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ONLINE DISCLOSURES

The Federal Trade Commission's recent proposed settlement with retailer Sears regarding an alleged failure to adequately disclose the scope of consumer personal information collected by marketing research software is at odds with established industry and regulatory practice. The settlement has the potential to create substantial uncertainty for online commerce, and thereby undercut the clear rules that have helped the Internet become a robust engine of economic growth and consumer choice.

End of the Notice Paradigm?: FTC's Proposed *Sears* Settlement Casts Doubt On the Sufficiency of Disclosures in Privacy Policies and User Agreements

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On June 4, the Federal Trade Commission (''FTC'') announced a proposed settlement regarding an alleged failure to adequately disclose the scope of consumer personal information collected by marketing research software that could portend a significant shift in the FTC's willingness to recognize and accept consumer consent based on disclosures communicated in detailed notice documents.

The FTC's enforcement action is surprising because Sears appears to have highlighted the relevant practices, at least in short hand form, in its up-front pitch to pay consumers to download software that would track their ''online browsing'' activities. Sears then more fully disclosed the practices in the relevant privacy statement/user license agreement. The full disclosures were available to consumers who could scroll down and review the terms of the agreement before being required to explicitly agree (opt-in) to download software and participate in the tracking program. The FTC faulted Sears despite the fact that the company had conspicuously alerted consumers that the software would broadly track their ''online browsing'' activities, because the precise explanation of the tracked activities was not spelled out until the 75th line of the user agreement. The FTC criticized Sears because ''*[o]nly* in a lengthy user license agreement did [Sears] disclose that the Application would: monitor nearly all of the Internet behavior that occurs on consumers' computers.'' Sears Holding Mgmt. Corp., No. 0823099, at 1 (.F.T.C. 2009), (analysis of proposed consent order) available at http://www.ftc.gov/os/caselist/0823099/090604searspcomment.pdf

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The agency's characterization that ''only'' the user agreement set forth the details of the company's practices is a significant change in FTC enforcement, and may reflect the view, as summarized by David Vladeck, director of the FTC's Bureau of Consumer Protection, that '' 'notice and consent may have outlived its usefulness.' '' Amy E. Bivins, *FTC Attorneys Say Additional Inquiry Coming Regarding Data Collections or Web Targeting*, E-Commerce Law Daily (BNA), June 22, 2009. This could portend a shift away from a contract-based, consumer choice model, and toward a more prescriptive set of government rules. What is not clear is whether the FTC intends this new model to apply to all

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privacy issues, or only conduct deemed particularly sensitive, such as online tracking. It should be noted, however, that the consumers agreeing to download Sears' tracking software apparently did so only after affirmatively signifying their opt-in consent—this was not a case where consumer consent was implied, or where the key disclosures were not reasonably available to the consumer before he or she accepted the terms in question.

This proposed settlement is thus potentially significant because Sears' conduct does not necessarily strike one as particularly egregious in light of the company's actual disclosures. One imagines that the reasonable expectations of consumers who chose to be paid to have their online activities tracked is that they would have their online activities tracked. Heretofore, the FTC had emphasized that it was not engaged in a game of ''Gotcha'' with online business. The *Sears* settlement, on the other hand, could easily have caught the respondent company by surprise—especially since Sears was unquestionably providing something of value to the participating consumers in exchange for their reduced privacy (i.e., paying them cash).

Sears' software tracked consumer online browsing data, including secure sessions such as online bank statements, third party shopping carts, and the sender, recipient, subject and size of Web-based e-mails. In this regard, it would seem not dissimilar from widely-used programs such as Gmail. The settlement would require Sears to stop collecting data from those who had agreed to download the software, destroy all previously collected data, and in addition to the privacy policy and end user agreement, include prominent additional disclosures on separate screens, and elicit an additional and separate consent process for the collection of online browsing data in the future. Such requirements are novel, and may reflect a brave new world of online regulation in which the FTC has the authority to determine—without providing robust notice or soliciting effective input from the consumer or business stakeholders—that certain practices are illicit. Further, the rejection of the disclosures in the privacy statement and user agreement as inadequate could represent a significant turn-around, since most companies have heretofore understood the FTC to favor—not oppose—the detailed disclosure of a company's practices in user agreements, privacy policies or terms of service. The proposed consent agreement is additionally troubling to the extent that it casts doubt on the validity of disclosures a company makes in its privacy policy, user agreement, or terms of service—one of the cornerstones of online commerce. While the FTC—and consumer protection jurisprudence, in general—is often critical of ''fine print'' disclosures that undercut the thrust of what consumers reasonably understand the agreement to be, here Sears was conspicuously inviting, and paying, consumers to have their online activities tracked. The details of that tracking had to appear somewhere, and one would have thought that the user agreement accepted by the consumer before downloading the tracking software would be an obvious place for them.

The proposed settlement may create substantial confusion in the marketplace. Companies may begin to re-evaluate the wisdom of publishing detailed privacy polices if the *Sears* settlement were to signal a trend that such policies only give rise to liabilities, and are not a valid basis to inform consumers and establish consent. If this decision is finalized in its current form, and if the Commissioners indicate that the erstwhile notice paradigm is legally insufficient to protect consumers, then the FTC should publish clear rules for how they expect companies to communicate online with their consumers. At a minimum, the FTC should provide a ''safe harbor'' for where key privacy disclosures should appear and what they must contain.

The FTC should ensure that it effectively solicits and weighs all relevant considerations from interested parties so as to protect consumers without unduly inhibiting online enterprise. While the comment period for this proposed settlement may prompt thoughtful attention, it may not be sufficient to fully vet the potential consequences. The online community, and businesses that are actively engaged in electronic commerce, should encourage the FTC to pursue traditional ''notice and comment'' regulatory procedures rather than one-off adjudication to adopt new general standards.

Sears 'My SHC' Community Agreement

From April 2007 until January 2008, Sears Holdings Management Corporation, a subsidiary of Sears, Roebuck and Co. and Kmart, developed and implemented a program to bring together customers with market research analysts through its online portals, sears.com and kmart.com. *Sears Holdings Mgmt. Corp.*, No. 082 3099, ¶¶ 3 & 5 (F.T.C. June 4, 2009) (complaint) (''*Sears Complaint*''). As part of the program, users were invited to participate in the ''My SHC Community,'' allowing them to share their preferences and opinions on Sears and Kmart products and services. Id. ¶ 5. In addition to participating in the online community, users were asked to provide Sears with contact information and download an application that would ''confidentially track [their] online browsing.'' Id. ¶ 6. In exchange for retaining the application for at least one month, users would receive a $10 payment. Id.

If a customer chose to participate in Sears's program, he or she was invited to proceed through a series of registration steps, each requiring express consent to continue. Customers were first presented with a pop-up box informing them of the ''My SHC Community,'' which was described as a ''new'' and ''different'' ''dynamic and highly interactive on-line community,'' and inviting consumers to provide their e-mail address to receive a follow up e-mail with more information. Id. ¶ 5. If they so chose, they would then receive an e-mail describing the SHC Community, including how to join:

> You'll also be asked to take a few minutes to download software that is powered by (VoiceFive). This research software will confidentially track your online browsing. This will help us better understand you and your needs, enabling us to create more relevant future offerings for you, other community members, and eventually all shoppers. You can uninstall the software at any time . . . During the registration process, you'll learn more about this application software and you'll always have the opportunity to ask any and every question you may have.
>
> . . . We'll also collect information on your internet usage.

Id. ¶ 6. After clicking on a button at the bottom of the invitation e-mail labeled ''Join Today!'', customers were

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directed to a landing page, again describing the online community, and again asking them to click another button labeled ''Join Today!'' Id. ¶¶ 6-7.

If customers chose again to continue with the registration, they were directed to a registration page. This page contained a ''Privacy Statement and User License Agreement,'' (''PSULA''), explaining the nature of the relationship between users and Sears, and detailing the functions of the application that the users would download. Id. ¶ 8. The PSULA was presented both in a ''scroll box'' and a printable version, which opened in a new browser window. Id. Included in the PSULA were large-font headers, introducing the ''requirements for participation'' and answering questions such as ''What information is collected?'', ''How is the information collected?'' and ''How is the information secured?'' Id. at Ex. E. The policy also explained how ''cookies'' were employed in the information gathering, and what a user should do if he or she wished to stop participating. Id. The policy explained that the application would collect ''normal Web browsing'' and activity undertaken in ''secure sessions, such as filling a shopping basket, completing an application form or checking your online accounts, which may include personal financial or health information.'' Id. This information would be used to ''better understand[ ] . . . household demographics.'' Id. Sears would also take steps to prevent the collection of confidential personally identifiable information; whenever this filtering was insufficient, and resulted in the inadvertent collection of such information, Sears would take reasonable efforts to erase it from its databases. Id.

Before users could download the application, they were required to click inside a blank checkbox, next to the statement ''I am the authorized user of this computer and I have read, agree to, and have obtained the agreement of all computer users to the terms and conditions of the Privacy Statement and User License Agreement.'' Id. ¶ 9. Once users had selected the check box, they could click the ''Next'' button to complete registration, and were directed to the application installation page. Id. ¶¶ 9-10.

FTC Alleges Unfair And Deceptive Trade Practices

The FTC uses § 5 of the FTC Act as the source of authority to regulate privacy and information security. Under this authority, the FTC has emphasized its prohibitions against deceptive practices, and they have consistently forced companies to honor privacy commitments undertaken in their privacy policies. The FTC has thereby expressly endorsed norms that depend upon thorough disclosure of privacy and information security practices, and it has previously recognized that companies can rely upon consumer consent, even if implicit, as long as it is based on clear disclosure.

The current Sears action departs from this prior philosophy. As Director Vladeck has noted, previously the FTC ''relied on notice and consent and harm-based approaches,'' but now it appears that ''no one is particularly confident that either of these frameworks work very well.'' Bivins, supra p. 1.

The proposed Sears settlement may thus signal a significant alteration of these standards, and could undermine confidence in the ability of notice and consent mechanisms to provide legal disclosures and ensuing agreements on the Internet.

The proposed consent order would require that Sears,

> prior to the consumer downloading or installing [a Tracking Application]:
>
> A. Clearly and prominently, and prior to the display of, and on a separate screen from, any final ''end user license agreement,'' ''privacy policy,'' ''terms of use'' page, or similar document, disclose: (1) all the types of data that the Tracking Application will monitor, record, or transmit, including but not limited to whether the data may include information from the consumer's interactions with a specific set of Web sites or from a broader range of Internet interaction, whether the data may include transactions or information exchanged between the consumer and third parties in secure sessions, interactions with shopping baskets, application forms, or online accounts, and whether the information may include personal financial and health information; (2) how the data may be used; and (3) whether the data may be used by a third party; and
>
> B. Obtain express consent from the consumer to the download or installation of the Tracking Application and the collection of data by having the consumer indicate assent to those processes by clicking on a button or link that is not pre-selected as the default option and that is clearly labeled or otherwise clearly represented to convey that it will initiate those processes, or by taking a substantially similar action.

Sears Holdings Mgmt Corp., No. 082 3099, at 4 (F.T.C. June 4, 2009) (proposed agreement containing consent order) (''*Sears Proposed Order*'').

Sears had made all the above disclosures in its privacy policy. Thus, this proposed settlement would first and foremost set a precedent that material is ineffectively disclosed if it is merely included in a standard length privacy policy. It would also suggest that in addition to a privacy policy, businesses that use some undefined class of Web technologies must disclose the type of data they collect and use, and any third party sharing, in a *separate* disclosure from the privacy policy or terms of service. Whether the FTC will eventually mandate a type of standardized disclosure—perhaps a ''Liebowitz-Vladeck'' page—or whether it will simply deem certain techniques to be per se unreasonable remains to be seen. Stand-alone privacy policies, where all the privacy disclosures are located in one identifiable location, could well become insufficient for certain material disclosures if the *Sears* settlement becomes a broad precedent or is eventually embodied in official regulations. This approach of requiring further, separate notice would seemingly only compound the difficulties faced by consumers who may now have to deal with several separate pages of material disclosures. The newly mandated notice provisions thus present the possibility of proliferating the places consumers must look for pertinent information, and might even imply that some disclosures (in the detailed privacy policy) are merely technical, and may be ignored.

The related question of whether a company must obtain express, opt-in consent prior to collecting online browsing information has recently been the topic of considerable regulatory and legislative attention. The FTC is publicly considering regulations, and has engaged in an open conversation to better understand the

concerns of the public, privacy advocates and industry on the matter.[1] As of today, only a Staff Report with non-binding guidelines has been issued.[2] Congress has held hearings to explore whether legislation is called for to set a firm consent standard for the collection of browsing information.[3] And in the meantime, the nature of consent for online information collection is left to industry self-regulation. The FTC's proposed consent order quietly preempts the deliberate decision making process currently playing out both in Congress and in the FTC's ongoing engagement with industry and the public on the topic.

FTC Proposed Order Stands In Contrast to Settled Contract Norms

The FTC's consent order in this case reflects its desire to impose ''fairness'' duties that sound more in tort than contract. The settlement is in tension with the established presumptions of contract law, as well as the principles it has established through various prior consent orders in the area of privacy. Elementary contract law demands that a party to a contract be bound by the terms contained therein, and that manifestations of assent bind the parties, absent fraud, misrepresentation, or unconscionable terms. ''Clickwrap''[4] contracts, as were used in this case, have been widely upheld by courts which have considered their application, and the FTC's declaration in this case that Sears's PSULA was insufficient flies in the face of established law.

The minority of cases in which standardized contracts have been held unenforceable have usually involved terms that were considered manifestly bizarre or oppressive, void against public policy, eviscerated the terms agreed to, or eliminated the dominant purpose of the contract. The provisions in Sears's agreement were not obviously oppressive, especially in comparison to terms in standardized contracts that have been upheld, such as choice-of-forum requirements, nor do they eliminate the dominant purpose of the contract. Indeed, the terms at issue here are the very purpose of the agreement—to establish a framework for collecting all of the browsing activity of the paid participants for marketing research purposes.

The method employed by Sears in collecting data is also in keeping with established industry practice and principles. Many other major companies collect data similar to those collected by Sears in this case, and many disclose such practices with equal, if not less, transparency. In addition, Sears's practices comport with the standards developed by industry consortiums. The 2008 Principles developed by the Network Advertising Initiative, though created for direct online behavioral advertisers, are instructive. They mandate that businesses should ''clearly and conspicuously post notice'' that describes the activities undertaken by the online entity, what types of data are collected, and how the data will be used and transferred. NAI, 2008 *NAI Principles*, 7 (2008).[5] Similarly, TRUSTe, an online privacy seal organization, requires that its members disclose what personally identifiable data is being collected, how it will be used, whether it will be shared, and what kind of tracking technology is employed.[6] The FTC's recent staff report on behavioral advertising practices[7] mandates similar disclosures and protections. Sears's actions in this case would appear to have accorded with NAI's, TRUSTe's, and the recent staff report's exhortations of conspicuous notice, clear description of data collected and uses for it, and reasonable security and retention policies. It is important to bear in mind that the online tracking contemplated by the Sears software was not a hidden tangent of the downloaded software—it was the entire point. While the details may have been enumerated deep in the terms of the agreement, the tracking purpose of the software seemed to have been expressly and conspicuously highlighted.

The FTC's proposed order appears to diverge from its previous actions in this area. Although the FTC has long pursued online businesses that fail to secure personal information adequately, or which allow personal data collected from consumers to be compromised, the FTC has restricted its indictment of the *method* of online data collection to those companies that *deceive* consumers. The FTC has never targeted a company for securely gathering data that has completely, accurately and intelligibly disclosed, in an industry-approved format, what information is being collected.

Contract Law

When a party signs a document, he or she is generally held to be bound by the document's terms. 2 *Richard A. Lord, Williston on Contracts* § 6:44, 384 (4th ed. 1999); see also *Restatement (First) of Contracts* § 70 (1932). This remains true even if the offeree signs in ignorance of those terms. Id. A party is not entitled to relief ''merely because [he] neither read[s] the standard

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[1] See FTC, *Protecting Consumers in the Next Tech-ade*, (Nov. 2006), testimony available at http://www.ftc.gov/bcp/workshops/techade/index.html; FTC, *Ehavioral Advertising: Tracking, Targeting, and Technology*, (Nov. 2007), comments available at http://www.ftc.gov/os/comments/behavioraladvertising/index.shtm.

[2] FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising* (Feb. 12, 2009), *available at* http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf.

[3] *See, e.g.*, *Behavioral Advertising: Industry Practices and Consumers' Expectations*, H. Subcomm. on Commerce, Trade & Consumer Protection (June 18, 2009), *available at* http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1678:energy-and-commerce-subcommittee-hearing-on-behavioral-advertising-industry-practices-and-consumers-expectations&catid=129:subcommittee-on-commerce-trade-and-consumer-protection&Itemid=70; *Privacy Implications of Online Advertising*, S. Commerce Comm. (July 9, 2008), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=e46b0d9f-562e-41a6-b460-a714bf370171.

[4] A ''clickwrap agreement'' allows the consumer to manifest its assent to the terms of a contract by ''clicking'' on an acceptance button on the Web site. If the consumer does not agree to the contract terms, the Web site will not accept the consumer's order. Such agreements are common on Web sites that sell or distribute software programs that the consumer downloads from the Web site. The term ''clickwrap agreement'' is borrowed from the idea of ''shrinkwrap agreements,'' which are generally license agreements placed inside the cellophane ''shrinkwrap'' of computer 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] Available at http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Web site.pdf.

[6] http://www.truste.org/requirements.php

[7] See supra, note 2.

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form nor considered the legal consequences of adhering to it.'' 1 *E. Allen Farnsworth, Farnsworth on Contracts* § 4.26 (2d ed. 1990); see, e.g., *Lawrence v. Muter Co.*, 171 F.2d 380, 384 (7th Cir. 1948) (even if an individual testified ''that he merely 'glanced' at [the] instrument,'' it is ''the universal rule that he cannot thus evade his responsibilities for its terms and conditions.'').

In the last fifty years, courts have modified this rule in a minority of cases, particularly those involving standardized ''contracts of adhesion.'' In these cases, where there is a disparity of relative bargaining power between the parties, many courts assess whether the stronger party ''ha[d] reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term''; if so, that term is not part of the agreement. *Restatement (Second) of Contracts* § 211(3) (1981). The comment to this section of the *Restatement* explains that ''[a] party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even read the standard terms.'' Id. at cmt. b. Instead, if a term is ''bizarre or oppressive,'' in the context of the agreement, in that it ''eviscerates the non-standard terms explicitly agreed to,'' or ''eliminates the dominant purpose of the transaction,'' the drafting party should expect that the offeree never would have agreed to such a term, had he noticed it in the contract. Id. at cmt. f.

Courts have most often applied this doctrine to contractual provisions regarding arbitration of disputes arising from the contract. In one oft-cited case, for example, a woman injured during an abortion procedure found her malpractice suit barred in the trial court by such an agreement. Reversing the lower court, the appellate court held that the arbitration agreement was an unenforceable adhesion contract, because the waiver of her right to a jury trial was beyond the scope of the plaintiff's expectations. *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992); see also *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 430, 431 (N.C. Ct. App. 2004) (holding that an arbitration requirement in a credit card agreement, imposed unilaterally in a written notice of changes, was not within the reasonable expectation of cardholders, and not done in good faith).

In contrast, courts have regularly enforced contractual provisions dictating requirements such as forum selection and choice of law. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the Supreme Court, under maritime law, upheld a requirement referenced on the face of cruise line tickets purchased by the plaintiffs that disputes arising from the cruise be litigated in Florida. Conceding that the requirement was not negotiated, and was routinely applied to every passenger, the Court nonetheless rejected the notion that the clause was unenforceable per se. Id. at 593. Instead, the Court noted the many benefits of a standardized form, such as dispelling confusion over the location of suits, sparing litigation time and expense, and thereby reducing fares. *Id.* at 593-94. Since the clause did not evince any bad faith by the defendants, whose principle place of business was in Florida, and since the plaintiffs had actual notice of the provision, the Court refused to find the clause offensive to fundamental fairness, and thus dismissed the plaintiffs' claims. Id. at 595. Courts have reached similar conclusions in the context of choice-of-law provisions, e.g., *Shoney's, Inc. v. Morris*, 100 F. Supp. 2d 769, 777 (M.D. Tenn. 1999), and limits in insurance policies to bodily injury of only one person, e.g., *Lepic ex rel. Lepic v. Iowa Mut. Ins. Co.*, 402 N.W.2d 758, 761 (Iowa 1987) (holding that the limit was not ''bizarre or oppressive,'' and did not eliminate the dominant purpose of the coverage or eviscerate any terms to which the parties agreed).

Following *Carnival Lines*, many commentators have recognized the economic value of standardized contracts. ''Standardization of agreements . . . [is] essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. . . . Operations are simplified and costs reduced, to the advantage of all concerned.'' *Restatement (Second) of Contracts*, § 211, cmt. a. Because judicial interpretation of a standard form serves as an interpretation of similar forms, standardization ''facilitates the accumulation of experience. It helps make risks calculable and . . . 'increases that real security which is the necessary basis of initiative and the assumption of tolerable risks.' '' *Farnsworth*, supra p. 7 § 4.26.

''Clickwrap agreements,'' such as the one at issue here, have also generally been held valid. These agreements often mandate similar terms to those types of contracts that have been upheld in traditional standardized contracts, such as choice of forum and choice of law. For example, in *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007), involving a clickwrap agreement in the purchase of online advertising services, the court granted the defendant's motion to transfer the action to California pursuant to a forum-selection clause, id. at 234-35; the court noted that an agreement was not necessarily one of adhesion simply because it was a form contract, id. at 236. The court emphasized that the agreement was not procedurally unconscionable, and that the plaintiff could have rejected the agreement with impunity by selecting a different service provider. Id. at 241. See also *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007 (D.C. 2002) (upholding a forum selection clause in online clickwrap agreement, where plaintiff entered into Internet access subscription by clicking the ''Accept'' button at the end of the clickwrap). Courts have even upheld clickwrap agreements when the user was not required to affirmatively select or click ''I agree'' before using the service. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) (assent indicated by using the online service, when terms were clearly posted on the Web site), aff'd as modified, 356 F. 3d 393 (2d Cir.2004).

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (Easterbrook, J.) is one of the most important and widely-cited opinions to address adhesion contracts in this context. In that case, the plaintiff's software contained with it a license, encoded on the CD-ROM disk, which appeared every time the program was run by the user; this license limited the use of the material on the disk to non-commercial purposes. Id. at 1450. The Court of Appeals upheld the terms of the contract packaged with the disk, finding that the ''money now, terms later'' (that is, presenting the terms to the customer upon arrival of the disk in the mail) was permissible under the Uniform Commercial Code. Id. at 1452-53. Because the defendant had an opportunity to inspect the disk, and possibly reject it if he felt the terms unacceptable, and because neither the U.C.C. nor Wisconsin law required that the terms at issue receive any greater

prominence in the license agreement than the terms in *Carnival Lines* received, the contract was enforceable against the defendant. Id. at 1453.

In *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999), the plaintiff's clickwrap agreement appeared in a scroll down window requiring the consumer to click ''I agree'' to register for service. The agreement specified King County, Washington as the forum. The court enforced the forum selection clause because there was no fraud or dramatic disparity in bargaining power between the parties, and the clause did not violate New Jersey's public policy. The court also found that consumers had adequate notice because they could scroll through the agreement before accepting its terms.

The court specifically held that the scroll-down agreement provided adequate notice to New Jersey consumers for an issue as important as relegating them to a county in Washington State as their only forum for relief. The court stated:

> The only viable issues that remain bear upon the argument that plaintiffs did not receive adequate notice of the forum selection clause, and therefore that the clause never became part of the membership contract which bound them. . . . Defendants respond by arguing that 1) in the absence of fraud, a contracting party is bound by the provisions of a form contract even if he or she never reads them; 2) this clause met all reasonable standards of conspicuousness; and 3) the sign-up process gave plaintiffs ample opportunity to review and reject the agreement. . . .
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> . . . [I]t seems clear that there was nothing extraordinary about the size or placement of the forum selection clause text. By every indication we have, the clause was presented in exactly the same format as most other provisions of the contract. It was the first item in the last paragraph of the electronic document. We note that a few paragraphs in the contract were presented in upper case typeface, presumably for emphasis, but most provisions, including the forum selection clause, were presented in lower case typeface. *We discern nothing about the style or mode of presentation, or the placement of the provision, that can be taken as a basis for concluding that the forum selection clause was proffered unfairly, or with a design to conceal or de-emphasize its provisions. To conclude that plaintiffs are not bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented. Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole.* See *Rudbart v. North Jersey Dist. Water Supply Comm'n*, 127 N.J. 344, 351-53 (referring to the principle that a contracting party may be bound by the terms of a form contract even if he or she has never read them), cert. denied, 506 U.S. 871 . . . (1992).

Id. at 532 (emphasis added, footnotes omitted)

While some recent clickwrap cases have invalidated portions of standardized agreements that imposed the type of onerous terms often struck down in traditional contracts of adhesion, generally, courts have done so when all the terms of the contract, taken together, made them unconscionable. For example, in 2007, a federal court in *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) refused to uphold a clickwrap provision requiring arbitration. The court found the clause unconscionable because only the consumer, and not the business, was required to resort first to arbitration, and because the clause was accompanied by a forum selection provision, and a confidentiality requirement. Id. at 607-11. See also *Comb v. PayPal*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) (refusing to uphold arbitration provision, citing lack of mutuality, prohibition against consolidation of claims, costs of arbitration, and difficulty of traveling to chosen venue).

In *Koch v. America Online, Inc.*, 139 F. Supp. 2d 690 (D. Md. 2000), however, the District of Maryland held that AOL's forum selection clause specifying Virginia as the forum did not violate Maryland's public policy of allowing residents access to the judicial system. Even though class action lawsuits would not be available in Virginia, Maryland's interest in assuring class actions was not as compelling, for example, as California's.

A number of courts have struck down other contractual provisions contained in clickwrap agreements that have been accompanied by additional restrictions on the rights of consumers. The Washington Supreme Court, for example, invalidated of a choice of forum clause in a clickwrap agreement, because, in combination with the waiver of class action rights required in the contract, the provision violated the policies of the state. *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1021-25 (Wash. 2007). In *Aral v. Earthlink, Inc.*, 134 Cal. App. 4th 544 (2005), the court struck down a class action waiver in combination with an arbitration clause and forum selection clause. The court held that since the gravamen of the complaint was that numerous consumers had been cheated out of small sums of money, the provision was unconscionable. Id. at 556-57. The arbitration clause, however, was upheld. Id. at 553.

Sears Action at Odds With Contract Principles

The user agreement in the Sears case appears to comport with mainstream principles of contract law. Sears presented the terms of use of its software to users in a clickwrap agreement, which described in plain language all of the data that would be monitored and collected. *Sears Complaint* ¶ 8. Users were required affirmatively to check a box indicating that they had read the terms and agreed to them, and click the ''Next'' button to proceed with the installation. Id. ¶ 9. In exchange for using the service, and allowing the collection of data, users received $10. Id. ¶ 6.

Under the basic presumptions of contract law, the agreement between Sears and its users seems to have been valid. The manner in which Sears presented its terms of use was no more deceptive than those employed in *Feldman*, *Forrest*, or *Carnival Lines*; indeed, the terms presented by Sears were not obviously unconscionable compared to those cases, as Sears did not mandate onerous requirements of arbitration or a certain forum. See *Carnival Lines*, 499 U.S. at 603 (Stevens, J., dissenting) (arguing that the choice-of-forum requirement ''lessens or weakens [the plaintiffs']

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ability to recover,'' due to the distance they and their witnesses must travel). The agreement between Sears and its users was not unconscionable, as when one party is required to give up their ''fundamental right to a jury trial,'' *Broemmer*, 840 P.2d at 1017, and did not ''eliminate the dominant purpose'' of the agreement, *Lepic*, 402 N.W.2d at 761. On the contrary, collecting data about consumers of Sears's products and services *was* the dominant purpose of the contract.

In addition, Sears's methods in this case accord with the policies of many other online content and service providers. Neither the location of Sears's disclosure, at the 75th line down in its privacy policies, *Sears Complaint* ¶ 8, nor its proposed use of the information garnered from customers was unusual; many companies disclose similar policies much less transparently. For example, in order to sign up for the popular e-mail service hosted by Google, Gmail,[8] a user is presented with Google's ''Terms of Service'' and required to click on a button signifying acceptance. On the 193rd line, the terms note that Google may ''reproduce, adapt, modify, translate, publish, publicly perform, publicly display, and distribute any content which [the user] submit[s],'' with a ''perpetual, irrevocable, worldwide [and] royalty-free'' license. Not until the 347th line down do the terms acknowledge that Google may display advertisements targeted at users based on their personal data stored on Google's services. Contained on the 110th line is a link to Google's privacy policy, which requires the user to travel to a different page,[9] from which the user can link to the actual privacy policy.[10] Beginning 30 lines down on this page, the policy discloses that Google retains records of users' personal information, search queries, e-mail content, and location data, on its servers.

Likewise, the New York Times Web site discloses, beginning at approximately the 75th line of its privacy policy,[11] that it also collects user data such as IP addresses, content viewed, and queries submitted, for use in targeted advertising. Its privacy policy is *not* required to be read before users click to complete their registration for an online account.

Previous FTC Orders

The Sears proposed order is somewhat surprising in light of recent FTC activity against companies that market their products or solicit business through deceptive online practices. For example, in 2008, the Department of Justice, acting on behalf of the FTC, entered into a consent agreement with ValueClick, Inc. The agreement enjoined ValueClick from sending e-mails or making online representations that it offered products ''free'' to consumers, without sufficiently disclosing that other conditions apply, such as making a purchase, applying for a loan, or enrolling in a for-pay service. *United States v. ValueClick, Inc.*, No. cv-08-01711, slip op. at 6-7 (C.D. Cal. 2008) (stipulated final judgment). ValueClick was also enjoined from misrepresenting its encryption and security procedures in handling consumer data. Id. at 9. Similarly, in 2000 the FTC pursued Toysmart, LLC, in federal district court for disclosing or selling personal information collected from users, in contradiction of its representation that it would ''never'' do so. First Amended Complaint, *FTC v. Toysmart.com, LLC*, No. 00-11341-RGS, ¶¶ 17-18 (D. Mass. 2000); see also *Gateway Learning Corp.*, No. 042-3047, ¶¶ 11-15 (F.T.C. 2004) (additionally alleging failure to notify consumers of change in privacy policy).

Similarly, the FTC pursued Liberty Financial for misrepresenting that the data it collected on its Web site for young adults would be kept anonymously. *Liberty Fin. Co., Inc.*, No. C-3891, ¶¶ 5-6 (F.T.C. 1999) (complaint).

The FTC's actions with respect to Sears is in some tension with these precedents. The FTC's complaint does not allege that Sears employed inadequate or insufficient security in protecting the data in collected from users. Nor does the complaint assert that Sears reneged on any promise to offer ''free'' products or services, as in *ValueClick*, or to refrain from renting or selling the collected data, as in *Toysmart*. Most notably, the FTC complaint does not allege that Sears misrepresented the type of data that it would collect, or the manner in which it would do so, as in *Liberty Financial*. The FTC's conclusion that Sears acted deceptively in its data collection experiment by disclosing the data it collected in a standard privacy policy thus stands in stark contrast to the history of its own anti-deception enforcement orders.

Conclusion

The FTC proposed consent decree thus reflects a potential significant change for the FTC and the online community. Before this case, one would likely have considered Sears's disclosures both legally valid and commonplace, and the FTC's attempt to cure what it saw as too much detail in the user agreement by proliferating the required notice requirements does not necessarily represent a reasonable or effective response. In its present form, the FTC has required that, before Sears disseminate any tracking application, it ''[c]learly and prominently . . . display'' (1) all types of data collected, (2) how the data will be used, and (3) whether the data may be used by a third party. *Sears Proposed Order* at 4. Although Sears already disclosed this information in its PSULA, see *Sears Complaint* ¶ 8, the FTC's proposed order requires that this information be displayed ''prior to the display of, and on a separate screen from'' any end user license agreement, privacy policy, or terms of use. *Sears Proposed Order* at 4. Given that the software in question was manifestly identified to consumers as an online tracking device, there would not appear to be any principle of contract law, industry practice, or previous FTC order requiring that the detailed explanation of the tracking be placed in a disclosure outside the PSULA. Indeed, the PSULA appears to have been designed as the mechanism for disclosing vital privacy information to users, and the FTC's approach could allow, or even mandate, companies to scatter various parts of their notices in various different sub-notices.

The proposed Sears settlement is at odds with established industry and regulatory practice allowing consumers to opt-in to contracts of their choice. It has the potential to create substantial uncertainty for online commerce, and could undercut the expectations that have helped the Internet become a robust engine of economic growth and consumer choice.

[8] http://mail.google.com/mail/signup
[9] http://www.google.com/intl/en/privacy.html
[10] http://www.google.com/privacypolicy.html
[11] http://www.nytimes.com/ref/membercenter/help/privacy.html#b

The impact of this proposed settlement potentially affects every entity with an Internet presence collecting personal information. The FTC will accept public comments on the proposed settlement until July 6, 2009.

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