



What Do Kim Kardashian And Your Random Facebook Friend Have in Common? A Right of Publicity That May Be Worth Money

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Use Facebook? If so, did you know that your right of publicity has been at the center of litigation for over a year?

In March 2011, a class action suit, *Fraleigh v. Facebook, Inc.*, was filed on behalf of users featured in Facebook's Sponsored Stories.¹ Sponsored Stories create customized paid advertisements, starring Facebook's own users based their activity on the site. For example, if your friend Bucky "likes" Rosetta Stone, you might see his profile picture underneath the Rosetta Stone logo on the right side of the page—the portion of the site where advertisements appear. See below.²



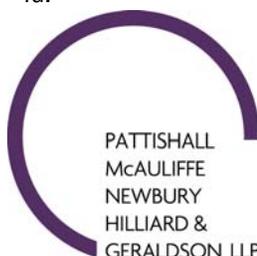
Mark Zuckerberg, Facebook founder and CEO, described the feature—which originally gave users a choice to opt out (rather than opt in)—as a "trusted referral" and "the Holy Grail of advertising."³ In their complaint, the named plaintiffs in *Fraleigh* instead described it as a violation of their publicity rights.⁴

¹ Class Action Complaint for Damages, *Fraleigh v. Facebook, Inc.*, CV 111-196193 (Cal. Super. Ct. March 11, 2011).

² *Id.* at Exhibit 2.

³ *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d 785, 792 (N.D. Cal. 2011)

⁴ *Id.*



Governed by state law, the right of publicity is an intellectual property right that protects against the unauthorized use of an individual's identity for commercial purposes and grants that individual the exclusive right to control and profit from commercial use of his or her identity.⁵ This means, for example, that Olympic gold medalist Ryan Lochte has the exclusive right to control and profit from any sales of custom-made American flag grills⁶ using his image or that Kim Kardashian has the exclusive right to control and profit from use of her name to sell perfume. Even your friend Bucky would have an exclusive right to control and profit from use of his identity in connection with Rosetta Stone advertisements. That is, of course, unless Bucky licensed or transferred his right of publicity to someone else—someone like Facebook.

In its motion to dismiss, Facebook contested, among other things, that users had consented to Sponsored Stories, in effect licensing their publicity rights by agreeing to Facebook's terms of service.⁷ These terms of service gave Facebook broad power to pair user content with commercial and sponsored information, allowing users to manage these pairings through their privacy settings.⁸ The plaintiffs noted that Sponsored Stories did not exist when they initially signed up for Facebook and agreed to the then-current terms of service.⁹ Even if the now-current terms are broad enough to encompass Sponsored Stories, the plaintiffs argue they never willfully or knowingly consented to Sponsored Stories.¹⁰

In denying Facebook's motion to dismiss last year, the court only stated that an issue of fact existed with regard to consent.¹¹ Before the court could make a final determination on the issue, the parties proposed a settlement last month.¹²

As cases like *Fraley* settle out of court without precedential holdings, questions about what constitutes valid consent within social media platforms—with terms constantly changing to keep up with new, revenue enhancing features—remain contested. Courts tend to evaluate these types of agreements on the basis of notice,¹³ with some courts finding that consent can be premised on constructive notice of the terms a user agrees to by entering a site or clicking “I Accept.”¹⁴ To

⁵ See e.g., *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir. 1992)

⁶ Cavan Sieczkowski. *Ryan Lochte Grill: London Olympics Swimmer Shows Off Red, White and Blue Teeth*. Huffington Post, Jul. 30, 2012, http://www.huffingtonpost.com/2012/07/30/ryan-lochte-grill-london-olympics-photos_n_1719116.html.

⁷ *Fraley*, 830 F. Supp. 2d at 805-06.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 806.

¹² Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, *Fraley v. Facebook, Inc.*, 2012 WL 2354653 (N.D. Cal. June 20, 2012)

¹³ See *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (holding customers had not consented to arbitration term because they did not have "reasonably conspicuous notice" of term that was "hidden below the 'Download' button" and only visible after they scrolled down the screen).

¹⁴ See e.g., *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236-38 (E.D. Pa. 2007); *Cairo, Inc. v. Crossmedia Services, Inc.*, 2005 WL 756610, at *2 (N.D. Cal. April 1, 2005) (holding that visible display of site's name and logo, with visible notice that proceeding constituted acceptance of terms, with visible hyperlink to those terms constituted valid notice and proceeding constituted acceptance of those terms); *Ticketmaster Corp. v. Tickets.Com, Inc.*, 2003 WL 21406289,

determine if Facebook's terms have changed or to receive notice of changes after they initially click "I Accept," Facebook users—like the plaintiffs in *Fraley*—must take further steps such as checking or "liking" the Site Governance Page.¹⁵ A court might charge users with being on constructive notice of any amendments given users' initial consent to accessible terms, one of which included how Facebook could amend these terms.¹⁶

With the consent issue left unresolved in *Fraley*, social media sites and the companies looking to advertise through these platforms should take note of the proposed terms of the settlement.¹⁷ Aside from paying out damages to the named plaintiffs, attorneys, and certain non-profit organizations, Facebook is required to make it easier for users to see and control what content appears in Sponsored Stories (although not requiring any universal opt-out feature) and spell out more clearly in its terms that users are granting Facebook a license of their publicity rights.¹⁸

Even if the parties agree to settle once these changes are made, the court must also accept the proposed settlement. The path to settlement has seen a few obstacles. Last month, Judge Lucy Koh stepped down one day before a hearing on the proposed settlement was set to occur.¹⁹ This past June, the plaintiffs in another class action, *C.M.D. v. Facebook, Inc.*, filed a motion to intervene to oppose the preliminary approval of the settlement.²⁰ *C.M.D.*, filed on behalf of minor users, involves Facebook's Sponsored Stories and advertising more generally and argues that its plaintiffs, as minors, are incapable of consenting to Facebook's use of their names and likenesses as a matter of law.²¹ The *C.M.D.* plaintiffs contend that, as members of the larger class in *Fraley*, their claims in the *C.M.D.* action would be barred without any substantial benefit if the *Fraley* settlement goes forward as proposed.²² Judge Richard Seeborg, the new judge assigned to the *Fraley* case, stated in his July 25, 2012 order that the *C.M.D.* plaintiffs could argue in opposition to the proposed settlement at the hearing for preliminary approval on August 2nd.²³

At the August 2nd hearing, Judge Seeborg expressed "significant concerns" about the proposed settlement, particularly why no class members—except the named plaintiffs—would recover any

at *2 (C.D. Cal. March 7, 2003) ("[A] contract can be formed by proceeding into the interior web pages after knowledge (or in some cases, presumption knowledge) of the conditions accepted when doing so.").

¹⁵ 14. Amendments, *Statement of Rights and Responsibilities*, Facebook, Inc., www.facebook.com/legal/terms.

¹⁶ *Id.*

¹⁷ See Laura Stampler. *Here's the Incredibly Clever Way Free People Uses Instagram to Sell Jeans*. Business Insider. Jul. 25, 2012, <http://www.businessinsider.com/free-people-and-urban-outfitters-instagram-advertising-2012-7?op=1>.

¹⁸ Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, *Fraley v. Facebook, Inc.*, 2012 WL 2354653 (N.D. Cal. June 20, 2012)

¹⁹ Dan Levine. *Judge Steps Away from Facebook Privacy Lawsuit*. CNBC. Jul. 11, 2012, <http://www.cnbc.com/id/48153005>.

²⁰ Motion and Memorandum and Points of Authority in Support of Intervention to Oppose the Motion for Preliminary Approval of Class Settlement, *Fraley v. Facebook, Inc.*, CV 11-1726 (N.D. Cal. June 22, 2012).

²¹ *Id.*

²² *Id.*

²³ Order Re Motion to Intervene, *Fraley v. Facebook, Inc.*, CV 11-1726 (N.D. Cal. Jul. 25, 2012).

compensation.²⁴ Facebook's counsel noted that the parties were unable to formulate the value of each user's publicity rights violation.²⁵

Stay tuned to see how, or if, Facebook's latest privacy saga—and your friend Bucky's publicity rights—get resolved and the implications any resolution might have on social networking sites' advertising.

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²⁴ Dan Levine. *Judge Skeptical of Facebook Settlement over Ad Product*. Chicago Tribune. Aug. 2, 2012, <http://www.chicagotribune.com/news/sns-rt-us-facebook-privacy-lawsuitbre8711sp-20120802,0,6642075.story>.

²⁵ *Id.*