

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/12/2020 9:12:57 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD1339/2020
File Title:	AUSTRALIAN COMPETITION & CONSUMER COMMISSION v FACEBOOK, INC. & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Dated: 16/12/2020 11:56:59 AM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Concise Statement

No.



Federal Court of Australia

District Registry: New South Wales

Division: General

Commercial and Corporations National Practice Area

(Regulator and Consumer Protection)

Australian Competition and Consumer Commission

Applicant

Facebook, Inc. and others

Respondents

IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. In this proceeding the Australian Competition and Consumer Commission (**ACCC**) alleges that Facebook, Inc. (**Facebook**), and its wholly owned subsidiaries Facebook Israel Ltd and Onavo, Inc. (together, **Onavo**), made false, misleading or deceptive representations that Onavo Protect would keep users' personal activity data private, protected and secret, and that such data would not be used for any purpose other than to provide the Onavo Protect services. Onavo Protect is a free downloadable software application providing virtual private network (**VPN**) and, for selected users, data management services (together, the **Onavo Protect Services**). A VPN uses encryption and other security mechanisms designed to provide secure, private transmission of a user's app and web traffic.
2. The ACCC alleges that, in fact, a key purpose and use of Onavo Protect, which utilised Facebook's servers, was for Facebook and Onavo to collect significant personal activity data, including about users' internet and app activity, for Facebook and Onavo to use for their commercial benefit, including to support market analytics and related activities such as identifying future acquisitions.

Background

3. Onavo offered Onavo Protect via the Apple App Store and Google Play Store, including in the period February 2016 to October 2017 (**Relevant Period**). During the Relevant Period, over 270,000 Australian consumers downloaded, and from December 2016, on average over 12,000 monthly active Australian consumers used Onavo Protect.

Filed on behalf of (name & role of party)	Australian Competition and Consumer Commission, Applicant
Prepared by (name of person/lawyer)	Tom Bridges
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4. In 2018 Apple removed Onavo Protect from the App Store for non-compliance with the developer terms. Apple's developer terms prevent developers from, amongst other things, collecting information about other apps installed on a user's device for the purposes of analytics or advertising/marketing. In 2019 Onavo Protect was removed from the Google Play Store.

Representations

5. In the Relevant Period:
 - (a) the Onavo Protect website at www.onavo.com was registered by Facebook and contained the statements set out in Annexure A1, including "Onavo. Save, Measure & Protect your mobile data";
 - (b) the Onavo Protect listing on the Apple App Store and Google Play Store contained the statements set out in Annexure A2, including "Use a free, fast and secure VPN to protect personal information";
 - (c) advertising for Onavo Protect on Facebook's website and app contained the statements set out in Annexure A3, including "Keep it secret. Keep it safe. Onavo Protect, from Facebook...";
 - (d) the Onavo Protect application contained the statements set out in Annexure A4, including "Take charge of how you use mobile data and protect your personal info".
6. Throughout the Relevant Period:
 - (a) the Onavo Protect website and the advertising for Onavo Protect on Facebook's website and app, including advertising referred to in paragraph 5(c) above, were controlled by Facebook and Onavo, and the statements referred to in Annexures A1 and A3 were made by Facebook and Onavo; and
 - (b) the Onavo Protect application and the relevant pages of the Apple App Store and the Google Play Store were controlled by Onavo, and the statements referred to in Annexures A2 and A4 were made by Onavo.
7. In circumstances in which Facebook and Onavo promoted and offered for download the Onavo Protect application, including those circumstances outlined in paragraphs 5 and 6, consumers had a reasonable expectation that Facebook and Onavo would prominently disclose any intended use of any consumer data (other than such use as was inherent in providing the VPN itself), including personal activity data.
8. Other than in its Privacy Policy dated 20 December 2013 (which consumers were required to acknowledge only after downloading Onavo Protect to their device and which, in any event, was not sufficiently prominent or clear), nowhere on the Onavo Protect website, the Apple App Store, the Google Play Store, or in the advertising for Onavo Protect, did Facebook or Onavo disclose to consumers in the Relevant Period that Onavo Protect would not protect and keep secret users' personal activity data, or that Facebook or Onavo would use personal activity data collected from users for the commercial benefit of Facebook or Onavo.

9. In the circumstances outlined in paragraphs 5 to 8 (or alternatively 5, 6 and 8), Facebook and Onavo, in trade or commerce, through the statements made on the Onavo Protect website, the Apple App Store, the Google Play Store, the application itself, and in the advertising for Onavo Protect:
 - (a) expressly and impliedly represented to consumers in Australia that Onavo Protect would keep users' personal activity data private, protected and secret;
 - (b) impliedly represented to consumers in Australia that Facebook and Onavo would not use users' personal activity data for any purpose other than to provide the Onavo Protect Services for consumer use; and
 - (c) impliedly represented to consumers in Australia that Facebook and Onavo would not use users' personal activity data for the commercial or other benefit of Facebook or anyone else
 (together, the **Representations**).
10. The Representations:
 - (a) were not qualified by any disclosure on any of the identified sites (including the statement in Onavo Protect "By clicking OK, you agree to our Terms and that you have read our Privacy Policy") with sufficient clarity, prominence or (temporal or physical) proximity such that the Representations were not communicated to members of the class of consumers at which they were aimed;
 - (b) concerned future matters.

False, misleading and deceptive conduct

11. In fact at all material times, including throughout the Relevant Period, Facebook and Onavo collected and used the personal activity data of Onavo Protect users, including to:
 - (a) acquire "a sample of users who we are able to know nearly everything they are doing on their mobile device";
 - (b) compile data usage tables on a user by user basis;
 - (c) collect and aggregate extensive user personal activity data including:
 - (i) every app the user has accessed;
 - (ii) the number of seconds the user spent in the app per day;
 - (iii) the percent of time the user spent in a specific app out of their total mobile usage time;
 - (iv) the actions taken by the user in each app; and
 - (v) the metadata for each app used by the Onavo Protect user;
 - (d) collect specific personal activity data, including the country or region location, age and gender of the user of the device, including where applicable, by

combining personally identifying data obtained from Onavo Protect with the same user's Facebook ID;

- (e) receive and collect information from cookies, pixels, etc for the purpose of, inter alia, "statistical and analytical purposes" and "supporting advertising and related activities"; and
 - (f) collect, aggregate and use the personal activity data collected from Onavo Protect users for their commercial benefit including to:
 - (i) "analyse apps usage and improve Facebook's product offerings", including to identify potential acquisitions and in-app features;
 - (ii) develop "commercial strategies" by using data such as estimates of the time spent on apps by each user;
 - (iii) undertake "market research" and "optimise marketing spend";
 - (iv) undertake "marketing analytics for Market Intelligence" and "Onavo App growth";
 - (v) "improve Facebook products and services"; consider "potential business opportunities", formulate "product and market strategies" and "assisting Facebook to understand the market landscape".
12. The personal activity data collected from Onavo Protect users was used by Facebook business groups, such as: "market strategy"; "product strategy"; and "partnerships; partnership – publisher solutions sales". Facebook's use of the personal activity data included, among other things, identifying local competitors, "big trends", overlaps in use between apps and shifts in consumer attention.
13. In the circumstances of paragraphs 11 to 4, at all material times:
- (a) Onavo Protect did not keep users' personal activity data private, protected or secret, because Facebook and Onavo:
 - (i) used the personal activity data of users for purposes other than to provide the Onavo Protect Services; and
 - (ii) those purposes included the collection of personal activity data for Facebook to use for their commercial benefit, including to support market analytics and related activities such as identifying future acquisitions;
 - (b) Facebook and Onavo did not have reasonable grounds for making the Representations, in circumstances where, at all relevant times, Facebook and Onavo intended that they would engage, and they did engage, in the conduct referred to in paragraphs 11 to 12 (and in this respect the ACCC relies upon s 4 of the ACL); and
 - (c) in any event, and whether or not the Representations were with respect to future matters, the Representations were false or misleading or deceptive, or were likely to mislead or deceive consumers.

PRIMARY GROUNDS FOR THE RELIEF SOUGHT

14. The ACCC alleges that, by making the Representations in the circumstances set out in paragraphs 5 to 13 (or, alternatively, 5, 6 and 8 to 13), Facebook and Onavo:
- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL;
 - (b) made false or misleading representations that Onavo Protect had particular performance characteristics, uses or benefits, in contravention of s 29(1)(g) of the ACL; and
 - (c) engaged in conduct that was liable to mislead the public as to the characteristics and suitability for purpose of Onavo Protect, in contravention of s 33 (alternatively, s 34) of the ACL.

RELIEF SOUGHT FROM THE COURT

15. The ACCC seeks the relief set out in the Originating Application.

ALLEGED HARM

16. The contravening conduct:
- (a) deprived tens of thousands of Australian consumers of the opportunity to make an informed choice about the collection and use of their personal activity data by Facebook and Onavo;
 - (b) resulted in those consumers providing additional, valuable information to Facebook and Onavo about their internet and app activity, which Facebook and Onavo in turn used for its own commercial purposes and benefit.
17. This harm is especially pronounced as the contravening conduct occurred under the pretext of providing consumers with additional privacy, protection and secrecy and, therefore, goes to the heart of consumers' reasoning for acquiring the Onavo Protect app. Where those consumers had expected to download an app that facilitated private, protected and secret web and app access, they were signing up to a service that facilitated the opposite – that is, the collection and use of personal activity data for the commercial purposes and benefit of Facebook and Onavo.

Date: 16 December 2020



Signed by Tom Bridges

Lawyer for the Applicant

This Concise Statement was prepared by Webb Henderson and settled by J K Kirk SC and C van Proctor of counsel.

Certificate of lawyer

I, Tom Lawton Bridges certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 16 December 2020



Signed by Tom Lawton Bridges

Lawyer for the Applicant

Schedule

No. of 2020

Federal Court of Australia
District Registry: New South Wales
Division: General

Respondents

Second Respondent:

Onavo, Inc.

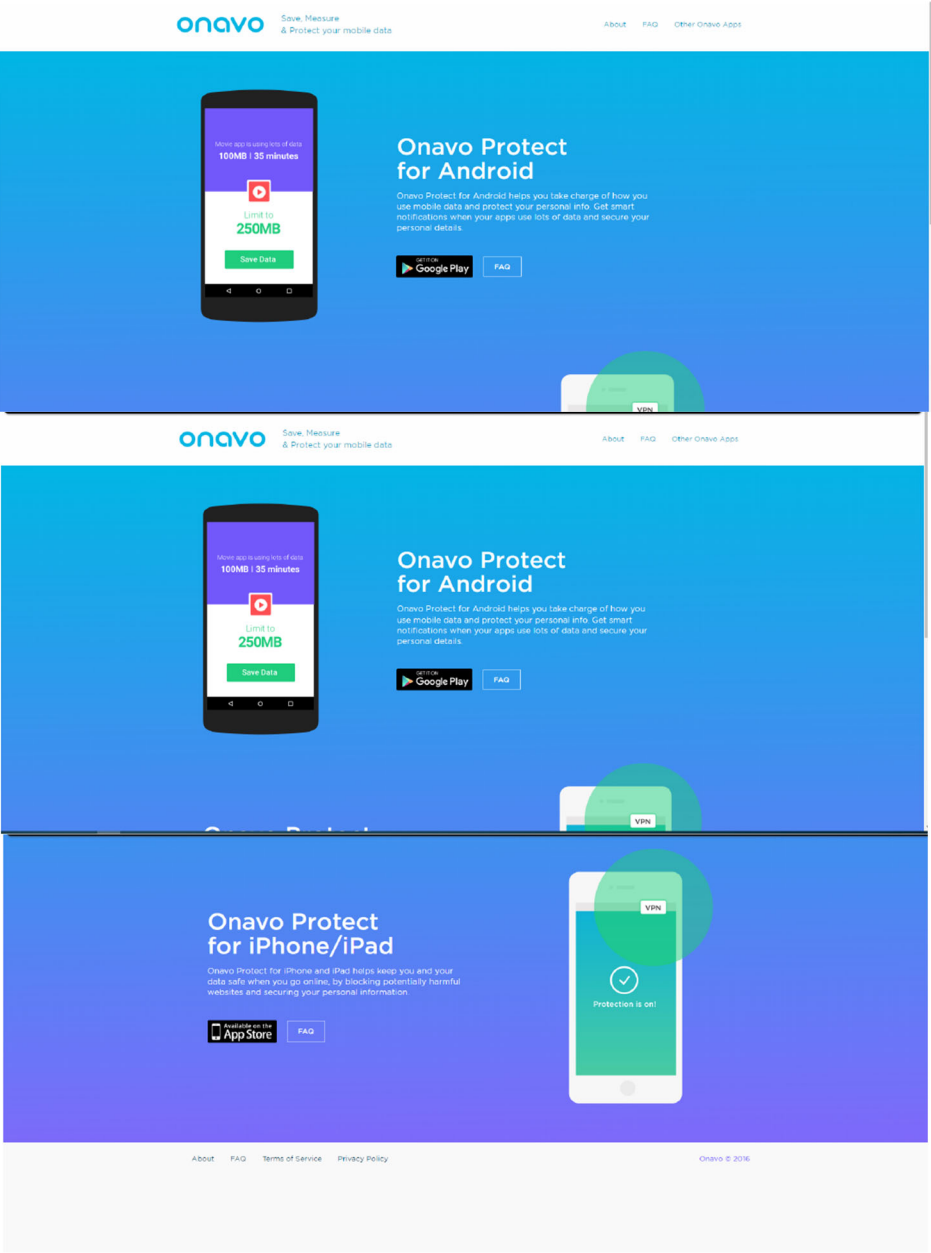
Third Respondent:

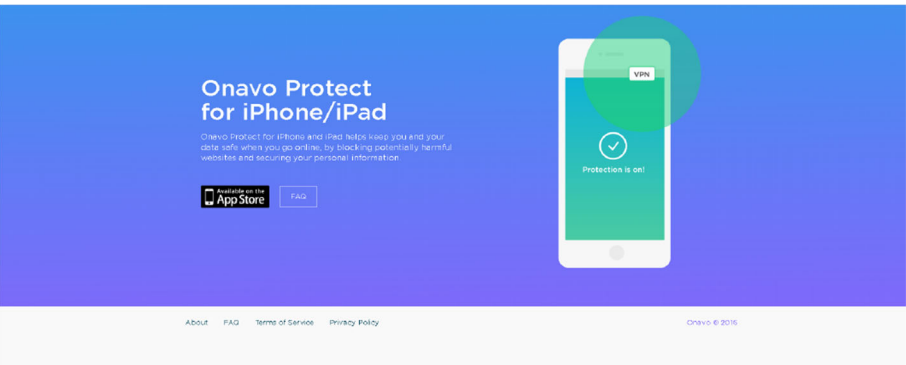
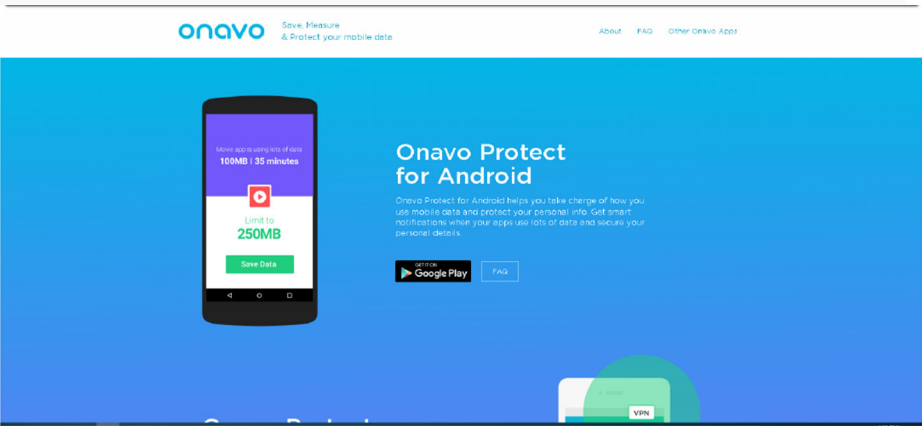
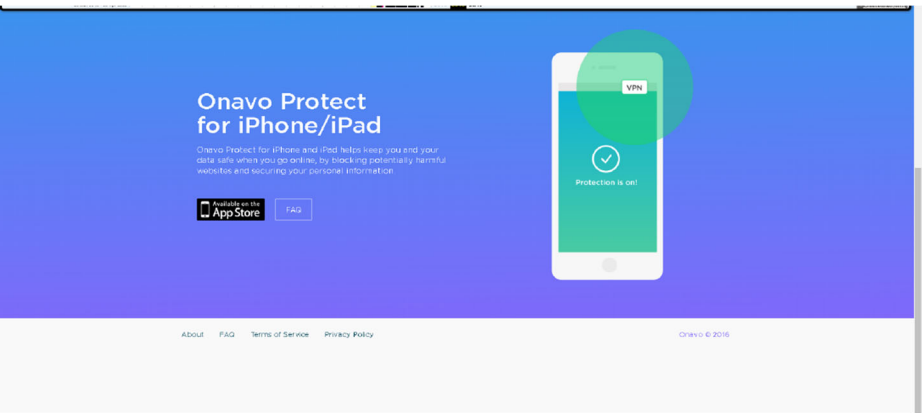
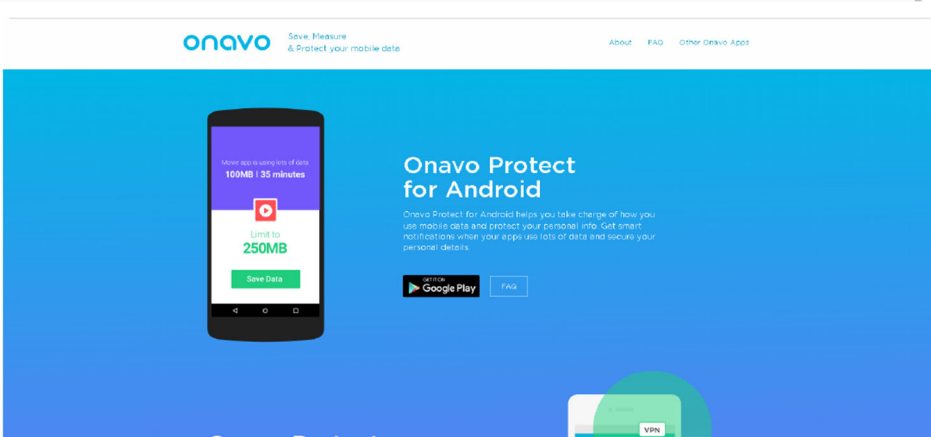
Facebook Israel Ltd.

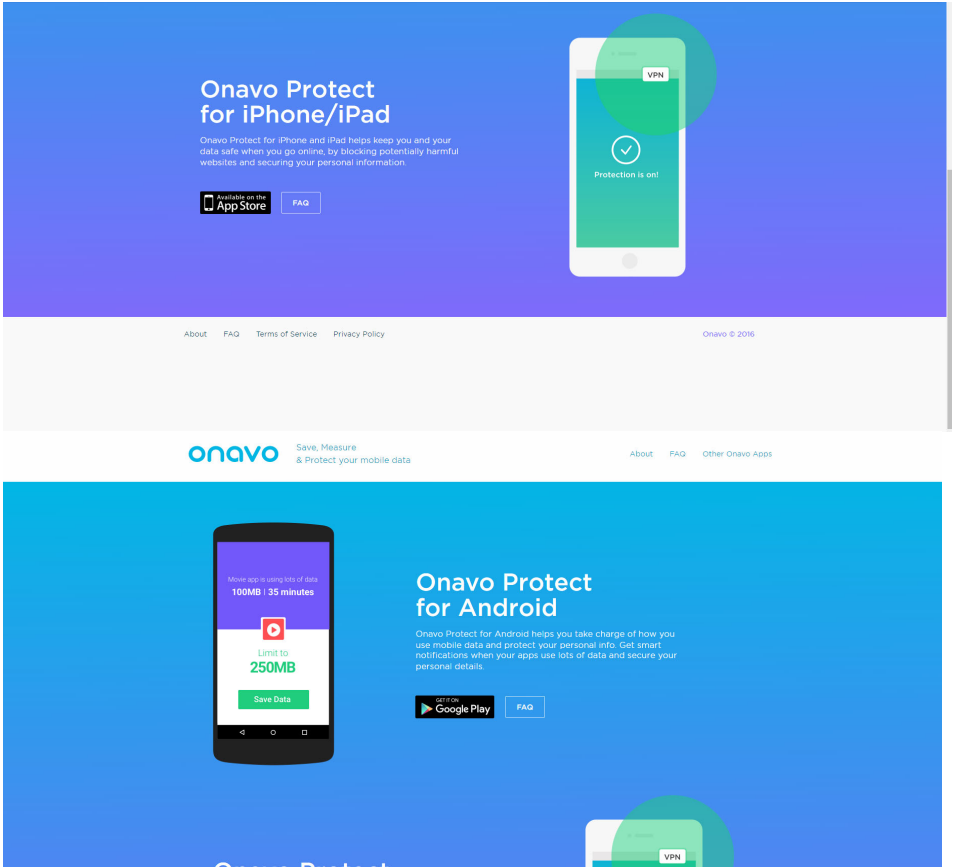
Date: 16 December 2020

Annexure A1

Onavo Protect website statements

Reference	Date	Statement	Screenshot
A1.1	1 Nov 2016	<p>Statement A1.1.1</p> <p><i>“Onavo. Save, Measure & Protect your mobile data”</i></p> <p>Statement A1.1.2</p> <p><i>“Onavo Protect for Android helps you take charge of how you use mobile data and protect your personal info. Get smart notifications when apps use lots of data and secure your personal details.”</i></p> <p>Statement A1.1.3</p> <p><i>“Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information.”</i></p> <p>Statement A1.1.4</p> <p>Image showing “VPN” with “Protection is on!”</p>	


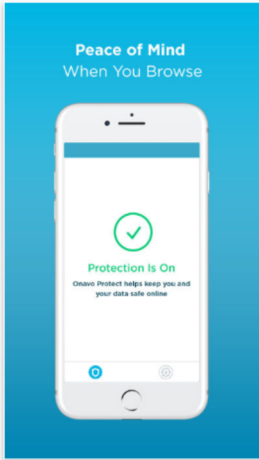
Reference	Date	Statement	Screenshot
A1.2	23 Dec 2016	<p>Statement A1.2.1</p> <p><i>“Onavo. Save, Measure & Protect your mobile data”</i></p> <p>Statement A1.2.2</p> <p><i>“Onavo Protect for Android helps you take charge of how you use mobile data and protect your personal info. Get smart notifications when apps use lots of data and secure your personal details.”</i></p> <p>Statement A1.2.3</p> <p><i>“Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information.”</i></p> <p>Statement A1.2.4</p> <p>Image showing “VPN” with “Protection is on!”</p>	 
A1.3	27 Dec 2016	<p>Statement A1.3.1</p> <p><i>“Onavo. Save, Measure & Protect your mobile data”</i></p> <p>Statement A1.3.2</p> <p><i>“Onavo Protect for Android helps you take charge of how you use mobile data and protect your personal info. Get smart notifications when apps use lots of data and secure your personal details.”</i></p> <p>Statement A1.3.3</p> <p><i>“Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information.”</i></p> <p>Statement A1.3.4</p> <p>Image showing “VPN” with “Protection is on!”</p>	 

Reference	Date	Statement	Screenshot
A1.4	19 Apr 2017	<p>Statement A1.4.1</p> <p><i>“Onavo. Save, Measure & Protect your mobile data”</i></p> <p>Statement A1.4.2</p> <p><i>“Onavo Protect for Android helps you take charge of how you use mobile data and protect your personal info. Get smart notifications when apps use lots of data and secure your personal details.”</i></p> <p>Statement A1.4.3</p> <p><i>“Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information.”</i></p> <p>Statement A1.4.4</p> <p>Image showing “VPN” with “Protection is on!”</p>	

Annexure A2

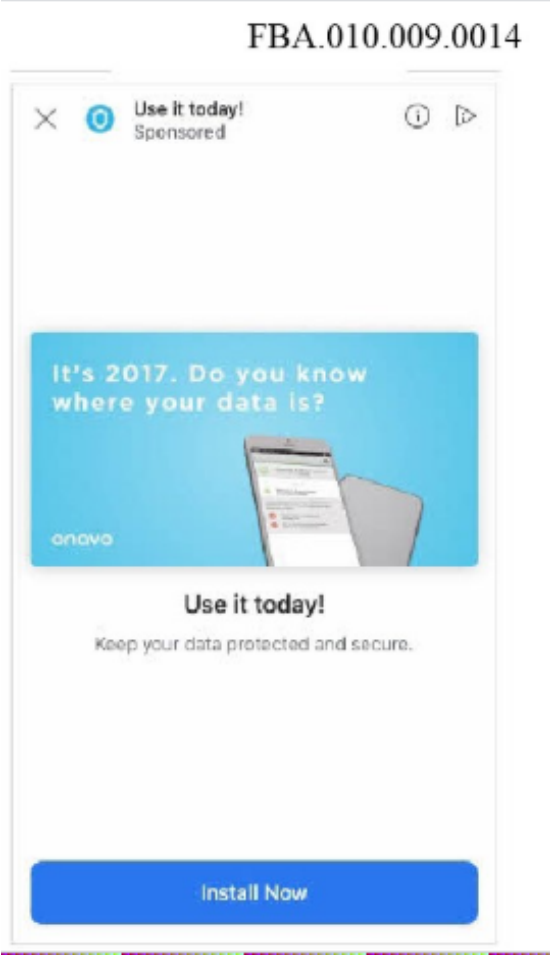
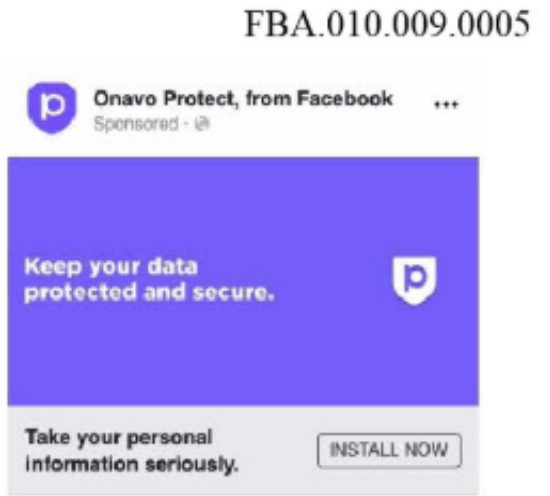
Apple App Store and Google Play Store listing statements

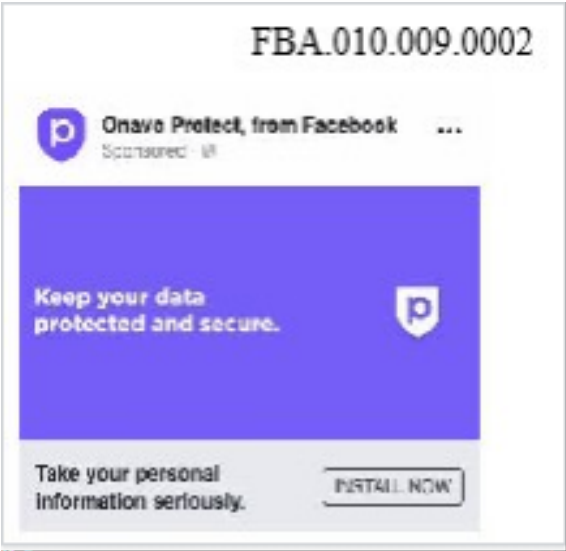

Reference	Date	Statement	Screenshot
A2.1	30 Apr 2017	<p>Statement A2.1.1</p> <p><i>“Use a secure VPN network for your personal info”</i></p> <p>Statement A2.1.2</p> <p><i>“With Protect, you can -</i></p> <ul style="list-style-type: none"> <i>- Get alerts when apps are using lots of data</i> <i>- Use a free, fast and secure VPN to protect personal information</i> <p><i>...</i></p> <ul style="list-style-type: none"> <i>- Add an extra layer of security and data encryption”</i> 	
A.2.2	11 Sep 2017	<p>Statement A2.2.1</p> <p><i>“Protect Your Personal Info For Free”</i></p> <p>Statement A2.2.2</p> <p><i>“Onavo Protect: Helps Keep You and Your Data Safe”</i></p> <p>Statement A2.2.3</p> <p><i>“Peace of Mind When You Browse”</i></p> <p>Statement A2.2.4</p> <p><i>“Onavo Protect helps keep you and your data safe online”</i></p> <p>Statement A2.2.5</p> <p><i>“Onavo Protect helps keep you and your data safe when you browse and share information on the web.”</i></p> <p>Statement A2.2.6</p> <p><i>“It also helps secure your details when you login to websites or enter personal information such as bank accounts and credit card numbers.”</i></p> <p>Statement A2.2.7</p> <p><i>“Onavo Protect works to:</i></p> <p><i>...</i></p> <ul style="list-style-type: none"> <i>- Add an extra layer of protection to all your mobile data traffic for additional security”</i> 	

Reference	Date	Statement	Screenshot
		<p>Statement A2.2.8</p> <p><i>“To provide this layer of protection, Onavo establishes a secure connection used to direct all of your network communications through Onavo’s servers. As part of this process, Onavo receives and analyzes information about your mobile data and app use”</i></p>	<div><div><p>Customer Ratings</p><p>Current Version: ★★★★ 104 Ratings</p><p>All Versions: ★★★★ 4692 Ratings</p></div><div><p>Screenshots</p><div><div>iPhone iPad</div><div><div><p>Protect Your Personal Info For Free</p></div><div><p>Peace of Mind When You Browse</p></div></div></div></div></div>

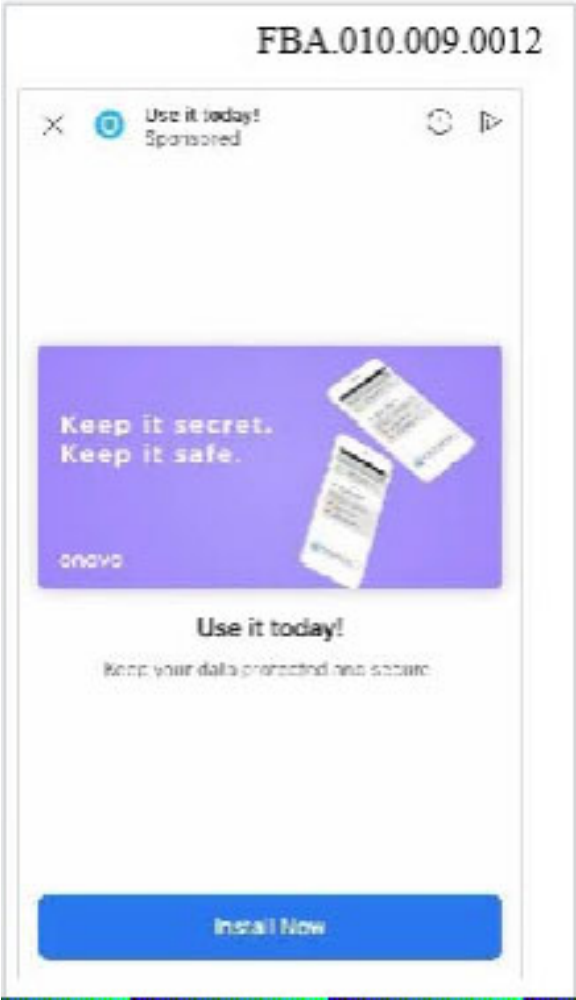
Annexure A3

Facebook, Inc.'s website and app statements

Reference	Date	Statement	Screenshot
A3.1	May 2017 Jul 2017	<p>Statement A3.1.1 <i>"It's 2017. Do you know where your data is?"</i></p> <p>Statement A3.1.2 <i>"Keep your data protected and secure."</i></p>	
A3.2	Feb 2016 to May 2016	<p>Statement A3.2.1 <i>"Keep your data protected and secure."</i></p> <p>Statement A3.2.2 <i>"Take your personal information seriously – Install Now"</i></p>	

Reference	Date	Statement	Screenshot
A3.3	May 2016 to Jul 2016	<p>Statement A3.3.1 <i>"Keep your data protected and secure."</i></p> <p>Statement A3.3.2 <i>"Take your personal information seriously – Install Now"</i></p>	 <p>FBA.010.009.0002</p> <p>Onavo Protect, from Facebook Sponsored · 18</p> <p>Keep your data protected and secure.</p> <p>Take your personal information seriously. INSTALL NOW</p>
A3.4	Jul 2017 to Sep 2017	<p>Statement A3.4.1 <i>"Keep it secret. Keep it safe."</i></p>	 <p>FBA.010.009.0013</p> <p>Use it today! Sponsored</p> <p>Keep it secret. Keep it safe.</p> <p>Onavo Protect, from Facebook Keep track of data hungry apps.</p> <p>Install Now</p>

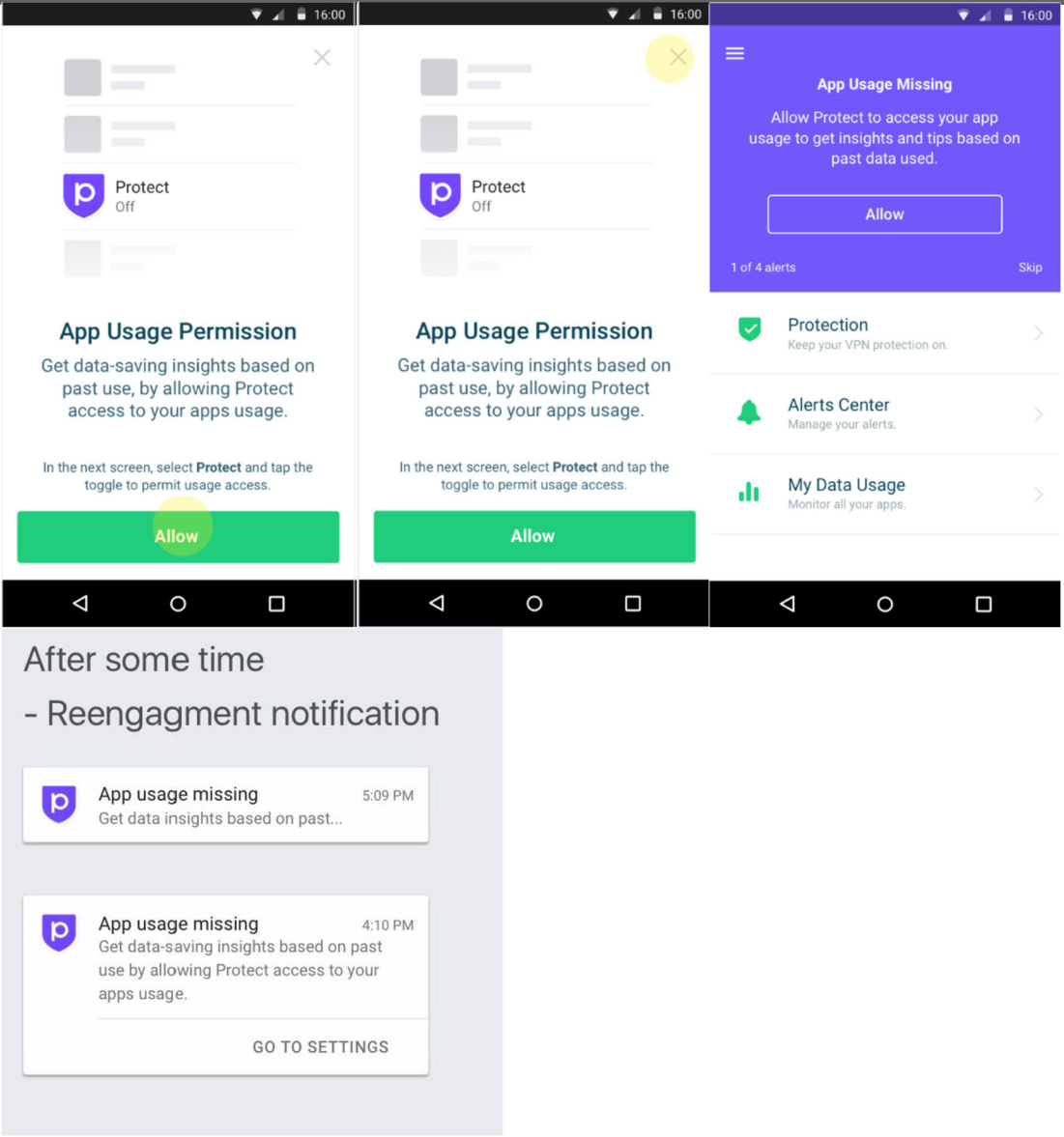
Reference	Date	Statement	Screenshot
A3.5	May 2016 to Jul 2016	Statement A3.5.1 <i>"Use Onavo Protect to manage your data usage and safeguard your personal information."</i>	<p>FBA.010.009.0009</p> <p>Onavo Protect, from Facebook Sponsored · 18</p> <p>Use Onavo Protect to manage your data usage and safeguard your personal information.</p> <p>My Data Usage 78.5MB used 221.5MB left</p> <p>Easily Track Data Usage Install Now</p> <p>Set App: Data Lim</p>
A3.6	Jul 2017 to Oct 2017	Statement A3.6.1 <i>"It's 2017. Do you know where your data is?"</i>	<p>FBA.010.009.0015</p> <p>Onavo Protect, from Facebook Sponsored · 18</p> <p>Keep track of data hungry apps.</p> <p>It's 2017. Do you know where your data is?</p> <p>Use it today! USE APP</p>


Reference	Date	Statement	Screenshot
A3.7	May 2017 to Jul 2017	Statement A3.7.1 <i>"Keep it secret. Keep it safe."</i>	

Annexure A4

Onavo Protect application statements

Reference	Date	Statement	Screenshot
A4.1	2017	<p>Statement A4.1.1</p> <p><i>“Network Protection</i> <i>Our VPN helps keep you and your data safe by understanding when you visit potentially malicious or harmful websites and giving you a warning. It also helps keep your details secure as you log in to websites or enter personal info.”</i></p>	
A4.2	Feb 2017 to Jul 2017	<p>Statement A4.2.1</p> <p><i>“Take charge of how you use mobile data and protect your personal info.”</i></p>	

Reference	Date	Statement	Screenshot
			<div></div>

Reference	Date	Statement	Screenshot
A4.3	July 2017	<p>Statement A4.3.1</p> <p><i>“Our VPN helps keep you and your data safe by understanding when you visit potentially malicious or harmful websites and giving you a warning. It also helps keep your details secure as you log in to websites or enter personal info.”</i></p>	<div><div>FBA.006.001.0001</div><div></div><div>Network Protection</div><div>Our VPN helps keep you and your data safe by understanding when you visit potentially malicious or harmful websites and giving you a warning. It also helps keep your details secure as you log in to websites or enter personal info.</div><div>Data Analysis</div><div>When you use our VPN, we collect the info that is sent to, and received from, your mobile device. This includes info about: your device and its location, apps installed on your device and how you use those apps, the websites you visit, and the amount of data you use.</div><div>This helps us improve and operate the Onavo service by analyzing your use of websites, apps and data. Because we're part of Facebook, we also use this info to improve Facebook products and services, gain insights into the products and services people value, and build better experiences.</div><div>By tapping below, you agree to our Terms and that you have read our Privacy Policy</div><div>Accept & Continue</div><div></div></div>