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THE NEW PRICE TO PLAY: ARE PASSIVE ONLINE MEDIA USERS BOUND BY TERMS OF USE?

WOODROW HARTZOG*

When individuals turn on the television, listen to the radio, or purchase newspapers, they are not forming contractual relationships. Yet, almost without exception, online readers, viewers and listeners are required to enter into "terms of use" contracts. These ubiquitous agreements are generally unfavorable for the user in areas of intellectual property rights and privacy. In addition, the terms often restrict users' behavior and their ability to litigate any disputes with a Web site. In analyzing the implications of contracts for Web site users, this article examines whether courts have recognized a distinction between online consumers, interactive users, and "passive media users" — online readers, listeners or viewers who engage in little, if any, of the activity traditionally required to form contracts. Case law reveals a frequent de facto *exemption from online agreements for passive media users, but not highly interactive users. This exemption could be formally recognized to benefit all parties to a contract.*

> "That [the plaintiff] either didn't read the agreement or didn't see it may be unfortunate for him, but it does not change the outcome. [He] is bound by the terms of the website's user agreement."[1]

When viewers turn on the television, they are not legally bound to arbitrate, rather than litigate in court, any disputes they might have with the network. The simple act of turning on the radio does not prohibit listeners from singing to a friend the songs they heard. By purchasing a newspaper, a reader is not agreeing to let the publisher sell personal

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[1]Burcham v. Expedia, 2009 WL 586513 at *4 (E.D. Mo. Mar. 6, 2009).

information. Yet as media converge digitally, readers, viewers and listeners are required to enter into contracts. Online contracts, typically in the form of "terms of use," accompany virtually every Web site, blog or social network site on the Internet.[2]

The agreements typically involve obligations regarding how the parties will settle disputes, licensing (and sub-licensing) of a user's copyrighted work, restrictions on use of the Web site and of the site's content, limitations on a Web site's liability, and notifications regarding how the user's personal information can be used.[3] These contracts are known as "browsewrap" and "clickwrap" agreements. A clickwrap agreement is electronically presented and requires an individual to click on a button indicating assent (agreement to the terms) prior to downloading software or accessing a Web site.[4] Browsewrap agreements dictate that any additional "browsing" past the homepage constitutes acceptance of proposed terms located on the Web site.[5] The terms are often found by clicking on hyperlinks labeled "Legal" or "Terms of Use."[6]

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[2]*See, e.g.*, Nancy Kim, *Clicking and Cringing*, 86 OR. L. REV. 797 (2007); Mark Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006); Juliet Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307 (2005). In the case of most blogs, even if the blog author does not require an online agreement, readers are subject to the terms of use imposed by blog hosting services such as Blogger, WordPress or Live Journal. *See, e.g.*, Blogger, Terms of Service, http://www.blogger.com/terms.g (last visited Mar. 4, 2010); Google, Terms of Service, http://www.google.com/accounts/TOS (last visited Mar. 4, 2010); WordPress, Terms of Service, http://en.wordpress.com/tos/ (last visited Mar. 4, 2010); Facebook, Bill of Rights and Responsibilities, http://www.facebook.com/group.php?gid = 69048030774#!/terms.php?ref = pf (last visited Mar. 4, 2010).

[3]*See, e.g.*, Blogger, Terms of Service, *supra* note 2; Google, Terms of Service, *supra* note 2; WordPress, Terms of Service, *supra* note 2; Facebook, Bill of Rights and Responsibilities, *supra* note 2.

[4]*See* Oracle USA v. Graphnet, 2007 WL 485959 at *1 (N.D. Cal. Feb. 12, 2007); Kim, *supra* note 2, at 799. According to Judge David O. Carter of the United States District Court for the Central District of California, "The term 'clickwrap agreement' is borrowed from the idea of 'shrinkwrap agreements,' which are generally license agreements placed inside the cellophane 'shrinkwrap' of consumer software boxes that, by their terms, become effective once the 'shrinkwrap' is opened." Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1080 n.11 (C.D. Cal. 1999).

[5]*See* Southwest Airlines Co. v. Boardfirst, LLC, 2007 U.S. Dist. LEXIS 96230, 2007 WL 4823761 at *5 (N.D. Tex. Sept. 12, 2007) ("Browsewraps may take various forms but typically involve a situation where notice on a website conditions use of the site upon compliance of certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink."). *See also* Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004); Specht v. Netscape Comm. Corp., 306 F.3d 17 (2d Cir. 2002); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000).

[6]*See* Juliet Moringiello & William Reynolds, *Survey of The Law of Cyberspace: Electronic Contracting Cases* 2007–2008, 64 BUS. LAW. 199, 200 (2008).

The shift from obligation-free access to media to binding, complex, contractual terms upon every Web site visit is problematic.[7] Edith Warkentine wrote:

> People who sign standard form contracts rarely read them. Counsel for one party (or one industry) generally prepare standard-form contracts for repetitive use in consecutive transactions. The party who has the greater bargaining power usually writes the standard form contracts and often presents it for signature on a "take it or leave it" basis.[8]

Wayne Barnes asserted:

> Through a few clicks of the mouse, consumers are agreeing in record numbers to unfavorable, one-sided terms in adhesion contracts. These include many of the standard favorite terms of businesses, such as arbitration clauses, damage limitations, and warranty disclaimers. But, in the online and software contract context, it also increasingly includes new creations such as spyware clauses and severe license restrictions.[9]

One of the problems inherent in online user agreements is that they purport to bind an individual accessing a Web site regardless of whether the user knows he or she has entered into an agreement or has knowledge of the specific terms.[10] Professor Mark Lemley wrote, "Ten years ago, courts required affirmative evidence of agreement to form a contract. No court had enforced a 'shrinkwrap' license, much less treated

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[7]Victoria Ekstrand, in 2002, noted the distinction between traditional and digital media in her survey of the user agreements of the top fifty news organizations in the United States. Victoria Ekstrand, *Online News: User Agreements and Implications for Readers,* 79 JOURNALISM & MASS COMM. Q. 602 (2002). Ekstrand stated:

> The contracting of news on the Web represents a fundamental shift in the way consumers receive their news. Rather than engaging in a traditional sale of information — in which the publisher receives payment for a printed newspaper — today's online news publishers often provide free content in exchange for tacit agreement to an online user agreement. Under such agreements, news consumers often agree not to redistribute content, expect reliability, or submit offensive material. In return, users are given permission to access news content, provided they abide by the terms.

Id. at 602–603.

[8]Edith Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 469 (2008).

[9]Wayne Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Section 211(3)*, 82 WASH. L. REV. 227, 228 (2007).

[10]*See, e.g.*, Burcham v. Expedia, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009).

a unilateral statement of preferences as a binding agreement."[11] Recently, however, "[M]ore and more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract even if no one agrees to it," Lemley wrote.[12] Additionally, empirical and scientific research have demonstrated that an individual's cognitive limitations and the design and presentation of standard-form contracts significantly frustrate an individual's ability to properly read and understand standard-form contracts.[13]

Contract doctrine is designed to protect the expectations of the parties.[14] With that in mind, does it make sense to enforce contracts against a party with *no* contractual expectations? The purpose of this article is to explore the implications of online-agreement jurisprudence for "passive media users," a group defined for purposes of this research as consisting of readers, viewers and listeners who make use of a Web site for informational, research or entertainment purposes only, without contributing content or otherwise interacting with a Web site. The issue of whether passive media users are bound by terms of use is important because these users are most likely to fail to realize they have entered into binding contracts.

Nearly every person on the Internet is, at some point, a passive media user.[15] For example, by merely clicking on a link to a story on *The New York Times* online, a user is purportedly bound by the Web site's terms of use, which include restrictions on what a user is permitted to do with *The New York Times* content, limitations on the legal remedies available to the user in any dispute with the Web site,[16] and pronouncements of user consent regarding what *The New York Times* is permitted to do with the users data/personal information.[17] Thus, terms and conditions drafted to benefit the Web site, not to protect users' fair use rights to use copyrighted material or to protect user privacy, will determine the rules

[11]Lemley, *supra* note 2, at 460 (citations omitted).

[12]*Id.*

[13]*See* Shmuel Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117 (2007); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995).

[14]*See* 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:1 (4th ed. 2010) (citing MCA Television Ltd. v. Pub. Interest Corp., 171 F.3d 1265 (11th Cir. 1999)).

[15]The fragmented nature of the medium ensures that at some point most Internet users will click on a news story without any further participation. For example, one of the most popular social media Web sites, Twitter, acts as a link super-feeder, exposing individuals to multiple sites (and thus, multiple terms of use agreements) each day.

[16]The New York Times, Terms of Service, http://www.nytimes.com/ref/membercenter/help/agree.html (last visited Dec. 2, 2009).

[17]The New York Times, Privacy Policy, http://www.nytimes.com/ref/membercenter/help/privacy.html (last visited Dec. 2, 2009) (incorporated by reference into The New York Times Terms of Service).

applied to those who get their news from *The New York Times* online and countless other Web sites. Additionally, if passive media users are held to violate a Web site's terms of use, they might even be charged with violation of a computer misuse statute such as the Computer Fraud and Abuse Act.[18]

Terms of use disputes with passive media users are being played out both in the courts and in threatened litigation.[19] Maura Larkins, who maintained a watchdog Web site for San Diego schools, was threatened with a lawsuit for reproducing a small amount of material from a forum thread from SchwabLearning.org's message board.[20] She received a cease-and-desist letter from the company that owns SchwabLearnig.org. The Citizen Media Law Project reported that the letter contained a clam "that reproducing message board content without permission was a violation of the GreatSchool's Terms of Use. [The letter] further indicated that GreatSchools would take legal action if Larkins failed to remove the content within two business days."[21]

Online consumers most likely realize that purchases, to some degree, involve the formation and execution of contracts. Users of highly interactive Web sites are, at numerous points in their interaction with a Web service, made aware of some terms, obligations and restrictions on behavior. Can the same be said for the itinerant user simply reading content after clicking a link? This article examines whether courts have either implicitly or explicitly recognized a distinction between consumers entering into transactions; interactive media users who create and upload content on Web sites and communicate with other users; and passive media users who engage in little, if any, of the activity traditionally held to signal the assent necessary to bind parties contractually. The article also examines other factors considered by courts in online agreement disputes and the resulting implications for passive media users.

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[18]18 U.S.C. §1030(a)(2) (2001). *See also* United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (holding that violating MySpace.com's terms of use does not constitute a violation of the Computer Fraud and Abuse Act, a theory advanced by the prosecution); Guajome Park Acad. v. Duperry, No. 06-0658 H RBB (S.D. Cal. filed Dec. 11, 2006); Christine Galbraith, *Access Denied: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet Websites*, 63 MD. L. REV. 320 (2004); Llewellyn Joseph Gibbons, *It's Nobody's Business, But You Still Cannot Lie About It: Criminalizing Innocent Attempts to Maintain Cyber-Privacy*, 30 OHIO N.U. L. REV. 377 (2004); Orin Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statues*, 78 N.Y.U. L. REV. 1596, 1596 (2003).

[19]*See* Wargo v. Lavanderia, No. 08–664752 (N.D. Ohio filed July 14, 2008) (dismissing a defamation claim for lack of personal jurisdiction over the author of Web site comments and noting the Web site's terms of service regarding choice of forum).

[20]GreatSchools, Inc. v. Maura Larkins, Citizen Media Law Project, http://www.citmedialaw.org/threats/greatschools-inc-v-maura-larkins (last visited Dec. 4, 2009).

[21]*Id.*

The article analyzed the fifty-six relevant federal and state cases within the past five years that significantly addressed terms of use or technology.[22] Given the rapidly evolving nature of online agreements, the search was limited to the previous five years to ensure relevance. Cases analyzing offline and/or paper standard-form contracts or those providing merely a cursory review of online agreements are beyond the scope of the article and were not analyzed.

Ultimately, this article concludes that although courts have not recognized an explicit passive media user exception to online agreements, the factors courts consider relevant in determining whether to bind a party to an online agreement provide strong support for a *de facto* exemption of passive media users from online agreements in most contexts. But the finding comes with a warning: Media users of highly interactive Web sites, such as social network sites and Web sites that allow users to create profiles, are likely to bind themselves to the terms of use by their participation. The article argues that the *de facto* exemption should be explicitly recognized by courts in order to remove ambiguity in the online contracting process and alleviate the contractual burden from those least likely to realize they are bound by law.

The first part of this article describes passive media users and how they can be different from other individuals online. The second part provides a brief review of online contract formation and problems regarding their enforcement. The third and fourth parts analyze online-agreement cases within the past five years to determine if and how courts distinguish between the types of parties to online agreements, what other factors courts consider in online-contract adjudication, and the implications for passive media users. The article concludes with reasons why the *de facto* exemption from online agreements for passive media users should be officially recognized by courts.

PASSIVE ONLINE MEDIA USERS

Readers, viewers and listeners of traditional media — print publications, television and radio — are almost all passive. Save the occasional letter to the editor or phone call to the disc jockey, the traditional media experience requires little interactivity or negotiation and, thus, little room for contract formation. Since contracts were not a part of a

[22]The primary tool for research was Westlaw, using the search (BROWSEWRAP "BROWSE WRAP" CLICKWRAP "CLICK WRAP" "TERMS OF USE" "TERMS OF SERVICE" "ONLINE AGREEMENT") & WEBSIT!) & (CONTRACT! ASSENT! AGREE!) & da(last 5 years) in the ALLCASES database. Efforts were made to supplement the research using refined searches, various bibliographies and secondary source references.

traditional media experience, readers, viewers and listeners have little reason to expect to be contractually bound by their media use. Arguably, the same can be said for many online media users, at least to the extent that an online media experience mirrors traditional media use — in other words, the passive online media user.

For the purposes of this article, "passive online media user" will be defined as any reader, viewer, listener who makes use of a Web site for informational, research or entertainment purposes only, without contributing content or otherwise interacting. A passive media user's main activity is browsing, not a financial transaction or communication with others. Examples of passive media users are individuals reading news Web sites and blogs, and individuals browsing (but not contributing to) social networking sites, discussion boards, instant messaging or other media that do not require financial transactions, communication with other users, or content creation for use. A passive media user would be an individual clicking on and reading a news story on *The New York Times* Web site.

Because courts have consistently enforced contracts that required affirmative action from the user,[23] media users who consent to contracts by clicking, typing initials, and the like at any point in their media use are excluded from the definition of "passive media user." Thus, many participatory forms of media, such as social network sites, will only be used by passive media users to the extent they can be passively viewed without an explicit assent to terms of use. Users actively engaging such Web 2.0 sites are referred to here as "interactive media users." This class of user would be anyone who creates a profile or account on Facebook, Flikr, Craigslist or other sites on the participatory Web. The class would not include Web site users simply browsing the publicly available portions of those sites.

It is important to note that passive media users are classified according to how they use Web sites. Thus, an individual could be an interactive media user on a social network site and moments later be a passive media user by clicking on the link to a story on Salon.com.

This article also includes an analysis of transactional consumers, who are arguably even more likely than interactive media users to realize they are entering into contracts online. The term "transactional consumer" is defined here as any individual who engages in a financial transaction or commercially related endeavor while using a Web

[23]*See, e.g.,* Oracle v. SAP, 2008 WL 5234260 at *7 (N.D. Cal. Dec. 15, 2008) ("Plaintiffs have stated a claim for breach of contract, based on the existence of the clickwrap agreement. Many courts have found clickwrap agreements to be enforceable."); Haustein v. Softwrap Ltd., 2007 WL 2404624 at *3 (W.D. Wash. Aug. 17, 2007) ("Other courts have held that 'clicking' agreement to the terms of a contract is an 'assent' for purposes of contract analysis."). *See also* Lemley, *supra* note 2, at 476.

site. Examples of transactional consumers are individuals using eBay, Amazon or Paypal; downloading software; or making other common e-commerce transactions. It should be emphasized that this definition includes not only those who actually make financial transactions but also those engaging activities commonly associated with commercial transactions, such as downloading trial or free software or placing orders for tangible goods at no cost.

Passive media users are most likely to fail to realize they have entered into binding contracts because their main online activity — browsing — is not a traditional method of accepting an offer. Additionally, users who browse are less likely to actually be presented with the terms of use, compared to users who must click-through terms to access Web pages. Although many terms in online agreements are more relevant to the activities of interactive media users and transactional consumers, passive media users can still be greatly (and negatively) affected by online agreements.

All online users leave a trail of browsing habits, IP addresses and user preferences that are typically covered by a Web site's privacy policy and incorporated into the terms of use by reference.[24] This information can be used in a way that violates a user's privacy and can harm the user financially.[25] Many terms of use also contain dispute resolution and choice of law and forum clauses,[26] meaning *any* dispute with the Web site will be subject to the Web site's terms if the plaintiff accessed the Web site. Thus, passive online media users seeking to bring defamation or privacy claims could be forced to litigate in the Web site's state of choice. Even if a Web site use is casual or fleeting, users are purportedly still bound by terms of use. Thus, this potential for harm exists for one-time visitors to Web sites as well as for users who spend only a brief amount of time on a Web site. An individual reading a single, brief story online from *The New York Times* could be harmed by terms of use in many of the same ways as a user who created a profile and extensively used the same Web site.

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[24]*See* Allyson Haynes, *Online Privacy Policies: Contracting Away Control Over Personal Information?*, 111 PENN ST. L. REV. 587, 594 (2007).

[25]*See, e.g.*, DANIEL SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (2004); Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. (forthcoming 2010).

[26]*See, e.g.*, Blogger, Terms of Service, *supra* note 2 (stating, "These Terms of Service will be governed by [California law], without giving effect to . . . your actual state or country of residence. *Any claims, legal proceeding or litigation arising in connection with the Service* will be brought solely in Santa Clara County, California, and you consent to the jurisdiction of such courts" [emphasis added]).

Victoria Ekstrand found that online news sites (some of the most likely to be "passively used") contained a great number of restrictions.[27] For example, most of the Web sites she analyzed contained restrictions on the use of site material, such as prohibitions on modifying, publishing, transmitting, reproducing or creating new works from, distributing, performing, displaying or in any way exploiting the content of the Web site.[28] These agreements also contain limitations on liability for the inaccuracy of the site's content and for any damage caused to computers or a user's business or financial interest by the site.[29] Thus, online agreements can have significant implications for even passive online media users, provided these terms of use are enforceable.

A REVIEW OF ONLINE AGREEMENTS

The contract is the method of autonomous legal ordering in society. Richard Lord in *Williston on Contracts* wrote, "[A] contract enables parties to project exchange into the future and to tailor their affairs according to their individual needs and interests; once a contract is entered, the parties' rights and obligations are binding under the law."[30]

The basic definition of a contract is deceptively simple: It is merely a promise or promises enforced by law.[31] Further inspection reveals an exceptionally complex and nuanced area of law. What are "promises?" What does it mean to "enforce" a contract? When are contracts binding upon individuals? A full examination of these questions is outside the scope of this article. However, as a review, the elements of a valid and binding contract include an offer, acceptance, capacity to form a contract, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent, and legality of object and of consideration.[32]

Online agreements in the form of terms of use constitute a subset of what are known as "standard-form" contracts. Unlike individualized agreements tailored to the specifics of a particular deal, standard-form contracts are one-size-fits-all, whereby their individual terms are not negotiated by the parties.[33] These typically take-it-or-leave-it contracts,

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[27]Ekstrand, *supra* note 7, at 608–10.

[28]*Id.* at 608.

[29]*Id.* at 611.

[30]LORD, *supra* note 14, at § 1:1 (citing Transport Workers Union of America v. Southeastern Pennsylvania Transp. Auth., 145 F.3d 619 (3d Cir. 1998)).

[31]*See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining contracts as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty").

[32]*See* Perlmuter Printing Co. v. Strome, Inc., 436 F. Supp. 409, 414 (N.D.Ohio 1976).

[33]*See* RANDY BARNETT, PERSPECTIVES ON CONTRACT LAW 141 (3rd ed. 2005).

also known as contracts of adhesion, present a number of problems, both theoretically and practically.

In theory, contracts are a "meeting of the minds."[34] Yet, in the case of standard-form contracts, usually at least one party has little idea exactly what he or she is agreeing to, if the contract was read at all.[35] Practically, standard-form contracts are highly efficient and allow businesses to manage risk and solve disputes.[36] Yet, these contracts are usually long, filled with legalese, and contain terms that benefit the drafter at the expense of the parties agreeing to the terms.[37]

There is no clear consensus on how to resolve the problems presented by online agreements. Yet the issue has received much scholarly attention. To paraphrase Professor Wayne Barnes, neither standard-form contracts nor articles about standard-form contracts are anything new.[38] Barnes found that "notwithstanding the voluminous treatment of standard form contracts in the literature, there is no uniform line of thought regarding appropriate treatment of such contracts."[39] The sizeable body of scholarly literature concerning online agreements generally finds that such contracts can be problematic and potentially detrimental to individuals outside a commercial context.[40] Of course, the same has been said for all standard-form contracts.[41]

Professor Juliet Moringiello asserted that "[i]t is a basic rule of contract law that in order for a contract to be formed, the parties to the

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[34]Minster Farmers Coop. Exchange Co., Inc. v. Meyer, 884 N.E.2d 1056, 1061 (Ohio 2008) (finding "[a] meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract") (citing Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations, 575 N.E.2d 134, 137 (Ohio 1991)).

[35]*See* Warkentine, *supra* note 8, at 476.

[36]*See* E. ALLEN FARNSWORTH ET. AL., CONTRACTS 368 (2001) (stating that standard-form contracts allegedly "reduce uncertainty and save time and trouble; they simplify planning and administration and make superior drafting skills more widely available; and they make risks calculable and 'increase that real security which is the necessary basis of initiative and the assumption of foreseeable risks'") (citing Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933)).

[37]*See* Warkentine, *supra* note 8, at 476.

[38]Barnes, *supra* note 9, at 228.

[39]*Id.*

[40]*See, e.g.,* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002); Kim, *supra* note 2, at 798; Lemley, *supra* note 2, at 460; Moringiello, *supra* note 2, at 1309; Warkentine, *supra* note 8, at 476.

[41]*See* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Karl Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939); John E. Murray Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984).

contract must reach a meeting of the minds. Because a contract is a consensual relationship both parties to the contract must agree to be bound."[42] However, Moringiello found that the traditional rules of contract law, "based on the ideal of two humans meeting in person to agree to terms, have been modified almost to the point of non-existence."[43] Moringiello cited as an example courts' increasingly strict adherence to the "objective theory of contract, which holds that the actual state of mind of the parties is irrelevant."[44] One of the largest bodies of literature regarding online contracting focuses on the requirement of mutual assent — the intent to be bound by a contract manifested in the process of offer and acceptance.[45]

In *Burcham v. Expedia,* the United States District Court for the Eastern District of Missouri found that "[c]ourts presented with the issue [of online agreements] apply traditional principles of contract law and focus on whether the plaintiff had reasonable notice of and manifested assent to the online agreement."[46] Specifically regarding browsewrap agreements, the court noted that other courts "have held that 'the validity of a browsewrap turns on whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site."[47] Thus, in order to be bound, parties need not have a "meeting of the minds." Rather, a "reasonable communication" of the terms will suffice.

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[42]Moringiello, *supra* note 2, at 1311.

[43]*Id.*

[44]*Id.* (citing Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913); Woburn Nat'l Bank v. Woods, 89 A. 491, 492 (N.H. 1914). This rule is sometimes tempered by the unconscionability doctrine, under which a party will not be bound to contract clauses to which he is deemed to have agreed if the clauses are particularly one-sided, *see* U.C.C. § 2–302, Official Comment 1, or if the clauses are unfairly surprising, *see* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c. (1981).

[45]*See* Warkentine, *supra* note 8, at 476. *See also* Kim, *supra* note 2, at 798; Lemley, *supra* note 2, at 460; Moringiello, *supra* note 2, at 1311.

[46]2009 WL 586513 at *2 (E.D. Mo. Mar. 6, 2009) (citing Feldman v. Google, Inc., 513 F. Supp. 2d 229, 236 (E.D. Pa. Mar. 29, 2007)). *See also* Specht v. Netscape Comm. Corp., 306 F.3d 17, 28–30 (2d Cir. 2002)).

[47]*Id.* at *8 (citing Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d Cir. 2004); Molnar v. 1-800-Flowers.com, 2008 WL 4772125 at *7 (C.D. Cal. Sept. 29, 2008) (stating that "courts have held that a party's use of a website may be sufficient to give rise to an inference of assent to the terms of use contained therein"); Southwest Airlines Co. v. Boardfirst, LLC, 2007 U.S. Dist. LEXIS 96230, 2007 WL 4823761 at *5 (N.D. Tex. Sept. 12, 2007); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (stating that "the browser wrap license agreement may be arguably valid and enforceable").

The reasonable communication requirement serves as a substitute for a clear manifestation of assent to the contract.[48] Thus, a reasonable communication of terms gives rise to what is commonly referred to as the offeree's "duty to read."[49] In other words, if the terms of a contract are reasonably communicated, the offeree cannot then absolve himself or herself from liability by failing to read the terms of the contract. The offeree had a legal duty to read them.

The substitution of "reasonable notice" for a "meeting of the minds" as a requirement for contract formation is based on the adoption of the objective theory of contracts. Under this theory, the intent of the parties, for example, "I thought I was agreeing to 'X,'" is irrelevant.[50] Instead, the contract is formed based on what a reasonable person would have been led to believe in the relevant context (an objective standard).[51]

Ian Rambarran and Robert Hunt observed that "[c]lick-through and browse-wrap agreements fulfill the notice requirement in different ways."[52] While notice for clickwrap agreements can be satisfied by using code to prevent a user from proceeding without first having the opportunity to review the contract, notice in browsewrap agreements "is given through conspicuous display of the contract."[53]

Nancy Kim wrote, "Currently courts purport to find assent where none exists in an attempt to enforce contracts that provide a net benefit to society. Yet, while a finding of constructive assent sometimes may be necessary to enforce socially desirable contracts, certain parameters should be set around such a legal fiction."[54] Her conclusion is consistent with many other scholars who find the issue of constructive assent problematic.

For example, Edith Warkentine stated that "[a]s a corollary to finding assent to contract formation, traditional contract doctrine imposes on the parties a 'duty to read.'"[55] Warkentine noted that the practical result of this duty is that "if a party objectively manifests assent to be bound to a contract (for example, by signing a written contract document), a court will almost automatically find assent to all terms contained in the writing."[56] Thus, parties will find little relief in defenses like "I didn't read it"

[48]*See* Moringiello, *supra* note 2, at 1314.

[49]*Id.*

[50]Barnes, *supra* note 9, at 228.

[51]*See* Moringiello, *supra* note 2, at 1314.

[52]Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up To Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173, 176 (2007).

[53]*Id.*

[54]Kim, *supra* note 2, at 799 (citing Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 9–10 (1993)).

[55]Warkentine, *supra* note 8, at 476.

[56]*Id.*

or "I didn't understand it."[57] Warkentine advocated a "knowing-assent" analysis for standard-form contracts, which, regarding an unbargained-for term, would require "(1) that the unbargained-for term be conspicuous; (2) that the importance of that term be explained so that the adhering party understands its significance; and (3) that the adhering party objectively manifests its assent to that term separately from its manifestation of assent to undertaking a contractual obligation."[58]

Yet, notwithstanding all of the academic attention paid to the problems with terms of use, courts seem to be struggling less than scholars with the enforcement of terms of use. In their 2007–08 survey of electronic-contracting cases, Juliet Moringiello and William Reynolds noted that "wrap" agreements do not present novel legal issues, only novel facts, which the courts have handled through analogy.[59] They found that the law of electronic contracting has matured to comport with traditional contract law, stating, "An offeree who 'signs' an agreement by hitting the 'I accept' button is bound to its terms just as much as will someone who signs a paper contract. Repeat and sophisticated players will be more likely bound by more ambiguous forms of assent than will innocent ones."[60]

In a previous review of Internet contracting cases, Moringiello and Reynolds asserted that "the question has apparently become one of procedure (whether notice was properly given) rather than one of substance (whether the terms were unfair in some sense)."[61] They observed that

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[57]*Id.*

[58]*Id.* at 473.

[59]Moringiello & Reynolds, *supra* note 6, at 218.

[60]*Id. See also* Chundner v. TransUnion Interactive, 626 F. Supp. 2d 1084 (D. Or. 2009); eBay, Inc. v. Digital Point Solutions, Inc., 608 F. Supp. 2d 1156 (N.D. Cal. 2009); Exceptional Urgent Care Center I, Inc. v. Protomed Med. Mgmt. Corp., 2009 WL 2151181 (M.D. Fla. July 13, 2009); Jackson v. American Plaza Corp., 2009 WL 1158829 (S.D.N.Y. Apr. 28, 2009) (stating "A 'terms of use' or 'terms of service' contract is often entered into by clicking an 'I agree' button on a webpage"); Riggs v. MySpace, 2009 WL 1203365 (W.D. Pa. May 1, 2009); Davis v. Dell, 2007 WL 4623030 (D.N.J. Dec. 28, 2007); Hauenstein v. Softwarp Ltd, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007) (stating, "Plaintiff's assent to the terms of the License Agreement, manifested through his 'clicking' the 'I agree' button, binds him to the terms of the License Agreement"); Oracle USA v. Graphnet, Inc., 2007 WL 485959 (N.D. Cal. Feb. 12, 2007); Recursion Software v. Interactive Intelligence, 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006) (finding "that clickwrap licenses, such as at issue here, are valid and enforceable contracts"); Adsit Co. v. Gustin, 874 N.E.2d 1018 (Ind. Ct. App. 2007); Jallali v. Nat'l Bd. of Osteopathic Med. Exam'rs, 908 N.E.2d 1168 (Ind. Ct. App. 2009); Fieldtech Avionics & Instruments v. Component Control.com, 262 S.W.3d 813 (Tex. App. 2008).

[61]Juliet Moringiello & William Reynolds, *Survey of the Law of Cyberspace: Internet Contracting Cases 2004–2005*, 61 BUS. LAW. 433, 434 (2005).

"[a]pparently it's okay to hang the other side, as long as you've given it proper notice of your intent to do so."[62]

Regarding distinctions made by the courts, Lemley found that "virtually all of the courts that have refused to enforce a browsewrap license have done so to protect a consumer."[63] He observed that the type of party to a contract could affect its enforceability. "[C]ourts seem to be creating [a division] between enforceability against businesses and enforceability against individuals,"[64] Lemley wrote. This distinction is important, as passive media users are one step further away than transactional consumers from commercial entities — those parties who derive the most use from and are obligated most by browsewrap agreements.[65]

If courts are willing to consider a party's characteristics as relevant to a contract's enforceability, then the distinction between passive media users and transactional consumers could be tenable. Although several scholarly articles have addressed contracts and media use,[66] none has expressly examined to what degree terms of use can bind passive media users.

DISTINGUISHING BETWEEN TYPES OF PARTIES IN ONLINE CONTRACTS

Twenty-four of the fifty-six cases analyzed involved disputes between businesses. The remaining thirty-two cases involved disputes between consumers and businesses or consumers who transacted for a Web site's services. This result is unsurprising given the role of contract in ecommerce.[67] These distinctions were at times difficult to make and, in some instances, seemed inconsequential. For example, some of the parties

[62]*Id. See also* Harold H. Huggins Realty v. FNC, 575 F. Supp. 2d 696, 698 (D. Md. 2008) (enforcing a clickwrap agreement and stating, "Normally, the user is informed that the agreement is accepted by using the service and is often asked to acknowledge such acceptance through clicking a radio button labeled with an affirmative statement such as 'I accept.' While clicking on 'I accept' constitutes the user's acceptance of the website's contract under the terms and conditions contained therein, such clicking may in reality merely reflect a desire by the user to simply make the pop-up window disappear. In this sense, these contracts are not unlike many other consumer purchase contracts in that they may not be read by the party agreeing to them but they are also no less valid.").

[63]Lemley, *supra* note 2, at 462.

[64]*Id.* at 476

[65]*Id.*

[66]*See* Ekstrand, *supra* note 7, at 607–11; Daxton R. Stewart, *The Promise of Arbitration: Can It Succeed in Journalism As It Has In Other Businesses?*, 6 APPALACHIAN J.L. 135, 136–37 (2006).

[67]*See* Southwest Airlines v. Boardfirst, 2007 WL 4823761 at *4 (N.D. Tex. Sept. 12, 2007) (stating that "browsewraps have become more prevalent in today's increasingly e-driven commercial landscape").

acting as businesses were individuals who more closely resembled consumers in that they lacked abundant institutional resources or sophistication.[68] Yet the cases revealed distinctions between parties, both in language and in result. While courts did not recognize passive media users explicitly, they seemed to implicitly recognize this class of users in the scope of their rulings. However, courts explicitly recognized businesses, consumers and offline contracting parties as separate classes of parties to a contract. These classifications are important because businesses were seen as more sophisticated than consumers or offline parties. Thus, they were more likely to be bound by online agreements.

Businesses

Mark Lemley stated that "courts presume that businesses know what they are doing when they access another company's Web site and are therefore more likely to bind them to that site's terms of use."[69] Moringiello and Reynolds found that "courts seem willing to treat businesses as fully capable of protecting themselves, absent some form of trickery."[70] Those observations held true for this analysis.[71]

Courts typically held businesses to higher standards than consumers when the businesses claimed to be free from terms-of-use obligations. In *MySpace v. The Globe.com*,[72] the defendant, "a public company that provides internet-based communications services," was accused of sending more that 400,000 unsolicited e-mails to MySpace users after creating a dummy profile — an activity prohibited by plaintiff's terms of use.[73] In refusing to dismiss plaintiff's claim for breach of contract, the United States District Court for the Central District of California stated that "the contract is not written prolixly, particularly for an experienced, sophisticated business entity whose area of expertise involves Internet related technology."[74]

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[68]*See, e.g.,* Costar Realty Info., Inc. v. Meissner, 604 F. Supp. 2d 757 (D. Md. 2009) (involving a dispute between a software licensor and an individual utilizing real estate information services, presumably for commercial purposes); Feldman v. Google, 513 F. Supp. 2d 229 (E.D. Pa. 2007) (involving an individual attorney with his own firm using a Web sites advertising services); Krause v. Chippas, 2007 WL 4563471 (N.D. Tex. Dec. 28, 2007).

[69]Lemley, *supra* note 2, at 460.

[70]Juliet Moringiello & William Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2005–2006*, 62 BUS. LAW. 195, 207 (2006).

[71]*See, e.g.,* Costar Realty Info. v. Copier Country New York, 2009 WL 3247431 (D. Md. Oct. 1, 2009); Productive People v. Ives Design, 2009 WL 1749751 (D. Ariz. June 18, 2009); Oracle v. SAP, 2008 WL 5234260 (N.D. Cal. Dec. 15, 2008); Cairo v. Crossmedia Servs., 2005 WL 756610 (N.D. Cal. Apr. 1, 2005).

[72]2007 WL 1686966 (C.D. Cal. Feb. 27, 2007).

[73]*Id.* at *1.

[74]*Id.* at *9.

Indeed, a business need not be a corporate body to be held to a seemingly higher standard of sophistication than a consumer. Individuals transacting business as sole proprietors, as small unincorporated businesses, or simply as amateurs appear to be more susceptible to online agreements than individuals acting as media users. In *Feldman v. Google*,[75] the federal district court for the Eastern District of Pennsylvania agreed with the defendant's characterization of the plaintiff, an individual using Google's advertising service to promote his business, as a "sophisticated purchaser" who, according to the court, "had full notice of the terms, who was capable of understanding them, and who assented to them."[76] Thus, courts adopting the *Feldman* reasoning would likely conclude that a "reasonably prudent internet user" would have some degree of digital literacy in order to have knowledge of the existence of terms of use.[77]

It is important to note that even in disputes between businesses, the party seeking to enforce the contract must provide evidence that the other party actually visited the Web site. In *Fractional Villas v. Tahoe Clubhouse*,[78] the federal district court for the Southern District of California noted that "[b]ecause the plaintiff cannot show [the rival business], or any of its agents, visited the site, plaintiff fails to show that [the business] accepted the forum selection clause."[79]

Transactional Consumers

Although consumers were routinely held to be bound by online agreements, courts appeared to give them slightly more deference than businesses when deciding whether to enforce terms of use. In *Hines v. Overstock.com,*[80] the federal court for the Eastern District of New York refused to enforce a terms-of-use browsewrap agreement against a consumer who used an online retailer. In this dispute over a restocking fee, the consumer stated that she was never made aware of the terms and conditions sought to be imposed *via* use of the Web site.[81] Specifically, the plaintiff argued:

> Because of the lawsuit, I later learned that if you scroll down to the end of the Web site page or pages, there is in smaller print placed between "privacy policy" and Overstock.com's registered trademark, the words "site

[75]513 F. Supp. 2d 229 (E.D. Pa. 2007).
[76]*Id.* at 240.
[77]*Id.* at 239.
[78]2009 WL 465997 (S.D. Cal. Feb. 25, 2009).
[79]*Id.* at *3.
[80]668 F. Supp. 2d 362 (E.D.N.Y. 2009).
[81]*Id.* at 365.

> user terms and conditions." I did not scroll down to the end of the page(s) because it was not necessary to do so, as I was directed each step of the way to click on to a bar to take me to the next step to complete the purchase.[82]

The court agreed with the plaintiff, finding that plaintiff had no actual or constructive notice of the terms and conditions of use. Particular deference seemed to be given to the plaintiff as a consumer, compared to a business, which is assumed to be sophisticated about contracts. The court found that the defendant "does not explain how a site-user such as Plaintiff is made aware of the Terms and Conditions."[83] The court considered it crucial that the plaintiff "could not even see the link to them without scrolling down to the bottom of the screen — an action that was not required to effectuate her purchase."[84] The court ultimately found that "[v]ery little is required to form a contract nowadays — but this alone does not suffice."[85]

Although the court's analysis in *Hines* seemingly turned on the prominence and placement of the terms of use, when contrasted with the *Feldman* court's language regarding a reliance on the sophistication of users to discover and understand the terms of use, the court's protection of consumers seems to indicate a paternal care for the potentially less sophisticated party.

Indeed, the sophistication of an individual seems to be judged on a sliding scale. In *Druyan v. Jagger*,[86] an individual purchasing a concert ticket online sought to recover damages based on allegations that the defendants intentionally withheld timely notice of a concert's postponement. The federal court for the Southern District of New York deemed the sophistication of the individual significant in determining whether to bind her to the defendant's terms of use. It found that a plaintiff "who avows 'concert expertise' and familiarity with the ticket-sales business, and now alleges that she has been using the [defendant's] website for approximately 5 years, can properly be charged with knowledge of the site's Terms of Use."[87] Consequently, it seems unsophisticated individuals might more plausibly deny knowledge of a Web site's online agreement.

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[82]*Id.*
[83]*Id.* at 367.
[84]*Id.*
[85]*Id.*
[86]508 F. Supp. 2d 228 (S.D.N.Y. 2007).
[87]*Id.* at 237.

Yet this paternalistic distinction is limited, and apparently it does not extend to agreements where the consumer explicitly indicates assent through activities like clicking.[88] In *Burcham v. Expedia*,[89] the federal court for the Eastern District of Missouri found that an individual booking a room on the Web site Expedia.com assented to the Web site's terms and conditions. Although the court had sympathy for the plaintiff, thus slightly distinguishing between sophisticated and unsophisticated parties, it declined to allow the plaintiff's self-confessed ineptitude to influence the decision to bind him to the agreement.[90]

Even minors were not given a reprieve from online agreements if they clicked to signify assent. In *A.V. v. iParadigms*,[91] the United States Court of Appeals for the Fourth Circuit affirmed a district court's decision to bind minors to a terms-of-use clickwrap agreement notwithstanding their asserted infancy defense, which renders contracts voidable at the option of the minor.[92] The court held that "plaintiffs cannot use [the infancy] doctrine as a 'sword' to void a contract while retaining the benefits of the contract-high school credit and standing to bring this action."[93]

Offline Contracting Parties

A few parties to disputes sought to enforce terms of use that were located on a Web site that was not visited by the other party.[94] In those cases, the party seeking enforcement argued that the terms were incorporated by reference into a separate and/or offline contract, such as a sales contract. Courts did not accept this argument for consumers and

[88]*See* Chundner v. TransUnion Interactive, 626 F. Supp. 2d 1084 (D. Or. 2009) (binding an individual to a clickwrap agreement as part of a credit monitoring service subscription); Riggs v. MySpace, 2009 WL 1203365 (W.D. Pa. May 1, 2009) (binding an individual media user to a clickwrap agreement as part of the MySpace registration process); Davis v. Dell, 2007 WL 4623030 (D.N.J. Dec. 28, 2007) (binding an individual to a clickwrap agreement as part of a purchase of a television); Jallali v. Nat'l Bd. of Osteopathic Med. Exam'rs, 908 N.E. 2d 1168 (Ind. Ct. App. 2009) (binding an individual registering for a licensing exam to become an osteopathic physician); Adsit Co. v. Gustin, 874 N.E.2d 1018 (Ind. Ct. App. 2007) (binding an individual to a clickwrap agreement as part of a purchase of armrest covers).

[89]2009 WL 586513 (E.D. Mo. Mar. 6, 2009).

[90]*Id.* at *4.

[91]562 F.3d 630 (4th Cir. 2009).

[92]*Id.* at 636.

[93]*Id.*

[94]*See* Greer v. 1-800-FLOWERS.COM, 2007 WL 3102178 (S.D. Tex. Oct. 3, 2007) (questioning whether a Web site's terms of use agreement is binding on a consumer making a purchase using the telephone); Hotels.com v. Canales, 195 S.W.3d 147 (Tex. App. 2006).

did not bind these "offline" consumers to online agreements. Business-to-business disputes were inconsistently decided, although courts consistently found businesses to be sophisticated contracting parties.[95] It is potentially significant that it was individuals, not businesses, who were released from their contractual obligations.

In *Hotels.com v. Canales*,[96] a class-action dispute over taxes and fees charged by the Web site, the defendant sought to enforce the user agreement against a class of plaintiffs who used its hotel booking service. The terms of use were accessed through the defendant's Web site as a clickwrap agreement, but persons making reservations by phone might not have viewed the online user agreement.[97] The Texas Court of Appeals noted that individuals who used the defendant's service through the Web site might be subject to the agreement, but individuals who made hotel reservations over the phone were not.[98] Thus, when parties are contracting offline and one party seeks to enforce a Web site's terms of use, courts evaluate such factors as whether reference to the terms was "clear and unequivocal," whether reference to the terms was brought to the attention of the other party, whether the other party consented to the inclusion of the terms, and whether the terms were known or easily available to the contracting parties.[99]

Passive Media Users

It is significant that none of the cases analyzed involved a passive media user. While several interactive media users — those maintaining a reciprocal relationship with Web sites or engaging in high levels of interactivity with Web sites — were involved in contractual disputes,[100] all of them either registered for a service or created a profile, both of which included clickwrap agreements which, as has been addressed previously, consistently binds all types of parties.

Yet it is clear that courts are willing to make distinctions based on the type of party. This was often found in courts' analyses of the unconscionability defense — essentially a claim of unequal bargaining

[95]*See, e.g.*, Hugger-Mugger v. NetSuite, 2005 U.S. Dist. LEXIS 33003 (D. Utah Sept.12, 2005) (finding that Web site terms were part of a written contract between two businesses); Affinity Internet v. Consol. Credit Counseling Servs., 920 So. 2d 1286 (Fla. Dist. Ct. App. 2006) (finding that Web site terms were not part of a written contract between two businesses).

[96]195 S.W.3d 147 (Tex. App. 2006).

[97]*Id.* at 150.

[98]*Id.* at 156.

[99]*See Hugger-Mugger*, 2005 U.S. Dist. LEXIS 33003, at *14; *Greer*, 2007 WL 3102178 (finding that plaintiff's invocation of the Web site's privacy policy also mandated assent to the terms of use).

[100]*See, e.g.*, Bowen v. YouTube, 2008 WL 1757578 (W.D. Wash. Apr. 15, 2008).

positions and/or hidden terms in adhesion contracts or overly hard or one-sided results that "shock the conscience."[101]

Moringiello and Reynolds stated that the case of *Aral v. Earthlink*[102] "reminds us that sometimes contracts between a business and a consumer are treated differently than from those between two businesses."[103] In *Aral*, the California Court of Appeal refused to enforce a class-action-waiver clause and an arbitration clause because they "are unconscionable where the case involves allegations that a large number of consumers have been cheated out of a small sum of money."[104] Moringiello and Reynolds found that "[t]he lesson in the case for parties questioning the enforceability of Internet contracts is that when a consumer is a party to the contract, mere notice of terms might not be sufficient. The terms themselves must also be reasonable."[105]

Although it remains to be seen the exact standard passive media users will be held to, it appears that their defining traits will play a significant role in a court's analysis.

OTHER FACTORS CONSIDERED IN ONLINE CONTRACT CASES

In addition to distinguishing between the types of parties in online-contract cases, courts also considered numerous other factors in determining whether to bind parties to online agreements. Of greatest significance to passive media users are proper notice, interactivity, timing and the scope of the terms. Passive media users are least likely to have adequate notice of online agreements because online agreements are typically accessed only at the user's option through hyperlinks on a Web site's home page. Browsewrap agreements are typically not conspicuously or affirmatively presented to users.[106] Additionally, courts seem more likely to bind those users who utilize multiple Web site features to online agreements rather than those who simply click links. Finally, passive media users might not be covered by the scope of terms of use because they are not the contemplated users of the Web site's services.

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[101]Feldman v. Google, 513 F. Supp. 2d 229, 239 (E.D. Penn. 2007) (citations omitted).

[102]36 Cal. Rptr. 3d 229 (Cal. Ct. App. 2005).

[103]Moringiello & Reynolds, *supra* note 70, at 205.

[104]36 Cal. Rptr. 3d at 232.

[105]Moringiello & Reynolds, *supra* note 70, at 205.

[106]*See* Andrea M. Matwyshyn, *Mutually Assured Protection: Toward Development of Relational Internet Data Security and Privacy Contracting Norms*, *in* SECURING PRIVACY IN THE INTERNET AGE 80 (Anupam Chander et al. eds. 2008) (finding that "traditional browsewrap format ... does not provide the requisite notice to users.").

Notice

Courts considered notice the most important factor in determining whether to bind a party to an online agreement. In nearly every clickwrap agreement, and with most browsewrap agreements, notice was found by evaluating the prominence, location and language indicating an intent to bind the Web site user.[107] In their examination of *Defontes v. Dell Computers Corporation,*[108] Moringiello and Reynolds stated that "it is not enough that the terms can be found somewhere; the terms also must be presented in such a way that they can be found by the reasonable user."[109]

Clickwrap agreements were nearly uniformly found to constitute proper notice to Web site users. In *Adsit Company v. Gustin*,[110] for example, the Indiana Court of Appeals Indiana found that the defendant's policy

> [G]ave reasonable notice of the terms. To complete a transaction, a user must accept the policy, the text of which is immediately visible to the user. The user is required to take affirmative action by clicking on the "I Accept" button; if the user refuses to agree to the terms, she cannot engage in the transaction.[111]

Notice was established for browsewrap agreements in several ways. In *Druyan*, the United States District Court for the Southern District of New York found notice of a browsewrap agreement to the user where:

> To purchase her tickets from [the defendant], the plaintiff was required to click on a "Look for Tickets" button, immediately above which appears the statement "By clicking on the 'Look for Tickets' button or otherwise using this web site, you agree to the '*Terms of Use*.'" Clicking on the "*Terms of Use*" link presents the full Terms of Use, including the "Purchase Policy"

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[107]*See, e.g.,* Burcham v. Expedia, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009); Facebook v. Power Ventures, 2009 WL 1299698 (N.D. Cal. May 11, 2009); Riggs v. MySpace, 2009 WL 1203365 (W.D. Pa. May 1, 2009); Mazur v. eBay, 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. Mar. 3, 2008); Brazil v. Dell, 2007 U.S. Dist. LEXIS 59095 (N.D. Cal. Aug. 2, 2007); Feldman v. Google, 513 F. Supp. 2d 229, 239 (E.D. Pa. 2007); Hauenstein v. Softwarp Ltd, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007); Krause v. Chippas, 2007 WL 4563471 (N.D. Tex. Dec. 28, 2007); MySpace v. The Globe.com, 2007 WL 1686966 (C.D. Cal. Feb. 27, 2007); Southwest Airlines Co. v. Boardfirst, LLC, 2007 U.S. Dist. LEXIS 96230, 2007 WL 4823761 at *5 (N.D. Tex. Sept. 12, 2007); Motise v. Am. Online, 346 F. Supp. 2d 563 (S.D.N.Y. 2004); Adsit Co. v. Gustin, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007); Hotels.com v. Canales, 195 S.W.3d 147 (Tex. Ct. App. 2006).

[108]2004 WL 253560 (R.I. Jan. 29, 2004).

[109]Moringiello & Reynolds, *supra* note 70, at 437.

[110]874 N.E.2d 1018 (Ind. Ct. App. 2007).

[111]*Id.* at 1023 (citing Feldman v. Google, 513 F. Supp. 2d 229 (E.D. Pa. 2007)).

> and a link directly to that policy, and the "Cancelled/Postponed Events" policy and a link directly to that policy. [The defendant's] Terms of Use are sufficiently conspicuous to be binding on the plaintiff as a matter of law.[112]

Thus, large font and a hyperlink to terms "above the fold" or at least conspicuously placed seem to factor strongly into court's decisions to bind Web site users to online agreements.

In *Recursion Software v. Interactive Intelligence*,[113] the federal court for the Northern District of Texas examined whether disclaimers of implied merchantability and fitness for a particular purpose were done in a conspicuous manner. According to the Uniform Commercial Code (U.C.C.), "[A] conspicuous term is one that is displayed in such a way that a reasonable person 'ought to have noticed it.'"[114] Moringiello and Reynold found that "the disclaimer at issue [in *Recursion*] was conspicuous because it was written in capital letters and because the License Agreement was relatively short."[115]

Also important in establishing notice for browsewrap agreements was the number of times a user had visited a Web site. Although no magic number was mentioned in any of the cases, regular visitors and those who had visited Web sites numerous times were more likely to be found to have proper notice than those who visited infrequently.[116] The question of whether a user who visited a Web site only once will be held to have notice has yet to be answered.[117]

Modifications to contracts will not be upheld unless a party had proper notice of the modification. In *Douglas v. United States District Court*,[118] an individual (notably not a business) contracting online for long-distance telephone service was not held to a term that was modified by the Web site owner without any notification to the individual.[119] The Ninth Circuit held that "a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. This is because a revised contract is merely an offer and does not bind the parties until it is accepted."[120] Thus, the court found that "[t]he district

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[112]508 F. Supp. 2d 228, 237 (S.D.N.Y. 2007).

[113]425 F. Supp. 2d 756 (N.D. Tex. 2006).

[114]U.C.C. § 1-201(b)(10) (2006).

[115]Moringiello & Reynolds, *supra* note 70, at 206.

[116]*See* Register.com v. Verio, 356 F.3d 393 (2d Cir. 2004); Ticketmaster v. RMG Technologies, 2007 WL 2989504 (C.D. Cal. Oct. 12, 2007); Cairo v. Crossmedia Servs., 2005 WL 756610 (N.D. Cal. Apr. 1, 2005).

[117]*See* Moringiello & Reynolds, *supra* note 61, at 436.

[118]495 F.3d 1062 (9th Cir. 2007).

[119]*Id.*

[120]*Id.* at 1067.

court . . . erred in holding that [the plaintiff] was bound by the terms of the revised contract when he was not notified of the changes."[121]

Interactivity

Interactivity proved to be significant in two was. First, a highly interactive Web site seemed to be more likely to subject a user to a clickwrap agreement.[122] Thirty-eight of fifty-six cases analyzed clearly involved clickwrap agreements. Thirteen cases clearly involved browsewrap agreements. The remaining five cases were not clear regarding the nature of the contract. Since interactivity requires user participation, clicking would seem the appropriate method of securing assent. Additionally, the interactivity of a Web site helps determine whether a court can exercise personal jurisdiction over a user.[123]

Although a full analysis of personal jurisdiction and online agreements is beyond the scope of this article, it is sufficient to note that courts possess discretion to decline to exercise jurisdiction if the parties' freely and voluntarily choose a different forum.[124] In other words, if the terms of use contain a provision acknowledging the user's consent to jurisdiction in a specified forum, then binding the user to that agreement prohibits the user from denying the exercise of personal jurisdiction over them. Thus a high level of interactivity simultaneously increases the likelihood of binding the user to an online agreement and establishing a court's personal jurisdiction over a user within a specified forum.[125]

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[121]*Id.*

[122]*See, e.g.,* Burcham v. Expedia, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009); Facebook v. Power Ventures, 2009 WL 1299698 (N.D. Cal. May 11, 2009); Riggs v. MySpace, 2009 WL 1203365 (W.D. Pa. May 1, 2009); Bowen v. YouTube, 2008 WL 1757578 (W.D. Wash. Apr. 15, 2008); Feldman v. Google, 513 F. Supp. 2d 229 (E.D. Penn. 2007); Hauenstein v. Softwarp Ltd, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007) (finding that "[p]laintiff has to register, and agree to terms of the contract before he could ever use [defendant's] products. Plaintiff's assent to the terms of the License Agreement, manifested through his 'clicking' the 'I agree' button, binds him to the terms of the License Agreement."); MySpace v. The Globe.com, 2007 WL 1686966 (C.D. Cal. Feb. 27, 2007); Nazaruk v. eBay, 2006 WL 2666429 (D. Utah Sept. 14, 2006); Motise v. Am. Online, 346 F. Supp. 2d 563 (S.D.N.Y. 2004); Hotels.com v. Canales, 195 S.W.3d 147 (Tex. Ct. App. 2006).

[123]*See Bowen*, 2008 WL 1757578:

> The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal due process. . . . . To satisfy due process, a defendant, if not present in the forum, must have "minimum contacts" with the forum state such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice."

Id. at *1 (citations omitted).

[124]*See Riggs*, 2009 WL 1203365 at *3 (W.D. Pa.).

[125]*See Bowen*, 2008 WL 1757578.

Timing

Courts often looked to *when* the terms of use were presented to the user. If the terms of use were presented before the user was allowed to use the Web site, the user will likely be deemed to have assented to the agreement.[126] In *Burcham*, for example, the federal district court for the Eastern District of Missouri found that "[a] customer must affirmatively click on a box on the Web site acknowledging receipt of and assent to the contract terms before he or she is allowed to proceed using the Web site. Such agreements have been routinely upheld by circuit and district courts."[127]

If the terms of use are not presented until after registration or use of the Web site, the terms of use are less likely to bind the user. In *Douglas v. United States District Court*, the Ninth Circuit would not enforce a modified terms of use because "[p]arties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other party."[128] Also, in *Hines v. Overstock.com*, the federal district court for the Eastern District of New York refused to enforce a browsewrap agreement because, among other things, the plaintiff was allowed to use the Web site without any prompting to review the terms of use.[129]

Scope of the Terms

The case of *Truebeginnings v. Spark Network Services*[130] illustrates a factor that could be relevant to passive media users — the scope of the terms of use. If the online agreement is explicitly limited to a particular type of activity (purchasing) or user (customer), then passive media users would not be bound by the terms of use. In *Truebeginnings*, the plaintiff operated an online dating service.[131] The defendant owned

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[126]*See Burcham*, 2009 WL 586513. *See also Feldman*, finding it significant that:

> At the bottom of the webpage, viewable without scrolling down, was a box and the words "Yes, I agree to the above terms and conditions." The advertiser had to have clicked on this box in order to proceed to the next step. If the advertiser did not click on "Yes, I agree" and instead tried to click on the "Continue" button at the bottom of the webpage, the advertiser would have been returned to the same page and could not advance to the next step. If the advertiser did not agree to the [defendant's] contract, he could not activate his account, place any ads, or incur any charges. Plaintiff had an account activated. He placed ads and charges were incurred.

513 F. Supp. 2d at 233.

[127]*Burcham*, 2009 WL 586513 at *2.

[128]495 F.3d 1062, 1066 (9th Cir. 2007).

[129]668 F. Supp. 2d 362 (E.D.N.Y. 2009).

[130]631 F. Supp. 2d 849 (N.D. Tex. 2009).

[131]*Id.* at 851.

a patent for "matching compatible profiles," which potentially covered plaintiff's Web site. In preparation for potential litigation, a user associated with defendant's law firm, gained access to the Web site and accepted the Terms of Use before taking screenshots of his computer monitor as part of an investigation to determine whether plaintiff was infringing on defendant's patent.[132] This activity is prohibited by plaintiff's terms of use.

Yet the online agreement was drafted in such a way as to govern only the "services offered" by the Web site, which were defined as the profile-matching service, not a mere use of the Web site (general browsing, for example). As a result, the district court for the Northern District of Texas found that the defendants were entitled to summary judgment on plaintiff's breach-of-contract claim because their conduct was outside the scope of the terms of use.[133] Thus, under this court's rationale, any passive media users accessing sites whose online agreements cover only interactive activity will not be bound to the terms of use.

IMPLICATIONS OF THOSE CONSIDERATIONS FOR PASSIVE MEDIA USERS

The relevant case law indicates that passive media users are unlikely to be bound by most terms of use agreements.[134] Yet this conclusion is only implicit, which is part of the problem. A stringent application of standard-form contract doctrine could still result in enforcement of online agreements against these users if, for example, knowledge of the terms could be proven *ex post facto*.[135] Additionally, courts failed to use language that could be relied upon by individuals in order to simply access Web sites without fear of contractual obligation.

Sophisticated businesses and anyone entering into clickwrap agreements will likely be bound by online agreements. Yet, consumers receive more paternalistic treatment from courts, which will only enforce a browsewrap agreement if sufficient notice of the agreement was given.

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[132]*Id.* at 852.

[133]*Id.* at 856.

[134]Indeed, it appears that a large number of browsewrap terms of use agreements may not legally enforceable against anyone. In an empirical study of seventy-five Web site terms of use agreements and privacy policies, Andrea Matwyshyn found that "terms of use of the forty-nine websites in the sample whose terms of use consisted of more than a simple copyright notice would most likely be deemed unenforceable under current Internet contracting case law." Matwyshyn, *supra* note 106, at 80.

[135]*See* Southwest Airlines Co. v. Boardfirst, LLC, 2007 WL 4823761 at *5 (N.D. Tex. Sept. 12, 2007) (finding that actual knowledge of terms of use supported the formation of a binding browsewrap contract).

Courts generally consider consumers to be less sophisticated than businesses. Given this protective tendency of the courts, passive online media users might not be subject to terms of use agreements because they often lack notice, are typically less sophisticated than businesses, and might lack the intent to contract.

In 2002, Victoria Ekstrand conducted an analysis of the online-user agreements of the top fifty U.S. daily circulation newspapers in the United States.[136] She found that "[n]early all the user agreements in the study were found by clicking on small type found at the bottom of the home page. Half of the fifty online news user agreements stipulated that use of the site was an acceptance to the terms."[137] Given that the terms of use are typically buried[138] and that traditional offline media entities do not require their readers, viewers or listeners to sign contracts, passive media users largely lack the typical indicia of notice to bind them to online agreements.

Distinctions regarding sophistication can also be drawn between consumers and passive media users. Consumers often have long-standing relationships with online retailers such as Amazon, eBay and Half.com. The goals of content-based Web sites and e-commerce retailers are not necessarily the same, as viewers are different from consumers. Web sites seeking viewers are successful as soon as a visitor accesses a page. However, Web sites seeking consumers are only successful upon the completion of a transaction for goods or services. Many visitors to a Web site have no intention of revisiting the Web site and simply browse one story, posting or page. These one-time visitors are more likely than return users to lack the desired sophistication, at least with regard to how that Web site functions and where it places its terms of use.

While the intent to form a contract is not dispositive of being bound by online agreements,[139] it is worth considering the implications of binding those who have little interactivity with a Web site to a contract. If a passive media user accesses a Web site with terms of use buried at the bottom of a homepage and simply views, reads or listens to online content, arguably such a user should not be bound by the online agreement for the simple fact that he or she didn't have the intent to enter into an agreement, nor did he or she have actual knowledge of the terms. To

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[136]Ekstrand, *supra* note 7.

[137]*Id.* at 607.

[138]*Id.*

[139]*See, e.g.*, Burcham v. Expedia, 2009 WL 586513 at *3 (E.D. Mo. Mar. 6, 2009) (finding that "[i]t is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree").

reiterate the thesis of this article, if the goal of contracts is to enforce the expectation of *all* parties to a contract,[140] then it makes little sense to enforce contracts against a party with *no* contractual expectations.

The notice requirement built into contract doctrine seeks to address this problem. But a finding of notice isn't based solely on the placement of terms on a Web page. Instead, the case law reveals that courts also look at the characteristics of the party charged with notice. Businesses and consumers usually interact in a way that engenders a relationship such that the parties should come to expect contractual obligation. Users are encouraged to click signifying assent to terms that create a contractual relationship. Businesses often negotiate and have every reason to seek and understand the terms to any agreement they enter into.

However, passive media users engage in none of this activity and have little in common with businesses and, to an extent, consumers. Their participation is limited to media consumption that is comprised of clicking on links to go from one piece of content to the next. Money does not change hands, true relationships are not formed, and, in the absence of conspicuous agreements, there is little reason for users to believe they will be subject to contracts that remove many procedural and substantive safeguards for individuals, such as personal jurisdiction and the right to seek resolution of disputes in a trial.

Yet there are a number of situations in which a passive media user could be affected by binding terms of use. Authors of copyrighted material might stumble upon their work republished on a Web site without authorization. An author's initial access of the Web site purportedly binds the author to the jurisdiction chosen in the terms of use to resolve a lawsuit for copyright infringement.[141] An embarrassed teenager might discover a private photograph of herself published on her favorite Web site, only to find that the Web site disclaimed liability for any harm to users in their online agreement. Bloggers wanting to republish breaking news are purportedly bound by the information use restrictions imposed by Web sites that they might have only visited once.[142] The broad range

[140]*See* LORD, *supra* note 14, at § 1:1 (stating "Contract law is designed to protect the expectations of the contracting parties") (citing MCA Television Ltd. v. Pub. Interest Corp., 171 F.3d 1265 (11th Cir. 1999)).

[141]*See* Krause v. Chippas, 2007 WL 4563471 (N.D. Tex. Dec. 28, 2007) (enforcing a forum selection clause in a browsewrap agreement because the plaintiff consented to the terms of use when he used the Web site).

[142]*See* Internet Archive v. Shell, 505 F. Supp. 2d 755 (D. Colo. 2007) (discussing a plaintiff's contention that a Web site formed a contract with her by visiting her Web site and later reproduced her content in violation of her terms of use.); Scranton Times v. Wlikes-Barre Publ'g Co., 2009 WL 3100963 (M.D. Pa. Sept. 23, 2009)(denying an objection to a breach of contract claim whereby a browsewrap contract imposed restrictions on the use of information found on the Web site).

of interests implicated by the expansive language included in terms of use often reaches beyond the user's activity on that particular Web site. These terms affect all Web site users, passive or not.

The *de facto* exemption of passive media users from terms of use, which has been identified by this research, should be explicitly recognized by the courts. This exemption could provide benefits for both Web sites and users. By explicitly exempting this class, passive online media users would not be forced to keep watch for agreements they likely never read and might not have known existed. Judicial articulation of this exemption might appear to have little significance. After all, empirical research and case law reveal that most passive online media users are unlikely to be bound by Web site terms of service.[143] However, an explicit exemption would offer something that is currently missing: clarity.

Courts could better articulate this exemption that they have already implicitly created to eliminate confusion: Users who are browsing — simply reading, listening or viewing — will not be bound contractually absent a conspicuous notice of terms and intentional expression of assent separate from media consumption. If at any point they are conspicuously presented with terms of use and click to agree to the terms, contribute content, or register with a Web site, they could be bound by the terms of use. Under this approach, a court would no longer assume notice and assent from the simple act of browsing. Rather, courts would require more convincing proof of assent to the terms of use beyond a showing of mere media consumption.

Explicit articulation of this exemption would solidify increasingly accepted doctrine, and thus encourage and guide the creation of binding contracts. The current confusion regarding enforcement of browsewrap agreements could be better resolved. Recognition of the exemption would benefit those seeking to enforce online agreements by providing more predictability. The exemption could encourage businesses to seek a clearer affirmative assent to their terms, thus avoiding surreptitious agreements while promoting the freedom to form contracts.

CONCLUSION

Traditionally, the study of contracts has not been included as a core area of journalism and mass communication law research. However, the Internet has increased the significance of contracts in the field.

[143]*See, e.g.,* Specht v. Netscape Comm. Corp., 306 F.3d 17 (2d Cir. 2002); Hines v. Overstock.com, 668 F. Supp. 2d 362 (E.D.N.Y. 2009); Ekstrand, *supra* note 7, at 607; Matwyshyn, *supra* note 106, at 80.

Terms of use are ubiquitous and broad in scope. Legally, the doctrine of online agreements is still developing, although approaching maturity. The full impact of browsewrap and clickwrap contracts has likely yet to be realized.

The purpose of this article was to determine if passive media users were bound by terms of use agreements. An analysis of recent case law reveals that a binding effect is unlikely but possible under some circumstances. Courts do not explicitly recognize passive online media users as a category of Web site users separate from interactive users, transactional consumers, and businesses in terms-of-use cases. Yet the factors courts consider significant when refusing to enforce online agreements are all indicia of readers, viewers and listeners who do not click to signal assent. Although courts almost uniformly enforced clickwrap agreements for all parties, they were more apt to bind businesses to terms of use than consumers. Typically, their rationale was that businesses were more sophisticated than consumers and, thus, more capable of understanding the consequences of agreeing to the terms of use.

Meanwhile consumers and, by implication, passive media users, might not have a full understanding of their agreed-upon rights and responsibilities, and they might not even know they agreed to any terms at all. Thus, courts were typically more hesitant to enforce terms of use against consumers, or they simply imposed higher barriers on parties seeking to enforce agreements. Courts looked to see if parties sought to be bound had proper notice, interactivity with the Web site, had been presented with the terms of use before using the Web site, and fell within the scope of the terms.

These considerations by courts seem to create a *de facto* exemption for passive media users in many contexts. In order to better enforce the expectation of both parties to a contract, courts should explicitly recognize this exemption of users. Those drafting and ultimately hoping to enforce online agreements would then be charged with creating terms of use that alleviate some of the paternalistic concerns of a court such as spotlighting the terms of use for users and requiring a more explicit form of consent beyond a vague "use" of the Web site, which could include passive consumption of media.

As a result, Web site users would be in a better position to determine whether they are bound by or free from terms of use obligations. Interactive media users could be more reliably charged with notice of the terms while passive media users would not suffer the harsh result of being bound to contracts of adhesion when they weren't even aware of a Web site's terms of use.

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The Changing Face of Privacy in the Digital Age

Samuel Warren and Louis Brandeis first advanced the concept of a "right to be let alone" in 1890. Fifty years ago, Dean William Prosser expanded on that concept. Increasingly, however, questions are arising as to exactly what is meant by the right to be let alone and whether Dean Prosser's classic four torts still cover the range of privacy issues. A growing number of privacy disputes involve a variety of torts, statutes, administrative regulations and contracts.

Communication Law and Policy, the research journal of the Law Division of the Association for Education in Journalism and Mass Communication, is exploring these questions. The journal is publishing a special issue examining the evolution of privacy and its role in the age of online communication. Papers may address any issues—historical, legal or cultural—related to the topic. That is, papers may be reflective, evaluative or prophetic—focusing on the history, status or future of privacy law. Possible topics might include issues related to social media, behavioral advertising, anonymous speech online, data security, current or proposed privacy legislation, the privacy implications of copyright law and digital rights management, Web site terms of use and privacy policies, computer misuse statutes, wrongful surveillance, the Freedom of Information Act or the traditional privacy torts.

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