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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Facebook's Controversial Emotion Study May Raise FTC's Ire

By **Allison Grande**

Law360, New York (July 01, 2014, 9:53 PM ET) -- This weekend's revelation that Facebook Inc. manipulated users' news feeds to study their emotional reactions has created a public firestorm, but experts predict the greatest risk to the company will come from the Federal Trade Commission, which is likely to aggressively probe how the experiment affected consumers and impacted the terms of Facebook's subsequent privacy pact with the agency.

In an attempt to determine the impact that users' emotional states have on their friends, a Facebook data scientist teamed up with researchers from Cornell University and the University of California, San Francisco, to tweak the news feeds of nearly 700,000 users for one week in January 2012, showing them a disproportionate number of positive or negative statuses. The researchers then recorded whether the demeanor of those users' own posts changed to reflect the emotion they were fed.

The study began to gain widespread attention over the weekend when media outlets picked up on the publication of the research — which concluded that emotions are in fact contagious on the social media site — in the June 17 issue of the Proceedings of the National Academy of Sciences.

While some have defended the research as a common and lawful data-gathering tactic that helps companies adjust their offerings, lingering questions over the way Facebook and its research partners went about gathering the data and informing users of how it would be used have led many others to accuse the site of ethical and legal violations.

“Almost any analysis of online metrics, and a subsequent change or response thereto, could be called research or an experiment, [and] that’s what Facebook and its ilk have been doing all day every day since the inception of their services,” Pryor Cashman LLP digital media practice group Co-Chairman Robert J. deBrauwere told Law360 Tuesday. “I think the rub here is that the 'experiment' at issue admittedly measured users’ emotional states, rather than behavioral characteristics, which, at first blush, raises red flags.”

The universities involved in the study could face probes into their compliance with research ethics rules, while the social networking site will likely feel the heat from class action plaintiffs. But experts predict that the recourse likely to pack the biggest punch is a review of the situation by the FTC.

“Private litigants may find it difficult to show damages from the Facebook experiment,” said Karen Bromberg, chairwoman of Cohen & Gresser LLP's intellectual property practice. “The greater danger may come from the FTC, which has already come down hard on the company for its privacy policy.

Expect further FTC scrutiny and some fireworks."

Both regulatory and class action claims hinge on the site's data use policy, which is designed to tell members about what the site plans to do with the data they share.

Facebook argues that its users gave their informed consent to the experiment when they signed up for the service and agreed to its data use policy, which informs members that information may be used for "internal operations, including data analysis, testing, research and service improvement."

But evidence has emerged in recent days that the site didn't add the "research" caveat until after its study was completed, leaving the door open for the FTC to use its authority under Section 5 of the FTC Act to assert that users were misled about how their data was being used, according to attorneys.

"The FTC may well choose to proceed because the term 'research' wasn't included in the privacy policy in effect at the time," said Kenneth Rashbaum, the head of the privacy and cybersecurity practice at Barton LLP. "The FTC has not been shy lately in protection of privacy and has tangled with Facebook before."

In August 2012, the FTC **finalized a settlement** with Facebook that resolved allegations that the site deceived users about the security and privacy of their personal information.

The pact required Facebook to be honest with users about the privacy of their information and to obtain express consent before making changes that override user privacy preferences — promises that are binding on Facebook for the next 20 years.

While the consent order, which won the regulator's approval eight months after the emotion-manipulation study ended, likely won't be applicable to the study, it raises another possible avenue for the regulator to probe, attorneys say.

"If the FTC had known that this study had occurred in January, the consent order may have turned out differently," said Bradley S. Shear, the managing partner of Shear Law LLC. "Now that this information has come to light, perhaps the FTC will want to reopen the issue."

A spokeswoman for the FTC declined on Tuesday to comment on whether the commission had known about the study during negotiations over the privacy pact or if the agency was planning to investigate the recent revelations related to the study.

Private litigants may also attempt to seize on the alleged lack of clear notice about what was being done with their data, but they face some hurdles, experts say.

"Lawsuits are always possible after a controversy, but whether they succeed will depend on whether there was user consent and whether Facebook's experiment was unfair, deceptive and/or harmful to users," Bromberg said.

In mounting their claims, plaintiffs are likely to have difficulty in identifying class members, given that Facebook has not revealed which of its more than 1 billion users were among the 700,000 members included in the study. And they will have a hard time showing that the site's experiment caused them any actual harm, according to experts.

“They will likely have a hard time establishing harm, since emotional impact alone is not enough to show cognizable harm,” said James Grimmelmann, a law professor at the University of Maryland.

He distinguished the current situation from separate claims that **have been lobbed** at Facebook over the alleged nonconsensual use of members' photos in ads disseminated as part of the site's behavioral advertising program called Sponsored Stories. The parties agreed to settle a class action over the Sponsored Stories program for $20 million in a deal that was granted approval by the district court in August and is **currently being reviewed** by the Ninth Circuit.

“In the Sponsored Stories case, the plaintiffs had a clearly established statutory tort that allowed them to protect their publicity rights regardless of the harm to them personally,” Grimmelmann said. “On the other hand, the clear intention of the study was to effect emotions, so it seems like the bigger risk to Facebook in this instance is going to be enforcement by the FTC over deceptive marketing.”

Part of the problem for plaintiffs is a lack of laws in the U.S. that set stringent restrictions on how companies are allowed to use the vast troves of consumer data they have been able to amass — a shortcoming that the controversy over Facebook's experiment could ultimately inspire lawmakers to address, according to attorneys.

“The big takeaway is that companies need to be more transparent and that we really need to rethink where do we draw the line regarding what companies do with our data,” Shear said. “It would not surprise me to see some state lawmaker come out with a new bill to put limits on how companies use and manipulate information that users post on their platform, although there is likely to be a major fight at any statehouse where that kind of proposal gets introduced.”

--Editing by Kat Laskowski and Christine Chun.