



2017

The Chaos of the CFAA: Facebook's Successful CFAA Claim Affects Website Owners, Competitors, and You

Breana Love

Loyola Law School, Los Angeles

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Computer Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Breana Love, Comment, The Chaos of the CFAA: Facebook's Successful CFAA Claim Affects Website Owners, Competitors, and You, 50 Loy. L.A. L. Rev. 831 (2017).

This Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

The Chaos of the CFAA: Facebook's Successful CFAA Claim Affects Website Owners, Competitors, and You

Cover Page Footnote

J.D. Candidate, May 2018, Loyola Law School, Los Angeles; B.A., Music Business, The University of Texas at Austin, 2015. Thanks to Professor Aaron Ghirardelli for sharing his invaluable expertise and feedback throughout the writing process, to the members of the Loyola of Los Angeles Law Review for their attention and hard work, and to my family and friends for their unwavering support.

THE CHAOS OF THE CFAA: FACEBOOK'S SUCCESSFUL CFAA CLAIM AFFECTS WEBSITE OWNERS, COMPETITORS, AND YOU

*Breana Love**

I. INTRODUCTION

In *Facebook, Inc. v. Power Ventures, Inc.*,¹ the Ninth Circuit created precedent that built upon previous decisions regarding the Computer Fraud and Abuse Act (“CFAA”).² The court interpreted the statute to solidify *who* can grant and revoke authorization to access a website and *how* they can do it.

A start-up company, Power Ventures, Inc. (“Power”), accessed Facebook’s website to peddle its service to Facebook users.³ By clicking a consent button, Facebook users authorized Power to enter into their Facebook accounts and send messages through Facebook’s servers.⁴ This activity elicited immediate action by Facebook in the form of a cease and desist letter to Power.⁵ Facebook then sued Power under the theory that Power violated the CFAA when it continued to access Facebook without authorization after receiving, and failing to abide by, the cease and desist letter.⁶ Ultimately, the Ninth Circuit held that although Facebook users could grant third parties, like Power, authorization to enter Facebook through their personal accounts, Facebook could nonetheless revoke such authorization by serving an

* J.D. Candidate, May 2018, Loyola Law School, Los Angeles; B.A., Music Business, The University of Texas at Austin, 2015. Thanks to Professor Aaron Ghirardelli for sharing his invaluable expertise and feedback throughout the writing process, to the members of the *Loyola of Los Angeles Law Review* for their attention and hard work, and to my family and friends for their unwavering support.

1. *Power Ventures II*, 844 F.3d 1058 (9th Cir. 2016).

2. *See generally* LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009) (*Brekka*); United States v. Nosal, 676 F.3d 854 (9th Cir. 2012) (*Nosal I*); United States v. Nosal, 828 F.3d 865 (9th Cir. 2016) (*Nosal II*), *vacated in part*, 844 F.3d 1024 (9th Cir. 2016).

3. *Power Ventures II*, 844 F.3d at 1062.

4. *Id.* at 1063.

5. *Id.* at 1062.

6. *Id.*

affirmative notice to the third party.⁷ Facebook's cease and desist letter to Power fulfilled this requirement, and Power's continuance thereafter sealed its fate.⁸

The Ninth Circuit reached an appropriate decision based on the facts present in this particular case. However, the court's muddled reasoning conflicts with earlier Ninth Circuit cases and fails to adequately define the scope of the CFAA, especially in regards to everyday Internet users ("everyday users").⁹ Therefore, the need for clarification on the CFAA and its reach continues.

Part II of this Comment discusses the factual and procedural record of *Power Ventures II*. Part III explores the Ninth Circuit's interpretation of the CFAA against the backdrop of the general rules derived from previous Ninth Circuit cases. Part IV explains how this case differs from the reasoning in similar, prior cases, and how the continued discrepancy will affect website owners, third party businesses, and everyday users. Part V concludes that the Ninth Circuit ultimately succeeded in reaching an adequate judgment, but it failed to fully illuminate the CFAA and whether its scope encompasses everyday users as well as businesses. The continued uncertainty regarding the CFAA creates a plethora of possibilities that concern third parties competing with powerful website owners and everyday users who worry about the potential loss of autonomy over their information and even criminal liability.

II. STATEMENT OF THE CASE

This case involves two online social networking platforms: Facebook and Power Ventures. Facebook is a popular website that had hosted over 130 million registered users as of 2008 and allowed them to store personal data and connect with one another.¹⁰ By contrast,

7. *Id.* at 1067.

8. *Id.*

9. See Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Defendants-Appellants at 9, *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058 (9th Cir. 2016) (No. 13-17154), https://www.eff.org/files/2016/08/29/089_amicus_curiae_brief_of_eff_aclu_and_aclu_nc_8.19.16.pdf ("The panel's reasoning is also in tension with *Nosal II* . . ."); see also Orin Kerr, *9th Circuit: It's a Federal Crime to Visit a Website After Being Told Not to Visit It*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/news/voлокh-conspiracy/wp/2016/07/12/9th-circuit-its-a-federal-crime-to-visit-a-website-after-being-told-not-to-visit-it/?utm_term=.bfd7a149de09 (disagreeing with distinguishing this case from *Nosal I* because this case does not involve non-compliance with terms of services).

10. *Power Ventures II*, 844 F.3d at 1062.

Power is a forgotten start-up that had accumulated 20 million registered users at its peak in 2008.¹¹ Power's platform allowed registered users to aggregate their data from other social networking sites, like Facebook, onto Power's site.¹² Essentially, this service allowed users to view all their information scattered on various networks on one integrated website.¹³ To attract more users, Power initiated a promotional campaign where the first one hundred people who brought one hundred new friends to Power.com received \$100.¹⁴ By selecting the "Yes, I do!" button, users could share this campaign invitation to their current Facebook friends.¹⁵ This allowed Power to access Facebook.com and caused either a form message or a form e-mail to be sent.¹⁶ The amount of sent messages is unknown; however, there were over sixty-thousand e-mails sent.¹⁷

Facebook took issue with how Power accessed its website because it had taken deliberate steps to limit and control access by non-registered third parties.¹⁸ For instance, Facebook created a program called Facebook Connect that allows third party businesses access to Facebook *only if* the third parties register with Facebook and agree to abide by the Terms of Use ("TOU") and an additional Developer TOU (collectively, "TOU Agreements").¹⁹ Power had not agreed to these TOU Agreements at the time of soliciting the messages.²⁰

When Facebook learned of Power's campaign, it sent a cease and desist letter that same day, instructing Power to terminate its current activities.²¹ Facebook then tried to convince Power to agree to its TOU

11. Aarti Shahani, *The Man Who Stood Up to Facebook*, NPR (Oct. 13, 2016, 4:52 PM), <http://www.npr.org/sections/alltechconsidered/2016/10/13/497820170/the-man-who-stood-up-to-facebook>.

12. *Power Ventures II*, 844 F.3d at 1062.

13. *Id.*; see also Matt Mansfield, *Social Media Statistics 2016*, SMALL BUS. TRENDS (Nov. 22, 2016), https://webcache.googleusercontent.com/search?q=cache:2m_7r3UMMrgJ:https://smallbiztrends.com/2016/11/social-media-statistics-2016.html+&cd=5&hl=en&ct=clnk&gl=us (As of 2016, "[i]nternet users have [an] average [of] 7 social accounts" and "[m]ore than half of online adults . . . use more than one of . . . five social media platforms.").

14. *Power Ventures II*, 844 F.3d at 1063.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Agreements for future involvement.²² After receiving the letter, Power's owner assured Facebook that they would comply with Facebook's demands.²³ However, a following e-mail retracted that promise of compliance, and Power refused Facebook's olive branch.²⁴ It continued the campaign and relied on its system to defend against Facebook's Internet Protocol ("IP") blocks that inevitably followed.²⁵ These actions pushed Facebook to file a lawsuit against Power, and the time and money that the litigation demanded eventually forced Power to shut down permanently.²⁶

Facebook's complaint, filed in the U.S. District Court for the Northern District of California, alleged that Power violated: (1) the CFAA, (2) the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"), and (3) section 502 of the California Penal Code.²⁷ The district court granted summary judgment in favor of Facebook for each claim,²⁸ but the Ninth Circuit's judgment on appeal differed in some respects. The Ninth Circuit reversed the CAN-SPAM judgment in favor of Power, and although it affirmed the CFAA and California Penal Code judgments, it did so upon different reasoning.²⁹

Power petitioned for a full rehearing of the case due to the Ninth Circuit's holding on the CFAA issue,³⁰ which allegedly contradicted the court's prior decision in *United States v. Nosal*.³¹ The Ninth Circuit denied the rehearing petition, but it amended *Power Ventures II* by deleting specific references to *Nosal II* and replacing them with a declaration that the analysis was "consistent with *Nosal II*."³²

22. *Id.*

23. Facebook, Inc. v. Power Ventures, Inc. (*Power Ventures I*), 844 F. Supp. 2d 1025, 1031 (N.D. Cal. 2012).

24. *Id.*

25. *Power Ventures II*, 844 F.3d at 1063.

26. *Episode 741: Amy and Steve vs. Facebook*, NPR (Dec. 9, 2016, 8:23 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=504999255>.

27. *Power Ventures I*, 844 F. Supp. 2d at 1027.

28. *Id.*

29. *Power Ventures II*, 844 F.3d at 1062.

30. Steven Trader, *9th Circ. Denies Full Rehearing in Facebook CFAA Suit*, LAW 360 (Dec. 9, 2016, 5:57 PM), https://www.law360.com/articles/871093/9th-circ-denies-full-rehearing-in-facebook-cfaa-suit?article_related_content=1.

31. 828 F.3d 865 (9th Cir.), *vacated in part*, 844 F.3d 1024 (9th Cir. 2016).

32. Trader, *supra* note 30.

Currently, Power is seeking the ear of the United States Supreme Court.³³

III. REASONING OF THE COURT

By interpreting the CFAA, assessing precedent, and rationalizing through an analogy, the Ninth Circuit arrived at a different decision from that of the District Court. Although *Power Ventures* involved other legal doctrines like the CAN-SPAM Act and the California Penal Code, this Comment will focus on the “most noteworthy” issue: the court’s analysis of the CFAA.³⁴

A. *The CFAA*

The CFAA is a federal law that creates criminal and civil liability for whomever “intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains . . . information from any protected computer.”³⁵ In 1984, before the Internet existed, Congress enacted the CFAA to secure government computers from hackers “to keep ‘bad’ information and ‘bad’ people out of computer systems.”³⁶ However, over the next few years, the Internet emerged and furthered the computer’s reach through an elaborate system of networks.³⁷ To accommodate this quick and constant evolution, Congress expanded the CFAA through multiple amendments.³⁸ Despite these efforts, the CFAA’s scope as to Internet users, such as business competitors and everyday users, remained ambiguous. This failure to clarify the statute is mainly due to the fact that the CFAA was enacted to “regulate an architecture that has since been demolished and rebuilt”³⁹

33. *Episode 741*, *supra* note 26.

34. James D. McNairy, Facebook, Inc. v. Power Ventures, Inc.: *Shotgun-Toting Borrowers of Jewelry From Bank Safe Deposit Boxes and the CFAA. Wait. What?*, TRADING SECRETS (July 19, 2016), <http://www.tradesecretslaw.com/2016/07/articles/computer-fraud/facebook-inc-v-power-ventures-inc-shotgun-toting-borrowers-of-jewelry-from-bank-safe-deposit-boxes-and-the-cfaa-wait-what/>.

35. 18 U.S.C. § 1030(a)(2)(C) (2008).

36. Michael J. Madison, *Authority and Authors and Codes*, 84 GEO. WASH. L. REV. 1616, 1621 (2016).

37. *Id.* at 1622.

38. PATRICIA L. BELLIA ET AL., CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE 737 (4th ed. 2011) (stating that the CFAA was amended in 1986, 1994, and 1996).

39. Madison, *supra* note 36.

The statute's main issue is its combination of overly broad explanations for some terms and the complete omission of explanations for other terms. For instance, the definition of a "protected computer" is broad enough to "capture any Internet-connected computer."⁴⁰ Thus, an everyday user that accesses any computer, whether it is a friend's, a spouse's, or a family member's computer, could potentially be held criminally liable if he or she accessed it without proper authorization.⁴¹ Additionally, the CFAA fails to define what does and what does not constitute "authorization,"⁴² nor does it indicate who can provide such authorization when accessing a website.⁴³ In attempting to answer the questions caused by the statute's ambiguity, the court in *Power Ventures* turned to prior cases.

B. Prior Ninth Circuit Cases

*LVRC Holdings LLC v. Brekka*⁴⁴ was the first case of this kind before the Ninth Circuit. It involved an employee who logged into his employer's computer and sent himself confidential information in order to form a competing business.⁴⁵ The employer sued the employee for violating the CFAA by accessing the employer's files without authorization.⁴⁶ The court held that a person acts "without authorization" when the person has not received permission to use the computer for any purpose or when such permission has been explicitly revoked.⁴⁷ The court held that because the employee was employed at the time he logged into the computer, his authorization was never revoked; thus, he did not violate the CFAA.⁴⁸ Had he accessed the information *after* he quit, then he would have been acting without authorization.⁴⁹

40. BELLIA, *supra* note 38, at 737.

41. See Brief for Electronic Frontier Foundation, *supra* note 9, at 2–3.

42. Some courts have recently expressed that the term "authorization" in the CFAA is so indeterminate that the act is void for vagueness. See Josh Goldfoot & Aditya Bamzai, *A Trespass Framework for the Crime of Hacking*, 84 GEO. WASH. L. REV. 1477, 1479 (2016).

43. Brief for Electronic Frontier Foundation, *supra* note 9, at 4.

44. (*Brekka*), 581 F.3d 1127 (9th Cir. 2009).

45. *Id.* at 1134.

46. *Id.* at 1128–29.

47. *Id.* at 1135.

48. *Id.*

49. *Id.* at 1136.

*United States v. Nosal*⁵⁰ was another case that allowed the Ninth Circuit to examine the CFAA. There, Nosal convinced two current employees at his old job to access the company's computer and send him confidential information so that he could start a competing business.⁵¹ Because the wrongful access "exceeded authorized access" by violating the TOU, the employer claimed that the employees violated the CFAA.⁵² Cautious of creating a sweeping policy decision that could impose criminal liability on all users that violate a website's TOU, the court did not hold the defendants liable.⁵³ Thereafter, violations of the TOU alone do not amount to violating the CFAA.⁵⁴

The Ninth Circuit then assessed a separate issue within the *Nosal* case. In *Nosal II*,⁵⁵ the employer claimed that Nosal violated the CFAA not by being an accomplice to exceeding authorization, but by accessing information without authorization.⁵⁶ At this point, the two current employees involved in *Nosal I* had quit and joined forces with Nosal.⁵⁷ In order to continue obtaining information, Nosal had the two former employees convince a different current employee to share her password information.⁵⁸ By using the current employee's login credentials, the two former employees sent Nosal the employer's files.⁵⁹ The court decided that Nosal's authorization was revoked the day he quit, and that he could not "sidestep the statute by going through the back door and accessing the computer through a third party."⁶⁰ Thus, the court held that the current employee's authorization did not suffice.⁶¹ It interpreted "authorization" to mean that an entity can grant permission, but that the current employee had "no mantle or authority to override [the employer's] authority to control access to its . . . information."⁶²

50. (*Nosal I*), 676 F.3d 854 (9th Cir. 2012).

51. *Id.* at 856.

52. *Id.*

53. *See id.* at 862–63.

54. *Power Ventures II*, 844 F.3d 1058, 1067 (9th Cir. 2016).

55. *United States v. Nosal (Nosal II)*, 844 F.3d 1024, 1028 (9th Cir. 2016).

56. *Id.* at 1029.

57. *See id.* at 1031.

58. *Id.*

59. *Id.*

60. *Id.* at 1028.

61. *Id.* at 1035.

62. *Id.*

From these cases, the court carved out some general rules that assisted their analysis in *Power Ventures II*.⁶³ Specifically, it referenced the rules in *Brekka* and *Nosal I*.⁶⁴ Although the court initially referenced the rules in *Nosal II*, it deleted these insertions and stated that *Power Ventures II* remained consistent with *Nosal II*.⁶⁵ This alteration is mainly due to Power's contest that the court's current holding contradicts the holding in *Nosal II*.⁶⁶ Despite this hiccup, the court solidified these general rules and applied them to the facts in *Power Ventures II*.⁶⁷

C. The Court's CFAA Conclusion

First, the court assessed whether Power accessed Facebook's computers "without authorization."⁶⁸ The court found that because Facebook authorizes its users to access its services, then Facebook users are able to transfer this authorization to a third party.⁶⁹ Thus, it held that Power *initially* had authorization to access Facebook's services on the Facebook users' behalf when the users voluntarily and affirmatively clicked the "Yes, I do!" button.⁷⁰ This is "akin to allowing a friend to use a computer or to log onto an e-mail account."⁷¹ However, the court held that Power began to act "without authorization" once Facebook expressly rescinded that permission by way of a written cease and desist letter.⁷² Even after knowing that it lacked authorization, Power continued its campaign and dodged Facebook's IP blocks along the way.⁷³

Inevitably, the court held that this persistent action constituted a CFAA violation because "consent that Power had received from Facebook users was not sufficient to grant continuing authorization . . . after Facebook's express revocation of permission."⁷⁴ Therefore, the court's holding was consistent with

63. 844 F.3d 1058, 1067 (9th Cir. 2016).

64. *Id.*

65. Trader, *supra* note 30; see *Power Ventures II*, 844 F.3d at 1067.

66. Trader, *supra* note 30.

67. *Power Ventures II*, 844 F.3d at 1067.

68. *Id.*

69. *Id.* at 1067.

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1068.

Nosal I because the initial violation of Facebook’s TOU did not condemn Power, but Power’s continued violations after the execution of a cease and desist letter did.⁷⁵ Additionally, consistent with *Brekka*, the letter served as affirmative notice that Power’s authorization was revoked, and its relationship with Facebook users could not serve as a loophole.⁷⁶

The court also initiated a new general rule that built upon this foundation, and it did so through an analogy. It compared the situation to a person borrowing jewelry from a friend.⁷⁷ The friend granted the borrower permission and a key to access the jewelry that was kept in a safe deposit box in the bank.⁷⁸ However, the bank kicked the borrower out when he entered the bank carrying a shotgun.⁷⁹ Thus, “the person need[ed] permission *both* from his friend (who controls access to the safe) *and* from the bank (which controls access to its premises).”⁸⁰ Here, Power initially had authorization from Facebook users who controlled their personal pages, but it also needed Facebook’s authorization because Facebook controls the overall physical servers.⁸¹

Based on this analysis, the Ninth Circuit held that the initial authorization bestowed upon Power from Facebook users terminated once Facebook explicitly rescinded its authorization via a cease and desist letter.⁸² Therefore, Power’s continued actions subsequent to the letter constituted access “without authorization” and rendered Power liable under the CFAA.⁸³

IV. ANALYSIS

A. *The Decision’s Faults*

The *Power Ventures II* court claimed to base its ruling on general rules it gleaned from prior cases; however, the result actually contradicted some of these rules. For instance, *Power Ventures II*’s

75. *See id.* at 1068–69.

76. *Id.* at 1068.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

decision is “irreconcilable with the Ninth Circuit’s”⁸⁴ decision in *Nosal II*. As explained above, the court in *Nosal II* concluded that an employee with legitimate login credentials did not have the authority to grant access to an employer’s computer; only the company could grant such access.⁸⁵ In contrast, here, the court held that—at least initially—Facebook users with legitimate login credentials *did* have authority to grant access to Power.⁸⁶ This discrepancy could be solved by an explanation of how the court viewed the rule from *Nosal II*, but the court abstained from such an explanation and instead brushed it under the rug by conclusively stating that the rulings were consistent.⁸⁷

Further, the decision also ignores a pressing issue that arose in *Nosal I*. *Nosal I* declared that TOU violations alone would not qualify for CFAA liability.⁸⁸ Here, the court held that this case did not involve such an issue since “Facebook and Power had no direct relationship, and it does not appear that Power was subject to any contractual terms that it could have breached.”⁸⁹ However, this conclusion is incorrect because when a third party uses a service through the account of someone who has assented to the TOU, that third party is bound by the TOU as if they had assented.⁹⁰ Power was bound by Facebook’s TOU because it entered the site via Facebook users who had assented to the TOU.⁹¹ Therefore, the court erred by dismissing this issue.

Additionally, the court failed to adequately explain how *Nosal I*’s general rule and this new rule fit together. After incorrectly dismissing the issue, the court then distinguished *Nosal I* from this case by stating that *Nosal I* was concerned with the threat of penalizing unaware users that inadvertently violated frequently changing TOU.⁹² Conversely, in *Power Ventures II*, that same threat was not at issue since Power received a cease and desist letter notifying them of such violations.⁹³ It is true that the concern expressed in *Nosal I* is eradicated when the defendant is put on notice of the TOU. However, there is still some

84. Trader, *supra* note 30; see Brief for Electronic Frontier Foundation, *supra* note 9, at 2.

85. Brief for Electronic Frontier Foundation, *supra* note 9, at 9.

86. *See id.* at 10.

87. *Power Ventures II*, 844 F.3d 1058, 1067 (9th Cir. 2016).

88. *Id.*

89. *Id.* at 1069.

90. Amyt Eckstein, *Enforceability of Website Terms of Use*, 18 N.Y. ST. B. ASS’N, no. 2, Fall 2009, at 4.

91. *See Power Ventures II*, 844 F.3d at 1062–63.

92. *Id.* at 1069.

93. *Id.*

discomfort in this distinction because some view this holding as a roundabout way to effectively hold defendants liable for mere violations of the TOU.⁹⁴ It is confusing that a website owner can have express language in their TOU denying access to a certain party, but the party's access is "not deemed 'unauthorized' unless that very same language is sent in the form of a cease and desist letter."⁹⁵ It seems to be a "distinction without a difference."⁹⁶

Although the court clarified in a footnote that the mention of a TOU violation in the cease and desist letter was not dispositive, it then highlighted how the letter also warned Power that it may have violated federal and state law.⁹⁷ Therefore, if the court follows *Nosal I* and only attaches CFAA liability when there is something additional to a TOU violation, then what is that additional thing? Is it only a notice, or is it a notice that also warns of violations other than those of the TOU? If it is only a notice, then what level of notice is required?⁹⁸ Is a formal cease and desist letter by itself sufficient?⁹⁹ These questions currently remain unanswered.

Finally, the court's "shotgun-toting-borrower-of-jewelry" analogy¹⁰⁰ has also been criticized as "simplistic, even clumsy."¹⁰¹ Although the analogy might have helped this court better understand the technology at issue, it "lacks the nuance that can swirl around alleged 'scraping' scenarios" that differ from this case.¹⁰² Like the other questionable stances taken, this analogy seems tailored to the

94. See Brief for Electronic Frontier Foundation, *supra* note 9, at 2–8 (stating that the "basis for the cease and desist letter . . . was Facebook's perception that Power was violating its terms of service . . .").

95. Kyri Tsircou, Facebook v. Power Ventures *When Accessing a Website is a Federal Crime*, TSIRCOU: INTELL. PROP. L. (July 25, 2016), <http://tsircoulaw.com/uncategorized/facebook-v-power-ventures-when-accessing-a-website-is-a-federal-crime>; Alison Frankel, *Facebook to 'Millions of Internet Users': Relax, You're Not Engaged in Computer Fraud*, REUTERS (Sept. 20, 2016), <http://blogs.reuters.com/alison-frankel/2016/09/20/facebook-to-millions-of-internet-users-relax-youre-not-engaged-in-computer-fraud>.

96. Frankel, *supra* note 95.

97. Jeffrey Neuburger, *CFAA Double Feature: Ninth Circuit Issues Two Important Decisions on the Scope of Liability Related to Data Scraping and Unauthorized Access to Employer Databases*, PROSKAUER: NEW MEDIA AND TECH. L. BLOG (July 14, 2016), <http://newmedia-law.proskauer.com/2016/07/14/cfaa-double-feature-ninth-circuit-issues-two-important-decisions-on-the-scope-of-liability-related-to-data-scraping-and-unauthorized-access-to-employer-databases>.

98. *Id.*

99. *Id.*

100. See McNairy, *supra* note 34.

101. Madison, *supra* note 36, at 1631.

102. McNairy, *supra* note 34.

specific facts of *Power Ventures II*. This helped the court decide the case at issue, but it will not be of much help to future litigants who try to apply this precedent to their similar, yet different situations.

B. *The Decision's Effects*

The Ninth Circuit's decision "set a huge legal precedent that could affect every person online."¹⁰³ While the concerns listed above "muddied the waters" regarding what constitutes unauthorized access for everyday users, it somewhat clarifies how website owners and third-party companies conduct business.¹⁰⁴

1. Effects on Businesses

This new precedent guides two different types of businesses: the website owner, like Facebook, and third party businesses, like *Power Ventures II* introduced a formula that benefits owners. Hereafter, it is likely that owners, if they have not already, will carefully draft their TOU to explicitly state the forms of access that the owner prohibits.¹⁰⁵ Owners will then meticulously monitor their website for any unwanted access by unauthorized users.¹⁰⁶ Finally, once such access is detected, owners will promptly send a cease and desist letter to notify the perpetrators of the violation and demand that they terminate the activities.¹⁰⁷ Website owners, like Facebook, could argue that such heightened security measures are needed to "regulate access for security reasons."¹⁰⁸ This argument may be true for many website owners, but it is suspect for those larger owners that occupy a substantial amount of the current marketplace—monopoly-like companies like Facebook. Some find that website owners like Facebook are really resorting to these measures, not to protect their platforms, but to eradicate competing third party businesses.¹⁰⁹

103. *Episode 741*, *supra* note 26.

104. Jeremy D. Mishkin, *Prosecutorial Discretion under the CFAA Gets More Discretionary: US v. Nosal*, WHITE COLLAR ALERT (July 18, 2016), <https://whitecollarblog.mmwr.com/2016/07/18/prosecutorial-discretion-cfaa-gets-discretionary-us-v-nosal/#page=1>. *But see* Frankel, *supra* note 95.

105. McNairy, *supra* note 34.

106. *Id.*

107. *Id.*

108. *See* Venkat Balasubramani, *EFF Weighs in on Facebook v. Power Ventures—Facebook v. Power Ventures*, TECH. AND MARKETING L. BLOG (May 27, 2010), http://blog.ericgoldman.org/archives/2010/05/eff_weights_in_o.ht.

109. *See id.*

As for third-party businesses, the future looks bleak. It is true that authorized users can grant such entities lawful access to a website, making websites “presumptively open to all comers.”¹¹⁰ However, this warm welcome can come to a swift end if the website owner expressly revokes permission through a notice.¹¹¹ Therefore, the third party can “intentionally violate the [TOU] but [it] cannot intentionally ignore a cease and desist letter.”¹¹²

This could likely lead to the situation that the court referred to in a footnote but chose not to address:¹¹³ a situation where a website owner, because of the formula portrayed in *Power Ventures II*, initiates an “automatic boilerplate revocation” that follows any and every violation of the website’s TOU.¹¹⁴ Such action could create long-term effects, initiating issues regarding Internet monopolies and whether social media platforms like Facebook amount to “public forum[s].”¹¹⁵ However, the court abstained from addressing this issue, so this Comment can only speculate as to this possibility.

2. Effects on Everyday Users

The effects of *Power Ventures II* on everyday users is less clear than the effects on the businesses discussed above. This decision has the potential to stretch the CFAA beyond its original scope by criminalizing everyday users for everyday uses. For instance, suppose that a family member uses your Amazon account with your permission, but then a pop-up notice warns that only registered users are allowed to stream videos.¹¹⁶ *Power Ventures I* implies that the family member is a third party accessing the website legally by way of you, a registered user, but that permission is expressly revoked by

110. *Power Ventures II*, 844 F.3d 1058, 1067 n.2 (9th Cir. 2016).

111. *See id.* at 1067.

112. Orin Kerr, *9th Circuit: It’s a Federal Crime to Visit a Website After Being Told Not to Visit It*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/12/9th-circuit-its-a-federal-crime-to-visit-a-website-after-being-told-not-to-visit-it/?utm_term=.bfd7a149de09.

113. Tsircou, *supra* note 95.

114. Shawn E. Tuma, *Top 3 CFAA Takeaways from Facebook v. Power Ventures Case in Ninth Circuit*, BUS. CYBERSECURITY L. (Dec. 12, 2016), <https://shawnetuma.com/2016/12/12/top-3-cfaa-takeaways-from-facebook-v-power-ventures-ninth-circuit-amended-order-computer-fraud>.

115. Lyrrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011); *see Everybody Wants to Rule the World*, ECONOMIST (Nov. 27, 2014), <http://www.economist.com/news/briefing/21635077-online-businesses-can-grow-very-large-very-fastit-what-makes-them-exciting-does-it-also-make>.

116. *See* Brief for Electronic Frontier Foundation, *supra* note 9, at 13–14.

receiving the notice.¹¹⁷ Thus, use of an account in this way is not just a “bad thing,” it is a crime.¹¹⁸

Although a reasoned reading of this case allows for such possibilities,¹¹⁹ it is unlikely that criminal liability under the CFAA would be imposed on the average Joe logging onto a family member or friend’s account. As demonstrated above, the court in *Power Ventures II* based its reasoning on the case’s specific facts, which involved two businesses rather than an everyday user. Thus, the ruling is likely limited to the “narrow and stark facts of this case,” so “[o]rdinary folk have nothing to worry about.”¹²⁰ However, even if the CFAA never imposes criminal liability on an everyday user, the court must still deal with the fact that this decision “opened up [] Pandora’s box.”¹²¹ The Ninth Circuit allowed such a possibility to become reality, and only clarification can calm these concerns.

Moreover, even if everyday users are not held criminally liable, this decision still affects them. *Power Ventures I* concluded that a third party must retain authority from both the website owner and the authorized user.¹²² This essentially is a message to users that “they don’t control their data.”¹²³ “Our Facebook account may feel like private property, but we’re not allowed to give away the keys. It is Facebook’s house.”¹²⁴ Facebook users opted to allow Power into their accounts so that they could view their personal data on one site, Power’s site. However, Facebook slammed the door on this option by sending the cease and desist letter. Aside from the fact that Facebook’s TOU requires third party businesses to enter a separate agreement, Facebook opposed this access because it makes money off the ads it places next to your personal data.¹²⁵ Thus, if you are not visiting and viewing your data on Facebook, then Power is essentially stealing business from Facebook.

117. *Power Ventures I*, 844 F. Supp. 2d 1025, 1039 (N.D. Cal. 2012).

118. *Episode 741*, *supra* note 26.

119. *Id.* (stating that other lawyers agreed with Orin Kerr’s reading of the case that such a holding could incriminate everyday users).

120. Frankel, *supra* note 95.

121. *Episode 741*, *supra* note 26.

122. *Power Ventures I*, 844 F. Supp. 2d at 1068.

123. Aarti Shahani, *The Man Who Stood Up to Facebook*, NPR (Oct. 13, 2016, 4:52 PM), <http://www.npr.org/sections/alltechconsidered/2016/10/13/497820170/the-man-who-stood-up-to-facebook>.

124. *Episode 741*, *supra* note 26.

125. *Id.*

Additionally, this holding could reach even further than limiting access to competitors. It could also limit users' ability to utilize companies that offer a service that Facebook does not.¹²⁶ For instance, if Facebook did not provide a way for users to delete their data, then users could be precluded from resorting to third parties that offer this service if Facebook does not approve.¹²⁷ Therefore, this ruling gives Facebook greater power to reduce its users' ability to control their personal data, leading to further potential issues in the realm of Internet monopolies.

C. *The Correct Decision for This Case*

Despite the mistakes and concerns listed above, the court reached the correct ruling in this particular case. In the real world, a person commits trespass when he or she ignores a property owner's command to keep out and continues to sneak in.¹²⁸ Here, Power, a sophisticated business, defied a "targeted instruction to stay away," and relied on its system to thwart Facebook's technological defenses thereafter.¹²⁹ Power's relentless actions labeled it an "egregious computer trespasser," and warranted liability under the CFAA.¹³⁰ Thus, Power acted synonymously to a "hacker," which concerns the CFAA. Although this decision remains narrowly applicable to the facts of this specific case, there remains an impending need for the court to clarify on the questionable grounds discussed above.¹³¹

V. CONCLUSION

The court reached the correct result, but its reasoning will lead to future litigation because the CFAA "continues to be beset with problems."¹³² Clarity on this law is essential, as cyberspace and e-commerce law continues to evolve, and businesses are ready to duke it out to set the groundwork.¹³³ *Power Ventures II* might not be the right vehicle to clarify the CFAA, but sooner or later a court must take

126. See Balasubramani, *supra* note 108.

127. *Id.*

128. Allison Grande, *Facebook Says 9th Circ. Has Clear CFAA Case On Its Hands*, LAW 360 (Sept. 16, 2016, 10:25 PM), <https://www.law360.com/articles/841154/facebook-says-9th-circ-has-clear-cfaa-case-on-its-hands>.

129. *Id.*

130. Frankel, *supra* note 95.

131. *Id.*

132. Andrea M. Matwshyn, *The Law of Zebra*, 28 BERKELEY TECH. L.J. 155, 185 (2013).

133. *Episode 741*, *supra* note 26.

on the job.¹³⁴ Currently, Power is seeking the former with its appeal to the United States Supreme Court.¹³⁵ If the Supreme Court grants certiorari, the end result should remain the same, but all would benefit from a clarification of the parameters of the CFAA, its intended scope, and whom it affects.

134. Frankel, *supra* note 95.

135. *Episode 741*, *supra* note 26.