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Facebook, Privacy, and Reasonable Notice: The Public Policy Problems with Facebook's Current Sign-up Process and How to Remedy the Legal Issues

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NOTE

FACEBOOK, PRIVACY, AND REASONABLE NOTICE: THE PUBLIC POLICY PROBLEMS WITH FACEBOOK'S CURRENT SIGN-UP PROCESS AND HOW TO REMEDY THE LEGAL ISSUES

*Michael J. Milazzo**

Social media usage increases with every passing day. One of the most popular social media companies is Facebook. Throughout Facebook's short history, they have had several controversies arising from possible infringement on their users' rights to privacy. Some of this is made possible because nearly universally, internet users will sign up for Facebook, as well as other social media websites, without ever reading the privacy policy pertaining to the website. Social media users give up rights, sometimes important privacy rights, but signing up for Facebook. While not per se illegal, the users are entitled to reasonable notice of the rights that are given up in exchange for use of the social media website. Facebook's signup policy does not give reasonable notice to its users of the privacy rights given up by the user. Facebook should make changes to its sign-up policy to ensure that new Facebook users are given reasonable notice to the exchange that occurs with the use of Facebook by the user.

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INTRODUCTION

Privacy, defined in layman's terms, is the "freedom from unauthorized intrusion"¹ or "the state of being free from intrusion or disturbance in one's private life or affairs."² The United States has a longstanding public policy favoring individuals' right to privacy, as notably recognized in *Griswold v. Connecticut* in 1965.³ The definition of privacy and privacy law in the United States has remained relatively stagnant in the

¹ *Privacy Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/privacy> (last visited Jan. 24, 2013).

² *Privacy Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/privacy> (last visited Jan. 24, 2013).

³ 381 U.S. 479 (1965). Justice Douglas's majority opinion in *Griswold* found the right to privacy to be protected by the penumbra of the First Amendment. *See id.* at 483.

last twenty years. But the significance of privacy rights has changed at a hastened rate with the advent of the Internet and social media.

The use of the Internet has increased tremendously over the last twenty years. In 2010, forty-four percent of Americans used the Internet both inside and outside of their home, twenty-seven percent used the Internet solely when at home, and three percent used the Internet only outside their home.⁴ Further, over half of all Americans use the Internet on a daily basis.⁵ Of the Americans who use the Internet, the average American spends sixty hours each month online.⁶ The amount of time the average American spends online each month is now equal to the amount of time the average American spends watching television each month.⁷ Finally, of American Internet users, about seventy percent use social media websites such as Facebook.⁸ This seemingly ever-expanding use of the Internet and social media will shape the history of privacy for the foreseeable future.

“The history of America is the history of the right to privacy.”⁹ The history of privacy currently being written is in flux because of the ever-expanding Internet and social media usage throughout the country. With this expanding use of social media comes conflicts between the rights and wants of social media users and the growing companies that provide social media services. The resolutions of such conflicts will shape the direction of privacy’s future.

Social media users are stuck between two goals that are inherently at odds with one another: “People want access to all the information around them, but they also want complete control over their own information.”¹⁰ Conflicting goals plague not only social media users, but also the corporate owners of social media websites.

⁴ U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: REPORTED INTERNET USAGE FOR HOUSEHOLDS BY SELECTED CHARACTERISTICS TABLE 1A (2010), available at <http://www.census.gov/hhes/computer/publications/2010.html>. In 2000, just over forty-four percent of Americans were using the Internet. *United States of America: Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm> (last visited Feb. 21, 2014).

⁵ Catherine Smith, *Internet Usage Statistics: How We Spend Our Time Online*, HUFFINGTON POST (June 22, 2010), http://www.huffingtonpost.com/2010/06/22/Internet-usage-statistics_n_620946.html.

⁶ *Id.*

⁷ Lauren Indivik, *Americans Now Spend as Much Time Using Internet as TV*, MASHABLE, (Dec. 13, 2010), <http://mashable.com/2010/12/13/Internet-tv-forrester>.

⁸ Smith, *supra* note 5.

⁹ FREDERICK S. LANE, AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT 1 (2009).

¹⁰ John Cassidy, *How Hanging Out on the Internet Became Big Business*, NEW YORKER, May 15, 2006, at 50, available at http://www.newyorker.com/archive/2006/05/15/060515fa_fact_cassidy.

The corporate owners of social media websites, including Facebook, are in the position of balancing two competing goals, attracting users and business survival. Social media companies struggle with how to monetize their social media websites without alienating or losing their users, who represent a large source of revenue, and thus are paramount to the social media companies' survival.¹¹ These conflicting goals lead to social media companies requiring potential users to give up, or more appropriately to "sell," some privacy rights in exchange for the use of the social media website. In order to make money on users and be profitable, social media websites must collect, sort, and distribute private information about their users to advertisers and others willing to pay for access to the private information.

While the collection of private user information may infringe upon a user's privacy rights, such invasion of privacy rights is not necessarily illegal if certain steps are taken. If users are given reasonable notice that they are "selling" some of their privacy rights, such that the relinquished privacy rights are manifestly consideration for the website's promise to let the user continue to use the website, the website owner obtains the rights to use and distribute the users' private information. Without reasonable notice of the terms of the exchange between the user and the social media website, the website's use of the information borders on tort and illegality if the terms of the agreement are found to be unconscionable or invalid.

This Note posits that Facebook's current sign-up process infringes upon a user's right to privacy without giving Facebook's social media users reasonable notice that they are selling their privacy rights.¹² This Note concludes with a possible method for giving reasonable notice to potential Facebook users of the contractual exchange that occurs.¹³ Facebook's dissemination of reasonable notice to its users will permit the terms of the exchange, including the user's consideration of giving up privacy rights in exchange for use of Facebook's website, to be valid and upheld.¹⁴

Part I gives a brief overview of the history of the legal right to privacy. Part II discusses shrinkwrap contracting, online "clickwrap" contracting, and online "browsewrap" contracting. Part III discusses the previous public missteps of Facebook, which infringed on Facebook's users' right to privacy. Part IV discusses Facebook's current terms of

¹¹ See Eric Savitz, *Could the Future of Facebook Be in the Enterprise?*, FORBES (Oct. 26, 2012), <http://www.forbes.com/sites/ciocentral/2012/10/26/could-the-future-of-facebook-be-in-the-enterprise>.

¹² See *infra* Part IV.

¹³ See *infra* Part V.

¹⁴ See *infra* Part V.

service and current sign-up process, and a case analyzing a previous Facebook sign-up process. Part V discusses how Facebook could remedy the lack of reasonable notice of the terms within Facebook's terms of service.

I. HISTORY OF THE RIGHT TO PRIVACY

Legal recognition of the right to privacy can be traced to an article written by Samuel D. Warren and Louis D. Brandeis.¹⁵ But even deeper, the underpinnings of the right to privacy derive from the protection of human dignity.¹⁶ The principle of inviolate personality is the core value protected by the right to privacy.¹⁷ The right to privacy protects each individual's "essence as a unique and self-determining being."¹⁸

Various types of privacy rights existed at common law and survive today.¹⁹ The most important type of privacy right in the current social media website landscape is the invasion of privacy by appropriation. Invasion of privacy by appropriation was a common law tort where the tortious offender used "another's name or likeness for one's own benefit."²⁰ The tort is meant to protect an individual's right to the economic benefits flowing from the commercial use of the individual's face and name.²¹ This is the right most at risk when a user signs up for a social media website, such as Facebook, because the websites extract the right to collect, control, and distribute a user's name, likeness, and other personal facts in exchange for the right to use the website's services.

II. ELECTRONIC CONTRACTING: CLICKWRAP AND BROWSEWRAP

A. Generally

With the advent of the Internet, contracting began to change. Recognizing this change in 1996, the Sixth Circuit stated: "Internet represents perhaps the latest and greatest manifestation of . . . historical,

¹⁵ Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 482 (1990). For examples of cases tracing the history of the right to privacy, see *Rhodes v. Graham*, 37 S.W.2d 46 (Ky. 1931); *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476 (Ala. 1964); *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 767 (N.Y. 1970).

¹⁶ See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973; Turkington, *supra* note 15, at 485.

¹⁷ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890). See also Turkington, *supra* note 16, at 485 (finding that Warren and Brandeis observed inviolate personality to be the core principle of the right to privacy).

¹⁸ Turkington, *supra* note 15, at 485.

¹⁹ See, e.g., "Invasion of Privacy by Intrusion," BLACK'S LAW DICTIONARY 901 (9th ed. 2009); "Invasion of Privacy by False Light," *id.* at 900; and "Invasion of Privacy by Public Closure of Private Facts," *id.* at 901.

²⁰ BLACK'S LAW DICTIONARY 900 (9th ed. 2009).

²¹ *Id.*

globe-shrinking trends.”²² People no longer need to contract in person or by postal mail. Agreements could begin and end online. Conducting business online led to the elimination of hard paper copies of agreements. This in turn meant that the agreements were not personally signed, and possibly not signed by the hand at all. The use of the Internet for contracting purposes led to the development of “shrinkwrap”-type principles for Internet contracts, namely “clickwrap” and “browsewrap.” Both are described below.

B. *Shrinkwrap*

Shrinkwrap is a contract typically concerning a software program, where the contract is contained within a storage device and wrapped in plastic.²³ With this type of contract came the issue of whether opening the plastic constituted assent to the terms of the contract, or if more was required. After courts in several cases found shrinkwrap to be an invalid form of contracting and thus not enforceable,²⁴ the pivotal case of *ProCD, Inc. v. Zeidenberg*²⁵ paved the way for upholding shrinkwrap contracting.²⁶

In *ProCD*, the court concluded that shrinkwrap contracts are “enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).”²⁷ The plaintiff, ProCD, had aggregated information from various telephone directories into a computer database.²⁸ ProCD then sold that database to both commercial and individual clients at varying prices.²⁹ The licensing agreement, contained in shrinkwrap, limited the use of the database to non-commercial purposes.³⁰ The defendant, Zeidenberg, purchased the database and ignored the license when he resold the information contained in the database to anyone willing to pay his price.³¹

Zeidenberg’s price for the service was lower than ProCD’s price.³² Zeidenberg could charge less because he did not pay for the upkeep of the database, as ProCD had.³³ The court found that ProCD gave users the

²² *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996).

²³ See NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 36 (2013).

²⁴ See, e.g., *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91, 105 (3rd Cir. 1991) (finding a shrinkwrap license to be invalid under U.C.C. § 2-207).

²⁵ 86 F.3d 1447 (7th Cir. 1996).

²⁶ See KIM, *supra* note 23, at 37.

²⁷ See *ProCD*, 86 F.3d at 1449.

²⁸ See *id.*

²⁹ See *id.* at 1449–50.

³⁰ See *id.* at 1450.

³¹ See *id.*

³² See *id.*

³³ See *id.*

option to accept the terms of the shrinkwrap contract by using the software after having an opportunity to read the licensing terms.³⁴ Further, the court found that Zeidenberg did assent because the software forced him to read the license when installed.³⁵ Finally, the court held that while a contract is usually formed by paying a price and walking out of a store, U.C.C. § 2-204(1) permits contracts to be formed in a different way as long as the manner is sufficient to show agreement through mutual assent.³⁶

C. *Clickwrap*

Clickwrap agreements are a type of adhesion contract.³⁷ Clickwrap agreements are created online and present “the potential [user] . . . with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement”³⁸

The user manifests consent by clicking on a box containing “I Agree,” “I Accept,” or similar language manifesting consent adjacent to the terms.³⁹ This process forces potential users to acknowledge the presence of the terms, even if the terms are not read by the user. Further, the user must “unambiguously manifest either assent or rejection prior to being given access to the product.”⁴⁰ If the user refuses to accept the terms, the user will not be permitted to use the service or obtain the good at the center of the exchange.

Commentators have found “nothing inherently troubling about enforcing clickwrap agreements.”⁴¹ Courts have agreed and thus found that users have reasonable notice of terms within clickwrap agreements and have upheld the provisions within the terms of service presented through clickwrap.⁴² When determining whether specific provisions in

³⁴ See *id.*

³⁵ See *id.* at 1453.

³⁶ See *id.* at 1452. See also Kim, *supra* note 23, at 38 (explaining that the Court in *ProCD* found that UCC 2-204(1) permits a contract to be formed in a “different way” as long as there is mutual recognition of the contract’s existence).

³⁷ See Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH L.J. 577, 577–78 (2007).

³⁸ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004) (citations omitted) (internal quotation marks omitted).

³⁹ See Kim, *supra* note 23, at 39.

⁴⁰ *Register.com, Inc.*, 356 F.3d at 429.

⁴¹ *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (quoting Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006)); see also Davis, *supra* note 34, at 579 (noting that courts have recognized that clicking “I Agree” on a clickwrap contract manifests assent). For cases that have upheld the terms of clickwrap agreements, see for example *ProCD, Inc.*, 86 F.3d 1447; *Groff v. Am. Online, Inc.*, No. PC 97–0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998).

⁴² See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999).

clickwrap agreements should be upheld and whether reasonable notice of the terms was given, courts apply traditional principles of contract law.⁴³ Courts assess whether the “clickwrap agreement’s terms were clearly presented to the consumer, the consumer had an opportunity to read the agreement, and the consumer manifested an unambiguous acceptance of the terms.”⁴⁴

D. *Browsewrap*

Browsewrap is another form of an online standard form agreement. “[A] browse wrap license is part of a web site” that explains the terms of service and privacy policy of that website.⁴⁵ For example, in many browsewrap licenses, “terms are posted on a site’s home page or are accessible by a prominently displayed hyperlink, and the user assents to the contract when the user visits the web site.”⁴⁶ Typically, in browsewrap and unlike clickwrap, the user does not “see the contract at all but . . . the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not.”⁴⁷ The most commonly found browsewrap form involves a disclaimer on the website that states that by visiting the site, conduct that was previously performed by the user, the user agrees to the terms of the website.⁴⁸ The terms of the website are available by clicking on a separate hyperlink.⁴⁹ Commonly, the hyperlink will be at the edge of a page, using words such as “Legal Terms,” “Terms of Use,” or “Conditions of Use.”⁵⁰ Thus, unlike clickwrap, browsewrap does not require a user to affirmatively manifest consent to the terms of service by clicking on “I Accept” or other similar language.⁵¹ Rather, the user’s assent occurs through the continued use of the site beyond the home page.⁵²

Many courts have been reluctant to enforce provisions found within browsewrap agreements because of a lack of reasonable notice of the agreement’s terms, both in cases where the browsewrap agreement was

⁴³ *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

⁴⁴ *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1256 (10th Cir. 2012).

⁴⁵ *Register.com, Inc.*, 356 F.3d at 429 (alterations in the original) (quoting *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000)) (internal quotation marks omitted).

⁴⁶ *Id.* (quoting *Pollstar*, 170 F. Supp. 2d at 981) (internal bracket omitted).

⁴⁷ *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (quoting Lemley, *supra* note 41, at 460).

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See* KIM, *supra* note 23, at 41.

⁵¹ *See id.*

⁵² *See* Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL’Y 405, 406 (2010); *see also* KIM, *supra* note 23, at 41.

between consumers and a business,⁵³ and between two sophisticated business parties.⁵⁴ But some courts have upheld browsewrap agreements between two sophisticated business parties who were in competition or conflict with each other.⁵⁵

III. PREVIOUS PRIVACY MISSTEPS OF FACEBOOK

Facebook has consistently pushed the envelope on its users' right of privacy. Below are several incidents that raised legal issues concerning Facebook's possible infringement of the right of privacy of its users.

A. A User's Voluntary Deletion of the User's Facebook Account

For many years after the inception of Facebook, it was not possible for users to delete their accounts. Rather, the only option was to deactivate the account.⁵⁶ But even when a user deactivated an account, the "[r]emoved information may persist in backup copies for a reasonable amount of time but will not be *generally available* to members of Facebook."⁵⁷ If a Facebook user deactivated an account, the information may not have been generally available to Facebook members, but no term prohibited Facebook from distributing the information to advertisers.⁵⁸ Instead, third-party applications and websites could hold on to the

⁵³ See, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002) (declining to apply terms of a browsewrap contract in a putative class action by several individuals).

⁵⁴ See, e.g., *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000).

⁵⁵ See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004); *Sw. Airlines Co. v. BoardFirst, L.L.C.*, 3:06-CV-0891-B, 2007 WL 4823761, 2007 U.S. Dist. LEXIS 96230 (N.D. Tex. Sept. 12, 2007). See also Lemley, *supra* note 41, at 472 ("An examination of the cases that have considered browsewraps in the last five years [prior to 2006] demonstrates that the courts have been willing to enforce terms of use against corporations, but have not been willing to do so against individuals.").

⁵⁶ See Bob Sullivan, *Didn't you know? Facebook is forever*, THE RED TAPE CHRONICLES ON NBCNEWS.COM (Feb. 20, 2009, 8:00 AM) http://redtape.nbcnews.com/_news/2009/02/20/6345783-didnt-you-know-facebook-is-forever?lite.

⁵⁷ See Bob Sullivan, *Didn't you know? Facebook is forever*, THE RED TAPE CHRONICLES ON NBCNEWS.COM (Feb. 20, 2009, 8:00 AM) http://redtape.nbcnews.com/_news/2009/02/20/6345783-didnt-you-know-facebook-is-forever?lite. (emphasis added).

⁵⁸ The relevant terms of service at the time were as follows:

"You hereby grant Facebook an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to (a) use, copy, publish, stream, store, retain, publicly perform or display, transmit, scan, reformat, modify, edit, frame, translate, excerpt, adapt, create derivative works and distribute (through multiple tiers), any User Content you (i) Post on or in connection with the Facebook Service or the promotion thereof subject only to your privacy settings or (ii) enable a user to Post, including by offering a Share Link on your website and (b) to use your name, likeness and image for any purpose, including commercial or advertising, each of (a) and (b) on or in connection with the Facebook Service or the promotion thereof.

You may remove your User Content from the Site at any time. If you choose to remove your User Content, the license granted above will automatically expire, how-

information to the extent permitted by Facebook's policies.⁵⁹ Further, there was no way for a user to permanently delete an account so that the information was destroyed and unavailable to advertisers and third-party websites. Rather, the content could only be removed by manually deleting every picture, every friend, and every item posted by the user on Facebook.⁶⁰

In response to the gradual uproar over the inability of users to delete their accounts, Facebook added a link to their website permitting users to delete their accounts.⁶¹ When the link was originally created, a bug in the process permitted the deleted accounts to still be found through Google searches,⁶² and Content URLs.⁶³ Once the link was fixed, the delay between the request for an account deletion and the actual deletion became fourteen days.⁶⁴ Even after a user deletes an account, some information, such as communications sent to other users, cannot be removed from Facebook and could remain eternally much like a sent email.⁶⁵

B. Beacon Online Advertising System

In November of 2007, Facebook introduced Beacon, an online advertising system for its website.⁶⁶ The Beacon system tracked the online

ever you acknowledge that the Company may retain archived copies of your User Content.

...

The following sections will survive any termination of your use of the Facebook Service: Prohibited Conduct, User Content, Your Privacy Practices, Gift Credits, Ownership; Proprietary Rights, Licenses, Submissions, User Disputes; Complaints, Indemnity, General Disclaimers, Limitation on Liability, Termination and Changes to the Facebook Service, Arbitration, Governing Law; Venue and Jurisdiction and Other."

C. Walters, *Facebook's New Terms of Service: 'We Can Do Anything We Want with Your Content. Forever.'* THE CONSUMERIST (February 15, 2009), <http://consumerist.com/2009/02/15/facebook-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever>.

⁵⁹ Ki Mae Heussner, *Quitting Facebook: What Happens when You Deactivate?*, ABC NEWS: TECH THIS OUT (May 11, 2010), <http://abcnews.go.com/Technology/quitting-facebook-deactivate/story?id=10607753&page=2>. The information included in the data Facebook may keep includes credit card information for any purchases transacted on Facebook, email addresses, and phone numbers given by its members. *Id.*

⁶⁰ See Sullivan, *supra* note 56; see also Steven Mansour, *2504 Steps to Closing Your Facebook Account*, STEVENMANSOUR.COM, (July 23, 2007), http://www.stevenmansour.com/writings/2007/jul/23/2342/2504_steps_to_closing_your_facebook_account (depicting one user's informal account of the process required to manually delete his Facebook profile).

⁶¹ See Sullivan, *supra* note 56.

⁶² See *id.*

⁶³ Facebook, Inc., No. 092-3184, 2011 WL 7096348, at ¶¶ 50-53 at *11 (F.T.C. Nov. 29, 2011).

⁶⁴ Heussner, *supra* note 59.

⁶⁵ *Id.*; see also *What's the difference between deactivation and deleting my account?*, FACEBOOK (Nov. 4, 2013, 11:00 PM), <https://www.facebook.com/help/125338004213029>.

⁶⁶ See Juan Carlos Perez, *Facebook's Beacon More Intrusive than Previously Thought*, PCWORLD (Nov. 30, 2007 4:10 PM), <http://www.peworld.com/article/140182/article.html>.

activities of Facebook users on more than forty participating websites.⁶⁷ Beacon would then report the activity of the user on the participating companies' websites to the user's friends list on Facebook.⁶⁸ Facebook automatically placed all of its users into the program, although a user could opt out of Beacon through express action.⁶⁹ If a user did not opt out, when the user purchased an item from one of the participating websites, the purchase would automatically be broadcast to the entire list of friends on the user's profile when logging on to Facebook's website.⁷⁰

The issue with Beacon occurred when a security researcher determined that Beacon went further than stated by Facebook.⁷¹ If Facebook users opted out of Beacon, thus declining to have their activities broadcast to Facebook friends, and then logged off of Facebook's website, Beacon would nevertheless continue to function.⁷² Beacon would report users' activity to Facebook, despite the fact that users were not informed about this feature.⁷³

Moreover, Facebook did not give users the option of preventing Beacon from tracking them.⁷⁴ The controversy led to Mark Zuckerberg, founder of Facebook, apologizing in his blog for the Beacon program's tracking.⁷⁵

The apology did little to quell the uproar caused by the infringement on Facebook users' right to privacy. In response to the violation, plaintiffs filed a class action lawsuit in California.⁷⁶ The lawsuit claimed that Facebook violated its users' privacy by collecting private data for use in

⁶⁷ *Id.* The participating websites included large corporations such as Blockbuster, The New York Times, Sony Pictures and others. C. Walters, *List of Companies that Participate in Facebook's Beacon Spy Program*, THE CONSUMERIST (Dec. 4, 2007), <http://consumerist.com/2007/12/04/list-of-companies-that-participate-in-facebooks-beacon-spy-program>.

⁶⁸ Perez, *supra* note 66.

⁶⁹ Jessica Guynn, *Latest Target of MoveOn: Facebook*, LOS ANGELES TIMES, Nov. 21, 2007, available at <http://articles.latimes.com/2007/nov/21/business/fi-facebook21>.

⁷⁰ See Perez, *supra* note 66. Facebook defended the Beacon program by arguing that the program would create a pop-up box telling the user that the information would be sent to Facebook. Guynn, *supra* note 69. The user could click "No Thanks." *Id.* If the user did not click "No Thanks," the next time the user visited Facebook, a message would ask for permission to share the information with the user's friends. *Id.*

⁷¹ See Perez, *supra* note 66.

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See Mark Zuckerberg, *Thoughts on Beacon*, FACEBOOK BLOG (Dec. 5, 2007, 10:00 AM), <http://blog.facebook.com/blog.php?post=7584397130>. See also C. G. Lynch, *Wake-Up Call in Facebook-Beacon Controversy*, PCWORLD (Dec. 6, 2007 3:45 PM), <http://www.pcworld.com/article/140372/article.html>.

⁷⁶ See Vasanth Sridharan, *Facebook Faces Class Action Suit Over Beacon Ad System*, BUS. INSIDER, (Aug. 14, 2008, 11:48 AM), <http://www.businessinsider.com/2008/8/facebook-faces-class-action-suit-over-beacon-ad-system>.

advertising without informing or seeking permission from its users,⁷⁷ thus violating online privacy and computer fraud laws.⁷⁸

The lawsuit and uproar continued until Facebook shuttered the Beacon program as part of a proposed settlement to the 2009 class action lawsuit.⁷⁹ Though the case was settled, Facebook denied every accusation in the claim.⁸⁰ Several years later, Zuckerberg admitted that Beacon was a “high profile” mistake.⁸¹

C. February 2009 Change in Terms of Service

On February 6, 2009, Facebook changed its terms of service by eliminating several lines of text.⁸² Prior to the change of the terms of service, Facebook’s terms stated that when a user closed an account on Facebook, all rights Facebook claimed to original content uploaded by the user expired.⁸³ The altered terms permitted Facebook to utilize uploaded content for perpetuity, permitted Facebook to sublicense a user’s content without paying royalties, and permitted Facebook to use a user’s name, likeness and image for any purpose.⁸⁴ But termination of a

⁷⁷ See Perez, *supra* note 66; Sridharan *supra* note 76.

⁷⁸ See Anastasia Ustinova, *Suit Says Facebook Ad Program Invaded Privacy*, SFGATE (Aug. 15, 2008, 4:00 AM), <http://www.sfgate.com/business/article/Suit-says-Facebook-ad-program-invaded-privacy-3273100.php>. Along with Facebook, many companies that participated in the Beacon program were also named as defendants in the suit. *Id.*

⁷⁹ See Cecilia Kang, *Facebook Shuts Beacon Advertising Program that Shares Info on Online Shopping*, WASH. POST (Dec. 9, 2009 10:00 AM), http://voices.washingtonpost.com/posttech/2009/12/facebook_shuts_beacon_advertiser.html. See also Jon Brodtkin, *Facebook Halts Beacon, Gives \$9.5M to Settle Lawsuit*, PCWORLD (Dec. 8, 2009, 1:39 PM), http://www.pcworld.com/article/184029/facebook_halts_beacon_gives_9_5_million_to_settle_lawsuit.html. Facebook also set up a \$9.5 million dollar fund for a non-profit foundation that will support online safety and privacy. See *id.* The lawsuit settlement was appealed to the United States Court of Appeal for the Ninth Circuit and upheld. See *Lane v. Facebook, Inc.*, 696 F.3d 811, 812 (9th Cir. 2012).

⁸⁰ See Kang, *supra* note 79.

⁸¹ Mark Zuckerberg, *Our Commitment to the Facebook Community*, FACEBOOK BLOG (Nov. 29, 2011, 9:39 AM), <https://blog.facebook.com/blog.php?post=10150378701937131>. The eliminated lines of the terms of service are as follows: “You may remove your User Content from the Site at any time. If you choose to remove your User Content, the License granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.” Walters, *supra* note 58.

⁸² See Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES (Feb. 18, 2009), available at http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html?_r=0.

⁸³ See Walters, *supra* note 58.

⁸⁴ See Walters, *supra* note 58. The new terms of service stated the following:

“You hereby grant Facebook an irrevocable, perpetual, non-exclusive, transferable fully paid, worldwide license (with the right to sublicense) to (a) use, copy, publish, stream, store, retain, publicly perform or display, transmit, scan, reformat, modify, edit, frame, translate, excerpt, adapt, create derivative works and distribute (through multiple tiers), any User Content you (i) Post on or in connection with the Facebook Service or the promotion thereof subject only to your privacy settings or (ii) enable a user to Post, including by offering a Share Link on your website and (b) to use your

user's account would no longer terminate Facebook's right to the user's content.⁸⁵

Facebook's right to a user's data would continue even if a Facebook user removed all of the user's photographs, deleted each of the user's friends from the user's Facebook page, and canceled the user's account.⁸⁶ This change originally came with little publicity until The Consumerist, a blog owned by a subsidiary of Consumer Reports, brought the altered terms of service to light on February 15.⁸⁷

In response to public attention to the changes in Facebook's terms, the Electronic Privacy Information Center and other groups planned to file a complaint with the Federal Trade Commission (FTC) alleging unfair and deceptive trade practices.⁸⁸ The claim was grounded on Facebook's repeated promises to users that users owned the content they shared.⁸⁹ The organization claimed that the altered terms of service were intended to give advertisers access to content contributed by users, and that the content sometimes revealed private details about a user's life.⁹⁰

In order to stave off the planned complaint with the FTC, Facebook retreated from the change of terms of service.⁹¹ In order to placate Facebook users, Facebook invited all users to help contribute to a new Bill of Rights and Responsibilities for the company.⁹² Despite Facebook's appeasement of Electronic Privacy Information Center, the FTC filed a complaint against Facebook over the issues.⁹³

D. Facebook Privacy Issues in 2010

On May 5, 2010, Facebook users discovered a glitch that permitted access to the private information of their Facebook friends.⁹⁴ Although this glitch was temporary, the privacy breach "heightened a feeling

name, likeness, and image for any purpose, including commercial or advertising, each of (a) and (b) on or in connection with the Facebook Service or the promotion thereof."

Id.

⁸⁵ See Walters, *supra* note 58.

⁸⁶ See Sullivan, *supra* note 56.

⁸⁷ See Walters, *supra* note 58.

⁸⁸ See Stone & Stelter, *supra* note 82.

⁸⁹ See *id.*

⁹⁰ See *id.*; Walters, *supra* note 55.

⁹¹ See Stone & Stelter, *supra* note 82.

⁹² See *id.*

⁹³ See Facebook, Inc., No. 092-3184, 2011 WL 7096348, at *1 (F.T.C. Nov. 29, 2011). In its complaint, the FTC included a charge that Facebook materially changed promises to keep information private. See *id.* ¶¶ 19-29 at *4-6.

⁹⁴ See Jenna Wortham, *Facebook and Privacy Clash Again*, N.Y. TIMES, May 6, 2010, at B1, available at <http://www.nytimes.com/2010/05/06/technology/internet/06facebook.html>.

among many users that it was becoming hard to trust the service to protect their personal information.”⁹⁵

The privacy issues continued with a change in the design of Facebook profiles. Facebook began causing some previously private information of its users to become public because of the way the information was linked to the user’s profile.⁹⁶ This change caused the Electronic Privacy Information Center (EPIC)⁹⁷ to file a complaint with the FTC.⁹⁸ Unlike the planned complaint in 2009, Facebook did not strike a deal with EPIC to prevent the FTC filing.⁹⁹ In response to the filed complaint the FTC and Facebook proposed a settlement barring Facebook from making future changes to users’ privacy settings without their affirmative consent, as well as requiring Facebook to implement a comprehensive privacy protection program and submit to independent privacy audits for twenty years.¹⁰⁰ The terms of the settlement were finalized in August of 2012.¹⁰¹

E. *Find Friends Nearby Feature*

In June of 2012, Facebook created a “Find Friends Nearby” feature.¹⁰² This permitted Facebook users to locate their friends nearby using the GPS feature prevalent on mobile phones.¹⁰³ The feature was intended to permit a Facebook user to “quickly look up and ‘friend’ someone” who the user had met in person.¹⁰⁴ Rather than receiving accolades Facebook experienced a backlash from its users, some labeling

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ The Electronic Privacy Information Center is a public interest research center located in Washington, DC established “to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.” *About EPIC*, ELECTRONIC PRIVACY INFORMATION CENTER, <http://epic.org/epic/about.html> (last visited Mar. 6, 2013).

⁹⁸ *See* Wortham, *supra* note 94, at B1.

⁹⁹ *See supra* Part III.C.

¹⁰⁰ *See* Facebook, Inc., No. 092-3184 (F.T.C. Nov. 29, 2011) (agreement containing consent order), <http://ftc.gov/os/caselist/0923184/111129facebookagree.pdf>; *see also In re Facebook*, ELECTRONIC PRIVACY INFORMATION CENTER, <http://epic.org/privacy/inrefacebook> (last visited July 12, 2013).

¹⁰¹ *See* News Release, Federal Trade Commission, FTC Approves Final Settlement with Facebook (Aug. 10, 2012), *available at* <http://ftc.gov/opa/2012/08/facebook.shtm>.

¹⁰² *See* Joanna Stern, *Facebook ‘Find Friends Nearby’ Lets You Find New Friends Around You*, ABC NEWS, (June 25, 2012, 11:21 AM), <http://abcnews.go.com/blogs/technology/2012/06/facebook-find-friends-nearby-lets-you-find-new-friends-around-you>. Facebook released a statement after the feature was available stating the feature was not a full release, but rather a test. *See id.*

¹⁰³ *See id.*

¹⁰⁴ John D. Sutter, *Facebook Pulls Location-Tracking Feature*, CNN (June 26, 2012, 6:12 PM), <http://www.cnn.com/2012/06/26/tech/social-media/facebook-pulls-find-friends-nearby/index.html>.

the feature a “stalking app,”¹⁰⁵ causing Facebook to eliminate the feature.¹⁰⁶

IV. FACEBOOK’S CURRENT TERMS OF SERVICE, PRIVACY POLICY TERMS, AND NEW USER SIGN-UP PROCESS

A. *The Current Sign-Up Process for Facebook*

To join Facebook a new user must go to Facebook’s home page to sign up.¹⁰⁷ The new user is required to input a first and last name, give an email address, select a password, enter a birthday, select the user’s gender, and then click “Sign Up.”¹⁰⁸ On that same page, in a font size smaller than the rest of the sign-up materials, is the following: “By clicking Sign Up, you agree to our Terms, and that you have read our Data Use Policy, including our Cookie Use.”¹⁰⁹ The words “Terms,” “Data Use Policy,” and “Cookie Use” are hyperlinked so that clicking on each link brings a new user to the appropriate policy.¹¹⁰ Upon filling in the required information and clicking the “Sign Up” button, the new user is transported to the “Getting Started” page of Facebook and is free to continue to the site without performing other required conduct.¹¹¹

B. *Facebook’s Previous User Sign-Up Process: Fteja v. Facebook, Inc.*¹¹²

In *Fteja*, the Southern District of New York upheld Facebook’s previous sign-up process as giving reasonable notice to potential users of its forum selection clause.¹¹³ However, the previous sign-up process is different from the current process. Thus, new analysis is needed to determine whether Facebook gives reasonable notice to its users with its new sign-up process. Further, the right to privacy should receive greater protection than a forum selection clause, which determines where a user may file a claim against Facebook. Being forced to litigate in California is an annoyance and sacrifice that many may be willing to take on for a

¹⁰⁵ *Id.*, see also Dave Copeland, *How to Use Facebook’s Newest Stalking App*, READWRITEWEB (June 25, 2012), <http://readwrite.com/2012/06/25/how-to-use-facebooks-newest-stalking-app>.

¹⁰⁶ See Stacy Curtin, *‘It Is Not Our Intention to Sell Your Photos’: Instagram Co-Founder*, CNBC (Dec. 19, 2012, 11:10 AM), http://www.cnbc.com/id/100327905/039It_Is_Not_Our_Intention_to_Sell_Your_Photos039_Instagram_CoFounder.

¹⁰⁷ FACEBOOK, <https://www.facebook.com> (last visited Feb. 4, 2014).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

¹¹³ See *id.* at 841. This case pertained to a forum selection clause within the terms of service causing all litigation involving Facebook to occur in a federal court located in Santa Clara County, California. See *id.*

less expensive product. However, unknowingly sacrificing privacy rights for the “free” use of a social media website is a serious violation of rights that requires more disclosure.

In *Fteja*, the sign-up process at the time consisted of clicking a box that said “Sign Up” on two distinct pages.¹¹⁴ On the first page, the potential user was required to fill out personal and contact information.¹¹⁵ Once the potential user clicked on the box labeled “Sign Up,” the user was taken to a second page titled “Security Check.”¹¹⁶ On this page, the user was required to enter a series of characters displayed on the page, and once again click on the “Sign Up” button.¹¹⁷ Immediately below that button appeared the following text: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.”¹¹⁸ “Terms of Service” was underlined, indicating the text was a hyperlink that could be clicked on to bring the user to Facebook’s terms of service.¹¹⁹

The court, relying partly on *Carnival Cruise Lines, Inc. v. Shute*,¹²⁰ found that the user assented to Facebook’s forum selection clause during the sign-up process because a hyperlinked “Terms of Use” phrase is equivalent to a sign that states “Click Here for Terms of Use.”¹²¹ Once the users assented to the terms, the court looked at the public policy ramifications of the forum selection clause that required all litigation to occur in the Northern District of California.¹²² Because both the witnesses and Facebook employees, in addition to the relevant documents in the case, were located in the Northern District of California, the court found litigation there would be “more logical, convenient, and just.”¹²³ Thus, potential plaintiffs would be forced to litigate in California, the location where many if not all of the witnesses and evidence required for the trial would be located.

While the *Fteja* court’s analysis may seem sound at first glance, and thus applicable to the current Facebook sign-up process and terms of service, there are several weaknesses. First, in the cases cited by the

¹¹⁴ See *id.* at 834.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 835.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ 499 U.S. 585 (1991). In *Carnival Cruise Lines*, the Supreme Court upheld a forum selection clause in fine print on the back of a cruise ticket, even though purchasers did not receive the ticket until some time after purchase. Thus, the purchasers were bound by the terms even though they did not receive notice of them until after the purchase. See *id.*

¹²¹ *Fteja*, 841 F. Supp. 2d at 841.

¹²² See *id.*

¹²³ *Id.* at 844. The court also found that *Fteja* had not pointed to “any significant connection between his action and [the Southern District of New York]” where *Fteja* had filed his claim.

court in *Fteja*, the user of the vendor's services each purchased an express use of the service. In *Carnival Cruise Lines*, the plaintiffs had "purchased passage for a 7-day cruise on petitioner's ship, the *Tropicale*."¹²⁴ The purchasers paid a fare directly and expressly to a travel agent for the purpose of exchanging the payment for a cruise, and the travel agent in turn paid the defendant cruise ship company.¹²⁵ In *Effron v. Sun Line Cruises, Inc.*,¹²⁶ the plaintiffs had "purchased a 17-day South American vacation package through her Florida based travel agent," And making an express payment in exchange for a vacation.¹²⁷ In both *Carnival Cruise Lines* and *Effron*, the plaintiffs were held to have had reasonable notice of unseen terms after purchasing and paying for the right to use a service.

Unlike in the above cases, a Facebook user does not pay a monetary fee to utilize the services of Facebook's social media website.¹²⁸ Rather, the user pays an implicit price during sign up by permitting Facebook to gather information on the user, including the user's name, age, birthday, gender, and any photos posted.¹²⁹ In many cases, a reasonable user would not be aware of the price users implicitly pay upon completing Facebook's sign-up process. Thus, unlike in *Carnival Cruise Lines* and *Effron*, there is no express payment from the purchaser to the vendor that would place a reasonable person on notice that the vendor may have terms of service.¹³⁰ While one expects contract terms to be present when purchasing a good or service, such as a return policy or conditions of use of the service, it is less apparent, possibly even concealed from a reasonable person's knowledge, that Facebook will encroach upon a user's right to privacy when the individual user makes no express purchase.

Further, the Court in *Fteja* analogizes the Facebook sign-up process to a simple roadside fruit stand.¹³¹ The court states:

The situation might be compared to one in which Facebook 'maintains a roadside fruit stand displaying bins of apples.' For purposes of this case, suppose that above the bins of apples are signs that say, 'By picking

¹²⁴ *Carnival Cruise Lines*, 499 U.S. at 587.

¹²⁵ *See id.*

¹²⁶ 67 F.3d 7 (2d Cir.1995).

¹²⁷ *Id.*

¹²⁸ *See* David Goldman, *You're Only Worth \$1.21 to Facebook*, CNN MONEY, (May 16, 2012) <http://money.cnn.com/2012/05/16/technology/facebook-arpu/index.htm> ("Facebook customers don't pay the social network directly—they upload personal information, which Facebook uses to attract advertisers.").

¹²⁹ *See* Facebook's Data Use Policy, FACEBOOK, <http://www.facebook.com/about/privacy/your-info> (last visited Feb. 4, 2013).

¹³⁰ *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012).

¹³¹ *Id.* The court in *Fteja* adopts the analogy from a previous court of appeals case from the Second Circuit: *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004).

up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign.¹³²

Just as in the cases cited by the court, the fault in the reasoning lies in the analogy. With a fruit stand, a purchase of an apple will lead a reasonable person to believe there is some type of return policy. For example, if a customer bought a rotten apple infested with worms, the customer would believe that a return or exchange would be permitted. Thus, a reasonable person would believe that additional terms existed besides the exchange of an apple for money. The exchange of currency for the product dictates that terms such as a return policy exist. Thus, if something goes wrong, it is possible for the customer to be restored to their previous position.

But with Facebook, the situation is significantly different. A reasonable person may not expect terms to exist when signing up for a “free” website, especially when never expressly agreeing to terms by clicking on “I Agree” or similar language. When a user signs up, they are not expecting a return policy to be hidden somewhere on the website because in the user’s mind, no purchase has occurred that would require a return of a purchase price. Thus, they do not expect worms in the product that would require a return or exchange because no money has changed hands. But Facebook’s collection and distribution in to advertisers of the user’s demographics and other private information is the price paid by the user. The information Facebook obtains leads to a large part of Facebook’s revenue.¹³³ This price is paid implicitly instead of explicitly as in the cases cited by the court or the fruit stand analogy. While the individual who pays for a product gets less protection concerning contract formation, the actual exchange of cash makes it clear that an agreement is occurring.

Further, once a user’s information is disseminated to Facebook, there can be no return of the implicit purchase price. If the user finds “worms” inside Facebook, the user can never be placed in the same position as immediately after the exchange because Facebook commoditized the user’s information by selling it to advertisers.¹³⁴ The user sold a

¹³² *Freja*, 841 F. Supp. 2d at 839 (citations omitted).

¹³³ Goldman, *supra* note 128. The average revenue per user is \$1.21 per quarter, or \$4.84 per year. *See id.*

¹³⁴ The use of user’s private information has led to lawsuits. For example, a recent class action lawsuit involving Facebook involved the use of Sponsored Stories. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011). If a user clicked on the like button of a brand or corporation, the user’s friends could start seeing the corporation’s advertisements with the user’s name and photograph. Laurie Segal, *Facebook Could Pay Users in Class-Action Sponsored Stories Settlement*, CNN MONEY, (Jan. 28, 2013) <http://money.cnn.com/2013/01/28/technology/social/facebook-class-action/index.html>. In response to suit, Facebook offered a settlement which included changing its terms of services to “more clearly explain how Sponsored Stories” work. *Id.*

commodity, the user's privacy and information, to Facebook in exchange for use of the website. While a user may be able to cancel the Facebook account, it is impossible to retrieve information that has likely already been disseminated and used by Facebook to attract advertisers and third-party applications. This is unlike purchasing a piece of fruit from a fruit stand. If a user of the fruit stand bites into an apple to find it is rotten to the core, the apple may be returned for a refund and the parties brought back to the same position as before they had contracted. If a Facebook user signs up to the website only to find that the product is rotten to the core, the user cannot get back the private information sold by Facebook and possibly used by advertisers. The substantive right of privacy is distinct from the right to choose a forum to litigate claims and must be treated as such in an analysis concerning whether reasonable notice was given.

C. Facebook's Current Sign-Up Process, Reasonable Notice, and Mutual Assent

1. Reasonable Notice of Terms of Service Permitting Facebook to Gather and Distribute a User's Private Information

In contracting, whether in the real world or online, manifestation of assent is an integral part of the process, for without assent determined objectively, there can be no contract.¹³⁵ Contracting on the Internet is different from real-world contracting. "Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."¹³⁶ When a clickwrap agreement is scrutinized, "[c]ourts evaluate whether a clickwrap agreement's terms were clearly presented to the consumer, the consumer had an opportunity to read the agreement, and the consumer manifested an unambiguous acceptance of the terms." It is because of this rationale and analysis of the above factors that courts consistently uphold clickwrap agreements where a user must scroll through the terms and click a box with the words "I Agree" or other similar language within the box. On the other hand, courts often find a lack of reasonable notice of terms within browserwrap agreements where the terms are located on a separate page and the user need not click on a box that states "I Agree" or other similar language.¹³⁷

¹³⁵ See *Specht v. Netscape Commc'ns. Corp.*, 306 F.3d 17, 28 (2d Cir. 2002); *Koch Indus., Inc. v. Does*, 2:10CV1275DAK, 2011 WL 1775765 (D. Utah May 9, 2011). See also RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981).

¹³⁶ *Specht*, 306 F.3d at 35.

¹³⁷ See *supra* Part II.

Facebook's current sign-up process is more like browsewrap than clickwrap. When a user signs up for Facebook, the user is not required to scroll through a list of terms, as would a user in a clickwrap agreement. Such a user may not expect additional terms when signing up for what the user believes to be a free service. This is especially true when the additional terms help weaken a right that is held to be sacred through public policy.

But Facebook's sign-up process is not typical browsewrap either. In a typical browsewrap agreement, a user must scroll to the bottom of the screen in order to find a link to the terms of service of the website. Here, Facebook has the links directly on the page above the box labeled "Sign Up" where it states, "By clicking Sign Up, you agree to our Terms and that you have read our Data Policy, including our Cookie Use." The words "Terms," "Data Policy," and "Cookie Use" are all links to the terms of use of the site. This statement above "Sign Up" is in size 8.5 font, whereas the boxes required to be filled out during the registration process and the "Sign Up" button are larger than the linked terms.

Reasonable notice is not given to Facebook users regarding the information contained within Facebook's Terms of Service. A user is not required to click on a box that says "I Agree." Rather, the user must click on "Sign Up." The statement which informs the user of the agreement is smaller and in a different font color than the rest of the page. While this procedure gives some notice, it is not reasonable notice for giving up privacy rights because of the importance of the substantive right of privacy.

2. The Substantive Right of Privacy is Distinct from the Right to Choose a Forum for Litigating Claims

Although the court in *Fteja v. Facebook*¹³⁸ upheld on reasonable notice grounds a similar previous sign-up process for Facebook that also did not fit neatly into a pure clickwrap or browsewrap category, the issues are distinct. A forum selection clause does not eliminate a user's constitutional right to a trial by jury. While the right to a trial by jury for civil cases is a legally protected constitutional right,¹³⁹ a forum selection clause does not destroy the right, but rather focuses the location of the trial in a specific court. This may inconvenience a plaintiff, but it does not destroy the right to trial by jury.

In *Fteja*, the forum selection clause did not limit the filing of claims to a jurisdiction that would be unsympathetic to the claim. Instead, the court found that the locus of operative facts would appear to be in the

¹³⁸ 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

¹³⁹ U.S. CONST. amend. VII.

Northern District of California, the jurisdiction in which Facebook's forum selection clause declared litigation would occur.¹⁴⁰ The action against Facebook in *Fteja* was for breach of contract. In a breach of contract case, the locus of operative facts looks at "where the contract was negotiated or executed, where it was to be performed, and where the alleged breach occurred."¹⁴¹ In a claim of contract breach against Facebook, although Facebook's social media website was meant to be utilized and available anywhere in the world,¹⁴² Facebook's terms of service were drafted and executed by Facebook in Palo Alto, which is located in the Northern District of California.¹⁴³ Lastly, any breach by Facebook would likely occur in its Palo Alto headquarters location where the corporation resides.¹⁴⁴ Thus, a reasonable person could expect terms to be present that permit the company to be sued in a location that is convenient for evidence purposes and minimizes other transaction costs.¹⁴⁵

Privacy is unlike a forum selection clause in several ways. First, the privacy rights given up by a Facebook user upon completion of the Facebook sign-up process destroy those rights completely. Unlike a forum selection clause, Facebook can and does sell the user's private information for a profit. Facebook cannot sell its forum selection clause and sell the right to force litigation into the Northern District of California to another company or individual. A Facebook user is still free to file a claim against others who may commit a contract breach or tort in a jurisdiction of the user's choosing.¹⁴⁶ But once Facebook obtains a user's privacy rights, the rights become a commodity that can be sold and transferred to advertisers and others for a price.

Because of its terms permitting Facebook to aggregate collected private user information with other data, such as public records and credit scores, the data compiled by Facebook creates a profile of a person "more accurate, and more detailed than any file ever compiled by J. Edgar Hoover."¹⁴⁷ "It is possible that [the user] can be known better by these data aggregators than by [the user's] own friends and kin."¹⁴⁸ If Facebook sells the data to a third party, the data could be used for com-

¹⁴⁰ *Fteja*, 841 F. Supp. 2d at 842.

¹⁴¹ *Id.*; see also *Reinhard v. Dow Chem. Co.*, 07 Civ. 3641(RPP), 2007 WL 2324351 (S.D.N.Y. Aug. 13, 2007).

¹⁴² See *id.*

¹⁴³ *Fteja*, 841 F. Supp. 2d at 842.

¹⁴⁴ See *id.*

¹⁴⁵ See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991); *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 8 (2d Cir. 1995).

¹⁴⁶ Assuming all jurisdictional rules are properly met.

¹⁴⁷ Richard J. Yurko, *Don't Click This Article!*, BOSTON BAR J., Fall 2012, <http://bostonbarjournal.com/2012/09/12/dont-click-this-article>.

¹⁴⁸ *Id.*

mercial, political, or possibly even nefarious ends, depending on the final resting point of the information.¹⁴⁹ The reasonable expectation of a Facebook user does not contemplate the possibility that the data could be used by anyone willing to purchase the information.¹⁵⁰

3. Termination or Completion of the Agreement

The termination or completion of a contract by either party has different consequences depending on whether the clause unknown to the user is a forum selection clause or a “sale” of privacy rights. Once the parties complete performance of a contract, a forum selection clause ceases to exist. Because the user does not need to have any further contact with the other party, the forum selection clause is rendered moot. But the privacy right sold has different consequences on contract completion. When a user cancels his Facebook account, ending the agreement between the user and Facebook, the “sale” of the user’s privacy rights will have already occurred. By that point, Facebook, and possibly third-party Facebook applications, will have already collected and aggregated the user’s data. The end of the contract terminates Facebook’s rights to the continued collection of a user’s data.¹⁵¹ But it leaves the previous data collected at the mercy of Facebook and others who Facebook may have permitted to collect data.¹⁵² Facebook could continue to sell the user’s personal data, data which the user almost certainly believes will become private once the user deletes his account. Because this data can be bought by anyone with the ability to pay, it is impossible to determine how or for what purpose the data already purchased has been used or how it will continue to be used. Unlike a forum selection clause which ends when the contract is complete, the “sale” of one’s privacy rights, and the consequences of that sale, cannot be undone.

¹⁴⁹ *Id.* The possibility of the use of this data in myriad ways has not escaped the notice of the Federal Trade Commissioner. See FEDERAL TRADE COMMISSION, REPORT, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (March 2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

¹⁵⁰ See Yurko, *supra* note 147.

¹⁵¹ See *Statement of Rights and Responsibilities*, FACEBOOK (Nov. 3, 2013, 6:19 PM), <http://www.facebook.com/legal/terms> (“This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.”). But see *Data Use Policy*, FACEBOOK, (Nov. 3, 2013, 6:19 PM), https://www.facebook.com/full_data_use_policy#deleting [hereinafter *Data Use Policy*] (“When you delete an account, it is permanently deleted from Facebook. It typically takes about one month to delete an account, but some information may remain in backup copies and logs for up to 90 days. . . . Certain information is needed to provide you with services, so we only delete this information after you delete your account. Some of the things you do on Facebook aren’t stored in your account, like posting to a group or sending someone a message That information remains after you delete your account.”).

¹⁵² See *Data Use Policy*, *supra* note 151.

There is a further difference between the types of clauses in the decision to create a public record after the termination of the contract. The filing of a lawsuit is a public matter. A user can take into account the forum selection clause when determining whether or not it would be a prudent move to go forward with a lawsuit, given the circumstances of the user's situation, and, consequently, to create a public record on the matter. One who files a claim creates a record that is "presumed to be open to the public."¹⁵³ Records of filed claims are often available online and searchable by party name.¹⁵⁴ Filing a lawsuit is a conscious action, and the filer can view the consequences of such conduct with foresight. The decision to file a lawsuit is something that an individual will typically contemplate and seek guidance and counsel on before choosing the proper course of action. An individual may choose whether or not to exercise this right. In contrast, as discussed above, upon termination of a user's Facebook account, the extent third parties use the user's data for purposes that generate a searchable public record is impossible to determine.¹⁵⁵ The Facebook user no longer has any choice in the matter.

4. The Lack of Reasonable Notice and Substantive Differences Between a Forum Selection Clause and the "Selling" of a User's Privacy Rights Lead to Lack of Mutual Assent

The concept of forum selection is wholly distinct from the concept of privacy. The privacy rights invaded by Facebook are rights that many may find to be powerful. In everyday social situations, people meet various other people in public while going about their daily activities. The meeting and introduction may be brief or last for a longer period of time. The normal expectation is that these new acquaintances would not turn the other person's name and photos into commodities, or sell that information to advertisers. Although introductions may be made and photos taken in public they are nevertheless private in the respect that they will not normally be commoditized and sold. Interacting with Facebook, on the other hand, does not parallel these normal, everyday interactions. Facebook introduces itself to the user by requiring the user to complete a sign-up process that requires the user to give his or her real name, rather than a pseudonym or screen name as many websites require. Sign up

¹⁵³ Paul Grabowicz, *Civil Court Lawsuits: Introduction*, UC BERKELEY GRADUATE SCHOOL OF JOURNALISM (Oct. 24, 2012), <http://multimedia.journalism.berkeley.edu/tutorials/civil-court-lawsuits>.

¹⁵⁴ For example, the Superior Court of California County of Los Angeles maintains a public website where a visitor can "search by name for litigants in Civil, Small Claims, Family Law, and Probate cases in the Los Angeles Superior Court via [its] secure web server." *Civil Party Name Search*, SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES, <https://www.lasuperiorcourt.org/onlineservices/civilIndex> (last visited Feb. 15, 2014).

¹⁵⁵ See *Data Use Policy*, *supra* note 151.

then requests that the user post a photo. Once this is complete, Facebook owns the right to sell and distribute the user's name and photo to advertisers. This transforms a brief encounter that would ordinarily fade into a private memory into a public commodity that is sold for a profit to any entity or person willing to pay.

A reasonable person expects their name and likeness, as unique and inherent personal attributes, to remain their right and property. This expectation is distinguishable from any expectation of a right to forum selection in filing a lawsuit, which is not inherent in an individual, but rather arises dependent on external conditions. In order for a user to assent to the sale of his or her right to privacy, clear and manifest notice must be given.¹⁵⁶ With Facebook's current sign-up process, Facebook turns around the assumption that a user owns his or her private information and states that the user is selling it to the site in exchange for website use, and does so without reasonable notice. Facebook turns the "introduction" between the user and the website into a marketable event, although the user is excluded from enjoying any part of the economic gain from sale of his name and photo. This process takes information from the user that is not inherently public and morphs it into a public record that can be turned into a commodity distributed for a profit to any other person or entity with the money. This is unlike a forum selection clause, which limits a right that is ever-present in the public domain. Facebook should carefully evaluate the contract formation process and ensure reasonable notice is given to the user that an agreement is being formed and, within that agreement, that the user is selling part of his or her right to privacy.

V. REMEDYING FACEBOOK'S LACK OF REASONABLE NOTICE OF ITS TERMS OF SERVICE EXTRACTING THE LOSS OF PRIVACY RIGHTS FROM FACEBOOK USERS

Public policy protects the right to privacy, but it does not prevent individuals from voluntarily and knowingly yielding the right.¹⁵⁷ But for a transaction to occur that involves the yielding of the right to privacy, reasonable notice must be given to the party who will be giving up his or

¹⁵⁶ See *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) ("[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious."). See also *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) ("[A] contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms . . ."). *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 268 (5th Cir. 2011) (citations omitted) ("Notice of incorporated terms is reasonable where, under the particular facts of the case, '[a] reasonably prudent person should have seen' them.").

¹⁵⁷ See *supra* text accompanying note 42.

her right to privacy.¹⁵⁸ Facebook's sign-up process is more akin to browsewrap than clickwrap, and thus does not give reasonable notice to Facebook users of the privacy rights "sold" by the user for the right to use Facebook.

The notice provided for forum selection clauses that is considered reasonable notice and adequate for gaining assent to litigation in a specified forum is inadequate in the case of privacy rights because of the divergence of the importance of the distinct rights. The selling of one's privacy leaves only a vestige of the right to privacy. Setting litigation in a forum that is convenient for one party, and is likely to also be the most convenient jurisdiction, leaves more than a vestige of a right for the user because the right given up cannot be sold to other entities.

While privacy is an important right, it is not inviolable. Americans give up privacy rights every day when they sign up for contests, sign up for loyalty cards at supermarkets, and when they sign up for mailing lists. In each of these instances, the person has reasonable notice of the surrendered rights because they are listed on the sign-up sheet, or the person must scroll through the rights that are given up before clicking on "I Accept."¹⁵⁹ This is especially important in an online agreement situation, where a typical user would require seventy-six work days each year in order to read each website's privacy policies visited by a user.¹⁶⁰

Facebook hides the ball by forcing its users to click through several screens, with links that are smaller and of a lighter color than the surrounding text, to determine what privacy rights are given up. Further, Facebook does not force the potential user to click on "I Accept" so the user manifests the acknowledgment of the additional terms. Instead, to create a Facebook account, the user clicks on "Sign Up." Thus, Facebook does not give its user reasonable notice of the quid pro quo of the exchange because "Sign Up" does not have the same effect as "I Accept." Without reasonable notice, it is not possible for the user to assent to the terms.

Facebook could rectify the lack of reasonableness and create mutual assent by changing its sign up process. Instead of clicking on "Sign Up," Facebook could force the user to click on "I Accept" or "I Agree" in order to manifest that an agreement is occurring. This would give clear notice that an agreement was being formed and that the user was as-

¹⁵⁸ See *supra* text accompanying note 42.

¹⁵⁹ See *supra* text accompanying note 42.

¹⁶⁰ Keith Wagstaff, *You'll Need 76 Work Days to Read All Your Privacy Policies Each Year*, TIME TECH (Mar. 6 2012) <http://techland.time.com/2012/03/06/you-d-need-76-work-days-to-read-all-your-privacy-policies-each-year>; see also Aleecia M. McDonald, Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY 540 (2008), available at http://moritzlaw.osu.edu/students/groups/isl/files/2012/02/Cranor_Formatted_Final.pdf.

senting to Facebook's terms. While many may understand that the sign-up process is legally analogous to a written contract, the reasonable person does not expect privacy rights to be "sold" for use by anyone willing to purchase the information by the simple process currently required to sign up for Facebook because privacy is an important right.¹⁶¹ Typically, when a user signs up to a website by providing only an email address, the reasonable person expects to receive promotional emails from the website. But with Facebook, more than promotional emails are sent to the user. The user will also receive targeted advertisements based on the information obtained by Facebook, including the pages the user has liked and the user's relationship status.¹⁶² The user will also receive spam email from companies, some legitimate companies as well as companies that are intended to defraud. The user will also receive target advertisements based on their likes on Facebook. In the past, Facebook has even offered to share users' home addresses and cellphone numbers with third parties.¹⁶³ Some apps Facebook gives access to obtain even more data from the user, which could lead to spam email, as well as collect information on the user's friends.¹⁶⁴ Thus, to give reasonable notice that more than just an email and name is being turned into a commodity, more is needed so the reasonable person understands the user is "paying" Facebook with privacy rights in exchange for the website's use. The terms must be presented clearly to the user so the user knows some terms exist and is given a chance to read the terms before manifesting assent.

In order to give reasonable notice, and thus manifest mutual assent to Facebook's terms of service, Facebook must change its sign-up process from its current browwrap-like contracting to be classic clickwrap. The current sign-up process is not true browwrap as the links for the terms of the agreement are not set at the bottom or top of the page. But they are in small font and a light color near a box that says "Sign Up" rather than "I Agree" or similar language. Facebook's terms are not prominent for a potential user to see, much like traditional browwrap. Thus, although Facebook's agreement process is not traditional brow-

¹⁶¹ For example, 66% of Americans do not want marketers to tailor advertisements to their interests, in part because of privacy concerns. See Joseph Turow et al., *Americans Reject Tailored Advertising and Three Activities that Enable It* 24–26 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478214.

¹⁶² See Lori Andrews, *Facebook is Using You*, N.Y. Times, Feb. 5, 2012, at SR7, available at http://www.nytimes.com/2012/02/05/opinion/sunday/facebook-is-using-you.html?page-wanted=all&_r=0.

¹⁶³ See Bianca Bosker, *Facebook to Share Users' Home Addresses, Phone Numbers with External Sites*, Huffington Post, (Feb. 28, 2011), http://www.huffingtonpost.com/2011/02/28/facebook-home-addresses-phone-numbers_n_829459.html.

¹⁶⁴ See Julia Angwin and Jeremy Singer-Vine, *Selling You on Facebook*, Wall St. J. (Apr. 7, 2012), available at <http://online.wsj.com/news/articles/SB10001424052702303302504577327744009046230>.

sewrap, the less than prominent posting of its terms of service and privacy policy make the agreement process more similar to browsewrap than clickwrap.

Facebook must change its sign-up process to be more like traditional clickwrap in order to obtain its users' consent. To start, before being permitted to click on "I Accept," Facebook should require a potential user to scroll through the terms of service, including any privacy rights "sold" as consideration for Facebook's promise to let the user continue to use the website. By doing so, Facebook would place the user on reasonable notice that his or her likeness, name, and other information may become a commodity that may be sold or used for advertising purposes upon the completion of the sign-up process when the user clicks on "I Accept." While each user may not stop to read the terms, the simple scrolling through the terms gives reasonable notice that some terms were being assented to upon the completion of the sign-up process.¹⁶⁵ If a user neglects to read the terms, reasonable notice was given even though the user declined to read the terms of the agreement. This leads to mutual assent despite the user failing to adequately inform herself of Facebook's terms.

Finally, to fend off possible future litigation over its privacy policy and terms of service, Facebook should make clear that sign up constitutes a bargained for exchange. Many potential users may not realize that signing up to Facebook is similar to a written contract or the purchase of other goods or services. This may be most important to the parents of the 20 million minors who are Facebook members, 7.5 million of who are under the age of thirteen,¹⁶⁶ because the parents likely do not realize that Facebook is selling and distributing information about their children to unknown individuals for advertising and other unknown purposes.¹⁶⁷

If Facebook makes the above recommended changes, it would remedy the browsewrap problems and give reasonable notice to users of the

¹⁶⁵ See *supra* text accompanying note 42.

¹⁶⁶ See Katherine Noyes, *Marketer Beware: 7.5 Million Facebook Users are Kids*, PCWORLD (May 12, 2011 10:40 AM), http://www.pcworld.com/article/227755/marketer_beware_75_million_facebook_users_are_kids.html; *CR Survey: 7.5 Million Facebook Users are Under the Age of 13, Violating the Site's Terms*, CONSUMER REPORTS, (May 10, 2011), <http://pressroom.consumerreports.org/pressroom/2011/05/cr-survey-75-million-facebook-users-are-under-the-age-of-13-violating-the-sites-terms-.html>. Facebook's terms of service does require that its users be at least thirteen years old. See *Data Use Policy*, *supra* note 151 ("Here are some commitments you make to us relating to registering and maintaining the security of your account: . . . You will not use Facebook if you are under 13.").

¹⁶⁷ Some have become concerned with the collection of private information from minors by companies and their websites. For example, in Massachusetts, there is currently proposed legislation that would prohibit companies that provide schools with a cloud-computing service from using information gleaned from students for any type of commercial purpose, including advertising use. See Jacob Gerhman & Shira Ovide, *Microsoft Backs School Privacy Bill Taking Aim at Google*, WALL ST. J., Mar. 7, 2013, at B5.

terms of the sign-up agreement. Thus, Facebook's terms of service would survive a legal challenge.

CONCLUSION

The right to privacy is an important right in a free society and is more critical than the right to select a location for litigation. Public policy dictates that the right to privacy cannot be yielded unknowingly. Many hold their privacy rights to high esteem, as evidenced by the multitude of Supreme Court Cases involving the right to privacy¹⁶⁸ and public relations issues faced by companies for infringing on the rights of their customers.¹⁶⁹ A violation of the right to privacy, whether by a private actor or the government,¹⁷⁰ causes uproar throughout American society. Facebook, a social media website used by millions of Americans, is not exempt from the duty to refrain from infringing upon another's privacy rights with proper notice.

In the past, Facebook has shown a willingness to infringe on the privacy rights of its social media users without giving the users reasonable notice about exchange that occurs upon the completion of Facebook's sign-up process. With the current Facebook sign-up process, the lack of reasonable notice of terms or changes of terms, which in previous incidents caused users to be concerned about their privacy rights, occurs once again. With the Internet's changing landscape, "[t]he protection granted by the law must be placed upon a broader foundation."¹⁷¹ The broader foundation of future privacy rights must be grounded in reasonable notice to a contracting party when the party's privacy rights are sold without the ability for the user to terminate the agreement and regain the private information.

¹⁶⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁶⁹ See *supra* Part III; see also Elizabeth A. Harris & Nicole Perloth, *For Target, the Breach Numbers Grow*, N.Y. TIMES (Jan. 10, 2014), available at http://www.nytimes.com/2014/01/11/business/target-breach-affected-70-million-customers.html?ref=business&_r=0.

¹⁷⁰ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence*, 539 U.S. 558.

¹⁷¹ Warren & Brandeis, *supra* note 17, at 211.