Crowdfunding: Fleecing the American Masses

limited because it is ill equipped to handle the influx of crowdfunding fraud.

The proposed exemption under H.R. 2930 is riddled with flaws and it exposes the average American to unbearable risks without the counterbalancing protections of the securities laws. H.R. 2930 makes it easier for issuers to target middle to lower class investors, yet it fails to properly protect such individuals who need it the most. As such, the exemption makes it easier for financially unsophisticated investors to gamble their life savings on highly speculative securities, thereby undermining eighty years of securities doctrine. I realize our economy desperately needs a boost, but an exemption for equity crowdfunding is not the answer; rather, it is a political knee-jerk reaction that will wreak havoc on the securities industry and the economy as a whole. Congress still has time to reconsider its actions; but if it goes forward with the exemption, get ready to watch the fleecing of the American masses and the next securities blooper of the 21st century.

PERSONAL HEALTH INFORMATION SHARED VIA SOCIAL NETWORKING:

THE GAP BETWEEN REALITY AND PROTECTION

Madison M. Pool

ABSTRACT

Control over personal information has long been valued in American society as a lynchpin of privacy. Traditional causes of action evolved to protect this privacy in a world confined by the bounds of physical space. However, these approaches fail to adequately remedy the harms confronted in the modern world of cyberspace. When Congress passed the Health Insurance Portability and Accountability Act of 1996, it recognized the revolutionary impact electronic medical records would have on individuals' control over their personal health information (PHI) in the health care context. This legislation not only laid the foundation for protection of PHI through the HIPAA Privacy Rule, it also statutorily validated this long-held American value of control over personal information in the form of protections for PHI. Although the HIPAA Privacy Rule established the first set of federal standards for protection of this highly valued category of information, it remains limited to a narrow group of covered entities.

Not only is PHI disclosed in social networking not protected by current federal regulations, it is also largely unprotected by state law. State law protections are still predominated by antiquated physical-space based causes of action that ignore the realities of social networking in a context unconstrained by geographic borders. Combined, the shortcomings of federal legislative protections and the outdated state protections result in a gap between the realities of social networking and the available protections for PHI. Social networking's ubiquity and the expectations of privacy held by users and promoted by the sites themselves challenge the values of privacy and protection for PHI. When the HIPAA Privacy Rule was established in 1996, Facebook did not exist. However, the legislation was envisioned as a floor on which to build protections as technology

1. I am grateful to Professor Ani Satz for her advice and mentorship on this project, and to Julia Hueckel, Bonnie Scott, and Francesca Pisano for their support and detailed comments on drafts. I would also like to thank Wes Floyd and Brett Snyder for sharing their expertise. Finally, I would like to thank Jeff Pool for his patience, input, and tireless support throughout this process.
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This Note proposes the adoption of federal regulations to protect PHI disclosed through online social networking. From rapidly and unpredictably changing privacy settings, to sale of information to advertisers, there are many ways in which PHI is disclosed and disseminated further than the user’s known or intended audience. If protection for PHI does not keep pace with the development of online social networking, users will increasingly find themselves without meaningful remedies to address emerging harms.

INTRODUCTION

Tom is a social networking user. He restricted his privacy settings so that only a small group of his “friends” could see his postings. These postings included a discussion of his struggles with diabetes. Without warning, the site changed its privacy settings and Tom’s postings—including his diabetes dialogue—became visible to everyone who subscribes to the site and hundreds of millions of other users, including his boss. Not only were his postings visible, but his picture also began appearing on other users’ pages next to advertisements for diabetes medications. In frustration, Tom attempted to delete his profile and erase all this information from the site. To his dismay, the site informed him that the information could not be deleted. Suddenly, the privacy settings Tom had been so vigilant in monitoring seemed like a sham.

While Tom is merely an illustrative example, the problems are real and mirror the experiences of millions of social networking users.

2. This example is fictional and the name invented; any resemblance to a real person or story is coincidental. For a real life example, see Julia Angwin & Steve Stockman, ‘Scraggers’ Dig Deep for Data on the Web, WALL ST. J. (Oct. 11, 2010 9:30 PM), http://online.wsj.com/article/SB1000142405270230455454381298117888.html (“I felt totally violated,” says Bilal Ahmed . . . who used PatientsLikeMe to connect with other people suffering from depression. He used a pseudonym on the message boards, but his PatientsLikeMe profile linked to his blog, which contains his real name.”).

3. Facebook has more than one billion monthly active users, with 618 million active daily users as of December, 2012. Key Facts, FACEBOOK (Dec. 31, 2012), http://newsroom.fb.com/Key-Facts. As of September 8, 2011, Twitter reached 100 million active users. @Twitter, One Hundred Million Voices, TWITTER BLOG (Sept. 8, 2011, 9:32 AM), http://blog.twitter.com/2011/09/one-hundred-million-voices.html. [hereinafter @Twitter Voices].

4. For example, Twitter reported an average of 400,000 new accounts created per day from mid-February, 2011, to mid-March, 2011 and a 182% increase in the number of mobile users from March 2010 to March 2011. @Twitter, #numbers, TWITTER BLOG (Mar. 14, 2011, 11:38 AM) http://blog.twitter.com/2011/03/numbers.html.

5. See, e.g., Maria Aspan, How Sticky Is Membership on Facebook? Just Try Breaking Free, N.Y. TIMES (Feb. 11, 2008), http://www.nytimes.com/2008/02/11/technology/11facebook.html?pagewanted=all (discussing difficulties with permanently deleting information from Facebook); see also Alex Pelt, Hey, Facebook, Just Let Go of Me, SUNDAY TIMES (Mar. 16, 2008), http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article3553216.ece (discussing lack of control of personal information resulting from the option to “deactivate,” but not permanently delete, a Facebook profile).


7. See, e.g., @Twitter Voices, supra note 3; Tweet, tweet! Using Twitter to Build Career Connections Now, supra note 6, at 8; Dysart, supra note 6, at 32.

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INTRODUCTION

Tom is a social networking user. He restricted his privacy settings so that only a small group of his “friends” could see his postings. These postings included a discussion of his struggles with diabetes. He used a pseudonym on the message boards, but his PatientsLikeMe profile was linked to his blog, which contains his real name. This setup had been carefully crafted to give the illusion of privacy.

Recently, Tom noticed a change to the site’s privacy policy. While Tom had been able to delete his postings in the past, the new privacy settings would prevent him from doing so. In frustration, Tom searched for a way to change the privacy settings back to their previous state. He contacted the site’s support team, who informed him that the information could not be deleted. Suddenly, the privacy settings Tom had been so careful to craft had been violated.

While Tom is merely an illustrative example, the problems he encountered are real and mirror the experiences of millions of social networking users. Tom’s story is not unique. With social networking on the rise, issues of informational privacy are also increasing. Yet despite social networking pitfalls, a fascinating phenomenon has arisen—users are increasing activity. Social networking is becoming more ingrained and incorporated into everyday life; socially, politically, and even in the workplace. Many users, like Tom, continue to believe their information is far more protected than it is. The reality of obtuse privacy policies, limited user control, and widespread distribution of personal information to third parties are obscured by the sites’ promotions advertising privacy control and “sharing but like real life.” These implications of
privacy, which mask the sites’ actual practices, undermine users’ legitimate privacy expectations. Disturbingly, current law does not adequately protect social networking users. One area in which this lack of protection is particularly worrisome is personal health information, which Americans attach great importance to protecting. Americans value protecting privacy through control of personal information generally, but uniquely high potential for misuse, embarrassment, pain, and personal information is particularly pertinent to social networking. With the continued increase in social networking there is a gap between social networking realities and current law, a gap has resulted.

Current protection for PHI falls into two categories: federal regulatory protection and state protection. Both of these categories fall short of preserving the control over PHI that American society expects. First, current federal regulations are limited to “covered entities” and do not apply to social networking. Second, state protections fail for two reasons: the differing protection among states does not align with the reality that social networking is largely unrestricted by state and even national borders, and traditional causes of action apply imperfectly, if at all, to privacy needs in an online social networking setting. These causes of action are characterized by a focus on physical space and retrospective rather than preventative measures, neither of which comport with the realities of harms in online social networking. This Note addresses the novel issue of protection for PHI in social networking and proposes the adoption of federal regulations to keep pace with online social networking’s rapid evolution and provide protection for PHI disclosed in this setting. Part I of this Note highlights the value Americans place on preserving informational privacy by controlling personal information. Privacy is a value strongly embedded both in American legal history and in American cultural understanding, and PHI is one area in which value of

9. See infra Part III.A.
10. See infra Part II.
12. Id. (“A right to privacy in personal information has historically found expression in American law.”).
13. Id. (“Among different sorts of personal information, health information is among the most sensitive.”). While much has been written about privacy issues with the advent of electronic medical records, other potential disclosures of personal health information have yet to be addressed. For example, both Nick Terry (Ball Render Professor of Law and Co-director of the William S. and Christine S. Hall Center for Law and Health at Indiana University Robert H. McKinney School of Law) and Sharona Hoffman (Professor of Law and Bioethics and Co-Director of the Law-Medicine Center at Case Western Reserve University School of Law) have written prolifically on this issue. See infra notes 24 and 101.
14. 2000 Privacy Standards, supra note 11, at 82,464 (“Among different sorts of personal information, health information is among the most sensitive.”).
15. See infra Part II.
16. See infra Part II.
17. 2000 Privacy Standards, supra note 11, at 82,476–77 (defining covered entities as “health plans, health care clearinghouses, and health care providers”).
privacy, which mask the sites' actual practices, undermine users' legitimate privacy expectations. Disturbingly, current law does not adequately protect social networking users.

One area in which this lack of protection is particularly worrisome is personal health information, which Americans attach great importance to protecting. Americans value protecting privacy through control of personal information generally, but PHI has received extra attention over the past two decades. Control over personal information is particularly pertinent to PHI because of its uniquely high potential for misuse, embarrassment, pain, and discrimination. However, protection for PHI is largely lacking in social networking. With the continued increase in social networking and the lack of protection under current law, a gap has resulted between social networking realities and PHI protections.

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control over personal information is particularly evident. The belief that PHI should be afforded privacy protection has been statutorily validated by the enactment of the Health Insurance Portability and Accountability Act of 1996 and the Health Information Technology for Economic and Clinical Health Act. This Part will discuss the values that underlie the passage of these two Acts to show the importance American society places on protecting PHI.

Part II explores the shortcomings of current privacy protections for PHI shared via social networking. It will discuss the protections offered by current regulations and show how this protection is limited only to narrow categories of actors in the health care field, falling short of the necessary protection for PHI in social networking. This Part will also show that state protections are insufficient for two reasons. First, this Part will demonstrate how having differing causes of action across states does not align with the reality that social networking is largely unrestricted by state and even national borders. Second, it will discuss the failings of the available causes of action—specifically, their antiquated bases in physical space and failure to provide meaningful remedies through adherence to retroactive privacy protections.

Part III of this Note discusses the modern trend of social networking and suggests that this is a viable area in which to extend protections. This Part will show the value of protecting PHI disclosed in social networking settings by addressing four realities of social networking: (1) social networking is on the rise; (2) social networking is valuable; (3) users expect that they will have control over their information; and (4) this expectation of privacy is undermined by the sites’ conflicting privacy representations. This Part will further show the value of extending protections into this area by highlighting harms that will result to social networking users if the disconnect between expected and actual protections remain unaddressed. These harms include an inability to delete personal information after it is posted, disclosure beyond the intended audience through unexpected and non-optimal privacy changes, and the sale of personal information to third party sites.

Part IV will advance a proposal for federal regulations to remedy the shortcomings of the current law. The proposed regulations would address the gaps in the law in three ways. First, the regulations would require meaningful privacy disclosures and truthful advertising by the social networking sites. Second, the regulations would establish guidelines for PHI use and distribution by social networking sites and third-party affiliates. Third, the regulations would provide meaningful causes of action and remedies for users and sites alike. This Part will also discuss the advantages of such a federal regulatory scheme, including filling the current gap in the law, providing meaningful dispute resolution options and remedies, and setting clear expectations for all parties involved.

Finally, Part V further outlines the beneficial ramifications of such a solution. With the rapid advancements in social networking, data management, and patient-managed electronic medical records, such regulations could serve as a benchmark for mitigating other harms before they arise.

I. Control of Personal Health Information: A Modern Recognition of Historical American Privacy Values

Privacy is a value strongly embedded both in American legal history and in American cultural understanding: “it speaks to individual and collective freedom.” From informational privacy to physical privacy, “the rights of the individual” have been at the “forefront of [American] democracy.” One way these rights are respected is through a privacy-based theory of control. Privacy through control can apply both to controlling one’s physical space and to controlling access to one’s personal information.

26. While this Note focuses on PHI disclosed in a social networking setting, the proposed regulatory scheme could be adapted to fit other categories of information and other data mining settings.
27. See supra note 22 and accompanying text.
29. Id.
31. See Levin & Abril, supra note 30, at 1007-08 (discussing ways of thinking about the concept of “privacy”). This Note focuses on
control over personal information is particularly evident. 24 The belief that PHI should be afforded privacy protection has been statutorily validated by the enactment of the Health Insurance Portability and Accountability Act of 1996 and the Health Information Technology for Economic and Clinical Health Act. 25 This Part will discuss the values that underlie the passage of these two Acts to show the importance American society places on protecting PHI.

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24. See, e.g., Daniel J. Gilman & James C. Cooper, There is a Time to Keep Silent and a Time to Speak, the Hard Part is Knowing Which is Which: Striking the Balance Between Privacy Protection and the Flow of Health Care Information, 16 MICH. TELECOMM. & TECH. L. REV. 279, 284 (2009-10); see also Sharona Hoffman & Andy Podgurski, In Sickness, Health, and Cyberspace: Protecting the Security of Electronic Private Health Information, 48 B.C. L. REV. 331, 335-36 (2007).

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found expression in American law." This tradition continued with
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Act of 1996 (HIPAA).

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present, or future physical or mental health or condition of an
individual." This information is extremely personal and intimate,
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last two decades have provided PHI with privacy protection. Congress passed HIPAA in part to establish "standards with respect
to the privacy of individually identifiable health information."

In passing HIPAA, "Congress recognized the importance of
protecting the privacy of health information given the rapid evolution
of health information systems." Pursuant to this goal, the U.S.
Department of Health and Human Service (HHS) promulgated final
rules and regulations to establish such standards. Published on
August 14, 2002, the regulations are now known as the HIPAA
Privacy Rule.

Informational privacy exercised via control over access to one's personal
information.

32. 2000 Privacy Standards, supra note 11, at 82,464.
33. HIPAA, supra note 25.
34. See supra notes 23 and 24.
35. HIPAA Privacy Rule, supra note 25, at § 160.103.
36. See 2000 Privacy Standards, supra note 11, at 82,464 ("Among different
sorts of personal information, health information is among the most
sensitive.").
37. See generally HIPAA, supra note 25A; HIPAA Privacy Rule, supra note
25; and HITTECH, supra note 25.
38. HIPAA, supra note 25, at § 264(a-b) ("The recommendations under
subsection (a) shall address at least the following: (1) The rights that an
individual who is a subject of individually identifiable health
information should have. (2) The procedures that should be established
for the exercise of such rights. (3) The uses and disclosures of such
information that should be authorized or required."). Individually
identifiable health information is health information "[t]hat identifies the
individual; or . . . [w]ith respect to which there is a reasonable basis
to believe the information can be used to identify the individual." HIPAA
Privacy Rule, supra note 25, at § 160.103.
39. HHS Standards for Privacy of Individually Identifiable Health
pts. 160 & 164) [hereinafter Privacy Standards Modifications].
40. Id. at § 264(c); HIPAA Privacy Rule, supra note 25.
privacy through control of personal information “has historically found expression in American law.” This tradition continued with the passage of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). As a nation, the United States places high value on protecting PHI. PHI includes “information . . . that . . . relates to the past, present, or future physical or mental health or condition of an individual.” This information is extremely personal and intimate, and its disclosure has a uniquely high potential for misuse, embarrassment, pain, and discrimination. Statutes passed over the last two decades have provided PHI with privacy protection. Congress passed HIPAA in part to establish “standards with respect to the privacy of individually identifiable health information.”

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41. HHS issued the Privacy Rule to implement requirements of the Health Insurance Portability and Accountability Act of 1996. See U.S. Dept. of HHS, Office for Civil Rights, Summary of the HIPAA Privacy Rule, 1 (2003), http://www.hhs.gov/ocr/privacy/hipaa/understanding/ summary/privacysummary.pdf. [hereinafter PRIVACY RULE SUMMARY] (A slight misnomer: the HIPAA “Privacy” Rule provides standards for “individuals’ privacy rights to understand and control how their health information is used” that in operation preserve the right of informational control and confidentiality rather than strict privacy.).

42. Privacy Standards Modifications, supra note 38.

43. 2000 Privacy Standards, supra note 11, at 82,463.

44. 2000 Privacy Standards, supra note 11, at 82,462 (“These protections will begin to address growing public concerns that advances in electronic technology and evolution in the health care industry are resulting, or may result, in a substantial erosion of the privacy surrounding individually identifiable health information. . . .”).

45. Id.

46. 2000 Privacy Standards, supra note 11, at 82,464.

47. Id.

48. Id.; see also PRIVACY RULE SUMMARY, supra note 41 at 1.

49. 2000 Privacy Standards, supra note 11 at 82,463 (“In enacting HIPAA, Congress recognized the fact that administrative simplification cannot succeed if we do not also protect the privacy and confidentiality of personal health information.”); see also, PRIVACY RULE SUMMARY, supra note 41, at 1 (balancing an assurance of proper protection for health information).
The HIPAA Privacy Rule’s framework was expanded with the passage of the Health Information Technology for Economic and Clinical Health (HITECH) Act, providing more protection for health information maintained electronically. Individuals now have the statutory right to know who has accessed their health information, a response to the pitfalls of electronically maintaining medical records. The requirement illustrates the value placed on privacy protection for electronic, sensitive information, as HHS recognized a fundamental right to privacy embodied in PHI.

However, despite PHI’s sensitive nature, the current regulatory protections are limited. They do not extend beyond a few narrow classes of “covered entities,” and do not address the social networking issues. Additionally, state laws do not offer adequate protection for PHI shared in social networking interactions, with provisions that “vary significantly from state to state” often failing to provide basic protections. These shortcomings were the reason for developing federal regulations to safeguard PHI in the first place. As noted by HHS, “Privacy is a fundamental right. As such, it must be viewed differently than any ordinary economic good.” The privileges and stringent privacy requirements established under these regulations are in place even though covered entities and their business associates are providing valuable services to individuals.

These requirements highlight the collective belief that individuals’ PHI deserves strong protection.

II. CURRENT PROTECTIONS FOR PERSONAL HEALTH INFORMATION ARE INSUFFICIENT

Despite the sensitivity of PHI and the belief that it should be protected, current protections are limited. Both the current federal regulatory protections and state protections fall short of providing adequate control over this valuable information. Combined with social networking’s rapid evolution, a significant gap has resulted between users’ expected and actual control over PHI shared online.

A. Federal Regulations: The HIPAA Privacy Rule and the HITECH Act

The first category of protection for PHI is federal: HIPAA and the HITECH Act.

Despite the high value American society places on protecting the privacy of PHI, these protections are limited. As currently written, these standards only apply to certain “covered entities” and their “business associates.” “Covered entities” are limited to health plans, health care clearinghouses, and certain health care providers. The HIPAA Privacy Rule also applies these privacy requirements to the “business associates” of covered entities. However, they do not
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provide protection outside of these narrow categories, thus failing to adequately protect PHI from disclosure in other settings. 76

While the HIPAA Privacy Rule and the HITECH Act are steps in the right direction of establishing federal standards for privacy protection of PHI, they fall short of protecting PHI and privacy in the social networking setting. When HHS promulgated the HIPAA Privacy Rule, it noted consumers’ increasing concerns “about the privacy of their personal information,”77 specifically as “advances in electronic technology . . . are resulting, or may result, in a substantial erosion of the privacy surrounding individually identifiable health information.” 78 Second, traditional causes of action have developed on a state-by-state basis.79 However, this paradigm neglects important realities for addressing harms that occur in online social networking.

These traditional causes of action fail to provide protection for PHI disclosed in social networking in two ways. First, traditional causes of action vary by state largely ignoring the reality that social networking is largely unrestricted by state and even national borders.79 Second, traditional causes of action apply imperfectly; if at all, to privacy needs in an online social networking setting because of: (1) outdated restrictions based on control of physical space, and (2) sole retrospective addressing of harms.80

1. Differing Protections Across the States: Adherence to State Borders

The lack of federal guidelines for privacy protection has resulted in a fragmented system across the states.81 In discussing the importance of privacy for PHI, HHS noted that “[r]ules requiring the protection of health privacy . . . have been enacted primarily by the states . . . [and] vary significantly from state to state and typically apply only to part of the health care system.”82 HHS also noted that many of these state laws “fail to provide such basic protections as ensuring a patient’s legal right to see a copy of his medical record.”83 Congress determined that privacy protection for PHI was sufficiently important to enact the first set of federal privacy protections for PHI.84 Fragmented protection for health records was not acceptable;

states and typically neither fully covers issues that arise in health care systems nor reaches other potential abuses of PHI.85 Traditional common law causes of action are the most prevalent way plaintiffs petition courts for redress, and these causes of action have developed on a state-by-state basis.86 However, this paradigm neglects important realities for addressing harms that occur in online social networking.

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B. State Protections: Traditional Causes of Action

Because there are no federal regulations that directly protect PHI outside of the narrow parameters described, most allegations of inappropriate use or disclosure of PHI in a social networking context are addressed by state law. Protection for PHI varies across the states and typically neither fully covers issues that arise in health care systems nor reaches other potential abuses of PHI. Traditional common law causes of action are the most prevalent way plaintiffs petition courts for redress, and these causes of action have developed on a state-by-state basis. However, this paradigm neglects important realities for addressing harms that occur in online social networking.

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similarly, fragmented protection for PHI shared in social networking should also be unacceptable. These protections, which are not nationally consistent, do not align with the reality that social networking is largely unrestricted by state and national borders.\footnote{See supra note 19}

The need for protection of PHI in social networking is not limited to a particular state, as these issues regularly traverse state borders.\footnote{See supra note 19.} Consider, for example,\footnote{Cohen v. Facebook, Inc., No. 10-5282 RS, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011).} a Connecticut case in which a martial arts instructor brought an action against a former student who had moved to Texas.\footnote{Id. at *10-26.} The instructor alleged that the student, while residing in Texas, posted unfavorable content about him on the student’s Facebook and Twitter accounts.\footnote{Id. at *3.} The court found personal jurisdiction under Connecticut’s long-arm statute, holding that because the student knew the teacher was a Connecticut resident, and because the social networking postings could result in a harm to the teacher in Connecticut, the long-arm provision for committing “a tortious act within the state” was satisfied.\footnote{Fraley v. Facebook, Inc., 830 F.Supp.2d 780 (N.D. Cal. 2011).} When discussing online issues, state lines cease to carry the same weight as in the non-cyber world.\footnote{Id. at *1.}

Despite social networking’s ability to transcend geographic borders, protections for users are still affected by geography, even within states. One example illustrative of this artificial division is California users’ inability to determine what uses of their likenesses or posted information are permissible. Compare, for example, Cohen v. Facebook with Fraley v. Facebook.\footnote{Cohen, 2011 WL 5117164, at *2.} Both cases arose in the Northern District of California, but in different divisions: Cohen in the San Francisco division and Fraley in the San Jose division.\footnote{Id. at 815.} Interestingly, even this small geographic distinction resulted in differing outcomes. Both cases concerned the use of Facebook users’ profile pictures for promotion of a new Facebook function.

In Cohen, users’ names and pictures were distributed to others through a “Friend Finder” function designed to attract new users by linking current users to other people who they might know.\footnote{Fraley, 830 F.Supp.2d at 797.} Gaining additional users resulted in more advertising revenue for Facebook.\footnote{Id. at 815.} Ultimately, the court dismissed the plaintiffs’ claims for misappropriation of their likenesses and unfair enrichment.\footnote{Cohen, 2011 WL 5117164, at *1; Fraley, 830 F. Supp. 2d at 790.}

In Fraley, users’ names and profile pictures were paired with products and companies they had “liked,” which were then displayed to the users’ friends.\footnote{Cohen, 2011 WL 5117164, at *1; Fraley, 830 F. Supp. 2d at 790.} In contrast to Cohen, the Fraley plaintiffs’ claims of misappropriation and unjust enrichment were allowed to move forward.\footnote{Fraley v. Facebook, Inc., No. 880 F.Supp.2d 785 (N.D. Cal. 2011).} The two claims were notably similar: both alleged Facebook had misappropriated the users’ likenesses and unjustly benefitted from that use.\footnote{See supra notes 19-20.} Both also took issue with Facebook’s conduct because of the ultimate economic advantage to Facebook.\footnote{See Abbrl, supra note 19, at 78-80 (discussing traditional torts and their potential application in the online realm).} Yet, the cases were inconsistently resolved.\footnote{Id. at 815.} Cases like these underscore the difficulty for individuals and social networking sites alike to know what is an appropriate use of personal information under the current legal framework.

2. Imperfect Application: The Limits of Physical Space and Retrospective Causes of Action

The traditional causes of action available to plaintiffs are ill-fitted to this virtual world. Causes of action such as intrusion upon seclusion and defamation are often used in attempts to address wrongs arising from inappropriate disclosure of personal information online.\footnote{Id. at *1-2.} Scholars have observed that these traditional causes of action apply imperfectly, if at all, to privacy needs in an online social networking setting.\footnote{Id. at *1.} Two primary shortcomings highlight this imperfect fit. First, these traditional causes of action focus on privacy
similarly, fragmented protection for PHI shared in social networking should also be unacceptable. These protections, which are not nationally consistent, do not align with the reality that social networking is largely unrestricted by state and national borders. The need for protection of PHI in social networking is not limited to a particular state, as these issues regularly traverse state borders. Consider, for example, Proto v. Hamic, a Connecticut case in which a martial arts instructor brought an action against a former student who had moved to Texas. The instructor alleged that the student, while residing in Texas, posted unfavorable content about him on the student’s Facebook and Twitter accounts. The court found personal jurisdiction under Connecticut’s long-arm statute, holding that because the student knew the teacher was a Connecticut resident, and because the social networking postings could result in a harm to the teacher in Connecticut, the long-arm provision for committing “a tortious act within the state” was satisfied. When discussing online issues, state lines cease to carry the same weight as in the non-cyber world.

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with regard to physical space, which is largely incompatible with an online setting. Second, these causes of action are retrospective rather than preventative.

First, the focus on physical space does not comport with the online medium. Traditionally, privacy has focused on control of physical space. Privacy could be attained through an individual's ability to control access to his physical space or to control the distribution of information about himself within that space. The tort of Intrusion upon Seclusion epitomizes the traditional focus on physical space in privacy protection. An actor is liable for invasion of privacy when he "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." While the definition provides that the intrusion could be a physical intrusion or "otherwise," courts have not expanded this concept beyond its traditional basis in physical space.

This physical space framework is a poor fit for social networking. Online social networking is conducted in cyberspace; a virtual world that does not fit within the physical bounds that this cause of action envisions. In addition, social networking is predicated on sharing information, which is antithetical to seclusion. Social networking is a rapidly evolving area that implicates PHI protections. Traditional causes of action based in concepts of physical space fail to protect this highly valued category of information.

The second reason these traditional causes of action apply imperfectly to social networking is that they are retrospective privacy protections. Adherence to retrospective measures ignores the reality that they provide little actual remedy for harms based on disclosure of information online. The traditional common law causes of action fail short because they are retrospective, thus, providing protection only in the form of causes of action arising after privacy is invaded. Defamation provides an example of retrospective protection. A suit for defamation is a poor response to the actual harm that results when such statements are posted online. As illustrated in in Proto v. Hamic, the defendant posted many negative remarks about his former teacher on Facebook and Twitter. Information posted online can have a disturbing permanence. Not only do sites limit users' abilities to delete information, but it may also be impossible to trace where the information has spread. Even if the teacher prevailed and the student removed the posting, the comments could have already spread beyond that site and may cause continual damage to the teacher's reputation.

105. See Abril, supra note 19, at 79-80 (discussing how a plaintiff would need a reasonable expectation of privacy in a physical area to bring an action under traditional tort laws); see also RESTATEMENT (SECOND) OF TORTS § 652 (1977).

106. See, e.g., RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining "defamatory communication" and discussing how the communication must have actually been made).

107. See supra notes 19-20.

108. See, e.g., Abril, supra note 19 at 79 (discussing expectations of privacy in traditional tort law).


110. This is evidenced by a LexisNexis search, returning only 21 results from a search of federal and state cases combined with the terms "intrusion w/2 seclusion AND "social network" OR Facebook OR Twitter OR Google." Of these results, only one case is relevant: Marenco v. Susan Fredman Design Group, Ltd., No. 10 C 7811, 2011 U.S. Dist. LEXIS 140446, *21 (N.D. Ill. Dec. 7, 2011), (dismissing claim for intrusion upon seclusion on basis of information shared on Facebook and Twitter being "not private").

111. Fact Sheet, supra note 18 (detailing Facebook's online operation model).

112. Fact Sheet, FACEBOOK (Oct. 9, 2011, 3:14 PM), http://www.facebook.com/press/info.php?factsheet (Facebook's self-identified purpose is to "facilitate the sharing of information through the social graph, the digital mapping of people's real-world social connections. Anyone can sign up for Facebook and interact with the people they know in a trusted environment.").
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113. Id.

114. See infra Part III.

115. There has been an increased emphasis on moving away from “physical-space-based” privacy torts to better reflect the reality of privacy in the social networking arena. See, e.g., Abril, supra note 19; Kiggins, supra note 19; and Terry, supra note 76.

116. See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (examples include defamation, intentional infliction of emotional distress, and false light privacy).

117. Id. (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”).

118. See supra Part II.B.1; Proto, supra note 18, at *1-2.

119. Proto, supra note 18, at *1-2

120. See supra note 5.

121. Id.

Retrospective causes of action provide little if any protection before the inflicted harm in the social networking context. Despite a potential deterrent effect, these causes of action do not effectively respond once information has been posted, nor do they prevent all postings. There is relatively little case law on the subject, which results in a lack of guidance for users and sites alike. With the potential for unwanted and unwarranted disclosure of information that brings with it an inability to delete the data, PHI protection becomes a paramount concern. The spread of information as personal and valued as health information can cause particular harm. If PHI is disclosed beyond its intended audience, the harm could include embarrassment, damage to relationships, and the impugning of reputations—the kinds of wrongs not easily remedied, even less so in retrospect.

Once harmful information is disclosed online, it is difficult to trace its spread, and nearly impossible to remove. To wait until the damage is done may result in no remedy at all.

III. PERSONAL HEALTH INFORMATION SHARED THROUGH SOCIAL NETWORKING DESERVES PROTECTIONS

American society values protecting privacy through control over personal information and, specifically, control over PHI. However, this value is being challenged by the swift evolution of social networking. This area raises challenges in new and unfamiliar ways. Preservation of this value will require significant attention to this rapid evolution, and protection should be extended to PHI on social networking sites for two reasons. First, extending protections to PHI shared in social networking would respect realities ignored by current law. Second, without protections, the disconnect between expected and actual privacy will harm users through unanticipated PHI disclosures.


124. See supra note 5.

125. 2000 Privacy Standards, supra note 11, at 82,464 (“Among different sorts of personal information, health information is among the most sensitive.”).

126. See id. at 82,465 (“Maliicious or inquisitive persons may download medical records for purposes ranging from identity theft to embarrassment to prurient interest in the life of a celebrity or neighbor.”).

127. See supra note 5; and Pradhan, supra note 122.

128. See supra Part I.
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A. Social Networking Realities

The swift evolution of social networking has produced four realities. First, social networking is on the rise.\(^{129}\) Second, social networking is valuable.\(^{130}\) Third, users expect that they have control over the information they share.\(^{131}\) Fourth, this expectation of privacy is undermined by the sites’ conflicting privacy representations.\(^{132}\)

Social networking is on the rise.\(^{133}\) Sites like Facebook,\(^{134}\) Twitter,\(^{135}\) and Google,\(^{136}\) which have become ubiquitous, boast membership in the hundreds of millions.\(^{137}\) Social networking has become a common method of interaction and shows no signs of abating.\(^{138}\) One possible way to address harms incurred by sharing information online is to warn a user against posting anything that user would not want shared with the world, a “just don’t post it” philosophy. However, while controlling personal information by not posting might be one way to fit into the current law, this is unrealistic and ignores social networking’s pervasiveness.

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Second, social networking is valuable. In today’s internet-based society, social networking sites serve important roles—creating opportunities for building identity, dignity, and intimacy. Social networking has also expanded beyond the social capacity, becoming a tool for business, marketing, news, and politics. This trend continues to escalate, and accordingly, social media will likely continue to permeate interpersonal interactions.

Third, users expect that they have control over the information they share. While there are disagreements over whether privacy can actually exist in the context of social networking interactions, those who participate in social networks experience real feelings of protectiveness of their online “space” and the information they share in that space. These feelings are supported by the sites’ reassuring privacy jargon. Sites market themselves as providing an opportunity to share personal information and develop personal relationships in a “trusted environment.” For example, Google recently launched a promotion for its Google+ platform, which includes “Circles.” Google promoted this feature as “sharing but like

130. Abril, supra note 19, at 83-87 (detailing four primary reasons for increasing online privacy protection: the promotion of identity; dignity; intimacy and socialisation; and discourse).

140. Facebook Public Policy Europe, Measuring Facebook’s Economic Impact in Europe, FACEBOOK NEWSROOM (Jan. 24, 2012), http://newsroom.fb.com/Whats-New-Home-Page/Measuring-Facebook's-economic-impact-in-Europe-en.aspx (“Citizens can now speak directly to their leaders, new political movements are born online, and a single voice can reach an audience of millions.”). See also, @Twitter, supra note 4; Twitter, tweet! Using Twitter to Build Career Connections Now, supra note 6, at 8; Dusart, supra note 6, at 32.

141. See, e.g., Levin & Abril, supra note 30 (demonstrating findings of an empirical study showing that users have expectations of privacy over what they share via social media).

142. Abril, supra note 19, at 73 (“[S]ome subscribe to the notion that online privacy is non-existent and its protection, whether legal or practical, is therefore futile.”).

143. Id. (citing users “feeling[s] of intrusion when their online personas are discovered by... unintended audiences”).

144. See, e.g., Facebook Reveals ‘Simplified’ Privacy Changes, supra note 3 (praising increased privacy setting options but criticizing overlooking sale of personal data to advertisers); and Bankston, supra note 3 (criticizing new Facebook privacy changes as “clearly intended to push Facebook users to publicly share even more information than before” and reducing user control over “personal data”) (emphasis in original).

145. See Fact Sheet, supra note 112 (discussing how Facebook advertises its service as being able to interact with friends in a trusted environment).

146. See Google, supra note 8.

147. Id. ("Sharing but like real life." quote appears at time code 1:21).

148. Id.


152. See Helft, supra note 150.


154. Tom McCarthy, Google’s New ‘Tailored’ Privacy Policy: How to Circumvent the Rules, GUARDIAN, (Feb. 29, 2012, 3:18 PM BST), http://www.guardian.co.uk/technology/us-news/blog/2012/feb/29/google-privacy-policy-tips-and-tricks (When users are signed in to Google, the new policy will permit Google to “do things like suggest search queries – or tailor your search results – based on the interests you’ve expressed [in Google+ Gmail, and YouTube].”)

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real life,” purporting to allow users to selectively share information with only certain contacts, just as they would divide their social groups offline. This approach equates cyberspace to real space, creating a feeling of security akin to sitting in a virtual living room talking to a set group of friends. This sense of security in online sharing renders users vulnerable to unintended disclosures of information, especially when these very public advertisements are only part of the reality.

Fourth, despite this emphasis on control and privacy, the reality is that much privacy control is subject to the sites’ discretion. For example, in addition to its “Circles” promotions, Google has recently begun to alert users to impending changes in its privacy policy. These changes include an increase in the information that is connected across various platforms—without users’ consent or

139. Abril, supra note 19, at 83-87 (detailing four primary reasons for increasing online privacy protection: the promotion of identity; dignity; intimacy and socialisation; and discourse).
140. Facebook Public Policy Europe, Measuring Facebook’s Economic Impact in Europe, FACEBOOK NEWSROOM (Jan. 24, 2012), http://newsroom.fb.com/Whats-New-Home-Page/Measuring-Facebooks-economic-impact-in-Europe-ae.aspx ("Citizens can now speak directly to their leaders, new political movements are born online, and a single voice can reach an audience of millions."). See also, @Twitter, supra note 4; Tweet, tweet! Using Twitter to Build Career Connections Now, supra note 6, at 8; Dysart, supra note 6, at 32.
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ability to opt-out. Obtuse and convoluted policies make it more difficult to determine the level of control individuals retain over privacy settings and other users’ access to their information. Not only are these policies dominated by legal terminology and difficult to understand, but scholars have also suggested that most users do not read them, and, if they did, the opportunities cost for reading these policies would approximate $780 billion annually for American users alone.

B. The Privacy Disconnect and Resulting Harms to Users

The disconnect between users’ expectations of control of information in social networking settings and the reality of its limits are likely to result in a myriad of harms to users. Three examples provide a sampling of these potential harms.

First, consider the storage of information on social networking sites. Urban legend—backed by truth—tells that nothing can ever truly be deleted from users’ online personas. Facebook itself cautions users of this fact, noting, “Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere.” An individual could attempt to take control of his information by removing it from a social networking site, only to be frustrated by a programmed inability to achieve that goal.


158. Id. (advocating that an online privacy system requiring users to read lengthy and complex privacy policies to preserve their rights is too costly, and that companies should find ways to convey privacy practices “in usable ways, which includes reducing the time it takes to read policies”).


Next, consider changing privacy policies that result in disclosure beyond what the individual intended. Social networking sites’ well-documented and contentious practice of changing their privacy settings seemingly overnight is just another of the potential snares for social networking users. These changes are often implemented without significant warning or user input, and often go into effect before users are aware of them. Google’s recent privacy changes provide an example. Users have the benefit of advanced notice in this instance, but lack the ability to opt-out of the increased cross-platform sharing of information. Many sites have not afforded users the same level of alerts before a change in policies. For example, Facebook has a history of changing privacy settings in such a way as to render privately held information public.

Privacy setting changes of this nature can mean that an individual user may have taken all the available protective steps, but still have their personal information disclosed beyond their intended audience. While the recent Federal Trade Commission (FTC) settlements address these issues retrospectively, the threat of future disclosures from social networking sites remains. Although the settlement agreements place stringent privacy requirements on Facebook and Google for the next twenty years, these requirements
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156. Discontent with such practices has seen discussion for several years. See supra note 149. Meanwhile, there has been no resolution until the recent settlement agreement with the F.T.C. See Protalinski, supra note 3 (discussion the settlement).


are based on harms from site components that are, in several instances, already obsolete.\textsuperscript{168} This rapid change further illustrates the need for protections based on categories of information and not on specific technological practices.

Fourth, consider the sale of information to third party sites, a practice that has been going on behind the scenes for years.\textsuperscript{169} Sites have advertised privacy controls to users while selling or otherwise distributing information outside the realm of the social networking site.\textsuperscript{170} This practice results in personal information being spread far beyond users' expectations or awareness.

From the control-as-privacy perspective, the storage, compromise, and sale of information in social networking give cause for concern. In the future, what will social networking sites do with stored information? What if the site is compromised or sold? What if a user takes all available precautions, or sends information in a private message, and the information is still compromised?

Current law does not provide a satisfactory answer to these potential problems. The fact remains that information spread through online social networking can reach beyond the intended audience.\textsuperscript{171} Ignoring the hazards the online world poses will not protect individuals, their privacy, or their PHI; these threats must be confronted. The recent FTC settlements with Facebook and Google validate both the reality of these harms and the legitimacy of the users' interests.\textsuperscript{172} Courts and legislatures, however, have not kept pace with these expectations,\textsuperscript{173} and retrospective solutions such as the FTC settlements offer insufficient protection.\textsuperscript{174} Bridging this gap will require more than retrospective causes of action based on the antiquated constraints of physical space and applied to artificial boundaries—it will require a national solution in the form of preventative federal regulations that can adapt to the current and developing problems of protecting PHI in social networking.

IV. PROPOSED SOLUTION: FEDERAL REGULATIONS

Americans value protection of privacy.\textsuperscript{175} Americans also value preserving individual control over PHI.\textsuperscript{176} Social networking is ubiquitous and is here to stay.\textsuperscript{177} This three-way confluence of privacy values, PHI protection, and expansion of social networking is an intersection in which problems will develop if not given proper attention.\textsuperscript{178} While online social networking has positive aspects,\textsuperscript{179} its potential dangers should be addressed preemptively. With the lack of meaningful protections from current federal regulations and state laws,\textsuperscript{180} there is a strong need for forward-thinking, preventative measures to protect this highly valued, vulnerable category of information. This Part first discusses how a comprehensive set of federal regulations could fill this need. Next, it outlines the advantages of this regulatory solution.

A. Proposed Regulations

To more effectively protect personal health information shared in online social networking settings, HHS should build on the “floor” described in the HIPAA Privacy Rule and promulgate additional federal regulations.\textsuperscript{181} In designing these regulations, HHS should allow individuals to retain a right of control over their personal health information by virtue of the character of the information itself.

One of the arguments against federal regulations for privacy protection of information shared in social networking is that this industry's vast scope would make the regulations impossible to enforce and therefore render them powerless.\textsuperscript{182} A similar criticism

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168. See supra note 149.
169. Id.
170. See supra note 149.
171. For example, the capacity to "retweet" information can send a post viral. See Dan Zarrella, The Science of Retweets, MASHABLE (Feb. 17, 2009), http://mashable.com/2009/02/17/twitter-retweets/ (analyzing how Twitter posts go viral).
110330googlebuzzagreeorder.pdf.
173. See, e.g., McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Doc. LEXIS 270 (Pa. Cnty. Ct. 2010) ("The relationships to be fostered through those media are basic friendships, not attorney-client, physician-patient, or psychologist-patient types of relationships, and while one may expect that his friend will hold certain information in confidence, the maintenance of one's friendships typically does not depend on confidentiality.").
174. See Protalinski, supra note 3 (discussing the settlement).
are based on harms from site components that are, in several instances, already obsolete. This rapid change further illustrates the need for protections based on categories of information and not on specific technological practices.

Fourth, consider the sale of information to third party sites, a practice that has been going on behind the scenes for years. Sites have advertised privacy controls to users while selling or otherwise distributing information outside the realm of the social networking site. This practice results in personal information being spread far beyond users' expectations or awareness. From the control-as-privacy perspective, the storage, compromise, and sale of information in social networking give cause for concern. In the future, what will social networking sites do with stored information? What if the site is compromised or sold? What if a user takes all available precautions, or sends information in a private message, and the information is still compromised?

Current law does not provide a satisfactory answer to these potential problems. The fact remains that information spread through online social networking can reach beyond the intended audience. Ignoring the hazards the online world poses will not protect individuals, their privacy, or their PHI; these threats must be confronted. The recent FTC settlements with Facebook and Google validate both the reality of these harms and the legitimacy of the users' interests. Courts and legislatures, however, have not kept pace with these expectations and retrospective solutions such as the FTC settlements offer insufficient protection. Bridging this gap will require more than retrospective causes of action based on the antiquated constraints of physical space and applied to artificial boundaries—it will require a national solution in the form of preventative federal regulations that can adapt to the current and developing problems of protecting PHI in social networking.

**IV. PROPOSED SOLUTION: FEDERAL REGULATIONS**

Americans value protection of privacy. Americans also value preserving individual control over PHI. Social networking is ubiquitous and is here to stay. This three-way confluence of privacy values, PHI protection, and expansion of social networking is an intersection in which problems will develop if not given proper attention. online social networking has positive aspects, its potential dangers should be addressed preemptively. With the lack of meaningful protections from current federal regulations and state laws, there is a strong need for forward-thinking, preventative measures to protect this highly valued, vulnerable category of information. This Part first discusses how a comprehensive set of federal regulations could fill this need. Next, it outlines the advantages of this regulatory solution.

**A. Proposed Regulations**

To more effectively protect personal health information shared in online social networking settings, HHS should build on the “floor” described in the HIPAA Privacy Rule and promulgate additional federal regulations. In designing these regulations, HHS should allow individuals to retain a right of control over their personal health information by virtue of the character of the information itself.

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was advanced against the recently proposed data laws in the European Union, arguing the standards imposed would prove too difficult for compliance. 183 Accepting the premise that “it would be nearly impossible to trace all the places information may have spread after disclosure” 184 underscores the need for preventative components to the proposed regulations. However, if the regulations were modeled on the value of protecting PHI based on its inherent characteristics, they would be able to regulate use of the information for broad categories of actors by providing guidance before inappropriate disclosure occurs.

Because the regulations would address uses pertaining to PHI, HHS should bear the responsibility of drafting and promulgating the regulations. As the agency with the most experience handling issues related to PHI, 185 HHS is best equipped to draft informed, meaningful regulations in this area. The definition of PHI should be similar to that articulated under HIPAA. 186 PHI should be defined as any information that relates to the past, present, or future physical or mental health or condition of an individual. 187 This includes a wide range of information that could be identified through filters and screening processes by the sites. Examples include, but are not limited to, an individual posting about a physician appointment, the cold they had last week, a friend’s surgery, or other health-related postings. As part of the regulations, HHS should establish administrative tribunals responsible for hearing complaints under these regulations.

These regulations should employ a three-pronged approach. First, the regulations should require meaningful privacy disclosures and truthful advertising from social networking sites. Second, the regulations should provide guidelines for the use of any PHI shared and collected on social networking sites. Third, the regulations should establish several courses of action and meaningful remedies for

183. See Prodhán, supra note 122 (discussing the likelihood that enforcing new E.U. data-protection proposals will be difficult, due in part to inability to trace and totally remove contested information).

184. Id.

185. HHS promulgated both the HIPAA Privacy Rule and the HITECH Act, both dealing with PHI. See 2000 Privacy Standards, supra note 11, at 82,662. See also HITECH, supra note 25.

186. HIPAA Privacy Rule, supra note 25, at § 160.103. (“Health information means any information, whether oral or recorded in any form or medium, that . . . [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.”).

187. See id.
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without the user’s affirmative authorization. In addition to the pop-up privacy policy review, any change in user-controlled privacy settings should be subject to a similar walkthrough and would be at the user’s discretion to accept or reject. Finally, sites should be required to give users the ability to flag or mark information as sensitive PHI that they do not want to be distributed, and the site should be required to review that information before proceeding with its use or distribution.

The fourth initial step would require social networking sites to be truthful in their advertising. Sites should have to issue a disclaimer that users should review the sites’ privacy policies before posting information. Sites should also be prohibited from advertising misleading levels of control over privacy and information. Depending upon the advertisement medium, any advertisement should have to be accompanied by a plain-language notice that is either visible or audible and in the same language as the predominance of the advertisement. A site’s advertisement should not leave a user with an inaccurate understanding of the privacy or control their posts are afforded.

2. Guidelines for Use of Personal Health Information

The second prong of the regulations would establish guidelines for the use of any PHI shared and collected on social networking sites. Attaching protection to the information itself would be more meaningful and long lasting than trying to regulate the fast-paced evolution of the technology, while also respecting the intrinsic value and basic premise of social networking. Current federal protections already take the approach that the PHI itself deserves protection and apply regulations to broad categories of health care industry actors. Regulating social networking sites’ use of PHI could follow HIPAA’s approach to regulating “covered entities.” By the same approach, regulating the vast network of other firms, advertisers, data storage companies, and so forth, is akin to regulating “business associates.”

The regulations would provide guidelines to social networking sites on what is permissible use of PHI. Social networking sites should not be allowed to collect or distribute this PHI from user’s profiles and interactions. The only exception to this would be if the sites de-identified the information and no longer linked it to the individual or his online profile or persona. The de-identified information could be collected and used for research purposes, but directed advertisements should not be allowed unless requested by the user.

The regulations should also provide guidelines to third party companies that gather or receive information from social networking sites. PHI should be a protected category of information that cannot be used for marketing, advertising, or further distribution, unless the user grants specific, informed consent. Just as the HITECH Act gives individuals the right to know who has accessed their PHI, the proposed regulations would confer a similar right. Once PHI is collected and distributed outside the realm of the social networking sites themselves, users would have a right to know who else has accessed that information. Third party companies—the “business associates” of social networking sites—would still be responsible to the users based on the nature of the PHI.

3. Available Actions and Remedies

Implementing the above-mentioned privacy disclosures and regulations would establish a framework that would decrease the incidence of harm to users from PHI disclosures. It would establish much of the needed preventative protection and decrease reliance on less effective retrospective remedies. However, in recognizing that not all harms can be prevented, the third prong of the regulations should establish several courses of action and meaningful remedies for both individual social networking users and social networking websites.

The regulations should also create a cause of action for individuals whose PHI has been inappropriately disclosed by social networking sites or their third party affiliates: “wrongful distribution of PHI.” Such a cause of action would abandon the constraints of traditional causes of action and their focus on physical space. The initial step in pursuing this cause of action should be for the user to request an administrative preliminary injunction. A social networking user who suspects his PHI has been compromised would

188. This portion of the regulations should be developed by HHS in conjunction with the FTC, so that the expertise of both agencies could be incorporated into this pivotal provision. For a summary of each agency’s areas of expertise, see About the Federal Trade Commission, Fed. Trade Comm’n, http://www.ftc.gov/ftc/about.shtm (last visited Mar. 14, 2013); What We Do, U.S. DEP’T OF HEALTH AND HUMAN SERV., http://www.hhs.gov/about/whatwedo.html/ (last visited Mar. 14, 2013).

189. See supra Part III.A.
190. See supra Part I.
191. See supra Part II.A.
192. See supra Parts I, II.A.
193. See supra Parts I, II.A.
194. HITECH Act, 123 Stat. 230, P.L. 115-5, §13405(c)(1)(B) (codified as amended 42 U.S.C. 17935) (“an individual shall have a right to receive an accounting of disclosures...”).
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file a complaint with the administrative tribunal in his jurisdiction designated to hear these complaints. This tribunal should evaluate the claim in the light most favorable to the individual and could then issue a preliminary injunction, requiring the accused site or affiliate to remove or cease use of the contested information. The administrative tribunal should then issue an opinion on whether the information qualifies as PHI and, if so, whether it has been inappropriately used or disclosed. These opinions should be published for precedential value on which users, social networking sites, and decision-makers in the other tribunals could rely.

Both parties would be entitled to appeal through a separate agency arbitration process. The decisions of these arbitrations should be reasoned awards, explaining the facts and reasons for the decision and should be available as precedent to the tribunals. If the individual prevailed, he should be entitled to damages as calculated for pain and suffering and/or damage to reputation. The social networking site or third party affiliate should be required to stop using the contested information. Further, the site should be required to contact any other sites to which they distributed the information to alert them to stop using the information. It should remain up to the individual's discretion whether to keep the information posted on his social networking page, but the site should not be allowed to use that information. If the social networking site prevailed, however, it would be entitled to use the information. Finally, appeal to the courts would be available to the individuals and social networking sites.

In addition to the cause of action established primarily for the benefit of individuals, there should also be a course of action available to the social networking sites themselves that would aid in understanding the limits imposed by the regulations. Sites should be permitted to request a "ruling letter" from HHS to evaluate proposed uses and disclosures of information. These ruling letters should serve as advisory opinions, and could provide another preventative avenue for decreasing harms to users. Such preventative measures would further decrease the need for retrospective actions.

B. Advantages of the Proposed Regulations

These proposed regulations provide three primary benefits. First, the regulations would fill the current gap in the law between the realities of social networking and protections for PHI. Second, they would provide a meaningful process to resolve disputes and obtain remedies. Third, and most importantly, they would set out clear expectations for all parties involved in social networking and help

preempt disputes. Together, these benefits would result in an online environment that aligns with users' current expectations, meaningfully guides businesses and courts, and sets precedent to inform future discussions as other similar issues arise.

1. Fill the Current Gap in the Law Between the Realities of Social Networking and Protections for PHI

The proposed regulations would bring protection for PHI shared in social networking forward from where HIPAA and HITECH stopped short. They would also eliminate the need for the fragmented and outdated state protection. The proposed regulations would fill the gap that has resulted from the convergence of privacy values, the value placed on PHI, and the rapidly evolving area of social networking.

PHI shared in social networking interactions is currently unprotected and therefore vulnerable, especially through third-party use. If an individual divulges PHI, even if in a forum that is not as "traditionally" private as others are, the information still retains the inherent character that American society feels strongly should be protected. The proposed regulations would update the law to effectuate this value.

2. Afford Meaningful Dispute Resolution Options and Remedies

Meaningful remedies do not just mean satisfaction to an injured plaintiff; they also entail remedies that reflect the context in which the wrong was committed. The proposed regulations outline an efficient process for dispute resolution that recognizes the unique character of wrongs in a social networking context. This approach results in simplicity, uniformity, and consistency of remedies to the advantage of all parties involved.

The proposed regulations ensure that decision-makers—the administrative tribunals, arbitrators, and courts—would have precedent on which to base their decisions. Complicating the current ability to shape meaningful remedies is the phenomenon of the "vanishing trial." With more and more disputes resolved through private methods of alternative dispute resolution, the number of precedential decisions from the courts has diminished, especially in the social networking context; this, in turn, has diminished the


197. Thomas J. Stipanowich, ADR and the 'Vanishing Trial': What We Know—And What We Don't, 10 DRAI RESOL. MAG. 7 (Summer 2004) (explaining why alternative dispute resolution methods are decreasing the frequency of trials).
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3. Preempt Disputes Through Clear Expectations for All Parties Involved

Perhaps the most meaningful impact stemming from these proposed regulations is that they would convey clear expectations for the use of PHI disclosed in social networking. Understanding what is expected regarding PHI would inform and guide the conduct of users, the social networking sites and third-party affiliates, and would help to preempt disputes.

The proposed regulations would comport with many of the expectations already held by online social networking users.199 In addition to meeting current expectations of privacy, meaningful privacy disclosures would set realistic expectations for social networking users of what is and is not protected in their online interactions. The combination of knowledge and proposed regulatory protections would provide for more control over that information. This paradigm would give users confidence in knowing both the boundaries of protection and the limits on how their PHI can be used, as well as comfort in knowing there are penalties for inappropriate use and disclosure. It would also place a burden of responsibility on users; as they are more informed, they will be expected to participate in the responsible management of their PHI. The proposed regulations would set clear expectations for users and encourage informed participation in protection of PHI.

Social networking sites and their third-party affiliates would also benefit from the clear expectations set out in the proposed regulations. Understanding what is permissible regarding PHI would decrease the amount of confusion and litigation. Sites would be better able to protect against liability by complying with the regulations. As a result, they would be spared the costs—of money, time, and reputation—of litigation arising from a lack of legal guidelines.200

200. Preemption of disputes and the proposed resolution process would save judicial resources as well.

V. FURTHER IMPLICATIONS

Addressing the emerging issue of privacy for PHI in online social networking will not only align with users' current privacy expectations and quell worries about inappropriate disclosure, but also assist in resolving similar problems in the future. This Note has focused on PHI specifically, but the proposed regulations could also serve as a framework for other categories of information deemed worthy of protection. Similarly, this focus can be expanded beyond social networking to address concerns about the practices of data mining and usage generally.201

Conclusion

Social networking challenges the value American society places on PHI protection as a highly vulnerable category of information. With HIPAA, the HITECH Act, and their attendant regulations confirming this value,202 the need for protections in social networking cannot be overlooked. The reality of social networking's ubiquity, popularity, and rapid evolution renders arguments such as "just don't post it" moot.203 PHI disclosure has a unique potential for negative consequences; embarrassment, discrimination, and damage to relationships are but a few of the potential harms.204 Forward-looking, preventative federal regulations will provide the most protection for PHI shared in a social networking context.

Current regulations do not extend into this area.205 Additionally, the law varies state to state, ignoring the reality that social networking is unrestricted by geographic borders.206 Similarly, frameworks rooted in a concept of physical space are a poor fit for wrongs in the online world.207 Finally, retrospective rather than proactive schemes are insufficient to address the potential damage through inappropriate disclosure of PHI online.208 Waiting to address

201. Another area where these regulations could have a positive impact would be in patient-managed electronic medical records. As patients increasingly begin to manage their own patient records electronically, significant access and disclosure issues will arise. See Terry, supra note 76 (outlining a framework to address issues between doctors and patients regarding electronic medical records).

202. See supra Part I.
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202. See supra Part I.
203. See supra Part III.A.
204. See supra part I.
205. See supra part II.A.
206. See supra Part II.B.1.
207. See supra Part II.B.2.
208. See supra Part II.B.2.
Personal Health Information Shared Via Social Networking

the problem until information is inappropriately disclosed results in little opportunity for a meaningful remedy.

Federal regulations would protect the value placed on control of PHI by attaching protection to the information itself. It is more realistic to place restrictions on what can be done with acquired information than to attempt detailed regulation of this rapidly evolving industry. While users should also participate in the protection of their personal information through use of the privacy settings afforded, deceptive privacy advertisements and obtuse privacy policies should not render this participation meaningless. Preemptively establishing a set of federal regulations as a benchmark for addressing these kinds of issues before they arise will help mitigate the harms that are otherwise sure to follow. Federal regulations requiring meaningful privacy disclosures and truthful advertising, establishing guidelines for use of PHI, and providing causes of action with precedential value would keep pace with reality of the evolution of online social networking.

Federal regulations protecting PHI would fill the gap in the current law, provide meaningful dispute resolution options and remedies, and delineate concrete expectations for all participants. The permanence of information posted online heightens the need for this sort of protection. It is all too likely that information posted will become a permanent part of an individual’s “digital” persona without the mercy of short human memory. Such a framework will have broad applicability as more and more interactions move toward online exchanges.

209. See supra Part IV.A.
210. See supra Part III.B.
211. Abril, supra note 19, at 75 (discussing how “the digital record has increased the stakes of privacy today...”).

HIT LOSERS: THE GOOD (FAITH) FIGHT FOR NET-PROFITS PAYMENTS FROM BLOCKBUSTER HOLLYWOOD PRODUCTIONS

Max Bialystock: You were saying that, under the right circumstances, a producer could make more money with a flop than he could with a hit.
Leo Bloom: Yes. It’s quite possible.
Max Bialystock: You keep saying that, but you don’t say how!
Leo Bloom: Well, it’s simply a matter of creative accounting. I think conservatively, you and me, we build ourselves in to split, ten percent. (Pause.)
Gould: Of the net.
Gould: Char. Charlie: Permit me to tell you: two things I’ve learned, twenty-five years in the entertainment industry.
Fox: What?
Gould: The two things which are always true.
Fox: One:
Gould: The first one is: there is no net.
Fox: Yeah . . . ? (Pause.)
Gould: And I forgot the second one.1

Neal Robin

I. INTRODUCTION

Contracts for services on an entertainment project contain many of the same provisions as those found in any commercial venture. These contracts include provisions describing the nature of services to be performed and the compensation to be provided in exchange for those services during the course of the agreement. Sought-after Hollywood actors, directors, and producers are able to secure additional concessions from the studios that hope to gain their

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