though Facebook replied to the complaint by setting internal guidelines, training, and a review board,<sup>545</sup> it is important to note that in the complaint no unfairness claims were made,<sup>546</sup> and in fact the consent order was not in force at the time of the experiment and relevant policy changes.<sup>547</sup> All in all, though other claims are being made to the FTC,<sup>548</sup> more recently Facebook has decided to once again re-imagine its privacy policy,<sup>549</sup> and where this research ends the historical analysis.

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<sup>542</sup> See Letter from Jessica Rich, Director, Bureau of Consumer Protection to Erin Egan, Chief Privacy Officer, Facebook, Inc. et al. 1-4 (Apr. 10, 2014) (on file with the F.T.C.) (explaining the consequences of not honoring promises made to users).

<sup>543</sup> See *In re Facebook*, ELECTRONIC INFORMATION PRIVACY CENTER, *supra* note 205 (explaining Facebook's emotional study and EPIC's response).

<sup>544</sup> See Complaint at 11-13, In the Matter of Facebook, Inc. (F.T.C. Jul. 3, 2014) (setting out EPIC's claims against Facebook regarding deceptive practices and breach of consent order).

<sup>545</sup> See Mike Schroepfer, *Research at Facebook*, FACEBOOK (Oct. 2, 2014), *archived at* <http://perma.cc/G3CS-N58Z> (introducing a new framework designed to govern internal work and research post the 2012 emotions experiment).

<sup>546</sup> See Complaint at 11-12, In the Matter of Facebook, Inc. (F.T.C. Jul. 3, 2014) (describing the claims against Facebook, which excludes unfairness claims, despite use of the word unfair describing Count II).

<sup>547</sup> See Complaint at 4, 11, In the Matter of Facebook, Inc. (F.T.C. Jul. 3, 2014) (pointing to the timing of the changed Data Use Policy and the subsequent consent order).

<sup>548</sup> See Kostas Rossoglou & Jeffrey Chester, *Letter to the Federal Trade Commission and the Office of Data Protection*, TACD.ORG 1 (Jul. 29, 2014), *archived at* <http://perma.cc/L9AA-WQQN> (outlining a more recent claim was made to both the FTC and the Irish Data Protection Commissioner against Facebook's decision to track the web activities of users and to profile offline purchase). *Id.*

<sup>549</sup> See *Facebook Site Governance*, FACEBOOK (Nov. 21, 2014), *archived at* <https://perma.cc/GUM9-ZSFD> (reaffirming Facebook's update data policy, cookie policy, and terms); *see also* *Updating Our Terms and Policies*, *supra* note 510 (excerpting Facebook's new privacy policy updates).

### iii. Facebook Interim Summary: Achieving goals by changing behavior

Overall, the complaints filed against Facebook revealed that the social network had lowered privacy restrictions and made users' information more accessible not only to their friends, but also to companies and marketing operators.<sup>550</sup> Indeed, as Facebook grew, the *Cohen* court observed that Facebook introduced new services designed to facilitate information sharing.<sup>551</sup> Simultaneously, Facebook provoked objections that it “[was] distributing too much information automatically, without users' consent or intent, and to the detriment of personal privacy interests.”<sup>552</sup>

Largely, the findings have focused on four aspects of the official objections filed by users' representatives: obscure notices in conflict with the language of the master policy; notices intended to deceive; nudging users to make their information public; and stakeholders changing their behavior and settling outside the formal systems. Moreover, these four aspects are tiered, with each building upon the previous in a dialectic battle around access to users' personal information, shopping habits, and online conversations.<sup>553</sup> In all cases, users' representatives argued that Facebook knowingly made changes that negatively impacted users' privacy.<sup>554</sup>

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<sup>550</sup> See *Cohen*, 798 F. Supp. 2d at 1093-94 (hinting that Facebook's privacy policies give too much information without the consent of its users).

<sup>551</sup> See *id.* at 1092 (specifying Facebook's new services as a means of facilitating information).

<sup>552</sup> See *id.* (stating the complaint towards Facebook regarding the disseminating of personal information).

<sup>553</sup> See *Cohen*, *supra* note 2, at 2 (analyzing the depth of “gamification” in which commercial surveillance not only watches customers but also recruits new ones).

<sup>554</sup> See *Cohen*, 798 F. Supp. 2d at 1093-94 (stating that the plaintiffs felt they were at a disadvantage with their profile pictures and names being used without their consent).

a. *Obscure notices in conflict with the language of the master policy*

The first and second problems raised by users' representatives focused on Notice.<sup>555</sup> At the most basic level, users' representatives criticized the manner in which Facebook presented its privacy policies to users.<sup>556</sup> Users' representatives found that information was not only presented as long and complex, but also spread over different, unlinked web pages, creating doubt as to whether users could understand or navigate the information.<sup>557</sup> Meanwhile, when Facebook's interests demanded it, Facebook presented users with a notice in the form of a one-time pop-up or a privacy setting wizard.<sup>558</sup> Presented to all users, these ephemeral methods of notice, in a couple of short sentences, alerted users to changes in information sharing practices.<sup>559</sup> Though those notices were universally visible to users, they revealed only parts of Facebook's overall changes in privacy policy and they appeared only once, disappearing without a visible trace when users clicked them shut.<sup>560</sup>

Slowly users began to complain, and their representatives emerged to argue that to understand their privacy options, users had to compile information from disparate, unlinked sources describing

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<sup>555</sup> See Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 787-89 (2014) (explaining how mandated notice is a popular method to force companies to disclose information to consumers). To explore some of the regulatory "benefits" behind noticing. *Id.* Compare Shahar & Schneider, *supra* note 22, at 729 (discussing the issues with people being able to interpret the relative urgency of mandated notices), with Florencia Marotta-Wurgler, *Even More Than You Wanted to Know About the Failures of Disclosure 3*, (NYU L. & Econ. Working Papers, Paper No. 394, 2014) (contrasting the importance of notice, as it is a means of enforcing a contract).

<sup>556</sup> See *Cohen*, 798 F. Supp. 2d at 1093-94 (reiterating the core of the plaintiff's complaint against Facebook).

<sup>557</sup> See *id.* (discussing Facebook's complex, constantly changing, multi-document privacy policy); see also Complaint at 13, *Lane v. Facebook, Inc.*, 696 F.3d 811 (No. C08 03845) (demonstrating the complexity and volume of documents that make up Facebook's privacy policy).

<sup>558</sup> See *Cohen*, 798 F. Supp. 2d at 1092 (listing a complaint that users had against Facebook's paltry usage of notices).

<sup>559</sup> See Complaint at 16-17, *Lane v. Facebook, Inc.*, 696 F.3d 811 (No. C08 03845) (expounding on reasons why the pop-up notifications are wholly inadequate).

<sup>560</sup> See *id.* (explaining the brevity of the pop-up notifications).

Facebook's privacy policy.<sup>561</sup> Moreover, because changes in that policy were in constant flux, users had no way of knowing which information they accessed was still viable, or which advice they should prioritize in helping them choose their privacy settings.<sup>562</sup> Additionally, not only were the sources of information unlinked, and sometimes outdated, the information Facebook provided typically only appeared once in an ephemeral form as a pop-up or wizard, making it difficult for users to acquire a genuine representation of the changes over time in Facebook's different versions of its privacy policy.<sup>563</sup> In its defense, Facebook submitted to the courts a series of screenshots of the notices, arguing that these notices were evidence that the company had made a good faith effort to inform users of policy changes.<sup>564</sup> Yet, the screenshots had no dates and it was not clear whether the notices accurately and adequately informed users of the

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<sup>561</sup> See *id.* at 13 (highlighting the variety of sources necessary for a user to work through to gain any understanding of Facebook's privacy policy).

<sup>562</sup> See *Cohen*, 798 F. Supp. 2d at 1094 (noting the difficulty in determining when certain provisions of Facebook's privacy policy might have been active or applicable at any given time).

<sup>563</sup> See *id.* (mentioning the difficulty in finding the applicable version of Facebook's privacy policy); see also Complaint at 16-17, *Lane v. Facebook, Inc.*, 696 F.3d 811 (No. C08 03845) (noting the brevity of the privacy policy updates that were not placed in the context of the Facebook privacy policy as a whole).

<sup>564</sup> See *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d at 794 (discussing photo evidence of notices provided by Facebook for users).

"(1) Facebook's Statement of Rights and Responsibilities; (2) a screenshot of a page from Facebook's website entitled "Where can I view and edit my privacy settings for sponsored content? -- Facebook Help Center," accessed on July 1, 2011; (3) a screenshot of a page from Facebook's website entitled "How can I control what my friends see in their News Feeds? -- Facebook Help Center," accessed on July 1, 2011; (4) a screenshot of a page from Facebook's website entitled "How can I control who can see things I post (for example: status updates, links, videos)? -- Facebook Help Center," accessed on July 1, 2011; (5) a screenshot of a page from Facebook's website entitled "How do I create Sponsored Stories? -- Facebook Help Center," accessed on July 1, 2011; and (6) a screenshot of a page from Facebook's website entitled "How do I unlike something? -- Facebook Help Center," accessed on July 1, 2011. ECF No. 31 at 2 & Exs. A through F."

*Id.*

privacy policies changes, so the courts had no choice but to find the notice examples troubling.<sup>565</sup>

Indeed, Facebook's master privacy policy, which users could access by clicking on the link on their Facebook's main webpage, appeared constant and unchanging over time.<sup>566</sup> The fact that Facebook did not update the language of its master policy, even as the changes were underway, resulted in outdated language that users found on Facebook's website.<sup>567</sup> This language, in turn, implicitly reassured users that their privacy setting options were the same as ever.<sup>568</sup> Meanwhile, the master policy failed to include the important updates that were *instead* offered for instance through pop-ups,<sup>569</sup> help desk questions,<sup>570</sup> and notices alongside the privacy settings.<sup>571</sup> These messages were often obscure, while simultaneously the privacy policy remained out-of-date.<sup>572</sup> These combined tactics resulted in users' representatives perceiving Facebook as being deceitful towards its users.<sup>573</sup>

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<sup>565</sup> See *Cohen*, 798 F. Supp. 2d at 1094 (noting the courts concern with the lack of notice Facebook provided to consumers). The court for instance stated that "[s]ubstantial questions . . . remain in this instance as to when various versions of the documents may have appeared on the website and the extent to which they necessarily bound all plaintiffs." *Id.*

<sup>566</sup> See *Data Policy*, *supra* note 325 (providing information about Facebook's privacy policy).

<sup>567</sup> See *Bosker*, *supra* note 129 (noting that Facebook has historically managed its data poorly).

<sup>568</sup> See Complaint at 13, *Lane*, 696 F.3d 811 (No. C08 03845) (explaining ambiguous language and difficulty for users to understand and make updates to their privacy settings).

<sup>569</sup> See *id.* at 15 (detailing how Facebook generated a pop-up notifying the user that information was being sent to Facebook).

<sup>570</sup> See Help Center, *supra* note 462 (explaining how to view and edit privacy settings).

<sup>571</sup> See Complaint at 8, 15, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (explaining the mechanics of the privacy settings).

<sup>572</sup> See Complaint at 21-22, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (quoting a newspaper story explaining how difficult it was to update privacy settings).

<sup>573</sup> Complaint at 25, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (delineating the alleged misrepresentations of Facebook with respect to user privacy).

*b. Notices intended to deceive*

In addition to updating their privacy policy in obscure ways, Facebook's policy changes were also notices grounded in deceit.<sup>574</sup> In their complaints, users' representatives claimed that users are told by either one of the various notices available through Facebook's interface that they have control over their information through the privacy settings.<sup>575</sup> Meanwhile, even after users had chosen a privacy setting that seemed to ensure that their information was secure, users discovered that in practice Facebook was sending information about them to third parties through other sources.<sup>576</sup> Users and their representatives complained of outright deceit on the part of Facebook.<sup>577</sup> The company, they said, had led them to believe falsely that they had control over the personal information stored in Facebook's databases.<sup>578</sup> As such, they concluded, Facebook was not only simply saying one thing and in practice doing another, but also pretending to give users the interface tools to make what were actually void choices.<sup>579</sup>

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<sup>574</sup> See Complaint at 6-9, In the Matter of Facebook, Inc. (F.T.C. Jul. 27, 2012) (No. C-4365) (describing the post-2009 updates and the ways in which the update notices were misleading).

<sup>575</sup> See *id.* at 7-9, (detailing how Facebook's 2009 updates misled users into believing that they could prevent third parties from accessing their information). *But see Cohen*, 798 F. Supp. 2d at 1094 (N.D. Cal. 2011) (detailing user allegations that Facebook did not obtain consent to share their information due to the vague and ambiguous language without mention of deceit). This connection between deceit and Facebook's privacy policy was true in almost all cases analyzed, but the connection was not clearly made by users' representatives in all cases. *Id.*

<sup>576</sup> See Complaint at 10, In the Matter of Facebook, Inc. (F.T.C. Jul. 27, 2012) (No. C-4365) (describing that Facebook was releasing information to third parties even after users believed they had made their profiles completely private).

<sup>577</sup> See *id.* (accusing Facebook of being deceitful in the privacy policy updates).

<sup>578</sup> See Complaint at 1, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (discussing complaint, request for investigation, injunction, and other relief requested); see also Complaint at 1, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (stating the Complaint, Request for Investigation, Injunction, and Other Relief). In one particular case Facebook was on the verge of losing its 230 Communication Decency Act Immunity. See *Fraley*, 830 F. Supp. 2d. at 802.

<sup>579</sup> See Complaint at 25, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (addressing the reality of Facebook's deceit).

*c. Nudging users to make their information public*

Interestingly, while most claims of deceit dealt with choices around privacy settings, other complaints focused on how Facebook nudged<sup>580</sup> users to share or make public otherwise private information.<sup>581</sup> Although Facebook sometimes presented users with the ability to choose among options, users' representatives complained when the changes to Facebook's interface were discovered to be without real choice.<sup>582</sup> Whether it was part of the automatic updates to the Facebook code,<sup>583</sup> taking away users' "one click" option to opt-out,<sup>584</sup> or a formally notified update to the new information sharing rules, users discovered that Facebook changed its interface to leave them with little choice in regard to how their information was shared and utilized.<sup>585</sup> In more extreme cases, users wishing to retain con-

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<sup>580</sup> See generally RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (2008); DANIEL ARIELY, *PREDICTABILITY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR BEHAVIOR* (2008) (according to "Nudge" theorists, users are given possibility to freely disregard either private or public actors' nudge and do as they want). The result of this nudge is a beneficial behavior or a decision made by choice. See also Paul Brest, *Quis Custodiet Ipsos Custodes?: Debiasing the Policy Makers Themselves*, in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* (Eldar Shafir, ed. 2013).

<sup>581</sup> See Complaint at 22-23, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (demonstrating how Facebook "nudged" users into making their private information readily available to public). These complaints were on a continuum of choice, as users' representatives claimed unfairness when users were forcefully nudged into sharing private information on their pages or by allowing Facebook to utilize users' information for commercial purposes.

<sup>582</sup> See Kevin Bankston, *Facebook's New Privacy Changes: The Good, The Bad, and The Ugly*, ELECTRONIC FRONTIER FOUNDATION (Dec. 9, 2009), archived at <http://perma.cc/ESZ7-9BSX> (focusing on how Facebook users' privacy options were not really an option, but rather an illusion).

<sup>583</sup> See Complaint at 27, In the Matter of Facebook, Inc. (F.T.C. Dec. 17, 2009) (discussing what updates were made to Facebook's code).

<sup>584</sup> See *id.* (identifying specific changes that were made in regards to new Facebook's new privacy settings).

<sup>585</sup> See *id.* (highlighting that Facebook initially conveyed that users would have ability to "opt-out of Facebook Platform and Facebook Connect altogether through [their] privacy settings").

trol over their online habits and information were offered only the unrealistic and aggressive choices of unfriending groups of friends or leaving Facebook altogether.<sup>586</sup>

These unfairness complaints dominated users' representatives' filings. Specifically, while the FTC Act forbids companies from unfair *or* deceptive practices,<sup>587</sup> users have argued that Facebook's changes to its privacy policies were *both* unfair *and* deceitful.<sup>588</sup> And yet, though people might perceive claims of unfairness to be subjective, here users' representatives basically argued that the unfairness resulted from a forceful nudge by Facebook.<sup>589</sup> Due to these nudges, users' representatives left the "safe zone" of providing users with additional information on the risks Facebook's new services offered them, and instead, users' representatives went straight to the FTC and the courts.<sup>590</sup>

The regulators, unlike the users' representatives, limited the usage of unfairness claims to specific cases.<sup>591</sup> For instance, the FTC claimed unfairness only when a change was retroactive and not in regard to Facebook's interface.<sup>592</sup> Meanwhile, the court claimed that providing users with control over their information, has more economic value, than what a third party can derive from using the information.<sup>593</sup> Specifically, the court managed to identify the value users have to their friends.<sup>594</sup>

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<sup>586</sup> See Agreement Containing Consent Order at \*7, In the Matter of Facebook, Inc. (F.T.C. 2011) (No. 092 3184) (identifying alternative offered to Facebook users who wanted to retain control of their privacy settings).

<sup>587</sup> See Federal Trade Commission Act, 15 U.S.C. § 45 (2015) (stipulating that methods of competition within the United States must not be unfair).

<sup>588</sup> See Complaint at 7 In the Matter of Facebook, Inc. (F.T.C. Jul. 27, 2012) (No. C-4365) (highlighting the concerns of the plaintiffs that Facebook's Privacy Policy was unfair and deceptive).

<sup>589</sup> See *id.* at 7-8 (discussing the changes that were implemented by Facebook, which users felt infringed upon their privacy).

<sup>590</sup> See *id.* at 7 (detailing the course of action taken by the users' representatives).

<sup>591</sup> See *id.* at 7-8 (showing specific counts of unfair acts and practices).

<sup>592</sup> See *id.* at 9 (highlighting claims in which Facebook materially changed promises that users could keep certain information private).

<sup>593</sup> See *Fraley v. Facebook, Inc.*, No. C-11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at \*12 (N.D. Cal Aug. 17, 2012) (stating a theory posited by the representatives, which was later dismissed by the court, as the plaintiff presented no theory which supported calculating the value of injunctive value).

<sup>594</sup> See *Fraley, Inc.*, 830 F. Supp. 2d. at 800 (distinguishing the findings of value from Cohen).

d. *Stakeholders changing their behavior and settling outside the formal systems*

In response to these complaints, Facebook reexamined its practices.<sup>595</sup> In response to all cases, including complaints and regulatory intervention, Facebook tried to balance the claimed insufficient notice and feeling of deceit among users.<sup>596</sup> Facebook clarified its data use practices by re-amending sentences, or adding new paragraphs to describe important practices.<sup>597</sup> Moreover, Facebook explained through its privacy policy and other notices that control over information is now easier to maneuver, thus giving back some of the control users claimed they had unfairly lost.<sup>598</sup> To clarify, with the exception of Beacon, users' complaints did not stop Facebook from introducing new services.<sup>599</sup> Nevertheless, by reacting to complaints, Facebook gave users more control over the methods in which outside services accessed their information.<sup>600</sup>

Lastly, it seems that as more stakeholders tried to formalize their interactions, users' ability to opt-out weakened.<sup>601</sup> While most initial complaints resulted in Facebook making changes to its interface, which in turn allowed users to easily control and opt-out of services, the *Fraleley* court concluded that in settling with Facebook, users' representatives received preferred control tools and transparency

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<sup>595</sup> See Stone, *supra* note 231 (discussing the changes made by Facebook after legislation occurred).

<sup>596</sup> See Steve Kovach, *Facebook's Privacy Policy is Changing and You're Going to Get a Long Email About It*, BUSINESS INSIDER (Nov. 27, 2014), archived at: <http://perma.cc/AJX6-MNDM> (highlighting the privacy basics tool implemented by Facebook which is meant to show users what they share).

<sup>597</sup> See *Statement of Rights and Responsibilities*, *supra* note 223 (declaring that Facebook took it upon itself to amend its policies to placate unsatisfied users).

<sup>598</sup> See *Statement of Rights and Responsibilities*, *supra* note 223 (stating that the user has the ultimate control over the intellectual property rights of all content posted on his or her page).

<sup>599</sup> See Complaint at 29, *In the Matter of Facebook, Inc.* (F.T.C. May 5, 2010) (discussing "Beacon," a third party ad service which allowed Facebook to disclose users' purchase history information without their consent).

<sup>600</sup> See *Statement of Rights and Responsibilities*, *supra* note 223 (indicating that Facebook was responding to the complaints of its users and making changes to placate them).

<sup>601</sup> See *Fraleley*, 830 F. Supp. 2d. at 792 (discussing how Facebook tried to compensate for users' fight for privacy by making it more difficult to gain that very privacy with increasingly difficult opt-out options).

that any victory in trial or court injunction could have made.<sup>602</sup> This specific court statement, it seems, highlighted advocacy groups' practices clearly developed to ask for an injunctive relief from the regulators.<sup>603</sup> Meanwhile, the FTC tried to deal with the question of information obscurement and how Facebook presented information to users.<sup>604</sup> These issues troubled the *Cohen* and *Fraleley* courts as well.<sup>605</sup> Ultimately it is unclear to what extent Facebook followed through. Indeed, disseminated but still easily accessible information was and will probably remain one of the most repeated complaints by users and the courts.

### Conclusions

Like any other social media, Facebook is building its social media services in its own unique way. Facebook grew throughout the years, expanding more and more the original boundaries of its services to allow users to browse through other users' profiles, and third parties to gain access to users' information.<sup>606</sup> In turn, Facebook had a unique regulatory response: the company updated its legal documents and privacy practices regularly in response to users' complaints.<sup>607</sup> True, as the data presented, for instance with Beacon and "Instant Personalization," Facebook managed to take out some of the

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<sup>602</sup> See *id.* at 814 (finding that plaintiffs adequately alleged their claims against Facebook). Initially, the users' representatives had sought monetary relief, but settled for an injunctive relief in the form of a settlement. *Id.* Any monetary relief was split between social causes and paying lawyers' fees. *Id.*

<sup>603</sup> See *id.* at 792 (seeking injunctive relief from regulators).

<sup>604</sup> See Verne Kopytoff, *F.T.C. Documents Show Extent of Rage Over Facebook Complaints*, TIME (Oct. 29 2013), archived at <http://perma.cc/CQT6-SPP9> (explaining how the F.T.C. addressed consumer complaints against Facebook regarding privacy protection).

<sup>605</sup> See *Cohen*, 798 F. Supp. 2d at 1093 (granting motion to dismiss in favor of Plaintiffs). Specifically, the court had the task of determining whether Facebook went too far in disseminating users' information. *Id.* See *Fraleley*, 830 F. Supp. 2d at 806-09; Complaint, In the Matter of Facebook, Inc. (F.T.C. Jul. 27, 2012) (No. C-4365) (noting Facebook's collection of users' information and its storage thereof).

<sup>606</sup> See *Facebook Sets Guidelines for Access to User Information*, REUTERS, archived at <http://perma.cc/4HFE-U9RL> (recognizing that although Facebook has guidelines for access to users' information, users are still upset).

<sup>607</sup> See Kovach, *supra* note 596 (analyzing Facebook's recently instituted privacy policy).

"sting" from the services it introduced in order to implement its corporate goals.<sup>608</sup> To accomplish such goals as enhanced sharing and diminished privacy, Facebook mainly nudged users.<sup>609</sup> Facebook was keener to implement changes by following the same internal practice: implement a new change, receive complaints, apologize, amend its policies, and give users more choices through its privacy settings.<sup>610</sup> All in all, Facebook did not step back from introducing the services it developed because of these complaints.<sup>611</sup>

Consent and deceive was also an issue in the Facebook regulatory discourse.<sup>612</sup> Over the years, Facebook implemented different methods to acquire consent and to avoid being found deceiving users. Facebook "polished" its privacy policy, re-imagined it, put its policies to a vote, and utilized its help desk. Meanwhile, as Facebook over and over worked hard to prove to the regulators that it managed to achieve users consent, the regulators kept telling Facebook that consent is mainly derived from its privacy policy.<sup>613</sup>

Finally, in the discourse among the stakeholders, regulators were inclined to criticize deceitful notices. Though in Facebook's cases, users complained repeatedly about the user interfaces they were offered and the FTC preferred to settle with Facebook on the matter of receiving affirmative consent to prevent Facebook from deceiving users.<sup>614</sup> It seems that due to the regulators' preference to proceed only on the deceiving route, Facebook could easily continue with its regular privacy and information collection practices.<sup>615</sup> True,

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<sup>608</sup> See Zuckerberg, *Opt-Out of Beacon*, *supra* note 168 (noting how users can opt-out of the Beacon Feature).

<sup>609</sup> See Zuckerberg, *Opt-Out of Beacon*, *supra* note 168 (announcing that Facebook users should be able to choose what they share and opt-out of the Beacon feature).

<sup>610</sup> See Zuckerberg, *An Open Letter*, *supra* note 138 (describing the progression from Facebook's mistake to their recourse).

<sup>611</sup> See Zuckerberg, *An Open Letter*, *supra* note 138 (illustrating how Facebook would permit errors and then apologize after correcting them).

<sup>612</sup> See Analysis of Proposed Consent Order To Aid Public Comment, 76 Fed. Reg. 233, 75885 (Dec. 5, 2011) (discussing regulatory policy regarding the effectiveness of controlled consent).

<sup>613</sup> See Analysis of Proposed Consent Order To Aid Public Comment, 76 Fed. Reg. at 75885 (detailing how Facebook primarily acquired "consent" through a deceptive privacy policy).

<sup>614</sup> See Analysis of Proposed Consent Order To Aid Public Comment, 76 Fed. Reg. at 75884 (explaining the FTC's settlement terms with regards to Facebook's affirmative consent issues).

<sup>615</sup> See *id.* (discussing the FTC's requirements for Facebook to give its users unambiguous notice to obtain consent).

deceitful notices are easy to find as they are more “textual” compared to unfairness claims, which users’ representatives originally preferred to claim following changes in user interfaces.<sup>616</sup> In contrast to these practices, when push came to shove and Facebook’s interests demanded, it made sure to present the information to all the users as a pop-up mid-screen or the preferred option highlighted.<sup>617</sup> Simultaneously, users’ representatives found relevant information lacking, notices hidden, and settings difficult to maneuver or simply void of having the needed effect.<sup>618</sup> Yet, overall, although regulators have tried to keep pace with users’ behavioral changes, these changes have vastly outpaced regulatory actions.<sup>619</sup> Clearly, in the search for regulatory action, moving to the digital world, much has changed.<sup>620</sup> Sociologists call this understanding Computer-Mediated Communication (“CMC”) symbolizing both the difference from interpersonal communication and the added value of the cultural artifact, the computer, working as a mediator.<sup>621</sup> As the data presented, the design of the online world is set by code writers, sometimes constraining behavior, sometimes allowing it.<sup>622</sup>

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<sup>616</sup> See e.g. Complaint at 1, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (inferring that certain practices which engage in unfair and deceptive acts are prohibited by the FTC Act).

<sup>617</sup> See Complaint at 11-12, In the Matter of Facebook, Inc. (F.T.C. May 5, 2010) (showing example of Facebook providing information to all users via pop-up mid-screen).

<sup>618</sup> See *Lane*, 696 F.3d at 827 (providing an example of Facebook’s deceitful practices through notices and pop-ups).

<sup>619</sup> See Amanda Scherker, *Didn’t Read Facebook’s Fine Print? Here’s Exactly What It Says*, HUFFINGTON POST (Jul. 21, 2014), archived at <http://perma.cc/9YHN-QS6R> (indicating that behavioral changes caused regulatory changes).

<sup>620</sup> See *id.* (describing Facebook’s contact with regulators); see also *In re Facebook*, *supra* note 205 (elucidating FTC’s authority to act).

<sup>621</sup> See MESCH & TALMUD, *supra* note 17, at 5 (describing the Computer-Mediated Communication’s influential features relating to computer technology advances).

<sup>622</sup> See James Grimmelman, Note, *Regulation by Software*, 114 YALE L.J. 1719, 1721 (2005) (mentioning how online code writers can control behavior as efficiently as the law).

Basically, the designers choose among design alternatives by embedding their values into the interface and technologies.<sup>623</sup> Overall, the influence of interfaces is part of a bigger notion of code.<sup>624</sup> To distinguish from real architecture,<sup>625</sup> code is automated,<sup>626</sup> immediate,<sup>627</sup> and most of all it is plastic.<sup>628</sup> At the same time, unlike architecture, code is fragile.<sup>629</sup> While the designer determines the responses as it tries to perceive users' actions,<sup>630</sup> the users can see only the results but users still lack access to the set of inputs that determined a particular output.<sup>631</sup> This is only half true with the institutional stakeholders, which have the capacity to regulate and govern

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<sup>623</sup> See Flanagan et al., *supra* note 21, at 328 (illustrating how online designers choose among different avenues of approach when favoring some users over others).

<sup>624</sup> See LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 45, at 6 (indicating that what appears in cyberspace depends on the people who have the ability to create computer codes); LAWRENCE LESSIG, CODE VERSION 2.0 5 (2006) (discussing the role of the government's role in regulating codes used in cyberspace); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 666 (1998) (stating how building codes suggest that there is a wider range of behavior); see also Lessig, *The Law of the Horse: What Cyberspace Might Teach*, *supra* note 45, at 503 (describing the issues created by two cyber-spaces on their respective social goals); Reidenberg, *supra* note 57 (highlighting the utility of the information policy, which is located deep within the framework of online networks).

<sup>625</sup> See Lessig, *The Law of the Horse: What Cyberspace Might Teach*, *supra* note 45, at 509 (noting that real architecture is limited by both the laws of nature and the law of men).

<sup>626</sup> See Grimmelman, *supra* note 622, at 1729 (listing the defining characteristics of software). Once set in motion by the programmer, the computer program makes it determinations, until another code tells them to stop, mechanically and without further human interaction. *Id.*

<sup>627</sup> See Grimmelman, *supra* note 622, at 1729-30 (discussing the distinction between immediate constraints and retrospective sanctions). Code does not rely on ex-post sanction, but rather the prevention of forbidden behaviors from the start. *Id.*

<sup>628</sup> See Grimmelman, *supra* note 622, at 1730-31 (describing the physical architecture of code as "plastic"). Code can be implemented almost in any method that can be imagined and described. *Id.*

<sup>629</sup> See Grimmelman, *supra* note 622, at 1722, 1723-24, 1742 (analogizing the fragility of code to physical structures). Code suffers constantly from both being buggy, hackable, and non-robust, moving from perfect function to broken, with the "wrong switch of a button." *Id.* at 1742.

<sup>630</sup> See Latour, *supra* note 37, at 161 (noting that on some occasions, anticipation of the prescribed user is needed as its expected to perform).

<sup>631</sup> See Grimmelman, *supra* note 622, at 1734-36 (discussing how software need not to be transparent).

users' privacy to a wider extent.<sup>632</sup> Consequently, these institutional stakeholders carry with them the ability to regulate and to affect users' privacy policies, privacy settings, and information collection practices. Mainly, these institutional stakeholders can nudge. Same as code, nudges also change the way users behave, but unlike code it allows users to choose whether to be influenced by the change or not.<sup>633</sup> Indeed, corporations can also nudge online. Yet, the importance of the digital nudge described above comes in the extent to which users are allowed easily to reverse the change, or whether this possibility is unfair to the point that the processes is time-consuming and cumbersome. Put differently, take away the ability to *easily* reverse the nudge, and people can find themselves moving along the choice continuum to the areas of the more unfair code.<sup>634</sup> Or in the terms of Sunstein and Thaler, these unfair nudges are more paternalistic, but not sufficiently libertarian.<sup>635</sup> To nudge efficiently and fairly we need both to be equal.

To some extent, the literature on social networks rejects the claim the people share personal information because they stop caring for their privacy.<sup>636</sup> On the contrary, James Grimmelman has reasoned otherwise and termed the concept "social dynamics of privacy."<sup>637</sup> According to Grimmelman, users entrust Facebook with their information due to "social reasons to participate on social network sites, and these social motivations explain both why users value Facebook notwithstanding its well-known privacy risks and why they

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<sup>632</sup> See Reidenberg, *supra* note 57 (discussing the general importance of policy in the context of code, or rather Lex Informatica).

<sup>633</sup> See Cass Sunstein & Richard Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1162-63 (2003) (expanding on the paternalistic aspect of influencing behavior); see also Calo, *supra* note 555, at 783-87 (discussing libertarian paternalism, otherwise known as "nudge"). According to the "Nudge" theory, users are given the possibility to freely disregard either private or public actors' nudges, and instead do as they want. *Id.* at 783. The result of this nudge is a beneficial behavior or a decision made by choice. *Id.* at 786.

<sup>634</sup> See Grimmelman, *supra* note 622, 1724-25 (describing human behavior in relation to code).

<sup>635</sup> See Sunstein & Thaler, *supra* note 633 at 1162 (discussing the paternalistic nature of nudges).

<sup>636</sup> See James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1151 (2009) (contrasting literary view with users' common beliefs about privacy on social media).

<sup>637</sup> See Grimmelman, *supra* note 636, at 1149 (introducing an overview of social participation on social media).

systematically underestimate those risks.”<sup>638</sup> Dealing with the issues from a different perspective, Grimmelmann explained that privacy settings, as well as other settings, are ineffective if they “get in the way of socializing as users will disable and misuse them.”<sup>639</sup> Nevertheless, the contrary is also true.<sup>640</sup> Privacy settings can be highly effective in influencing users’ behaviors to a point in which they are not given or when they are void. Consequently, users’ representatives have no choice other than going to the regulators to ask them to intervene. The result of which is the presented privacy governance discourse among the relevant actors, which this paper only started to unravel. Therefore, finding a common ground with privacy interfaces is important for the privacy governance discourse.

Meanwhile, users and mostly their representatives, might not find the utilization of users’ content and information by the social media that pleasant to the point of “creepy.”<sup>641</sup> It seems from the chosen case study that Facebook, for instance, throughout the years has pushed forward opening the boundaries between the sharing virtual communities and the commercial utilization of this content. In simpler cases, the users’ representatives wrote on the issue and warned users. In the extreme cases, they went to the regulators to seek injunctions or settled for court orders instead of payments.<sup>642</sup> All in all, the data presents a discourse among stakeholders and their values as fast pacing technologies and innovation are leading most of the debate.<sup>643</sup> Specifically, in the case of Facebook, as the data presented, though the narratives might be defined in the terms of privacy vs. innovation and freedom of expression,<sup>644</sup> in this particular case study, the stakeholders on the ground debate shows that privacy and

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<sup>638</sup> See Grimmelmann, *supra* note 636, at 1151 (reasoning that privacy settings on social media are ineffective).

<sup>639</sup> See Grimmelmann, *supra* note 636, at 1140 (highlighting the detrimental effects of socializing due to social media privacy settings).

<sup>640</sup> See Grimmelmann, *supra* note 636, at 1201 (introducing how social media privacy settings control the user’s behavior).

<sup>641</sup> See Omer Tene & Jules Polonetsky, *Introducing a Theory of Creepy*, RECODE (Apr. 18, 2014), archived at <http://perma.cc/7P3N-KGUM> (elucidating the “theory of creepy”).

<sup>642</sup> See *id.* (detailing specific cases where EPIC sought injunctions against sale of software used to spy on individuals).

<sup>643</sup> See Cohen, *supra* note 2 (detailing the discourses on the relationship between privacy and innovation).

<sup>644</sup> See Cohen, *supra* note 2 (comparing the existence of innovation and expression with privacy as a mutually exclusive factor).

innovation can coexist.<sup>645</sup> Knowing and understanding the key issues, narratives, and trends can thus help to build better privacy and trust related policy.

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<sup>645</sup> See Cohen, *supra* note 2 (explaining how regulator have embraced balancing privacy and innovation).