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To Like Or Not To Like: Fraley V. Facebook's Impact On California's Right Of Publicity Statute In The Age Of The Internet

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TO LIKE OR NOT TO LIKE: *FRALEY* v. FACEBOOK'S IMPACT ON CALIFORNIA'S RIGHT OF PUBLICITY STATUTE IN THE AGE OF THE INTERNET

*Francesca Grea**

I. INTRODUCTION

More than one billion people use Facebook each month.¹ Approximately one out of every seven people in the world has a Facebook account, making this social networking site one of the most popular global tools to date.²

While becoming a member of Facebook is free, the site generates revenue by selling advertising space.³ Given Facebook's enormous reach, advertisers recognized its tremendous potential to promote their products worldwide.⁴ However, as advertisers developed new marketing techniques specifically for use in social media, users complained that their legal rights—particularly their statutory right of publicity—were being infringed.⁵ Internet privacy has become a growing concern, and users are becoming more cautious of how their personas are being exploited by social media

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1. *Number of Active Users at Facebook Over the Years*, YAHOO NEWS (May 1, 2013), <http://news.yahoo.com/number-active-users-facebook-over-230449748.html>; Dave Thier, *Facebook has a Billion Users and a Revenue Question*, FORBES (Oct. 4, 2012, 12:41 PM), <http://www.forbes.com/sites/davidthier/2012/10/04/facebook-has-a-billion-users-and-a-revenue-question/>.

2. Thier, *supra* note 1.

3. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

4. *Id.* at 792.

5. *See id.*

sites.⁶ In fact, some Facebook users felt so strongly that Facebook's advertisers were violating their right of publicity that they finally took a stand by filing a class action suit against Facebook, which ultimately resulted in an approximately twenty million dollar settlement for the users.⁷

In *Fraley v. Facebook, Inc.*,⁸ Facebook users claimed that the site used their "names, photographs, likenesses and identities to sell advertisements for products, services, or brands without obtaining [their] consent" through Facebook's "Sponsored Stories"⁹ feature.¹⁰ The suit survived the defendant's motion to dismiss, as District Judge Lucy H. Koh determined that the plaintiffs had made a preliminary showing of economic injury from the unauthorized uses of their personal information.¹¹

This Comment considers what precedential effects *Fraley* will have on future right of publicity cases dealing with advertising on social-networking sites, and how issues of consent and newsworthiness may affect users' rights. While *Fraley* settled before the court rendered a decision as to Facebook's liability,¹² the court explored users' statutory and common-law rights of privacy and their ability to control how others use their images and likenesses.¹³ These issues have become urgent at a time when people are sharing more and more about themselves on the Internet. Part II discusses the relevant facts from the *Fraley* case. Part III addresses California's right of publicity statute, California Civil Code section 3344. More specifically, Part III-A explores the issue of consent and discusses whether users consent to allowing others to exploit their personal information by merely providing it to social media sites. Part III-B focuses on the carve-out in the California statute—the "newsworthiness" exception¹⁴—and contemplates when users can be

6. See *id.* at 790; see *Cohen v. Facebook, Inc.* 798 F. Supp. 2d 1090, 1094 (N.D. Cal. 2011); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705 (N.D. Cal. 2011).

7. Joint Motion for Preliminary Approval of Revised Settlement at 1, *Fraley v. Facebook*, 830 F. Supp. 2d 785 (N.D. Cal. 2012) (No. 11-01726).

8. 830 F. Supp. 2d 785 (N.D. Cal. 2011).

9. See *infra* Part II.

10. *Fraley*, 830 F. Supp. 2d at 797.

11. *Id.* at 810.

12. Joint Motion for Preliminary Approval of Revised Settlement, *supra* note 7, at 1.

13. *Fraley*, 830 F. Supp. 2d at 803–10.

14. See CAL. CIV. CODE § 3344(d) (West 2012).

considered public figures and thereby potentially lose privacy protections. Part IV analyzes the key issues in the *Fraleley* case surrounding newsworthiness and consent. Finally, Part V concludes that Facebook does not receive genuine consent before it uses members' identities and likenesses; instead, it employs complicated consent requirements, and other techniques, to escape liability for its improper use of these personal attributes. Thus, Part V proposes that Facebook should better explain its advertising techniques to its users, and offers suggestions as to how Facebook can receive genuine consent from its users' attributes

II. STATEMENT OF THE CASE

In *Fraleley*, Facebook members Angel Fraley, Paul Wang, Susan Mainzer, J.H.D., and W.T. filed a class action suit against Facebook in the United States District Court for the Northern District of California.¹⁵ The plaintiffs claimed that by “misappropriating their names and likenesses for commercial endorsements without their consent,” Facebook violated the members' statutory rights of publicity under California Civil Code section 3344¹⁶ and California's Unfair Competition Law, Business and Professions Code section 17200.¹⁷

One of Facebook's controversial advertising techniques was its use of “Sponsored Stories,” a feature that was activated for all members by default.¹⁸ These stories were a form of paid advertising that appeared on a member's Facebook “news feed,” displaying a friend's name and photo next to the advertiser's logo, and stating that the friend “liked” the advertiser¹⁹ or its product.²⁰ These Sponsored

15. *Fraleley*, 830 F. Supp. 2d at 785, 790.

16. California Civil Code § 3344(a) states: “Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.” CAL. CIV. CODE § 3344 (West 2012).

17. *Fraleley*, 830 F. Supp. 2d at 790, 792.

18. *Id.* at 791.

19. A user “likes” an advertiser or its products when he or she clicks on a link underneath a photo for the advertisement or on the advertiser's Facebook page that displays a small “thumbs up” sign, paired with the words “Like” or “Like This Page.” *Id.* at 790–91. Upon clicking the link, Facebook generates the Sponsored Story message and displays it on the user's friends' news feeds. *Id.*

Stories appeared on members' Facebook pages after the user who seemingly endorsed the product or service clicked "like" on the advertiser's Facebook page or any affiliated page, when the member used the "post" or "check-in" feature, or when the user opened an application whose content somehow related to the advertiser.²¹

For example, plaintiff and Facebook-user Angel Fraley claimed that she visited Rosetta Stone's Facebook page, where she was required to click the "like" button before she could use a free software demonstration.²² After she did so, Fraley's picture appeared on her friends' news feeds alongside Rosetta Stone's logo and text stating that "Angel Frolicker²³ likes Rosetta Stone."²⁴ The other *Fraley* class representatives described similar experiences after "liking" a company's Facebook page.²⁵

The plaintiffs claimed that through the Sponsored Story system, Facebook essentially turned users' "likes" into advertising revenue by creating unauthorized personal endorsements of the advertisers' products and services without giving users the ability to "opt out" of the endorsement.²⁶ They asserted that they did not even know of this Sponsored Story service and did not realize that their actions would be "interpreted and publicized by Facebook as . . . endorsement[s]."²⁷

They further claimed that they were effectively lured into clicking the "like" button—before they even had a chance to find out if they actually liked the product—in order to "receive discounts on products, support social causes, or to see a humorous image."²⁸ The plaintiffs asserted that millions of Facebook users had been injured and should have been compensated under California law for being "unpaid and unknowing spokespersons [sic] for various products."²⁹

Facebook subsequently filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6).³⁰ Facebook claimed, among numerous other

20. *Id.*

21. *Id.*

22. *Id.* at 791.

23. Angel Fraley's registered user name on Facebook was "Angel Frolicker." *Id.*

24. *Id.*

25. *Id.* at 791–92.

26. *Id.* at 792.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 793–94.

grounds for dismissal, that the plaintiffs “fail[ed] to state a claim for misappropriation under California Civil Code § 3344 because they [did not] allege[] any actionable injury, they consented to the use of their names and likenesses, and the republished content is newsworthy under § 3344(d).”³¹ However, Judge Koh, the presiding judge, denied Facebook’s motion and found that the plaintiffs did in fact have a colorable cause of action, as Facebook members were “likely to be deceived into believing [they] had full control to prevent [their] appearances in Sponsored Story advertisements while otherwise engaging with Facebook’s various features, such as clicking on a ‘Like’ button, when in fact members lack such control.”³² Koh stated that dismissal was improper because the defendant used the plaintiffs’ personal, albeit newsworthy, information for commercial purposes, removing the defendant from the umbrella of protection under section 3344(d).³³ Koh also reasoned that the issue of consent remained a “disputed question of fact,” thus making dismissal improper.³⁴

III. MISAPPROPRIATION UNDER SECTION 3344: CALIFORNIA’S RIGHT OF PUBLICITY STATUTE

California recognizes two actions for violation of one’s right of publicity: one at common-law for commercial misappropriation and one under California Civil Code section 3344.³⁵ The common-law cause of action and statutory cause of action are virtually identical.³⁶ Both require “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”³⁷ In addition to these elements, section 3344 requires the plaintiff to show that the defendant knew of the use of

31. *Id.* at 795.

32. *Id.* at 814–15. For a more in-depth description of Judge Koh’s reasoning, see *infra* Part IV.

33. *Fraleigh*, 830 F. Supp. 2d at 805.

34. *Id.* at 806.

35. *Id.* at 803.

36. *Id.*

37. *Id.* (quoting *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983)).

the plaintiff's name or likeness and that there was "a direct connection between the alleged use and the commercial purpose."³⁸

A. *Consent: Defining the Nebulous Term in the Age of the Internet*

While most of the above elements are not hotly contested in the *Fraley* case, consent stands out as a major issue. Generally, consent is defined as an "agreement, approval, or permission as to some act or purpose, esp[ecially] given voluntarily by a competent person."³⁹ The term has also been defined as "voluntarily yielding the will to the proposition of another . . . [The] result of coming into harmony or accord."⁴⁰ These definitions suggest that giving consent is "an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side. It means voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another."⁴¹ Giving genuine consent is "an act unclouded by fraud, duress, or sometimes even mistake."⁴² Recently, courts have been faced with determining what constitutes true consent. The court in *Cohen v. Facebook*⁴³ homed in on the idea of consent on the Internet, addressing whether users offer consent by agreeing to a website's terms of service and what the scope of that consent is.⁴⁴ Other important questions that have not been addressed in depth are *who* can consent on the Internet and whether minors have the ability to consent away the right to use their personal information. Both *E.K.D. v. Facebook*⁴⁵ and *I.B. v. Facebook*,⁴⁶ both decided in 2012, were among the first cases to explore these issues.

38. *Id.* The requirement for "lack of consent" is somewhat counterintuitive in that it creates a presumption that the plaintiff consented to the use. Thus, the requirement forces the plaintiff to make a prima facie showing that there was no consent rather than requiring the defendant to raise consent as a defense. Interview with Professor Evan Gerstmann, Professor of Political Science and Law, Loyola Marymount Univ., in L.A., Cal. (Feb. 2012).

39. BLACK'S LAW DICTIONARY 346 (9th ed. 2009).

40. BLACK'S LAW DICTIONARY 305 (6th ed. 1990).

41. *Id.*

42. *Id.*

43. 798 F. Supp. 2d 1090 (N.D. Cal. 2011).

44. *See generally id.*

45. *E.K.D. ex rel Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894 (S.D. Ill. 2012).

46. *I.B. ex rel Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989 (N.D. Cal. 2012).

1. *Cohen v. Facebook*: Consenting to a Website's Terms of Service

The court in *Cohen v. Facebook* explored what constitutes consent in the age of the Internet by considering the consequences of users consenting to a website's terms of use.⁴⁷ In *Cohen*, Facebook argued that the plaintiffs—Facebook users—gave appropriate consent to the use their likenesses when they agreed to the company's "Statement of Rights and Responsibilities" upon joining the social media site.⁴⁸ Every user, Facebook argued, has the ability to opt out of having personal information shared by enabling privacy settings on the site.⁴⁹ However, the court was unconvinced by this argument, explaining that it was "far from clear" that Facebook could simply rely on the terms of service to escape legal liability for improper uses of the plaintiffs' personas.⁵⁰ The court stated that "substantial questions would remain in this instance as to when various versions of the documents may have appeared on the website and the extent to which they necessarily bound all plaintiffs."⁵¹

Facebook claimed that a provision in their Statement of Rights "unambiguously gives Facebook the right to use any photos, including Plaintiffs' profile photos, in any manner on Facebook, subject to Users' privacy and application settings."⁵² However, the court did not agree with Facebook that the Statement of Rights provided such a clear catchall release of liability.⁵³ Instead, the court interpreted the clause as an ambiguous grant that gave Facebook a worldwide license to use members' photos and insulated Facebook from copyright infringement claims for the reproductions, but not as a defense against improper use for commercial purposes.⁵⁴ Additionally, the court was quick to note that nowhere in this clause did Facebook claim the right to use members' names.⁵⁵

The court concluded outright that "nothing in the provisions of the Terms documents to which Facebook has pointed constitute[d] a

47. See *Cohen v. Facebook, Inc.* 798 F. Supp. 2d 1090, 1094 (N.D. Cal. 2011).

48. *Id.* at 1094–95.

49. *Id.*

50. *Id.* at 1094.

51. *Id.*

52. *Id.* at 1095.

53. *Id.*

54. *Id.*

55. *Id.*

clear consent by users to have their name or profile picture shared in a manner that discloses what services on Facebook they have utilized, or to endorse those services.”⁵⁶ Although users did consent to *something* upon use of the site, the scope of their consent was not as all-encompassing as Facebook argued.⁵⁷ The court made very clear that while members of the social media site did consent to sharing their personal information with their Facebook friends and potentially even with users of the site at large (depending on what privacy restrictions were in place), they certainly did not consent to this particular use.⁵⁸

2. Minors Consenting to Terms of Service

Some twenty million minors in the United States have a Facebook account.⁵⁹ About seven-and-a-half million of those users are under the age of thirteen, Facebook’s minimum age to hold an account.⁶⁰ Roughly five million of those minors are under the age of ten.⁶¹ With so many minors using Facebook, it is important to determine how much power, if any, these adolescent users have to give away the rights to their names and likenesses. While it is unclear whether children under the age of thirteen can consent to anything due to their status as prohibited users, courts have addressed this issue for minors ages thirteen to seventeen.⁶² In *E.K.D. v. Facebook*, the court found that while minors are generally able to disaffirm contracts entered into during minority, they could not disaffirm portions of the contract without disaffirming the contract in its entirety.⁶³ Therefore, underage users could not

56. *Id.*

57. *Id.* at 1096.

58. *Id.*

59. Ki Mae Heussner, *Underage Facebook Members: 7.5 Million Users Under Age 13*, ABC NEWS, <http://abcnews.go.com/Technology/underage-facebook-members-75-million-users-age-13/story?id=13565619> (last updated May 10, 2011).

60. Heussner, *supra* note 59. Per the Children’s Online Privacy Protection Act (COPPA), which dictates protections for minors, Facebook bans children under the age of thirteen from creating a Facebook account. *Under 13 Year Olds On Facebook: Why Do 5 Million Kids Log In If Facebook Doesn’t Want Them To?*, REUTERS, http://www.huffingtonpost.com/2012/09/19/under-13-year-olds-on-facebook_n_1898560.html (last updated Nov. 19, 2012, 5:12 PM).

61. Heussner, *supra* note 59.

62. *See* I.B. *ex rel* Fife v. Facebook, Inc., 905 F. Supp. 2d 989 (N.D. Cal. 2012); *E.K.D. ex rel* Dawes v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012).

63. *E.K.D.*, 885 F. Supp. 2d at 899.

disaffirm Facebook's Terms of Service if they continued to use the social media site.⁶⁴ However, *I.B. v. Facebook* took a different approach, concluding that minors can still disaffirm the entire contract, even after receiving the benefit of the bargain by continuing to use Facebook.⁶⁵

B. The Exception: Newsworthiness and Its Interplay with the Public Figure Doctrine

Although consent remains a pivotal element in a right-of-publicity action, the California legislature has made an important exception that tracks First Amendment rights to freedom of speech: the "newsworthiness" exception.⁶⁶ This exception is codified in California Civil Code section 3344(d).⁶⁷ Section 3344(d) states that "a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."⁶⁸ The exception extends to matters of the press and the reporting of recent events.⁶⁹ However, "the information does not have to be 'news' in the strict sense of the word,"⁷⁰ nor does it have to be used in a not-for-profit manner.⁷¹ Courts have broadly interpreted the meaning of "newsworthy," including in it "any matter of public concern."⁷² "It extends . . . to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have

64. See *id.* at 899–900; Eric Goldman, *Facebook's "Browsewrap" Enforced Against Kids—EKD v. Facebook*, TECHNOLOGY & MARKETING L. BLOG (Mar. 16, 2012), http://blog.ericgoldman.org/archives/2012/03/facebooks_brows.htm.

65. *I.B.*, 905 F. Supp. 2d at 1000–03, 1013. Unfortunately, Judge Koh did not address the issue of minors consenting in *Fraleley* and, thus, did not provide any insight as to the treatment of this issue. See *Fraleley v. Facebook*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

66. *Fraleley v. Facebook*, 830 F. Supp. 2d 785, 804 (N.D. Cal. 2011).

67. CAL. CIV. CODE § 3344(d) (West 2012).

68. *Id.*

69. *Id.*

70. Zac Locke, *The Diminishing Power of California's Rights of Privacy and Publicity*, L.A. LAWYER, June 2010, at 12 available at <http://www.lacba.org/files/lal/vol33no4/2711.pdf>.

71. *Michaels v. Internet Entm't Group*, No. CV 98–0583 (CWx), 1998 WL 882848, at *4 (C.D. Cal. 1998); Locke, *supra* note 70, at 12.

72. *Michaels*, 1998 WL 882848, at *7.

a legitimate interest in what is published.”⁷³ Courts have found that “there is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.”⁷⁴

Thus, this brings to mind the public figure doctrine.⁷⁵ Public figures fall into two categories.⁷⁶ First, there are “all-purpose” public figures.⁷⁷ These are people who have reached a widespread level of fame, such as celebrities.⁷⁸ Additionally, there are “limited purpose” public figures, “who voluntarily inject[] [themselves] or [are] drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues.”⁷⁹ If one is found to be a public figure, it stands to reason that information about that person would more likely be newsworthy information, especially in light of the leniency in defining the term.⁸⁰

In the age of the Internet, people are more accessible than ever. Therefore, it is important to consider what exactly raises someone to the level of a public figure in a social networking context. Achieving such status may limit a person’s ability to seek redress for right of publicity violations if the contested use falls within the newsworthiness exception.⁸¹ In other words, the reproduction of one’s name or likeness may not be actionable, even if the use is for profit.⁸² In order to rise to the status of a public figure, courts have routinely required that a person have some level of fame in his or her community, or at least some level of notoriety.⁸³ Within this definition of a public figure, courts seem to look for some kind of

73. *Id.* at *4 (quoting *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998)).

74. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983).

75. *See Gertz v. Welch*, 418 U.S. 323 (1974).

76. *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 869 (Cal. Ct. App. 2005).

77. *Id.*

78. *Id.*

79. *Id.*

80. *See Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 804 (N.D. Cal. 2011).

81. *See CAL. CIV. CODE* § 3344(d) (West 2012).

82. S. Michael Kernan, *Privacy in Social Media: The Right of Publicity*, 34 HASTINGS COMM. & ENT. L.J. 363, 375 (2012).

83. Matthew Lafferman, Comment, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 199, 216 (2012–2013).

assumption of risk or voluntariness in putting oneself into the public eye.⁸⁴

In the context of social media, users are constantly putting many aspects of their personalities and lives on display for their friends—and sometimes even the world—to see (if no privacy settings are enabled).⁸⁵ It stands to reason that constant posting on social media sites, such as Facebook, can elevate users to the status of public figures in some contexts.⁸⁶ But what level of notoriety is actually required? While many courts have not specifically addressed the question of who is a public figure in relation to Internet activity, some have tackled the question and are using different approaches to attack this problem.⁸⁷

In *Tipton v. Warshavsky*,⁸⁸ an unpublished opinion, the Ninth Circuit held that a web user elevated himself to the status of a limited public figure when he “voluntarily involved himself in public life by inviting attention and comment on [a website].”⁸⁹ Additionally, the court in *Ampex Corp. v. Cargle*⁹⁰ stated “electronic communication media may constitute public forums” reasoning that “[w]eb sites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum.”⁹¹ Each case illustrates the “inherently public approach.”⁹² Under this view, the Internet is a public forum because Internet activity in itself is sufficient to constitute voluntary activity under the limited-purpose public figure test.⁹³ By requiring that an individual simply publish information on the Internet, these courts set a relatively low threshold for what it considered voluntarily placing oneself in the

84. Lafferman, *supra* note 83, at 216–17.

85. See *Fraleley*, 830 F. Supp. 2d at 791.

86. See Lafferman, *supra* note 83, at 229 (arguing that the availability of people and information online presents public figure doctrine problems).

87. Lafferman, *supra* note 83, at 235–36.

88. *Tipton v. Warshavsky*, 32 F. App'x 293 (9th Cir. 2002).

89. Lafferman, *supra* note 83, at 237 (quoting *Tipton*, 32 F. App'x at 295).

90. 27 Cal. Rptr. 3d 863 (Cal. Ct. App. 2005).

91. *Id.* at 869.

92. Lafferman, *supra* note 83, at 237. Lafferman discusses the “inherently public approach,” which some courts have adopted.

93. *Id.*

public eye.⁹⁴ This loose requirement should raise a red flag for users of social networking sites such as Facebook, as their consent may not be required before users all over the web see their “endorsements” for products and services that, in reality, they do not know much about.

IV. ANALYSIS

This section takes a closer look at two of the major issues the *Fraley* court focused on—newsworthiness and consent—and also identifies important areas that the court failed to address in its discussion.

A. *Newsworthiness*

In response to the plaintiffs’ allegations, Facebook argued that consent was not required for the Sponsored Stories because the plaintiffs’ information met the “newsworthiness” exception.⁹⁵ Facebook argued that this First Amendment defense encompassed the Sponsored Stories for two reasons. First, Facebook contended that the users’ names and photos were newsworthy matters because the Sponsored Stories included content such as Facebook’s members’ “accomplishments, mode[s] of living, professional standing” and similar information, as well as users’ expressions of their taste in products and services.⁹⁶ Additionally, Facebook argued that users’ likenesses were newsworthy because among their circles of friends on the website, they took the status of “public figures.”⁹⁷ Thus, Facebook claimed that it was exempt from needing members’ consent to use their likenesses in the Sponsored Stories.⁹⁸

Although the court did not ultimately find this argument a strong enough reason to grant Facebook’s motion, the court gave some deference to the principle behind it.⁹⁹ Effectively, Facebook argued that Facebook users are public figures in some contexts and, as a

94. *Id. But see* D.C. v. R.R., 106 Cal. Rptr. 3d 399, 428 (Cal. Ct. App. 2010) (“Millions of teenagers use MySpace, Facebook, and YouTube to display their interests and talents, but the posting of that information hardly makes them celebrities.”).

95. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 804 (N.D. Cal. 2011).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 804–05.

result, they are entitled to fewer privacy protections because of this status.¹⁰⁰ The court recognized that the plaintiffs essentially asserted a sort of “celebrity” status among their Facebook friends in order to support their claims, but then tried to deny that status so as to not trigger the First Amendment exception.¹⁰¹ The court noted that the plaintiffs could not have it both ways; if they wanted to claim economic injury from Facebook’s exploitation of their notoriety among their circle of friends, then that same notoriety should, theoretically, have turned them into public figures, who were subject to the newsworthiness exception.¹⁰² However, the court was careful to note that even newsworthy information can run afoul of section 3344(d) if it is used improperly for a “commercial rather than journalistic purpose.”¹⁰³ The court drew a careful line, noting that a defendant’s commercial use of information takes the information beyond the scope of the privacy privilege and the protection of section 3344(d).¹⁰⁴ This distinction ultimately led the court to conclude that the Sponsored Stories fell outside the limited sphere of the newsworthiness exception due to their commercial rather than journalistic nature, despite users’ status as local “celebrities.”¹⁰⁵

B. Consent

Facebook also argued that even if consent *was* required because the publication of the Sponsored Stories did not fall under the newsworthiness exception, Facebook users consented when they signed up to use the site and accepted the site’s Terms and Conditions.¹⁰⁶ Facebook contended that the Terms stated that users could modify their privacy settings in order to limit the exploitation of their likenesses relating to commercial and any other undesirable uses.¹⁰⁷ Facebook acknowledged that users could not specifically opt out of the Sponsored Stories feature.¹⁰⁸ However, the site claimed

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 805.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

that members were still afforded reasonable control over the use of their images by their ability to “exercise control over whether to take actions that can become Sponsored Stories, whether individual actions may be republished as Sponsored Stories, and the precise audience to whom their Sponsored Stories are shown.”¹⁰⁹ The court declined to address this at the motion to dismiss phase and stated that it was still an outstanding question of fact.¹¹⁰

However, applying the reasoning used in *Cohen*, it seems that Facebook will fail in hiding behind its terms of service to shelter the company from liability. While users did in fact consent to the terms of using the site, their consent was not so all-encompassing.¹¹¹ It had a limited scope. It is hard to imagine that users could have reasonably and intelligently agreed to a service that was not even in existence at the time they signed up to use the site.¹¹² Consent assumes that there was a degree of “reason, accompanied with deliberation” and a balancing that allowed the person to make an informed decision.¹¹³ Members were not afforded an opportunity to give *meaningful* consent. Simply giving users the ability to alter their privacy settings to limit having their information being used in Sponsored Stories does not eliminate the need for consent.

Consent also assumes that there is no fraud or mistake involved in the decision-making.¹¹⁴ Enticing users to “like” a company or its products with promotions and discounts without fully informing users that they will then be “endorsing” those products is not meaningful consent. Instead, advertisers seemingly jump the gun without giving users a chance to find out if they actually liked the product or not before boasting positive reviews of the company’s products and services to their friends.¹¹⁵ In reality, the members may not have “liked” the company or its product at all, but rather wanted

109. *Id.*

110. *Id.* at 806.

111. *Id.* at 805. (“[N]othing in the provisions of the Terms documents to which Facebook has pointed constitutes a clear consent by members to have their name or profile picture shared in a manner that discloses what services on Facebook they have utilized, or to endorse those services.” (quoting *Cohen v. Facebook, Inc.* 798 F. Supp. 2d 1090, 1095 (N.D. Cal. 2011))).

112. *Id.* at 795.

113. BLACK’S LAW DICTIONARY 305 (6th ed. 1990).

114. *See supra* Part III.A.

115. *See Fraley*, 830 F. Supp. 2d at 792, 804.

access to information, such as free demonstrations, photographs, special offers, or even promotional prizes.¹¹⁶

While the court decided that the scope of the consent seemed to be limited, an issue that was not addressed by the court was whether the *act* of “liking” something created an added element of consent to have information used in Sponsored Stories. However, without appropriate knowledge about the consequences of “liking” an advertiser’s company or product, it stands to reason that a user cannot give meaningful consent and do an appropriate balancing to make an informed decision. Additionally, when users are tempted by promises of free products and enticing promotions, the additional step of “liking” a product may be done more out of curiosity than out of consent.¹¹⁷ This deceitful advertising technique is a clever way to sidestep the true issue of whether or not users want to give advertisers permission to use their personas to endorse products that they truly do not know much about until after they have “agreed” to the endorsement.

Another issue the court left open was a minor’s ability to consent to having his or her persona used for commercial purposes. Two of the named plaintiffs in *Fraleley* were minors.¹¹⁸ Facebook preemptively attempted to settle this case before it proceeded any further in the court system, and the proposed settlement did in fact address the issue of minors offering consent.¹¹⁹ However, the first proposal was less than satisfactory for the plaintiffs.¹²⁰ Of the proposed changes in the company’s Terms and Conditions that would affect minors, the settlement required that minors give parental consent before they could be featured in a Sponsored Story.¹²¹ The minor plaintiffs objected to this change, claiming that while it addressed the “the fundamental issue that minors lack the capacity to provide consent . . . simply asking them to confirm they

116. *See id.* at 791–92.

117. *See id.* at 804.

118. *Id.* at 790.

119. *See Fraley v. Facebook, Inc.*, 2012 U.S. Dist. LEXIS 116526 (N.D. Cal. 2012).

120. *See Elizabeth Berman, He “Likes” Me, He “Likes” Me Not—Facebook’s Sponsored Stories Lawsuit, Fraley v. Facebook, Changes Landscape Of Privacy Litigation; Kids Threaten Proposed Class Settlement*, MONDAQ BUSINESS BRIEFING (Aug. 12, 2012).

121. Berman, *supra* note 120.

have parental consent is insufficient.”¹²² While the underage plaintiffs do have reason to stress their inability to provide meaningful consent and to demand change from the company, case law suggests that they may not stand on firm ground unless they are willing to stop using the site altogether—a tradeoff that many minors may not be willing to make.

V. PROPOSAL

The problem of garnering genuine consent can be approached in numerous ways so as to strike a compromise between Facebook, its advertisers, and its users. In the age of the Internet, where people are consistently confronted with ploys and plots to obtain their consent to one thing or another, it is important for companies to be crystal clear about what exactly they are asking users to agree to. Facebook could make relatively simple changes that would provide such clarity—for example, continuously updating its Terms and Conditions and requiring current users to accept each revision as it is made. Furthermore, Facebook should provide transparency to its users by highlighting the changes it periodically makes to the Terms and Conditions. It is no secret that Internet users scan through terms halfheartedly, if at all. Addressing such changes up front and in boldface would help ensure that users are aware of what they are consenting to. Additionally, Facebook could add another safeguard to make sure users know the consequences of “liking” something by inserting a disclaimer on members’ pages near the sponsored advertisements. The disclaimer should explicitly state that “liking” the advertiser or its products will result in a Sponsored Story being generated and the person’s name being used.

Users seem to be most concerned about what Facebook does with their personal information without their knowledge. Therefore, an alternative approach would be for Facebook to send members requests to use their information in Sponsored Stories—or, at least, notifications warning users that Facebook intends to publish their personal data in a Sponsored Story—before actually doing so. This way, members could take greater control over the potential use of

122. *Id.*

their personas by denying the request or tightening their privacy settings to limit what information is released through the stories.

Additionally, in order to entice users to consent to being featured in the Sponsored Stories, Facebook could offer incentives for their participation. Instead of activating the Sponsored Stories feature by default upon registration for the site, members would only trigger Sponsored Stories by explicit agreement, through a notification or request from Facebook or the advertiser. To encourage users to accept the notification or request, Facebook and its advertisers could present users with the option of receiving benefits, such as discounts, promotions, coupons, or other rewards, for endorsing the product through a Sponsored Story.

Each of these tactics would help to ensure that Facebook users know exactly what they are agreeing to and understand how their personal information will be used in advertisements. Facebook should not be permitted to hide behind its lengthy, muddled, and inadequate Statement of Rights and Responsibilities or its sizeable bank account to shield itself from liability for improperly using its members' personas. The company must be pushed toward getting genuine consent from its members.

VI. CONCLUSION

More people now use Facebook than were on the planet two hundred years ago.¹²³ In 2010, Facebook's user base exceeded the population of the United States, growing large enough to become the third largest "country" on earth.¹²⁴ Growing at an average rate of 77 percent per year, by 2016 Facebook may claim the title as the largest "country" on earth.¹²⁵ It is no surprise that advertisers want to utilize this enormous potential for global exposure. However, it is imperative that this social networking powerhouse obtain the necessary consent from its users so as not to violate their right of publicity.

123. *Kony 2012*, INVISIBLE CHILDREN (Mar. 6, 2012), <http://invisiblechildren.com/media/videos/program-media/kony-2012/>.

124. *Facebook may be the largest "country" on earth by 2016*, PINGDOM (Feb. 5, 2013), http://royal.pingdom.com/2013/02/05/facebook-2016/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+RoyalPingdom+%28Royal+Pingdom%29.

125. *Id.*

