

# Terms of Service and Consumer Privacy: A Closer Look at Balancing Contractual Obligations and Digital Rights.

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Keziah Gitonga, Mehmet Arvas, Amanda Kemmer, Constantinos Papantoniou, Timur Temirgazin.

## A. INTRODUCTION

Before the Snowden revelations people were living in a bubble of innocence in regards to how much information about them is held, processed and stored by companies, corporations and even government authorities. Even nowadays, the average user is still uncertain as to what is done to this information and how it is passed on to third parties. At the same time there seems to be a growing tendency of consumers wishing to know more about where their data has been and to be able and control their data online. The pennies have started to drop and people are more aware of their privacy rights. In a recent World Economic Forum (WEF) survey in 2012, The Internet Trust Bubble,<sup>1</sup> people in 63 countries were asked "to what extent do you trust the following institutions to protect your personal data?" Banks and financial institutions scored the highest (60.5%), providers of health and medical services came in second (at 55.1%) and government authorities in third (52.9%). Companies providing social-networking services (37.4%) and online marketers and advertisers (29%) were at the bottom of the list. This paper has sought to examine and assess the ToS for some of the most popularly used websites: Facebook, Twitter, Snapchat, Netflix and Gmail. We read the small letters, usually disregarded by the average user, who simply clicks "I accept" and ticks all boxes. Are the assumed contractual obligations offering sufficient protection to our online privacy? The remainder of this paper carefully examines this question and ultimately concludes that we are still a long way from entrusting our human rights with private corporations and their ToS.

With the use of technology we are seeing an increase in the number of people preferring to conduct everyday activities online, be it commerce or entertainment. This has led many companies to establish automated contractual relationships with their users/customers online in the form of a "click and accept" form, as opposed to the traditional way, whereby someone had to go into a store and sign a paper document, the old-fashioned contract. Terms of Services (ToS) -sometimes also referred to as Terms and Conditions- can be defined as; 'the rules a person or organization must observe in order to use a service.'<sup>1</sup> Generally legally binding, unless they violate national laws, the terms of service agreements are subject to change from time to time, and 'it is the responsibility of the service provider to notify its users of any such change. A Web site that provides only information or sells a product often does not have terms of service. However, Internet service providers (ISPs) and all Web sites that store personal data for a user do; in particular, social networking sites, online auctions and financial transaction sites'<sup>2</sup>.

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<sup>1</sup> PCmag, Definition: terms of service, <http://www.pcmag.com/encyclopedia/term/62682/terms-of-service> last accessed 6 February 2015

<sup>2</sup> *ibid*

## B. CASE STUDIES: TWITTER, FACEBOOK, NETFLIX, GMAIL/GOOGLE+ AND SNAPCHAT.

Mark Lemley states that, ‘electronic contracts have experienced a sea of change in the last decade.’<sup>3</sup> His main concern is the ease with which contracts are established and agreed upon without real intention. This article examines various cases of such ToS, ranging from social media and online entertainment platforms, in an effort to critically analyse whether the right balance between contractual obligations and consumer privacy is drawn. The right to privacy creates a tension fundamentally because companies need to collect and use personal information to remain competitive and to gain more revenues in return for “free services” while consumers find some methods of collection and use of their personal information unfair and an invasion to their privacy.<sup>4</sup>

### (i) Facebook

In 2014, 25,000 people sued the Facebook’s European subsidiary company which is located in Ireland on grounds of privacy infringement.<sup>5</sup> The Vienna Regional Court ruled and gave Facebook 4 weeks to respond to the class-action lawsuit over privacy.<sup>6</sup> The law suit being led by privacy campaigner Max Schrem claims that Facebook has violated data protection including its alleged participation in the US Prism spy programme.<sup>7</sup> Taking a closer look at Facebook’s Terms of Service (TOS), one notices that they are phrased in a broad unclear manner. It states that all information gained cannot be shared unless:

1. ‘Received ....permission;’- given notice such as by telling....about it in this policy or removing name and any other personal identifying information from it.<sup>8</sup>
2. ‘For information others share about you.....they control how it is shared
3. Granting us permission to use your information not only allows us to provide Facebook as it exists today but it also allows us to provide.....with innovative features and services we develop in the future that use the information we receive about.... In new ways<sup>9</sup>

It is well known that nowadays almost all legal systems accept the consent regime; in this context, Facebook’s terms of service have almost 4,000 words and these are too hard to read within 2 hours.<sup>10</sup> It can be said that the permission which taken by Facebook does not qualify as effective consent. This is because its terms of service are very broad and have some exceptions that Facebook can share every piece of information with 3<sup>rd</sup> parties. Thus, sharing information without effective consent amounts to privacy infringement.

<sup>3</sup> Mark A. Lemley, ‘Terms of Use’ (2007) 91 Minn. L. Rev. 459

<sup>4</sup> Mary J. Culnan, Robert J. Bies, ‘ Consumer Privacy: Balancing Economic and Justice Considerations’ (2003) 59 JSI 323

<sup>5</sup> Samuel Gibbs, ‘ Facebook V Europe- privacy case’ *The Guardian* (London 22 August 2014)

<http://www.theguardian.com/technology/2014/aug/22/court-orders-facebook-response-on-facebook-v-europe-privacy-case> last accessed 6 February 2015

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

<sup>8</sup> Facebook, <https://www.facebook.com/legal/terms> last accessed 6 February 2015

<sup>9</sup> *ibid*

<sup>10</sup> Oliver Smith, ‘Facebook terms and conditions: why don’t you own your online life’ *The Telegraph* (4 January 2013) <http://www.telegraph.co.uk/technology/social-media/9780565/Facebook-terms-and-conditions-why-you-dont-own-your-online-life.html> last accessed 6 February 2015

## (ii) Twitter

Although Twitter has not been particularly criticized for over intrusive terms of use, the company has had several problems with managing the personal data of its users. The Federal Trade Commission (FTC) looked into security breaches at Twitter in 2009 in which a hacker got access to the accounts of several prominent members including the President of United States, and was able to read their private twitter messages and send out fake messages from their accounts.<sup>11</sup> In 2010 the FTC fined Twitter for two security breaches of privacy following a hacking attack, a year later, the USA Government obtained a court order asking Twitter to reveal information of subscribers involved in the WikiLeaks case. This raised concerns over the users First Amendment rights. The use of witter services amounts to consent of the user to the collection, transfer, storage, aggregation and other uses of shared information. Twitter's policy clearly states that personal identifiable information (e.g. IP addresses) although automatically recorded are they removed or erased after 18 months. Still however many incidents of leaked tweets, originally meant to be private due to raise concerns over the privacy protection by Twitter

## (iii) Netflix

Netflix, a provider of on-demand Internet streaming media, has recently updated its features enabling users to delete their viewing history.<sup>12</sup> In 2011, a federal judge granted preliminary approval to Netflix Inc's 9 million dollar settlement of class-action litigation accusing the video rental company of violating consumer privacy laws. Two plaintiffs brought proceedings before the U.S District Court in California against Netflix citing that it had violated the Video Privacy Act 1988 by keeping the viewing history and the plaintiffs credit card information 2 years after that had cancelled service. They felt that Netflix used the information for their own advertising and marketing purposes. The Courts held that Netflix had to decouple subscribers' rental histories from other identification data once a year has passed since service the cancellation of service.<sup>13</sup> In examining the ToS OF Netflix, they state that if a subscriber cancels their membership their account will automatically close at the end of their current billing period. However if you used a 3<sup>rd</sup> party to open your account, you will need to go through the 3<sup>rd</sup> party to tur off auto renew or unsubscribe from Netflix. Netflix also state that, 'You understand that the countries to which we may transfer information may not have the same level of data protection as your home country.'<sup>14</sup> It can be concluded that Netflix does not explicitly state what they do with subscribes information after service cancellation.

## (iv) Snapchat

Although Snapchat has set out clear privacy settings it has been criticized for its privacy policy. In May 2014 the Federal Trade Commission (FTC) launched complaint against Snapchat arguing that

<sup>11</sup> Brad Stone, 'Twitter settles F.T.C Privacy Case' *The New York Times* (24 June 2010) [http://www.nytimes.com/2010/06/25/technology/25twitter.html?\\_r=0](http://www.nytimes.com/2010/06/25/technology/25twitter.html?_r=0) last accessed 6 February 2015

<sup>12</sup> Jenna Mullins, 'Netflix Is Finally Letting You Delete Your Viewing History, So Now No One Will Know You Watched the Katy Perry Movie' *E-loves* <http://uk.eonline.com/news/579585/netflix-is-finally-letting-you-delete-your-viewing-history-so-now-no-one-will-know-you-watched-the-katy-perry-movie> (16 September14) last accessed 11 February 2015

<sup>13</sup> Jonathan Stempel, ' Judge approves Netflix Privacy Settlement' *Reuters* (6 July 2012) <http://www.reuters.com/article/2012/07/06/us-netflix-privacy-settlement-idUSBRE8650L520120706> last accessed 11 February 2015

<sup>14</sup> Netflix, 'Netflix Terms of Use' <https://www2.netflix.com/TermsOfUse?locale=en-GB> last accessed 11 February 2015.

the social media organisation ‘misrepresented’ the claim that any pictures sent over its app would ‘disappear forever’. According to the FTC by connecting the device to a computer it is possible to access the files which were supposedly erased.<sup>15</sup> In November 2014 Snapchat updated the privacy policy including a section on ‘message deletion’. Interestingly it reads; Delete is our default. That means that most messages sent through our Services will be automatically deleted once they have been viewed or have expired. [...] We can’t guarantee that messages will be deleted within a specific timeframe. And even after we’ve deleted message data from our servers, that same data may remain in backup for a limited period of time. We also sometimes receive requests from law enforcement requiring us by law to suspend our ordinary server-deletion practices for specific information. Finally, of course, as with any digital information, there may be ways to access messages while still in temporary storage on recipients’ devices or, forensically, even after they are deleted.<sup>16</sup>

These Terms of Service provided by the social media company can be considered as controversial while Snapchat promises the data will be deleted, it also leaves room for the data to be stored. This carries added concerns for surveillance over data shared on Snapchat. Although such messages are of ‘ephemeral’ nature, Snapchat policies do not offer sufficient guaranteed for gaining the consumer’s trust. The other issue is that users can access the social media through third party application to save pictures, videos and messages. It is not clear whether these third parties comply with Snapchat policy to inform sender that the file has been captured.<sup>17</sup>

#### (v) Gmail & Google+

Another controversial privacy related issue comes from Google: The Company is set to launch a new service in Gmail which will give users the opportunity to send messages to other Gmail accounts regardless of whether the recipient has shared their email address.<sup>18</sup> This could pose significant problems for private communications as it would allow users to be essentially contacted by strangers’ outsider their contact list. Google stated that the new service would make it easier for people using Gmail and Google+ to connect over mail.<sup>19</sup> This led us to review Google’s TOS and access these concerns. Google’s TOS are highly general and over widely many aspects of privacy. According to the case above they have stated, ‘If you have a Google Account, we may display your profile name.....in our services.’<sup>20</sup> Users will have the option to disable this service but by default this feature is turned on and all people will be able to access for messaging.<sup>21</sup> It is like an ‘opt-out’ box and thus does not offer adequate privacy protection. Even if Google alerts all users about new feature and gives advice on how to turn it off, there may be cases where people would not receive notifications or will not pay attention to them.<sup>22</sup> An opt-in option would thus seem a safer choice for this service.

<sup>15</sup> Brad Reed, ‘Yes, Snapchat misled you about how private your snaps are’ (8 May 2014)

<http://bgr.com/2014/05/08/snapchat-ftc-privacy-settlement/> last accessed 11 February 2015.

<sup>16</sup> Snapchat, ‘Privacy Policy’ <https://www.snapchat.com/privacy> last accessed 11 February 2015.

<sup>17</sup> Brad Reed, (n 15)

<sup>18</sup> BBC News Technology, ‘New Gmail messaging feature causes privacy concerns’ *BBC News* (10 January 2014)

<http://www.bbc.co.uk/news/technology-25680010> last accessed 11 February 2015.

<sup>19</sup> *ibid*

<sup>20</sup> Google, ‘Google Terms of Service’ <http://www.google.com/intl/en/policies/terms/> last accessed 11 February 2015

<sup>21</sup> BBC News, Google (n 18).

<sup>22</sup> *ibid*

### C. CONCLUSION

Terms of Service are enshrined in contracts which people conclude with service providers when they use their services. There are two types of these contracts; first, when people accept contracts to use services and second, when people automatically accept a contract by using services without looking at the text of the contract.<sup>23</sup> This second option has given rise to many disputes as many people do not realise the privacy issues that could be a potential problem to them once they enter a contract as we have seen from the different scenarios reviewed in this article. Most people give their consent unknowingly to companies to collect their personal information in exchange of services.<sup>24</sup> One way of addressing privacy concerns would be the application of fair information practice; this seems to be the norm in United States. This offers a balance between the interests of the business and the interests of the consumer.<sup>25</sup> To ensure that the balance between the Terms of Service and proportionate protection over the consumer's privacy does not get out of control it is deemed necessary to adopt a mixed approach of governmental provisions to protect both the interests of the business and the consumer rights as well as technological and self-regulation solutions.

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<sup>23</sup> Consumer Privacy ,(n 4)

<sup>24</sup> Ibid

<sup>25</sup> Ibid