

I Spy: Addressing the Privacy Implications of Live Streaming Technology and the Current Inadequacies of the Law

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INTRODUCTION

We live in a world where almost everything is recorded. With tiny, powerful cameras at our fingertips—on our phones, laptops, and tablets—we can digitally capture almost every aspect of our lives if we choose to. Further, we can transmit these recordings virtually instantaneously for almost anyone to see, and the range of uses for these videos is practically limitless. Applications like Snapchat, Instagram, Twitter’s Periscope, and Facebook are used for everything from capturing and exposing criminal activity or police misconduct, to disseminating makeup tricks and techniques, to performing lip-syncs in our cars.¹ Because of the ubiquitous usage of these powerful little cameras, some pundits have argued not only that society has less and less of an expectation of privacy in public places, but that people don’t mind the potential for constant video surveillance that this represents.² Others contest this idea and argue that the fact that we have accepted these technologies does not mean we have accepted the “constant, democratized monitoring” that they provide.³

Even though live-streaming technologies have existed since the 1990s, they have recently been declared “the next big thing in social media.”⁴ Modern live-streaming capabilities have evolved parallel to improvements in cellular phone devices: as cell phones have become more powerful and better able to transmit data, live-streaming technology has become more accessible to average users, both individuals and companies.⁵

There are various legal rights implicated in any given live stream, from copyright and trademark, to right of publicity, to speech and information-gathering rights protected by the First Amendment, to privacy rights. As outlets such as Facebook Live and Snapchat become more available and widely used, the implications of broadcasting live content over the Internet become more complicated. This Note looks to examine some of these implications in depth, focusing on one of the newest and most popular live-streaming mediums: Facebook Live.

Facebook launched Facebook Live exclusively for verified celebrities on August 5, 2015, but since that time, it has expanded the program’s availability to anyone with a Facebook account. Over the past year, the popularity of Facebook Live has grown significantly.⁶ Today, everyone from the average Facebook user to established broadcasters like ABC (who used Facebook Live to live stream the 2016 Presidential Debates) is using the platform.⁷ This rise from obscurity, along with the

1. Joe E. Lazauskus, *The Untold Story of Facebook Live*, THE FAST COMPANY (Sept. 29, 2016, 12:50 PM), <https://perma.cc/4BNE-39CT>.

2. Daxton Stewart & Jeremy Littau, *Up, Periscope: Mobile Streaming Video Technologies, Privacy in Public, and the Right to Record*, JOURNALISM AND MASS COMM. Q. 1, 2-3 (2016), available at <https://perma.cc/NV74-H9JM>.

3. *Id.*

4. Scott Kleinberg, *Live Streaming: The Next Big Thing in Social Media*, CHICAGO TRIBUNE (Apr. 1, 2015), <http://perma.cc/H7LY-W2Z3>.

5. Stewart & Littau, *supra* note 2, at 1 (“While live streaming video apps are not new, widespread growth in the use of this technology had been limited by poor quality and lack of social connectivity”).

6. Lazauskus, *supra* note 1.

7. *Id.*

proliferation of similar applications like Instagram Live, Snapchat, and Periscope, has raised a crop of legal issues, the ramifications of which have not yet fully come to light.

Some of these issues include: What are the legal implications of recording and broadcasting content without other people's permission via Facebook Live and similar mediums? Do the people captured in these recordings have any rights to control or prevent the recording and broadcast? What recourse do the people in the videos have if the videographers are liable for violations of privacy law? What happens if they are not? What would be the potential for exposure to civil or criminal liability for the streamers themselves? Lastly, what about the Internet Service Providers (ISPs): should they be liable for the actions of users? Can they be held responsible under current law?

This Note argues that live-streaming technology has implicated several important legal rights held by various parties, from the freedom of expression rights of the videographers/streamers themselves, to privacy rights of inadvertent participants in a third party's live stream. Part I briefly discusses the types of streaming currently available, focusing on an explanation of live-streaming and the transition from archived content applications to live-streaming applications, and then moves on to examining the trajectory of the laws governing live-streaming technology. Additionally, Part I discusses parts of the body of both state and federal privacy laws which could apply to live-streaming. Part II of this Note applies the framework established in Part I to Facebook Live, comparing the live-streaming service to more traditional broadcasting, and discussing the rights and liabilities of live-streamers, those who may inadvertently find themselves included in a live stream, and select third parties. Part III discusses past solutions to privacy issues raised by media activities, and Part IV examines why the advent of social media live-streaming presents novel questions. Part V concludes this Note by discussing potential policy implications and asking the question: where do we go from here?

I. BACKGROUND

A. TRAJECTORY OF SOCIAL MEDIA

The story of social media has been one of quick evolution. New "apps" are here one day and gone the next, and new methods of sharing information online have cropped up regularly for over a decade, giving users a plethora of options from which to choose.⁸

Adoption of live-streaming is a relatively recent social media trend. Webcasting options such as Google's Hangout Live and Ustream developed to allow users to broadcast from the built-in web cameras in their computers to multiple other users in real time.⁹ While these options saw some initial success, they did not gain the same traction as the newer live-streaming applications, because they were handicapped by

8. Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CENTER (Oct. 8, 2015), <https://perma.cc/32JZ-D3QL>.

9. Stewart & Littau, *supra* note 2, at 5-6.

poor video quality and slow Internet and data speeds.¹⁰ It was not until these problems were resolved that live-streaming could take its current form, transitioning to a model based on mobile apps and devices.¹¹

Apps like Meerkat and Periscope first surfaced in 2015, representing the start of live-streaming as a popular option of personal broadcasting.¹² Prior to these two options, while there were many popular social media platforms (like YouTube, Facebook, Twitter, Instagram and Snapchat) that allowed users to post videos, these videos were not live broadcasts transmitted simultaneously to users, but rather pre-recorded clips.¹³

Meerkat is a mobile app that allows users to broadcast live videos with their smartphones.¹⁴ Twitter's version of this function is Periscope, which also provides for the archiving and playback of content for twenty-four hours.¹⁵ Both apps provide for user communication through comments and messages that the broadcaster can read and respond to.¹⁶ The apps launched in rapid succession in March of 2015, but after a brief period of success for Meerkat, Periscope quickly dominated, becoming one of the most popular iPhone apps while Meerkat's growth stagnated and its popularity began to fall.¹⁷ By September 2016, the Meerkat application was removed from the App Store.¹⁸

More recently, a newer approach to live-streaming has been developed. Rather than requiring a separate application, live-streaming functionality has been integrated into popular apps that are already widely used, like Facebook and Instagram.¹⁹

Facebook remains the most-used social media platform, with over two billion users, but one of its biggest challenges has been differentiating itself from newer forms of social media and avoiding the pitfall of obsolescence.²⁰ As part of its response to that challenge, Facebook Live was first launched on a limited basis in 2015, after the debut of Meerkat and Periscope.²¹ The feature was rolled out slowly and took time to reach a large user base, but it is swiftly becoming a widely-used

10. *Id.* at 1, 6.

11. *Id.*

12. *Id.* at 1.

13. Kleinberg, *supra* note 4. Live-streaming capabilities are not new, however mobile technology has advanced significantly, allowing live-streaming to become more popular.

14. John Patrick Pullen, *You Asked: What is the Meerkat App?*, TIME, (Mar. 14, 2015), <https://perma.cc/YGC9-AR5X>.

15. See PERISCOPE, <https://perma.cc/6CZY-CPB2> (last visited Oct. 21, 2017).

16. Stewart & Littau, *supra* note 2, at 7.

17. Glenn Peoples, *The Meerkat Minefield: Legal Issues With Live-Streaming Apps*, BILLBOARD (Mar. 30, 2015), <https://perma.cc/636L-FLPU>.

18. Nick Statt, *Live-Streaming Pioneer Meerkat Has Been Pulled from the App Store*, THE VERGE (Sep. 30, 2016), <https://perma.cc/APJ4-SAZA>.

19. Michelle Fitzsimmons, *Instagram Live Video is Here: One Part Facebook Live, One Part Snapchat*, TECH RADAR (Dec. 16, 2016), <https://perma.cc/2LZZ-SCQ8>.

20. Shannon Greenwood et al., *Social Media Update 2016*, PEW RESEARCH CENTER (Nov. 11, 2016), <https://perma.cc/FN7N-EG3C>; Josh Constine, *Facebook Now Has 2 Billion Monthly Users...and Responsibility*, TECHCRUNCH (Jun. 27, 2017), <https://perma.cc/L8D9-JNNN>.

21. Lazauskus, *supra* note 1.

feature of Facebook.²² In the months following Facebook Live's launch, the creators at Facebook compiled data around the use of the platform which depicted a story of success beyond what the creators anticipated.²³ In response, Facebook invested heavily in researching the effects of the launch and developing content for viewers, spending as much as \$50 million to induce influential users to create video and content for the platform.²⁴

The future of both Facebook and live video broadcasting is still unclear, and there are many who doubt that live video will provide the sustained impetus Facebook needs, or that it will sustain the traction it has gained. However, Facebook Live has been one of the biggest launches for Facebook in terms of convincing users to heavily engage with the platform and post original content. The launch of Facebook Live moved the needle on engagement more than all of Facebook's earlier product launches of the year combined.²⁵ Considering the fickle nature of social media users and the rapid pace of advancements in streaming technology, it is hard to determine at this point just how successful this feature will be, but the data that Facebook has compiled following the roll-out of Facebook Live suggests that the platform has created a way for users to share timely, interactive, and valuable content, and that large numbers of people, on average, are watching that content.²⁶

B. LIVE-STREAMING TO REPLACE LIVE TV?

To illustrate how live-streaming has been utilized as a substitute for live television, I will briefly discuss a notable example of its use. The popular website *BuzzFeed* was an early adopter of Facebook Live. In one significant use of the medium, *BuzzFeed* broadcast a live video of rubber bands being used to make a watermelon explode; that broadcast reached more than 800 thousand simultaneous viewers.²⁷ When you consider that CNN averages 723 thousand prime-time TV viewers, the implications of this figure are clear: users are watching live streams in significant numbers.

On September 26, 2016, the first Presidential Debate of the 2016 Election was held. While traditional television stations such as CNN, ABC, and NBC still drew in tens of millions of viewers (making it the most-watched such debate ever), a large contingent of the estimated eighty-four million total viewers chose to watch via live stream.²⁸ The debates from the 2016 Presidential Election were broadcast via Facebook Live to over twenty-eight million people.²⁹ There were fifty-five million

22. *Id.* During initial testing, Facebook Live was only made available to celebrities and other users with verified Facebook accounts, such as The Rock, and Ricky Gervais.

23. Lazauskus, *supra* note 1.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*; Steven Perlberg, *Presidential Debate Sets Viewership Record*, WALL ST. J. (Sept. 27, 2016), <https://perma.cc/R9ZD-EGCD>.

29. *Id.*

viewers of debate-related videos on Facebook Live during the first debate.³⁰ Another 2.5 million simultaneous viewers watched live streams on YouTube, and millions more used other streaming services.³¹ If Facebook Live sustains its momentum, it has the potential to supplant or, at the very least, compete with live TV, especially with regard to the consumption of news.³²

II. THE LEGAL LANDSCAPE BEFORE FACEBOOK LIVE

A. DECENCY

While Meerkat and Periscope were lauded for the technological and social advancement that they represented, numerous legal issues were implicated by these early services. As Stewart and Littau wrote, “live-streaming technologies . . . are the most recent encroachment on the waning notion that people may have some right to privacy in public places.”³³

Since live-streaming on the Internet is a technological step forward from broadcast television, it is necessary to briefly discuss the law surrounding traditional broadcast TV. The Federal Communications Commission (FCC) received the power to restrict and respond to complaints of indecent material on broadcast TV with the passing of the 1934 Communications Act. This Act charged the FCC with ensuring that broadcasting activities serve the “public convenience, interest, or necessity.”³⁴

Traditional broadcast TV is overseen by the FCC which, in conjunction with 18 U.S. §1464, provides “decency” standards for the content broadcast on television.³⁵ In the case of “live” broadcasts, there are often short delays between the filming and the delivery of content; these delays allow broadcasters to edit their videos for excessively violent, indecent, and obscene content which might violate the decency standards of the FCC. These same delays can be used to “blur” the faces or identifying characteristics of individuals captured in a feed who have not consented to be broadcast. Additionally, television channels can transmit pre-recorded and edited footage to their viewers. Internet streaming services do not have these requirements or capabilities, leaving them more vulnerable to privacy violations.³⁶

In *Pacifica Foundation v. FCC*, “indecent” language was defined as language that “describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. . . .”³⁷

30. *Id.*

31. Brian Selzer, *Debate Breaks Record as Most-Watched in U.S. History*, CNN (Sept. 27, 2016), <https://perma.cc/ZRC2-7L9S>.

32. Lazauskus, *supra* note 1 (“Thus the growth of online video streaming in the past five years has slowly allowed citizen players to compete alongside broadcast corporations”).

33. Stewart, *supra* note 2, at 1.

34. 47 U.S.C. § 303.

35. 18 U.S.C. §1464.

36. Angela Moon & Dustin Volz, *Facebook Live Streaming of Shooting Spotlights Ethical, Legal Policies*, REUTERS, (July 7, 2016), <https://perma.cc/GW84-XNN3>.

37. *Pacifica Found. v. FCC*, 556 F.2d 9, 11 (D.C. Cir. 1977), *rev'd on other grounds*, 438 U.S. 726 (1978).

To warrant action by the FCC, the broadcast must contain more than an isolated use of an offensive word.³⁸

Broadcast television, like live-streaming, is afforded protection under the First Amendment, meaning the FCC's regulation or censorship of particular programs and stations is subject to the limitations of that Amendment. Federal law provides the FCC with the ability to respond to complaints about indecent or obscene content³⁹ by giving warnings, fining stations, or even revoking a station's license, and its decisions are legally binding;⁴⁰ however, any response to a complaint must be careful to balance the FCC's mandate with the broadcaster's freedom of speech under the First Amendment, as well as federal anti-censorship law.⁴¹

The Communications Decency Act also regulates computer service providers. In Section 230, the Act says in part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁴² This means that Internet companies that host content created and posted by third parties (like Facebook) are protected from the legal consequences of posting violent and obscene content, while traditional TV broadcasters are not.⁴³ Section 230 was a pivotal piece of legislation with regard to protecting freedom of speech on the internet and allowing host services like Facebook to thrive on user-generated content.⁴⁴ This potentially gives live-streaming services an advantage over their traditional broadcast predecessors. For example, because of statutory limitations placed on liability, ISPs have no legal obligation to affirmatively monitor the posting of content on their services, and thus do not need to expend costs to police content.⁴⁵

B. SELF-REGULATION AND CENSORSHIP OF LIVE-STREAMING

Traditional television broadcasting has a number of special characteristics that differentiate it from other forms of traditional media and protect broadcasters.⁴⁶ Traditional broadcasting includes "communication to the public, simultaneous reception by the public, passive audience and fixation of time and content."⁴⁷ Live-streaming has similar features to traditional live broadcasting in that the recording and broadcasting of content happen at virtually the same time, and thus the legal

38. *In re Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 (F.C.C. 1987).

39. *Obscenity, Indecency & Profanity – FAQ*, FED. COMM'NS COMM'N, <https://perma.cc/5W3H-89K8> (last visited Jan. 4, 2016).

40. *See* Thomas L. Tedford, *FREEDOM OF SPEECH IN THE UNITED STATES* 385 (1985).

41. *Id.*; 47 U.S.C. § 326.

42. 47 U.S.C. § 230.

43. *See* Moon & Volz, *supra* note 36.

44. *See CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUNDATION, <https://perma.cc/5W43-VR9X>.

45. 17 U.S.C. § 512.

46. As discussed by M. Sakthivel an assistant professor at the University School of Law & Legal Studies at GGS Indraprastha University who authored a comparative study of "peer-2-peer" streaming technology. *See* M. Sakthivel, *Webcasters' Protection Under Copyright - A Comparative Study*, 27 *COMPUTER L. & SEC. REV.* 479, 484 (2011).

47. *Id.*

protections afforded to live TV broadcasting are more applicable for live-streaming than for on-demand streaming.⁴⁸ There are two key differences between live-streaming apps and traditional broadcast television. First, anyone, anywhere can become a broadcaster, as long as they have a smartphone with the right technological capabilities. These apps are widely accessible, and anyone with access to them has the ability to broadcast content, eliminating many of the barriers for entry to live-broadcasting that have previously existed. Second, because people access these feeds with their phones and computers, the dissemination of these feeds is now decentralized.⁴⁹

Alongside the acknowledgment of the broadcast capabilities of live-streaming apps, questions have arisen about the use of these services to display graphic and disturbing images, and even to promote and facilitate terrorism.⁵⁰ A notable example of this friction arose in the aftermath of the Philando Castile shooting on July 6, 2016, which was broadcast via Facebook Live. Philando Castile was a young black man who was shot by a police officer after being pulled over for an alleged broken taillight.⁵¹ His fiancée, Diamond Reynolds, used Facebook Live to stream the immediate aftermath of the shooting to her Facebook followers.⁵² The video quickly went viral, with more than four million views by the next day.⁵³ While the use of cell phones by citizens to capture police violence and misconduct is not new, the simultaneity of the shooting and the video introduces a layer of complexity. In particular, the “decency” standards which apply to broadcast television do not apply to Internet streaming, and the simultaneity of the broadcast eliminates any opportunity to check for “indecent” content before the act of broadcast.⁵⁴

Reynolds’ video presented a test for Facebook’s new feature and an unusually public instance of Facebook working out some of the issues in their Live-streaming policies. Initially, Facebook removed Reynolds’ video; it then reposted the video with a graphic content warning label.⁵⁵ This removal garnered extensive criticism, and Facebook released a statement apologizing for the brief inaccessibility of the video, which it blamed on a technical glitch.⁵⁶ The video represents the type of sensitive, newsworthy, yet graphic content that makes the immediacy of Facebook Live and other live-streaming apps controversial under certain circumstances.⁵⁷

The controversy around Castile’s death was only one of Facebook’s many struggles with balancing the value of immediate live broadcasting and the desire to

48. *Id.*

49. Stewart & Littau, *supra* note 2.

50. See Moon & Volz, *supra* note 36.

51. Elliot C. McLaughlin, *Woman Streams Aftermath of Fatal Officer-involved Shooting*, CNN (July 8, 2016), <https://perma.cc/6GK9-ZX3P>.

52. Moon & Volz, *supra* note 36.

53. *Id.*

54. See *id.* There is often a slight delay between recording and broadcasting in live TV to account for these decency standards, that does not occur with Internet streaming.

55. Kathleen Chaykowsky, *Philando Castile’s Death on Facebook Live Highlights Problems for Social Media Apps*, FORBES (July 7, 2016 4:52 PM), <https://perma.cc/RXX3-WM9S>.

56. *Id.*; Moon & Volz, *supra* note 36.

57. See Chaykowsky, *supra* note 55.

content sensitive and violent content. In June, a terrorism suspect in France used Facebook Live to make threats of violence. Facebook shut down the suspect's account and removed the video.⁵⁸ That same month, following a double homicide in France, the killer used Facebook Live to incite further violence. A young man, Antonio Perkins, was using Facebook Live when shots rang out and he fell to the ground, apparently having been shot and killed.⁵⁹

Other platforms like Periscope have suffered from some of the same problems as Facebook Live: in April of 2016 a young woman used Periscope to film her friend's rape, and another used it to film her own suicide.⁶⁰ Rabbi Abraham Cooper of the Simon Wiesenthal Center's Digital Terrorism and Hate project worries about the ability of terrorists to use Facebook Live as a tool to promote terrorist agendas: "The availability of a live broadcast, unencumbered, becomes a horrendous tool in the hands of a terrorist."⁶¹ In response to these mounting problems, Facebook has expanded its team dedicated to reviewing live videos.⁶²

The next section will examine some of the methods of addressing privacy violations that have been deployed in the past against traditional media sources.

III. PAST SOLUTIONS AND TRADITIONAL MEDIA

There are two types of streaming methods in use today: Live-streaming, which means that video is simultaneously recorded and broadcast, and on-demand streaming, which occurs when video is captured, stored, and re-transmitted later. Live-streaming presents a novel challenge to the limits of privacy law for two significant reasons: first, anyone with access to a smartphone and the internet can be a live streamer; second, the acts of recording and transmitting occur simultaneously, meaning that without a preemptive regulatory framework, any recourse to privacy violations must happen after the fact.⁶³ Now, each user can function as their own broadcasting station, transmitting live events, entertainment, news, sporting events, and more with their smartphone.

Because live-streaming in its current form is a new phenomenon, the courts have yet to deal with a prominent live-streaming case that has yielded any guiding principles. However, we've seen changes in technology affect our perceptions and treatment of privacy in the past, and by looking to some of these examples, it is possible to predict how live-streaming may, and should, be treated in the future.

58. *Id.*

59. *Id.*

60. Moon & Volz, *supra* note 36.

61. *Id.*

62. *Id.*

63. *Id.* at 10.

A. RIGHT OF PUBLICITY

The right of publicity is the right to protect one's name and likeness from being used for a third party's *commercial* gain.⁶⁴ Generally, the ordinary citizen does not have a name or likeness that is attractive for the prospect of monetization. Therefore, the right of publicity tends to be enforced on behalf of commercial entities, celebrities, and public figures more often than ordinary citizens.⁶⁵ This right has been enforced against traditional media sources as a method of protecting the privacy of individuals; it creates a cause of action when an individual loses the ability to control the use of their name or likeness in commerce.

Right of publicity questions are a state law matter, and there tends to be significant divergence among the states.⁶⁶ For example, in New York, this right is codified in §50 of the Civil Rights Law.⁶⁷ To support a claim under § 50, the statute requires that the plaintiff demonstrate that (1) a person, firm or corporation used (2) for advertising or trade purposes (3) the name, portrait, or picture of any living person (4) without consent.⁶⁸ If these elements are satisfied, the defendant will be held guilty of a misdemeanor.⁶⁹

If a third party is using the rightholder's likeness to generate revenue (for example, using a celebrity's image to endorse a product in a commercial), the key legal question is whether the videographer (the person who takes the video) is merely an intermediary, as opposed to an independent commercial actor; is the videographer the person that must benefit in order for the plaintiff to have recourse? Will a corporation that hires a videographer be swept up in claims of liability for the videographer's actions?

B. RIGHT TO PRIVACY

This section sketches the evolution of state privacy laws as they have been applied to traditional media. The right to privacy is more applicable to lay people than the right to publicity, which, as discussed above, tends to be enforced on behalf of public figures more often than ordinary citizens. Thus, the right to privacy may be available to help those who find themselves live streamed on the Internet inadvertently. Though the right to privacy is alluded to in the Bill of Rights, the right is enforced through state law, which can become complicated when content is broadcast online and received by individuals in multiple states.⁷⁰

64. See Tara E. Langvardt, *Reinforcing the Commercial-Noncommercial Distinction: A Framework for Accommodating First Amendment Interests in the Right of Publicity*, 13 VA. SPORTS & ENT. L.J. 167, 169 (2014).

65. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982).

66. See Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW., 14 No. 2, (Aug. 2011).

67. See N.Y. CIV. RIGHTS LAW § 50.

68. *Id.*

69. *Id.*

70. See Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (2014).

Privacy law has typically been bifurcated between laws governing the gathering of information and those governing its dissemination. Live-streaming platforms like Facebook Live eliminate this distinction by allowing users to collect and broadcast information simultaneously. This creates a question for courts at the intersection of two rights: the right to record and the right to privacy.⁷¹

The first description of the right to privacy can be found in Samuel Warren and Louis Brandeis' Harvard Law Review article "The Right to Privacy."⁷² This article is considered one of the most influential law review articles of all time.⁷³ Warren and Brandeis argued in their article that a right to privacy was necessary because the law as it stood at the time was inadequate to address the concerns that invasions of privacy create.⁷⁴ For example, at the time of the article's publication, defamation law was not an adequate remedy to address some invasions of privacy because defamation requires a published false statement.⁷⁵ Many jurisdictions also require intent for defamation claims. The tort of invasion of privacy, on the other hand, has no intent requirement.⁷⁶ Moreover, unlike in defamation cases, truth is an absolute defense where an individual's privacy is invaded. An invasion of privacy does not arise from the dissemination of false statements about a person, but from the exposure of one's private life. In other words, individuals have an interest in preventing the dissemination of certain information *because it is true*.⁷⁷

Four privacy torts were developed by William Prosser, partly in response to Warren and Brandeis's article: (1) intrusion on seclusion; (2) public disclosure of private facts; (3) false light publicity; and (4) appropriation of name or likeness.⁷⁸ Each state that recognizes the privacy torts codifies them in a different way, but there are similarities across the board.

As stated in the Second Restatement of Torts, the first privacy tort is intrusion upon seclusion, which provides for liability on the part of "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another" in a *manner* that would be objectionable or offensive to the reasonable person.⁷⁹ Live streamers and broadcast television videographers alike are already subject to trespass laws, which provide for liability based on physical intrusions, but this tort provides protection for constructive intrusions as well. The remedy for these intrusions is civil damages.⁸⁰ The most common example of this tort is probably eavesdropping or

71. Jonathan Peters, *Could Facebook Live Change the Way Courts Think About Privacy Law?*, COLUM. JOURNALISM REV. (July 14, 2016), <https://perma.cc/J3T3-NV6Q>.

72. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

73. Daniel Solove, *Does Scholarship Really Have an Impact? The Article that Revolutionized Privacy Law*, TEACHPRIVACY (Mar. 30, 2015), <https://perma.cc/H7ET-DY5V>.

74. Warren & Brandeis, *supra* note 72, at 195-96.

75. 11-46 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 46.02 (2017)

76. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

77. Warren & Brandeis, *supra* note 72, at 218.

78. *See* Prosser, *supra* note 76.

79. Restatement (Second) of Torts § 652B (1977).

80. *Id.*

wiretapping but it can go further.⁸¹ In the Colorado case *Doe v. High-Tech Inst., Inc.*, the court held that while this tort clearly applies to invasion of private physical spaces, it can also encompass intrusions into a person's private concerns "based upon a reasonable expectation of privacy in that area."⁸²

The second privacy tort in the Restatement is public disclosure of private facts, which requires that a plaintiff demonstrate that the defendant made a statement that is "highly offensive to a reasonable person" (a question of fact), and that the disclosed information is not of legitimate concern to the public (which can be a question either of fact or of law).⁸³

Plaintiffs have frequently attempted to apply this tort in the context of news broadcasts but it is difficult to succeed with such a claim because true, newsworthy material is not actionable.⁸⁴ For example, in *Wilkins v. Nat'l Broad. Co.*, the Court of Appeal for the Second District of California was presented with a case in which two employees of a television network posing as potential investors recorded and later broadcasted a conversation with sales representatives of a firm they were investigating.⁸⁵ The court held that this was not a public disclosure of private facts. The court determined that the defendant's investigation was newsworthy as a matter of law, barring recovery under this tort.⁸⁶ Additionally, the judge noted that the plaintiffs did not conduct themselves as though the information they shared was private—they were in a public location, a restaurant, when the discussion took place.⁸⁷ The court concluded that the intrusiveness of the broadcast did not outweigh the public interest in the information that was collected.⁸⁸

The third privacy tort is false light publicity. A false light claim asks the court to provide damages for emotional distress and reputational harm stemming from the revelation of information that is used to construe the subject in a negative or misleading light.⁸⁹ Similar to intrusion upon seclusion and public disclosure of private facts, states codify this tort in varying ways. However, the elements of false light liability are: (1) conduct that is highly offensive to a reasonable person; and (2) committed by an actor who had knowledge of or acted in reckless disregard as to the falsity of the publicized matter.⁹⁰ The harm arises from the damage to an individual's reputation as a result of the false statements being disclosed, and the ensuing emotional distress.

81. See, e.g., *Ali v. Douglas Cable Comm'n.*, 929 F. Supp. 1362, 1371 (D. Kan. 1996); *Bradley v. Atl. City Bd. of Educ.*, 736 F. Supp. 2d 891, 893 (D.N.J. 2010); *Marks v. Bell Tel. Co.*, 331 A.2d 424, 426 (1975).

82. *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1068 (Colo. App. 1998); see *Phillips v. Smalley Maint. Serv., Inc.*, 435 So. 2d 705, 707 (Ala. 1983) (intrusion by employer into employee's sexual history); *Hamberger v. Eastman*, 206 A.2d 239, 241 (1964) (common law tort of intrusion upon seclusion should protect people not places).

83. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

84. See *infra* note 97 and accompanying text.

85. *Wilkins v. Nat'l Broad. Co.*, 71 Cal. App. 4th 1066, 1072 (1999).

86. *Id.* at 1086-87.

87. *Id.* at 1078.

88. *Id.* at 1086-87.

89. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

90. *Id.*

In the case of *Machleder v. Diaz*, the plaintiff sued a television network over an “ambush” interview.⁹¹ He argued that the interview portrayed him in an “intemperate and evasive” false light and suggested that he was involved in the illegal dumping of chemical waste. The Second Circuit Court of Appeals reversed the district court’s grant of damages for the plaintiff, holding that the truth is a complete defense in a false light claim.⁹²

The fourth and last privacy tort in the Restatement is appropriation of name or likeness. This tort involves the appropriation of the name or likeness of another for one’s own use and benefit.⁹³ Many states require that the defendant’s use must be commercial in order for relief to be granted to plaintiffs.⁹⁴ This tort comes in two variants: emotional harm based on misappropriation, and pecuniary harm based on right of publicity, which is a property based right.

In *Raymen v. United Senior Ass’n, Inc.*, a photographer took a photo of two men kissing at their wedding. This photograph was used without permission in an advertisement that opposed the AARP. The two men in the photograph argued that they were emotionally harmed by the fact that their image was used to support a political position they did not support. The question before the court was whether the defendant’s use was commercial or noncommercial. The court ultimately decided that the defendant’s use was not commercial.⁹⁵ Appropriation is not actionable when it is noncommercial and newsworthy because the First Amendment requires that a person’s name or likeness be used without liability if it is in connection to a matter of public interest or if the use is noncommercial in nature.⁹⁶ As the *Raymen* case demonstrates, this tort represents an attempt by courts to balance freedom of the press with privacy.⁹⁷

Several other cases have developed the law related to privacy and the media, providing a backdrop for examining privacy interests in live-streaming cases. Most of these cases involve traditional broadcast television or print media. In *Nader v. Gen. Motors Corp.*, Ralph Nader wrote an exposé about General Motors that criticized its allegedly unsafe safety and design practices.⁹⁸ Nader alleged that, in response to his exposé, GM began a “campaign of intimidation” against him by conducting interviews with his acquaintances, surveilling him when he was in public places, “accost[ing]” him with girls making “illicit” proposals in an attempt to entrap him, making threatening and harassing telephone calls to him, and tapping his

91. *Machleder v. Diaz*, 801 F.2d 46, 49 (2d Cir. 1986) (“Ambush interview is a derogatory descriptive term for a controversial investigative reporting technique in which a reporter and his news crew intercept an ‘unsuspecting newsworthy subject on the street and [bombard] him with incriminating accusations ostensibly framed as questions.’”).

92. *Id.* at 53.

93. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

94. RESTATEMENT (SECOND) OF TORTS § 652C cmt. b, illus. 1-6, cmt. c, illus. 7-8, cmt. d, illus. 9-10 (1979).

95. *Raymen v. United Senior Ass’n, Inc.*, 409 F. Supp. 2d 15, 25 (D.D.C. 2006).

96. *Id.* at 22.

97. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 2859 (1977); Lyrissa B. Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do about It*, 73 TUL. L. REV. 173, 184 (1998).

98. *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 767 (1970).

phone.⁹⁹ He charged GM with intrusion on seclusion, intentional infliction of emotional distress, and tortious interference with business practices or economic advantage. The court decided that there could be no invasion of privacy where the information sought was already open and available to the public or voluntarily revealed to others.¹⁰⁰ Such a concept is relevant when considering the types of events that could become the substance of a live stream.

In *Shulman v. Grp. W Prod., Inc.*, a case decided nearly thirty years after *Nader*, the court was faced with the question of assessing newsworthiness—a question relevant to privacy claims because content deemed “newsworthy” can evade certain privacy restrictions. Under California law, the question of what is newsworthy is largely a question of fact. *Shulman* involves the words uttered by the victims of a car crash to a responding nurse, which were captured and broadcasted by television news cameras on the scene. The plaintiff argued that the broadcast was an unlawful intrusion under the public disclosure of private facts tort. The court concluded in this case that there must be a “logical nexus” between the complaining individual and the matter of legitimate public interest. When a person is involuntarily involved in a newsworthy incident, not every aspect of the person’s conduct or life is thereby rendered newsworthy. Nonetheless, the Court held that the disputed material was newsworthy *as a matter of law*. The fact that the broadcast could have been edited to exclude the plaintiff’s words does not make them not newsworthy.¹⁰¹

Privacy law has evolved continuously since 1890 when it was first discussed in Warren and Brandeis’ article. It is not necessarily the case that our standards of privacy have changed with technological advances; rather, the emergence of new threats has led to a discordance between the public’s expectation of privacy and their experience in public places.¹⁰² While the current regime of privacy law is unlikely to impose liability upon the services that provide the platforms for live streamers, or users of these services, due to the protections built into the laws and developed through common law, the possibility of changes to these laws is not altogether far-fetched.

IV. WHY DOES LIVE-STREAMING PRESENT A NEW ISSUE?

Live-streaming presents a pressing question for courts regarding how far they are willing to extend privacy torts:

Further complicating the law surrounding use of [live-streaming technologies] is the right of citizens and journalists to record video in public places. Under United States law, taking photographs in public places has increasingly received protection under the

99. *Id.* at 767.

100. *Id.* at 769.

101. *Shulman v. Grp. W Prod., Inc.*, 955 P.2d 469 (Cal. 1998).

102. Stewart & Littau, *supra* note 2, at 9; HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE*, 148 (2009).

First Amendment, though courts are split on the extent to which those protections should be extended to recording video[.]¹⁰³

In the first week of January 2017, four young adults used Facebook Live to stream themselves as they physically and verbally assaulted a young disabled man, ultimately leading to their arrest.¹⁰⁴ This horrific attack is a harsh example of how Facebook Live and live-streaming are changing our reality: live-streaming is becoming ever more pervasive to the point where people are filming just about everything—even their own criminal acts. Social media users are broadcasting their “private” lives to an ever greater extent.¹⁰⁵ Arguments can be made that our expectations of privacy have shifted due to these changes because our lives could be seen by anyone in the world at virtually any time.¹⁰⁶ Facebook Live and similar live-streaming technologies represent the most recent foray into altering the public’s expectation of privacy or, at the very least, the most recent threat to the expectation of privacy that the public already holds.

What makes Facebook Live particularly threatening is the sheer scale of its use. With over two billion Facebook users, the chance of encountering a Live user is high, and the law is unequipped to deal with some of the problems this pervasive recording presents. In light of this, along with the fact that live-streaming technology is likely to become more (rather than less) widely used as time passes, legislators and scholars have begun to acknowledge that some sorts of adjustments are necessary with regard to privacy law. This section will look to past applications of privacy law and discuss which, if any, could shed light on the implications of streaming technology for privacy law moving forward.

As discussed above, there are multiple players that must be considered when conducting an analysis of the encroachment upon privacy caused by streaming and the status of privacy law. For the purposes of this essay, I have boiled these players down into three main categories: (1) the broadcaster, meaning the person using Facebook Live (or another streaming service) to capture and disseminate a live feed; (2) the service provider (the company that provides the platform through which users may stream and view streams); and (3) the inadvertent participant (the individual who finds themselves captured in a third party’s stream without their consent). This section will aim to outline the major problems faced by each of these stakeholders when live-streaming occurs.

A. DRONES AND THE CURRENT STATUS OF THE LAW

Before delving into how the current law affects the players, it is useful to briefly look at the development of drones, and their effect on privacy law, as a potential blueprint for the way live-streaming can push privacy law forward. As the

103. Stewart & Littau, *supra* note 2, at 3.

104. Emanuella Grinberg, *Chicago Torture: Facebook Live Video Leads to 4 Arrests*, CNN (Jan. 5, 2017 10:33 AM), <https://perma.cc/D2G2-2DEQ>.

105. *Id.*; *13 Million U.S. Facebook Users Don’t Use Privacy Controls, Risk Sharing Updates Beyond Their ‘Friends’*, CONSUMER REP. (May 3, 2012), available at <https://perma.cc/W79S-T4GC>.

106. See Nissenbaum, *supra* note 102.

affordability of these devices has increased, their pervasiveness has increased with it. In response to this proliferation of drones, privacy law has advanced, if only incrementally.¹⁰⁷

Drones represent the capacity for increased unwanted aerial surveillance that is difficult to prevent. If an unmanned aerial surveillance craft flies into one's yard, there is little recourse for the person being surveilled short of knocking it out of the sky (which would create a host of problems of a different sort).¹⁰⁸ While privacy laws vary by state, by 2014 at least thirteen states had passed civil or criminal laws to outlaw the use of drones for unwanted surveillance, and the Federal Aviation Administration released guidelines to regulate the use of drones in 2016.¹⁰⁹ As will be the case with live-streaming, legislators were forced to consider how to balance the right to record with the right to privacy when devising methods to combat this new threat to privacy.

The Federal Aviation Administration estimated that by the year 2030 there would be at least thirty thousand private drones in use.¹¹⁰ And yet, the response by legislators has been tepid at best. The FAA declined to include privacy matters in its 2016 drone regulations, considering the job a task for state legislators, despite facing a federal lawsuit attempting to compel it to do so.¹¹¹ However, at least thirty-eight states in 2016 have considered some form of legislation related to "UAS" or unmanned aircraft systems, the technical term for drones.¹¹²

The question at this point is under which legal theory legislators can feasibly advance changes to privacy law given the status and progression of drone technology. Potential options which stand out as especially viable include property law and tort law. The Supreme Court, spurred by the advancement and proliferation of airplanes, decided in *U.S. v. Causby* that a homeowner "owns" (and can control) up to eighty-three feet of airspace above their property.¹¹³ Under a property doctrine, some legal theorists argue that by extending the height of property ownership, some of the privacy issues related to drones could be evaded.¹¹⁴ Alternatively, using the privacy torts established through common law, a case for extending the breadth of the intrusion upon seclusion tort to encompass drones can be made. Lyriisa Lidsky suggests that lawmakers "rejuvenate" tort law in light of technological advances:

If the intrusion tort is to shield plaintiffs from prying, spying, and lying . . . courts must interpret the tort more expansively. Courts must acknowledge that citizens are entitled

107. Stewart & Littau, *supra* note 2, at 21.

108. Stephen Carter, *A Battlefield of Drones and Privacy in Your Backyard*, CHI. TRIBUNE (Aug. 3, 2015), <https://perma.cc/Q5RB-LXZB>.

109. Stewart & Littau, *supra* note 2, at 21.

110. Carter, *supra* note 108.

111. *The FAA's New Drone Rules Are Effective Today*, FED. AVIATION ADMIN. (last updated Aug. 29, 2016), <https://perma.cc/EL5Y-KM4J>; *Elec. Privacy Info. Ctr. v. Fed. Aviation Admin.*, 821 F.3d 39, 41 (D.C. Cir. 2016).

112. *Current Unmanned Aircraft State Law Landscape*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 25, 2017), <https://perma.cc/X7XW-6H2X>.

113. *United States v. Causby*, 328 U.S. 256 (1946).

114. Carter, *supra* note 108.

to a modicum of privacy even in public places, and must modernize the intrusion tort to the threat posed by high-tech surveillance methods.¹¹⁵

At this point, it is unclear which strategy, if any, will be most successful, but the fact that state legislators have considered updates and changes to their privacy laws in response to the increased accessibility of drones suggests that a response to live-streaming is also feasible as the full impact of such technology becomes more apparent.

One of the hurdles to get over before updating privacy laws on a large scale is possible is the First Amendment right to record. The Supreme Court has not yet recognized or established a clear right to record in public places.¹¹⁶ However, various circuit courts have recognized such a right.¹¹⁷ This right, which has typically applied to filming government officials, is based on the premise that the First Amendment not only protects speech, but also certain methods of gathering and disseminating information and an individual's right to record or photograph public officials performing their duties in public spaces.¹¹⁸ Expanded privacy laws could come up against the First Amendment in instances where users of live-streaming technology are prohibited from transmitting their streams, or service providers exercise prior restraint over their streams. First Amendment protection for making and disseminating video recordings in public places is not entirely defined, especially in cases that do not involve public officials performing their duties.¹¹⁹

Different Circuits and courts have come out in various ways as to how far protection for these video recordings extend.¹²⁰ For example, while the Supreme Court has thus far not recognized any explicit right to make video recordings in public places, the Court of Appeals for the First Circuit has found First Amendment protection for the recording of police activity in public places, a ruling which theoretically could be extended to include making recordings of any public activity, though it currently applies only to public officials (with limitations, such as in "particularly dangerous situations," or if the recording activity involves undercover police activity).¹²¹ In contrast, in a case before Texas' Court of Criminal Appeals, the court essentially protected the right to record in public when it struck down Texas' "Improper Photography" law as unconstitutionally "overbroad."¹²²

115. Lidsky, *supra* note 97, at 248.

116. Stewart & Littau, *supra* note 2, at 16.

117. *Id.* at 16-17.

118. See *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). *But see* *Turner v. Driver*, 848 F.3d 678, 691 (5th Cir. 2017) (where officers were entitled to qualified immunity regarding plaintiff's First Amendment claim, because there was no "clearly established" First Amendment right to record police at the time of his activities).

119. "With regard to the First Amendment claim, appellants dispute the clarity of the law establishing a First Amendment right to record . . ." See *Glik*, 655 F.3d at 82.

120. Stewart & Littau, *supra* note 2, at 17-18.

121. *Id.* at 16-19.

122. *Ex parte* Thompson, 414 S.W.3d 872, 881 (Tex. App. 2013).

Stewart and Littau suggest that live-streaming technologies have the potential to be “privacy law catalysts.”¹²³ But privacy law has not yet caught up to the incursion of these technologies. Thus, there are important questions to consider when live-streaming, such as where to strike the balance between the right to privacy and the rights protected by the First Amendment. Each party affected by a live stream may have different questions depending on which role they play in the live-stream scenario, and there can be different answers to these questions. By using Facebook Live, the successful live-streaming platform on the most used social media platform, and examining the players involved in a Facebook Live stream, some of these questions may be answered, and next steps revealed.

B. FACEBOOK LIVE: A CASE STUDY

As mentioned, this Note has honed in on Facebook Live because it is currently the most widely used example of live-streaming technology.¹²⁴ Instagram has introduced live-streaming capabilities as well, becoming the (relatively distant) second-most-used live-streaming platform.¹²⁵ Earlier versions of live-streaming technology, like Meerkat and Periscope, represent even smaller fractions of internet users.¹²⁶ Facebook’s market dominance makes it uniquely positioned to introduce widespread live-streaming to the public.

1. Rights of the Streamers

The first category of stakeholders in any live-streaming analysis is the streamer themselves. As discussed above, an individual using Facebook Live has essentially assumed the position of a broadcaster—whether they know it or not. Traditional broadcasters can expect to enjoy a number of rights: The First Amendment protects their freedom of expression.¹²⁷ Further, the 1934 FCC Act was passed with the intention of regulating the substance of broadcasts, but simultaneously, “Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.”¹²⁸ Thus, broadcasters can expect that their content will not be overly censored or removed for, say, voicing an unpopular political opinion, and they can be relatively sure they will not be sued for discussing controversial topics on air, so long as they comply with the parameters of the law (such as the decency standards discussed above, and time, place, and manner

123. Professors Stewart and Littau, at Texas Christian University and Lehigh University, respectively, examine mobile streaming video technology (MSVTs) and the right to record in public places, in their article *Up, Periscope*. Stewart & Littau, *supra* note 2, at 21.

124. Greenwood et al., *supra* note 20. While Pew Research Center estimates that as of 2016 roughly 79% of Internet users used Facebook, only 32% of users, and 28% of all U.S. adults, used Instagram.

125. *Id.*

126. Salman Aslam, *Periscope by the Numbers: Statistics, Demographics and Fun Facts*, OMNICORE (Jan. 22, 2017), <https://perma.cc/QC69-ZYSP>.

127. U.S. CONST. amend. I.

128. *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110 (1973).

restrictions).¹²⁹ However, under the FCC's regulations, the rights of viewers trump the rights of broadcasters.¹³⁰ So, what rights does Facebook reserve in its Privacy and Data policies for these individuals? They can be found in Facebook's Community Standards and Privacy Policy.¹³¹

Facebook's Community Standards are in place to ensure that Facebook remains as friendly to diverse viewpoints as possible. This means that some content that some individuals may find disturbing may not be removed. On the other hand, this also means that Facebook has reserved the right to disable the accounts of, or delete posts by, users who violate these norms.¹³² In other words, Facebook Live streamers are essentially subject to "decency" standards, similar to traditional media broadcasters. However, these standards are arguably far more lenient than the legal standards broadcast media must abide by, because the standards attempt to balance diverse and various viewpoints and sensibilities.¹³³ Thus violence, nudity, and other graphic or insensitive content that is unlikely to appear on a TV broadcast because of decency standards can still appear on Facebook, though it is all subject to being reported by an offended user, and removed if deemed outside of Facebook's Community Standards provisions.¹³⁴ Consequently, regardless of the rights that may or may not be legally protected for streamers, to use Facebook Live, they must abide by these standards or risk having their streams removed or disabled.

Facebook's Privacy Policy, on the other hand, mostly operates to protect the personal data of Facebook users and explain how and why Facebook collects and shares some of this data.¹³⁵ In fact, nothing in the policy addresses how Facebook might respond to or address a complaint against one user by another when they find themselves included in a video or live stream against their will. The Privacy Policy is not a tool for protecting streamers from other users.

In addition to the policies enforced by Facebook against the streamer, there is the question of what a streamer can do if Facebook curtails their ability to live stream in a manner that is inconsistent with these policies, or with the current legal landscape. While the protections provided by the First Amendment, as mentioned above, are vague in some areas, and private actors are not beholden to the First Amendment, the progression of technology does call for the First Amendment right to record to be examined again.

Facebook undoubtedly dealt with First Amendment questions related to the posting of photographs and prerecorded videos. While Facebook is not *legally* obligated to act or to create policies within the limits of the First Amendment, the Community Standards reflect Facebook's attempt to balance the principle of freedom of speech with a level of decency and safety for Facebook users. But live-streaming

129. FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).

130. 47 U.S.C.S. § 151; CBS, Inc., 412 U.S. 94.

131. See *Community Standards*, FACEBOOK, <https://perma.cc/MR6G-Y4DQ>; *Data Policy*, FACEBOOK, <https://perma.cc/MR6G-Y4DQ>.

132. *Community Standards*, *supra* note 131.

133. *Id.*

134. *Id.*

135. *Data Policy*, *supra* note 131.

raises a different and more complicated sort of question altogether. The instantaneous nature of a live stream makes it difficult, if not impossible, to quickly notice when content is in violation of the Community Standards, absent a user report. While there is a team of Facebook employees who can interrupt streams, should they notice violations, it is unlikely that any and every offensive stream will be interrupted, especially if it is not widely viewed.¹³⁶

Additionally, the right to record is unclear, as multiple courts have limited or stretched it in different ways, whereas the doctrine of freedom of speech on the Internet is accepted.¹³⁷ Drawing on this clear doctrine, Facebook can be sure that, regardless of any legal obligation (or lack thereof), its policy mandating the removal of user-posted photographs and videos, should they violate its content rules, are consistent with the principle of freedom of speech.¹³⁸ Where to strike the correct balance between privacy and expression is less certain when a user is live-streaming, and privacy law, which could serve as a guide, is unclear as to how far a user's rights extend. Scott Kessler of S&P Global Market Intelligence summarized the problem: "They have to figure out how to strike a balance between decorum and freedom. The onus is on these companies to make clear they actually have a process."¹³⁹

Technically, Facebook Live streams and streamers are still subject to all of the same Community Standards as other Facebook users. But in a statement Facebook released following the investigation of a video showing a mother slapping her daughter on Facebook Live, the company noted that:

One of the most sensitive situations involves people sharing violent or graphic images of events taking place in the real world. In those situations, context and degree are everything. For instance, if a person witnessed a shooting, and used Facebook Live to raise awareness or find the shooter, we would allow it. However, if someone shared the same video to mock the victim or celebrate the shooting, we would remove the video.¹⁴⁰

In other words, it is not always clear to users what may or may not comply with Facebook's standards (especially when there are teams of individuals screening content, who may introduce a level of discretion), and it is even less clear what privacy laws allow, and what they do not.¹⁴¹ While Facebook Live streamers have been compared to and function akin to broadcasters, there is currently no law or statute which explicitly treats them as broadcasters for legal purposes. Thus, their avenues for enforcing their rights against Facebook are limited: they do not benefit from FCC regulation in the way broadcasters can; case law on the subject of live-

136. Moon & Volz, *supra* note 36.

137. See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 82, 85 (1st Cir. 2011); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369 (S.D.N.Y. 2015). *But see* *Potts v. City of Lafayette*, 121 F.3d 1106 (7th Cir. 1997); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

138. U.S. CONST. amend. I.

139. Emanuella Grinberg, *Facebook Live is Changing Our World. Is That a Good Thing?*, CNN (July 30, 2016, 10:29 AM), <https://perma.cc/3T2S-7PZX>.

140. *Community Standards and Facebook Live*, FACEBOOK NEWSROOM (July 8, 2016), <https://perma.cc/Y2HD-RQBV>.

141. Moon & Volz, *supra* note 36.

streaming is scant, whereas there are many cases involving traditional broadcasting; and while there are various statutes which pertain to censorship and expression that are enforceable against the state, these same statutes are not enforceable against private actors.¹⁴²

2. Rights of the Streamed

One of the hardest questions to answer is whether the people captured in another's live stream have any rights to enforce, and if so, whether they have any viable avenue through which to enforce those rights, either against the streamer themselves or the service provider. One of the advantages of live-streaming, the elimination of the distinction or lag between the capturing and dissemination of video, is also one of the largest disadvantages for anyone who may wish to remain anonymous but finds themselves on camera. In many cases, it is not feasible to use privacy laws to go after individuals who live stream, since the relevant footage is gone as soon as it is broadcast. Further, the service providers themselves are largely immune from legal prosecution for many violations.¹⁴³ In a situation like this, while ostensibly one could still seek legal recourse, the harm has already been done, and it would be hard to provide an adequate remedy.

The usefulness of privacy law in the streaming context depends on two components: the nature of the harm (and thus what is an adequate remedy), and whether the live stream is cached, stored, or uploaded anywhere. If the law is aimed at violations for obtaining information regardless of its publication, this would require an altogether different remedy than a law aimed at penalizing the dissemination of private information. Additionally, live streams that are subsequently stored or cached take on a different nature than streams which disappear as they are broadcast in real time—they can be treated like the more traditional videos one might see on YouTube, or posted to Facebook, and some of the answers to questions regarding how to deal with violations of the law stemming from such videos can be found in case law which has already been determined.

The current discourse around potential rights for these individuals focuses on the right of privacy when one is in a public place—or the lack thereof: in the current landscape, it is hard to conceive of a way in which those who are captured in a live stream in a public place, without their consent, can enforce their rights against those who captured them.¹⁴⁴

For example, the New York state law right of publicity allows plaintiffs to recover for their voice, name, or likeness being used for commercial purposes by another without their consent.¹⁴⁵ For an individual captured in a live stream, however, this law probably does not provide much recourse, unless the live streamer happens to be a brand or company, because it requires commercial use.¹⁴⁶ Large companies like

142. See, e.g., U.S. CONST. amends. I, IV; 47 U.S.C.S. § 230 (1998).

143. 17 U.S.C. § 512.

144. Stewart & Littau, *supra* note 2, at 15.

145. N.Y. CIV. RIGHTS LAW § 51.

146. *Id.* at cmt. c.

those Facebook paid to produce content for Facebook Live appear less likely to erroneously include individuals in a live stream without consent.¹⁴⁷ Yet, the possibility is still there. In such a situation, N.Y. Civ. Rights Law § 51, which protects the right to publicity, could actually provide a remedy.¹⁴⁸

The current privacy torts regime is not yet fully equipped to protect those unwittingly captured in live streams. As Stewart and Littau explain, “[T]he door is open for Congress and state legislatures to consider laws that could punish the act of recording without knowledge or consent or provide civil remedies to citizens suffering privacy harms caused by the act of recording inherent in [live-streaming].”¹⁴⁹ The fact that there are currently laws which punish the taping or interception of an individual’s conversations without their knowledge or consent provides a precedent for such laws.¹⁵⁰ The torts of intrusion upon seclusion and public disclosure of private facts provide the most likely avenues for enforcement, but there are substantial obstacles to creating a regime of liability for nonconsensual live-streaming under both tort schemes.

Claims of intrusion of seclusion can be difficult to win, especially when the alleged intrusion takes place in a public place, as many live streams undoubtedly will. A live-streamed individual will have a hard time showing that the intrusion was objectionable to a reasonable person under current law, because society has become so accustomed to the constant possibility of being caught on camera.¹⁵¹ Tort law has generally followed the principle that privacy cannot be invaded when a person is in public (with some exceptions).¹⁵² Therefore, without an expansion in the scope of intrusion upon seclusion and a realignment of what privacy expectations an individual has in public, this avenue of redress will largely be closed to streamers.

Like intrusion upon seclusion, public disclosure of private facts claims can also turn on an individual’s reasonable expectation of privacy.¹⁵³ Considering the amount of oversharing done online and the lack of use of privacy controls, it can be difficult to see how many disclosures could be truly offensive to the reasonable person. Thus, a disclosure’s reasonableness insulates live streamers from liability while limiting recourse for those captured in the streams.¹⁵⁴

147. Steven Perlberg and Deepa Seetharaman, *Facebook Signs Deals With Media Companies, Celebrities for Facebook Live*, WALL ST. J. (Jun. 22, 2016), <https://perma.cc/6FN5-DGH8>.

148. N.Y. CIV. RIGHTS LAW § 51.

149. Stewart & Littau, *supra* note 2, at 322.

150. For example, in New York, N.Y. PENAL LAW §250.05 punishes eavesdropping as a class E felony. N.Y. PENAL LAW §250.00 requires the consent of at least one party to the conversation in order to engage in wiretapping or “mechanical overhearing of a conversation.”

151. Lidsky, *supra* note 97, at 244.

152. “Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon those matters.” RESTATEMENT (SECOND) OF TORTS §652B cmt. c (1977). See also Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1085 (1995), available at <https://perma.cc/QN3A-UZC7>.

153. See, e.g., *Shulman v. Grp. W Productions, Inc.*, 955 P.2d 469 (Cal. 1998); *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1128, 91 Cal. Rptr. 3d 858, 861 (2009).

154. CONSUMER REP., *supra* note 105.

The tort of appropriation has evolved into a remedy generally more applicable to celebrities, and is thus not useful to the average individual.¹⁵⁵ However, the false light tort could provide a channel for some individuals who find that they are associated with a stream or streamer, or that they have been captured in another's stream without consent, and have been harmed by the "false light" that this inclusion has cast upon them, particularly if that stream is widely viewed. Ultimately, however, these three torts, and particularly intrusion upon seclusion and public disclosure of private facts, are unlikely to help an individual who has been streamed without consent in the typical case, without some changes to privacy law first:

[None of the privacy torts] apply directly to most digital image capture. Intrusion on seclusion provides relief only against images involuntarily captured within the target's own home or in facilities remote from the public; publication of private facts is generally held to be inapplicable to images voluntarily exposed to the public gaze.¹⁵⁶

3. The ISP's Protections

The third category of stakeholders in the live-streaming analysis is the streaming service or ISP. If the streamers themselves cannot be found liable for streaming someone against their will, can the streaming services? Short answer: Probably not. Attempting to hold a streaming service like Facebook liable for the privacy invasions of a user is unlikely to be successful, especially since private actors are not required to abide by many of the relevant laws that bind state actors. Even though individuals captured in a live-stream presumably have not agreed to be featured in the stream, or to any conditions or terms, the live-streamers agreed to the Terms of Service and Policies of Facebook and similar services in order to use the services.¹⁵⁷ This places an additional barrier to liability between the ISP and someone caught in the stream: the law has generally limited the duty of internet services to monitor legal violations entirely committed by their users.¹⁵⁸

Of course, there are exceptions to the idea that ISPs will not be held liable for legal violations committed by their subscribers.¹⁵⁹ In addition, despite the lack of a legal duty, Facebook can and will remove content at its discretion based on its policies, which include barring infringing content and other content which violates the law or rights of others, including the law of privacy.¹⁶⁰ In order to hold Facebook accountable for violations of individuals' privacy, Facebook must be found to have some sort of legal duty to prevent such infringements by its users; so far, no such duty has been established by case law or statute.

155. McClurg, *supra* note 152, at 1086.

156. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 UNIV. PA. L. REV. 335, 352 (2011).

157. See e.g., *Community Standards*, FACEBOOK, <https://perma.cc/5JMV-CUEP>; *Data Policy*, FACEBOOK, <https://perma.cc/89RN-T5DA>; *Statement of Rights and Responsibilities*, FACEBOOK, (Jan. 30, 2016), <https://perma.cc/S2T5-NVDY>.

158. Communications Decency Act, 47 U.S.C. § 230.

159. For example, "red flag" provisions in copyright violation cases. See Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)(ii).

160. *Statement of Rights and Responsibilities*, *supra* note 157.

V. WHERE DO WE GO FROM HERE?

A. POLICY IMPLICATIONS

The primary implication of the proliferation of live-streaming technology is that changes to our privacy laws are necessary. Currently, no “right to obscurity” exists under U.S. law in the sense of the right of individuals to be “delisted” from the Internet, rather than the right to avoid being captured at all.¹⁶¹ “In the context of [live-streaming], obscurity is not about the act of being left alone in public. Rather, it is about” reasonably being able to expect that one’s public life will not be open to immediate, worldwide online viewing and archiving without any potential remedy.¹⁶² The most significant obstacle to updating privacy law to cover live-streaming is the principle that acts conducted in public are automatically open and available to public scrutiny, which has a lengthy history in law, but which legal commentators are finding less palatable as applied to the current and evolving technological and social landscape.¹⁶³

The notion that we become susceptible to scrutiny and surveillance once we step into the public sphere will be hard to shake, especially because technological advances have made it easier to surreptitiously observe and record others. Yet, rather than assume that this means the public has accepted discarding of our privacy rights, legislators must understand that the opposite may just as easily be true: the public may fear the encroachments upon their privacy represented by new technology and desire legal recourse that is not currently available. Since the privacy regime is state-based, this will require piecemeal examination and analysis of current state privacy laws, and an understanding both of the catalysts to past changes in privacy law and of how live-streaming compares to such previous catalysts.

How can we make a law that is adaptable to the rapid changes and advances in technology? Should we *want* to punish streamers? These are important policy questions which will shape whether and how privacy law changes in response to live-streaming. If we wish to promote further live-streaming as a natural advancement of broadcast journalism and to avoid any curtailment of expression, any updates to privacy law may be weak or limited. However, if legislators value privacy over expression, changes may be more forceful. As it stands, finding a sustainable balance between privacy and expression is paramount. Precedent such as updates to privacy law spurred by the advent of personal drones tells us that striking an appropriate balance between the right to record and freedom of expression on the one hand, and

161. David Hoffman et al., *The Right to Obscurity: How We Can Implement the Google Spain Decision*, 17 N.C. J.L. & TECH. 437 (2016), available at <https://perma.cc/H7YZ-8MRX>.

162. Stewart & Littau, *supra* note 2, at 324.

163. “[T]he primary legal obstacle facing those seeking to avoid the scrutiny of MSVTs remains overcoming the notion that something done in public may never again be private. For now, under U.S. law, users of MSVTs are unlikely to face civil or criminal liability for their use.” *Id.* at 325. See, e.g., *Borton v. Unisys Corp.*, No. 90-4793, 1991 U.S. Dist. LEXIS 93, at *27-28 (E.D. Pa. Jan. 4, 1988); *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1018 (D. Kan. 1986); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980). See also Stewart & Littau, *supra* note 2 at 313-314; McClurg, *supra* note 152, at 1085.

the right to remain obscure and anonymous on the other, is difficult, and authorities prefer to shift the burden of delineating these rights rather than address these issues head on.

B. PRIVACY TORTS

Two of the four privacy torts are of particular interest as candidates for extension to cover live-streaming. Stewart and Littau point out that various academics have already suggested potential expansions to some of the privacy torts: “Thierer noted that the ‘tort of intrusion upon seclusion may evolve in response’ to increased surveillance . . .” Such adjustments, which would likely involve embracing the “limited privacy” approach Strahilevitz identified, are one avenue in which plaintiffs may have some recourse for violations of their expectation of privacy, even in public places.¹⁶⁴

The tort of public disclosure of private facts presents one possible avenue of redress. The tort can be difficult to successfully enforce against traditional media sources, because it does not actually pertain to *methods* of newsgathering, but to the dissemination of this information. Thus, as currently understood, it does not really reach the actual invasion of privacy itself, from a plaintiff’s point of view; rather, it punishes the defendant for publicizing the information gathered by this invasion.¹⁶⁵ While not worthless, such a remedy does not address the original harm itself. Plaintiffs are primarily concerned with the invasion of privacy when they bring claims under this tort.¹⁶⁶ Additionally, proving that a particular piece of gathered information is not “newsworthy” has proved more difficult for plaintiffs than one might imagine, as displayed in cases like *Shulman v. Grp. W. Productions, Inc.*¹⁶⁷

In many instances, especially where the media has been involved, establishing liability for privacy torts has been difficult.¹⁶⁸ In the case of live-streaming, however, there are opportunities to do just that. For example, while traditional media sources have adopted live-streaming as an additional method of disseminating news, ordinary individuals are the most numerous users of live-streaming services.¹⁶⁹ There are many instances of users acting as citizen journalists and capturing newsworthy or noteworthy events in their live streams, but there are significantly more instances of mundane, daily activities being live streamed to a person’s Facebook friends.¹⁷⁰ It would be hard for the average streamer to make the case that

164. Stewart & Littau, *supra* note 2, at 323 (citing Adam D. Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns without Derailing Innovation*, 21 RICH. J.L. & TECH. 6, at 102 (2015); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005)).

165. Lidsky, *supra* note 97, at 199.

166. *Id.*

167. *Shulman*, 955 P.2d at 228-229. *See also* Sipple v. Chronicle Publ’g Co., 201 Cal. Rptr. 665, 669-670 (Cal. Ct. App. 1984); Lidsky, *supra* note 97, at 199.

168. *See* Lidsky, *supra* note 97, at 173.

169. *Facebook Reports Second Quarter 2016 Results*, FACEBOOK (July 27, 2016), <https://perma.cc/B5CN-W4AV>.

170. *See* David Uberti, *Philando Castile, Facebook Live, and a New Chapter for Citizen Journalism*, COLUM. JOURNALISM REV. (Jul. 7, 2016), <https://perma.cc/G4BT-WBDT>; Eleonora Israele, *Get Camera*

a video of oneself speaking into the camera about their day, during which an unsuspecting individual came into the frame, is “newsworthy” and deserves protection from tort liability. However, the more followers the streamer has, the harder this argument may be to make, because there is a presumption that above a certain threshold of followers, an individual becomes a “public figure” and thus even their mundane activities are of interest to the public.¹⁷¹ At the same time, if the streamer does not have a significant following, the harm alleged can be harder to demonstrate.

The traditional understanding of this tort was generally applicable to news media, who could make arguments that the subjects they captured and investigated represented “news.”¹⁷² Short lags in the time between video capture and broadcast could alleviate some of the issues by providing time for news organizations to “blur” faces, thereby protecting privacy, but in instances where this did not happen, First Amendment protection for newsgatherers has generally protected such intrusions, so long as they do not violate generally applicable laws.¹⁷³

Now that ordinary people are using live-streaming technologies to keep their friends and families in the loop, disseminate their opinions, and display their skills, the public disclosure of private facts tort can be an instrument for the ordinary user to protect their privacy. In the past, however, plaintiffs have found it difficult to succeed this way. In the case *Sipple v. Chronicle Pub. Co.*, the plaintiff was publicly outed to his family and friends as a homosexual man as a result of his involvement in a foiled assassination attempt on President Ford.¹⁷⁴ The court determined that because the fact of Sipple’s sexuality was a known fact in public circles, it was not a private fact and thus there was no liability for this intrusion.¹⁷⁵ In contrast, in *Doe v. Mills*, the First District Court of Appeals of Michigan held that the defendant’s publication of the plaintiffs’ identities in connection with their abortions was held by the First District Court of Appeals of Michigan to be enough to state a question for the jury as to whether such information was sufficiently private to warrant recourse for its publication.¹⁷⁶ Extrapolating from these cases the basic premise that a fact made public to some cannot be protected when revealed to others, one can derive the boundaries of liability for live-streaming in instances where ordinary individuals are concerned.

The second privacy tort of note for present purposes is intrusion upon seclusion. Due to shifting notions of privacy, especially privacy in public, as discussed above, some lawmakers of this generation have found it hard to conceive of a regime in

Ready: Live Streaming is The Future of Social Media, BUSINESS.COM (Feb. 22, 2017), <https://perma.cc/7XQE-QGZ7>.

171. Elena Kuzmina, *Instagram and Measuring the Marketing Value of Live Video*, BUSINESS ZONE (Feb. 3, 2017), available at <https://perma.cc/PC8V-SZQH>.

172. *Time, Inc. v. Hill*, 385 U.S. 374, 383 (1967).

173. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) (Where the court held that “[T]he First Amendment does not invalidate incidental burdening of the press” resulting “from the enforcement of civil or criminal statutes.”).

174. *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 667 (Cal. Ct. App. 1984).

175. *Id.* at 669.

176. *Doe v. Mills*, 536 N.W.2d 824, 829 (Mich. Ct. App. 1995).

which there is an expectation of privacy in public places that can be protected. Further, social media users have a tendency to over-share on the Internet.¹⁷⁷ However, statistics on privacy and social media indicate that users still value their privacy and are using the provided methods of protecting it on social media sites.¹⁷⁸ With this in mind, extending the tort of intrusion upon seclusion to encompass live streamers could be a potential method of protecting the privacy of individuals.

Since the alleged harm of exposure done by a live stream is nearly impossible to remedy before or even during the fact, any remedy would be based on the concepts of retribution and deterrence. That said, many live streamers may be virtually judgment proof because they are ordinary individuals with low net worth.

C. ALTERNATIVE METHODS OF PROTECTION

One potential extralegal avenue for addressing the privacy issues raised by live-streaming is via the Privacy Policies and Terms and Conditions written and enforced by service providers. Often, these terms can govern where the law cannot or does not reach. While changes to legislation can be slow, with political roadblocks impeding the process, ISPs have the autonomy to insert any provisions into their policies and terms that they would like, within the contours of the law.¹⁷⁹

Inserting provisions which require streamers to obtain consent from any participants in their stream in the course of streaming events that are not considered “newsworthy,” while perhaps burdensome, would at the very least allow recourse to those individuals who take issue with finding themselves online. Streamers could then be punished by suspending their accounts if they willfully fail to obtain this consent. Potential remedies could include warnings to the streamers themselves sent from the service providers, and even temporary disabling of accounts or streams, should an individual file a complaint with the service provider.¹⁸⁰ Using this approach, the service provider becomes the entity in charge of enforcing the privacy of individuals, rather than the state. While the punishments for violations would be less severe, balancing expediency and the value of live-streaming with privacy rights warrants at least some enforcement through this method.

VI. CONCLUSION

The two most viable ways to bring privacy law and protections in line with current attitudes and concerns are expanding the privacy torts of intrusion upon seclusion and public disclosure of private facts to better provide remedies for privacy violations

177. Paul Hiebert, *The Real Reason Why So Many People Overshare on Facebook*, SLATE (Aug. 19, 2013), <https://perma.cc/THK6-HVMG>; Claes Bell, *How Oversharing on Social Media Can Cost You*, FOX BUSINESS (Aug. 21, 2014), <https://perma.cc/EL5S-X9TZ>.

178. Mary Madden, *Privacy Management on Social Media Sites*, PEW RES. CENTER, at 2 (Feb. 24, 2012), <https://perma.cc/39L7-F93Y>.

179. See e.g., Communications Decency Act, 47 U.S.C. § 230 (FCC regulations governing ISPs, general principles of contract law, etc. . .).

180. Though the notice and take down provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)(ii) (2017) have faced challenges in their effectiveness.

caused by live-streaming, and non-legal methods of protection such as updating service provider privacy policies and terms of use and service. The public debate surrounding privacy and the Internet is becoming increasingly polarized; there is a disconnect between how service providers act and address privacy concerns, and what users claim to want.¹⁸¹ Users of social networking sites, especially women and younger users, are increasingly taking steps to protect their privacy online, such as un-friending other users, removing content, and restricting access to their profiles.¹⁸² These actions point to the conclusion that privacy online still matters to users. Legislators and service providers must implement strategies and changes to privacy law which will protect these interests while balancing the right of individuals to post content and exercise their freedom of expression.

181. Madden, *supra* note 178, at 4.

182. *Id.* 63% of users “have deleted people from their “friends” lists . . . 44% have deleted comments made by others on their profile; and 37% have removed their names from photos that were tagged to identify them.” 58% of users restrict access to their profiles.