

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,  
Plaintiff,  
v.  
BRANDTOTAL LTD., et al.,  
Defendants.

Case No. [20-cv-07182-JCS](#)

**ORDER REGARDING MOTION TO  
DISMISS AMENDED  
COUNTERCLAIMS**

*Provisionally Filed Under Seal*

Re: Dkt. No. 132

**I. INTRODUCTION**

Plaintiff Facebook, Inc. brought this action asserting that Defendants BrandTotal Ltd. and Unimania, Inc. (collectively, “BrandTotal”) improperly collected data from Facebook’s social networks. BrandTotal, which is in the business of analyzing advertising data collected from social media websites, asserts counterclaims based on Facebook’s efforts to block its collection of data. The Court previously denied BrandTotal’s motion for a temporary restraining order (“TRO”) and granted Facebook’s motion to dismiss BrandTotal’s counterclaims, with leave to amend. BrandTotal has now amended its counterclaims and moved for a preliminary injunction, and Facebook moves once again to dismiss. The Court held a hearing on May 28, 2021, at which the parties reached an agreement that rendered BrandTotal’s motion for a preliminary injunction moot. For the reasons discussed below, Facebook’s motion to dismiss is GRANTED in part and DENIED in part.<sup>1</sup>

**II. BACKGROUND**

The following summary of the facts, allegations, and procedural history of this case is intended for the convenience of the reader to provide context for the analysis below, and should

---

<sup>1</sup> The parties have consented to the jurisdiction of a magistrate judge for all purposes pursuant to

1 not be construed as resolving any disputed issue of fact. Specific allegations of the amended  
2 counterclaims at issue are addressed in the Court’s analysis. Because this order addresses a  
3 motion to dismiss under Rule 12(b)(6), which turns on the sufficiency of BrandTotal’s allegations,  
4 its analysis does not address the evidentiary record submitted in support of the motion for a  
5 preliminary injunction or the earlier motion for a TRO, although some of that evidence is included  
6 in this background section for context.

7 BrandTotal is an advertising consulting company that helps its corporate customers  
8 analyze their own advertising and their competitors’ advertising on social media and other  
9 websites, by enlisting individual consumers—in BrandTotal’s terminology, “panelists”—to agree  
10 to share the advertisements they view on those websites. In order to prepare valuable analysis for  
11 its corporate customers, BrandTotal relies heavily on data collected from Facebook, as opposed to  
12 other social media websites, due to Facebook’s size. BrandTotal’s most popular consumer  
13 product is UpVoice, an application or browser extension that offers panelists cash rewards to share  
14 their demographic information and the advertisements they see and interact with on social media.  
15 The particular form of UpVoice central to this case is an extension for the Google Chrome  
16 browser, offered for download from Google’s web store. BrandTotal has also offered other  
17 applications and browser extensions that operate similarly in their collection of data, but provide  
18 different (non-cash) benefits to users, like a streamlined interface for browsing social media  
19 networks. BrandTotal began offering some of those programs multiple years ago. BrandTotal  
20 offers its consumer-facing products under the name of its subsidiary Unimania, in what was  
21 intended as an effort to obscure the source of its analytical data from potential competitors.

22 The UpVoice product available before this case commenced—which the parties refer to  
23 here as UpVoice Legacy for clarity—automatically collected multiple categories of information  
24 when users who had installed it browsed Facebook, including demographic data about the user,  
25 information about advertisements the user encountered on Facebook, and information that  
26 Facebook had generated about that user’s preferences. Some such data was collected by the  
27 product automatically querying Facebook for information that would not otherwise have been

1 information if they chose to). According to BrandTotal, it disclosed all of this data collection to  
2 its users and obtained their consent, and did not collect personal data pertaining to any other  
3 Facebook users. All personal data was deidentified from a user's name and aggregated for the  
4 purpose of analyzing the demographic groups to whom particular advertisements were presented.  
5 One flaw in BrandTotal's consent system was that UpVoice Legacy could collect potentially  
6 collect personal data from unsuspecting users who logged into Facebook on a shared computer  
7 where someone else had installed UpVoice Legacy, although there is no evidence that either party  
8 considered that issue before this litigation commenced.

9 BrandTotal uses UpVoice and similar products to obtain data about advertising on  
10 Facebook that is not available from other sources. Facebook maintains a public "Ad Library" of  
11 all advertisements currently running on its platform, but with the exception of ads related to  
12 politics and social issues—a category of ads that tends not to be of particular interest to  
13 BrandTotal's corporate clients—that library does not provide information about ads that are no  
14 longer running, the demographic groups to whom the ads were presented, the number of people  
15 who saw an ad, or how users have engaged with an ad. Facebook also offers certain approved  
16 application programming interfaces ("APIs") to access data from its network, but none that  
17 provide the sort of information that BrandTotal collects through UpVoice and its other products.

18 By automatically collecting data from users about the ads they see on Facebook and other  
19 social networks, BrandTotal is able to provide analytical services to its corporate clients about  
20 their own and their competitors' advertising efforts. Facebook provides a more limited set of  
21 similar information to at least some advertisers on its platform in at least some circumstances,  
22 including metrics for "share of voice"—the portion of advertising within a particular category that  
23 a particular advertiser accounts for.

24 In 2018, a third party (Adguard) published a report indicating that BrandTotal used  
25 unsecure means to transmit personal data. BrandTotal thereafter changed its encryption method to  
26 a more secure standard. Facebook began investigating some BrandTotal products in the spring of  
27 2019 but closed its investigation after determining that Google had removed those products from  
28 its store. BrandTotal disputes that those products were removed

1           Among other potentially relevant provisions, Facebook’s terms of service prohibit  
2 “collect[ing] data from our Products using automated means (without [Facebook’s] prior  
3 permission).” In March of 2019, BrandTotal received legal advice from its Israeli counsel  
4 concluding that to the extent its products passively collected data served to users during their  
5 browsing, that did not implicate Facebook’s terms of service, based in part on a dubiously narrow  
6 interpretation of the word “Products” in those terms to exclude advertisements—an interpretation  
7 that, at least thus far, BrandTotal has not pursued here. BrandTotal’s attorneys determined that  
8 with respect to “active” collection through “calls” initiated by BrandTotal’s products, BrandTotal  
9 was in a “grey area” because on one had the data collected might not implicate the terms of service  
10 if it was not part of Facebook’s “Products,” but on the other hand that method of collection could  
11 be considered as misuse of Facebook’s APIs to access data for which BrandTotal lacked  
12 permission. BrandTotal did not change its practices in response to that opinion.

13           In the spring of 2020, Facebook began investigating UpVoice Legacy. On September 21,  
14 2020, Facebook employee Jeremy Brewer sent an email to Google employee Benjamin Ackerman  
15 identifying “some Chrome extensions we believe are improperly scraping user PII<sup>[2]</sup> (e.g. gender,  
16 relationship status, ad interests, etc.) without proper disclosure”—including UpVoice Legacy—  
17 and requesting that Ackerman coordinate with Facebook security researcher Sanchit Karve, who  
18 had conducted the investigation, to “see if there is a way to collaborate and better protect user  
19 privacy.” 1st. Am. Counterclaims (“FACC,” dkt. 120) Ex. I. Karve replied to note that Google  
20 had removed certain other extensions that behaved similarly, produced by another developer. *Id.*  
21 Ackerman did not immediately respond.

22           In the days immediately following that exchange, a handful of internal Facebook emails  
23 involving other Facebook employees reflect that Facebook had received inquiries from advertisers  
24 who were either using BrandTotal’s product or curious about its capabilities. One Facebook  
25 employee suggested that Facebook might consider partnering with BrandTotal. FACC Ex. G. An  
26 employee who had received a request from Facebook’s marketing team regarding BrandTotal’s  
27

28

29

1 capabilities contacted Karve on September 24, 2020, who informed her that Facebook was  
2 “enforcing on them this week.” FACC Ex. H. The next day, Karve followed up with Ackerman  
3 at Google, who responded three days after that on September 29, 2020 to say that Google would  
4 investigate the browser extensions Facebook identified (including UpVoice Legacy), and that  
5 based on a preliminary review of BrandTotal’s privacy policy, “it does look like they are  
6 collecting a bunch of information for advertising purposes which is a no no.” FACC Ex. I.

7 On September 30, 2020, Facebook disabled BrandTotal’s accounts on its social networks.  
8 On October 1, 2020, it filed a civil action against BrandTotal in state court. Later that day, Google  
9 removed UpVoice Legacy from its store, which disabled most installed copies of the browser  
10 extension, although around ten to fifteen percent of installations continued to collect data (with  
11 that number slowly declining over time) until relatively recently, when changes that Facebook  
12 made caused them to cease sending data. BrandTotal listed another version of UpVoice on  
13 Google store on October 12, 2020, which it contends was a mistake arising from efforts to prepare  
14 a new version to go live only if it prevailed in obtaining a TRO.

15 On October 14, 2020, Facebook dismissed its state court action and filed the present action  
16 in this Court, adding a federal claim under the Computer Fraud and Abuse Act (“CFAA”).  
17 BrandTotal filed counterclaims and moved for a TRO, which the Court denied because, although  
18 BrandTotal had shown serious issues going to the merits of its counterclaims, the public interest  
19 did not favor requiring Facebook, through expedited judicial proceedings, to allow a third party to  
20 scrape data from its network without BrandTotal having made any effort before deploying  
21 UpVoice Legacy to coordinate with Facebook and confirm that its program would respect user  
22 privacy. Order re Mot. for TRO (dkt. 63).<sup>3</sup> The Court later granted Facebook’s motion to dismiss  
23 BrandTotal’s counterclaims because, among other reasons, an order by the Federal Trade  
24 Commission (“FTC”) requiring Facebook to block access to any “Covered Third Party” that did  
25 not certify compliance with Facebook’s terms of use appeared to apply to BrandTotal, but granted

26

27

28

---

<sup>3</sup> *Facebook, Inc. v. BrandTotal Ltd.*, 499 F. Supp. 3d 720 (N.D. Cal. 2020). Citations herein to the Court’s previous orders in this case refer to page numbers of the versions filed in the Court’s ECF

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.