
INSTAGRAM SETS A PRECEDENT BY AN “INSTA” CHANGE IN SOCIAL MEDIA CONTRACTS & USERS’ IGNORANCE OF INSTAGRAM’S TERMS OF USE MAY LEAD TO ACCEPTANCE BY A SIMPLE “SNAP”

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I. INTRODUCTION

In the age of technology, social media has taken to new heights and continues to grow rapidly. The development of social media networks has led users to be creative and innovative in the way they express themselves to the public.² A social media site is described as a “web-based service[] that allow[s] individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and

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² See Jennifer Jacobs Henderson, *The Boundaries of Free Speech in Social Media*, in *SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATIONS STUDENTS AND PROFESSIONALS*, 9 (Daxton R. Stewart ed., 2013) (explaining how social media platforms have become a new tool for communication); see also Anthony Curtis, *The Brief History of Social Media: Where People Interact Freely, Sharing and Discussing Information About Their Lives*, archived at <http://perma.cc/GZ3B-BBNP> (describing social media sites as places “where people interact freely, sharing and discussing information about each other and their lives, using a multimedia mix of personal words, pictures, videos and audio”). In addition, the article gives a timeline of social media site development. See *id.*

(3) view and traverse their list of connections and those made by others within the system.”³ One social media platform that has recently cultivated a unique identity for its user is Instagram.⁴ Instagram is an online social networking service that allows users to take pictures or videos and apply digital filters to them before sharing them on other social networking services such as Facebook and Twitter.⁵ However, the unique service that Instagram offers begins with a hook which users tend to ignore, the terms of use.⁶

Like any online social media network, the terms of use express the network’s policy for users to hopefully read and follow.⁷ In June of 2012, the popular social media network, Facebook Inc., bought Instagram for one billion in cash and stock.⁸ This deal led to the transformation of Instagram’s controversial terms of use.⁹ Instagram’s terms of use binds the users into a so-called contract.¹⁰ Instagram outlines its terms of use and in exchange for the user’s acceptance, they are allowed access to the services Instagram

³ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM’N 210, 211 (2008). See also Henderson, *supra* note 2, at 2-5 (describing a social media site).

⁴ See Kara Swisher, *The Money Shot*, VANITY FAIR (June 2013), archived at <http://perma.cc/JV4M-Z5W8> (detailing the story of the invention of Instagram and its impressive growing popularity after it launched).

⁵ See *Instagram and Kids: A Parent’s Guide to Privacy and Safety*, SOCIALLYACTIVE, archived at <http://perma.cc/6XNQ-NA6G> [hereinafter *Instagram and Kids*] (describing the purpose and role of Instagram); see, e.g., Curtis, *supra* note 2 (explaining social media sites appear in many forms including images and video sharing like Instagram).

⁶ See David Axelson & Brian Wassom, *Social Media Terms of Service: Venue and Arbitration Clauses*, WASSOM.COM (June 28, 2013), archived at <http://perma.cc/A8ZY-PDTN> (highlighting how social media users ignore the terms of use when they join a site).

⁷ See *Terms of Use*, INSTAGRAM, archived at <https://perma.cc/AXD8-AJ8H> [hereinafter *Terms of Use*] (explaining the rules and procedures for Instagram site users); see also Boyd & Ellison, *supra* note 3, at 211-12 (showing the development of social media sites).

⁸ See Swisher, *supra* note 4, (explaining Facebook’s offers to purchase Instagram).

⁹ See Gerry Shih & Alexei Oreskovic, *Instagram tests new limits in user privacy*, REUTERS (Dec. 19, 2012), archived at <http://perma.cc/N4Y6-X9ZQ> (discussing the controversial debate about the change in Instagram’s terms of use).

¹⁰ See Woodrow Hartzog, *Privacy & Terms of Service*, in SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATIONS STUDENTS AND PROFESSIONALS, 71-73 (Daxton R. Stewart ed., 2013) (describing contracts as terms of use agreements on social media sites); see also Axelson & Wassom, *supra* note 6 (explaining the development of terms of use policies is common to all social media sites).

provides.¹¹ This transformation led to a debate about how much control over personal freedom users must give up in order to live and participate in a world steeped in social media.¹²

This Note will argue that Instagram's new terms of use policy will set a precedent for how social media network companies should develop their future user contract policies. Part II of this Note examines the development of contracts in social media networks. This section will explore the basic principles of entering into a contract, with an emphasis on substantive contract law provisions exemplified by the Restatement, the Uniform Commercial Code (UCC) and Uniform Computer Information Transaction Act (UCITA). Also, there will be a short segment on a procedural statute in the United States, known as the Uniform Electronic Transaction Act (UETA). Additionally, Part II will explore the history of an arbitration clause in a contract, the development of the terms of use agreements policies on the Internet and Finally, children using social media sites.

Part III of this Note analyzes the development of Facebook's user terms and policies that created the foundation for Instagram's new contract policy. Part III will also analyze the recent case, *Rodrigues v. Instagram, LLC*,¹³ which challenged Instagram's terms of use. Part IV will be broken down into five parts: (1) A "point and click" policy, which will demonstrate that once a user creates an Instagram account, they have essentially agreed to all terms in the contract, (2) Instagram's "take it or leave it" policy, (3) Instagram's development of an arbitration clause that prevents class action suits and states all legal complaints must be brought in arbitration, (4) minors assenting to Instagram's terms of use, (5) the effect of Instagram's "take it or leave it" policy on other social media networks. This Note will conclude that Instagram's new terms of use will set a precedent for the future of contract policies in social media networks.

II. HISTORY

¹¹ See Hartzog, *supra* note 10, at 71 (explaining the role of contracts between users and websites, which are typically seen in the forms of terms of use).

¹² See Shih & Oreskovic, *supra* note 9 (showing that the revision of Instagram's terms of service has sparked renewed debate).

¹³ See *Rodriguez v. Instagram, LLC*, No. 12-06482, 2013 U.S. Dist. LEXIS 98627, at *2-3 (N.D. Cal. July 15, 2013) (discussing the civil action suit that was brought against Instagram, LLC due to its modification to the terms of use policy).

A. Contract Law Provisions

1. Common Law-Restatement

In an age of technology, there has been increasing development of social media sites and their own terms of use policies.¹⁴ Courts have struggled to define the scope of traditional contract principles and their applicability to the terms of use agreements in the social media context.¹⁵ In order to understand the development of social media networks and their terms of use by using contract principles, one must learn the history of contract law.¹⁶ The history of contracts in the United States developed with the use of the common law, which is governed by the Restatement of Contracts.¹⁷ The common law is made up of prior cases to determine the rules applicable to current disputes developed by court decisions on the topic and modified by the legislation.¹⁸ If the facts of a prior case are similar to the present case, then the ruling in the prior case becomes the controlling precedent for the present suit.¹⁹

¹⁴ See Henderson, *supra* note 2, at 3 (discussing the development of social media sites); see also Curtis, *supra* note 2 (discussing the history of social media sites).

¹⁵ See Robert Terenzi, Jr., *Friending Privacy: Toward Self-Regulation of Second Generation Social Networks*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1049, 1071-72 (2010) (illustrating that courts have struggled with the history of contract law in the terms of use in electronic contracts); see also *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (displaying ordinary contract principles, such as a shrinkwrap license, which is a valid and enforceable contract); see, e.g., *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001) (explaining prior California courts, which held that software license agreements are binding contractual agreements).

¹⁶ See Terenzi, *supra* note 15, at 1072 (demonstrating that one must understand the history of contract law in order to understand the trouble courts and legislators have when applying traditional contract principles to click-through terms of use agreements).

¹⁷ See JAMES F. HOGG ET AL., *CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION* 19 (2007) (discussing the development of the common law in the United States).

¹⁸ See *id.* (describing common law principles); see also Terenzi, *supra* note 15, at 1074 (discussing how the common law regulates the construction, interpretation, and enforcement of contracts).

¹⁹ See HOGG, *supra* note 17, at 19 (explaining how facts from a previous case that are relatively similar to a present case will be controlling in the court's decision).

Under the common law, a contract is defined as a promise or set of promises that is enforceable at law.²⁰ To form a contract, there must be a meeting of the minds between the two parties.²¹ Mutual assent occurs when there is an offer and acceptance between the two parties in order for an agreement to be formed.²² Contracts also require there to be consideration, such as an act, forbearance, or a return promise, that is bargained for and received by a promisor from the promisee.²³ A contract must be analyzed from an objective standard, which is a reasonable person's position on the terms of the agreement.²⁴

2. Uniform Commercial Code (UCC)

In order to comprehend the development of the terms of use policies of social media networks, one must understand the Uniform Commercial Code ("UCC").²⁵ The UCC is applicable to all sales of goods.²⁶ Most states have adopted Article 2 of the UCC, which governs contracts for the sale of goods, and only a few have adopted Article 2A, which governs contracts for the lease of goods.²⁷ The UCC defines "goods" as movable things with certain specified exceptions.²⁸ There has been a major controversy in the court system in-

²⁰ See Restatement (Second) of Contracts § 1 (1981) (explaining the definition of a contract); see also RICHARD RAYSMAN ET AL., INTELLECTUAL PROPERTY LICENSING: FORMS AND ANALYSIS, § 2.02[1] (2006) (defining that a contract is a promise or set of promises).

²¹ See RAYSMAN, *supra* note 20, at § 2.02[1] (explaining that a contract only exists if there is mutual assent between the two parties).

²² See Terenzi, *supra* note 15, at 1072-73 (explaining that a contract only exists if there is an offer and acceptance between two parties).

²³ See Terenzi, *supra* note 15, at 1072 (stating that a contract also needs to have consideration in order to be valid and enforceable).

²⁴ See Terenzi, *supra* note 15, at 1074 (mentioning that contracts must be construed from an objective standard); see also HOGG, *supra* note 17, at 19 (explaining that the common laws uses the universal human idea of reasonableness and justice).

²⁵ See Curtis, *supra* note 2 (discussing development of social media law).

²⁶ See JULIAN MILLSTEIN ET AL., DOING BUSINESS ON THE INTERNET: FORM & ANALYSIS § 8.04[2] (2013) (stating that the UCC involves the sale or lease of goods).

²⁷ See *id.* at § 8.04[2][b] (explaining the purpose of Article 2 and Article 2A in the UCC).

²⁸ See U.C.C § 2-105(1) (2012) (explaining goods as all things which are movable at the time of identification to the contract); see also MILLSTEIN, *supra* note 26, at § 8.04[2][b][i] (defining the meaning of a good under UCC Article 2).

volving whether the use of computer software contracts are for “goods” or “services” under the UCC.²⁹ A majority of the courts have applied a “predominant purpose” test in order to consider whether computer software is a “good.”³⁰

3. *Uniform Computer Information Transactions Act (UCITA)*

Although courts have applied UCC Article 2 to software licenses agreements, it is not clear whether Article 2 applies to other transactions in computer information agreements.³¹ For example, the UCC inadequately addressed commercial transactions involving intangibles such as information and software as well as transactions involving both goods and information.³² Due to special contract and distribution issues presented by the “virtual” world of the Internet, the Uniform Computer Information Transactions Act (“UCITA”) was drafted.³³ Originally the UCITA was drafted to be Article 2B of the UCC, and would have applied to most industries involved in the creation and licensing of intangibles.³⁴ Comparable to the UCC, UCITA is a substantive uniform contract law that may be adopted by state legislature and be superimposed on the common law in connection with contracts for the licensing of computer information.³⁵ Currently, UCITA has only been adopted by two states, while a number of states have adopted “bomb shelter” legislation that invalidates any choice

²⁹ See MILLSTEIN ET AL., *supra* note 26, at § 8.04[2][b][i] (showing the confusion of software computer contracts by the courts).

³⁰ See MILLSTEIN ET AL., *supra* note 26, at § 8.04[2][b][i] (referring to the “predominant purpose” test that a majority of courts use to determine if computer software is considered a good).

³¹ See MILLSTEIN ET AL., *supra* note 26, at § 8.04[2][b][i] (discussing inconsistencies amongst courts as to how to apply Article 2 to internet transactions).

³² See RAYSMAN, *supra* note 20, at § 2.02[1] (describing the drafting of UCITA to address special contract and distribution issues).

³³ See RAYSMAN, *supra* note 20, at § 2.01[1] (explaining the purpose of drafting UCITA); see also MILLSTEIN ET AL., *supra* note 26, at § 8.04 (outlining how UCITA has been applied to other transactions involving computer information).

³⁴ See RAYSMAN, *supra* note 20, at § 2.01[1] (explaining that UCITA was originally supposed to be part of the UCC as Article 2B).

³⁵ See MILLSTEIN ET AL., *supra* note 26, at § 8.04 (describing UCITA as a substantive uniform contract law that may be adopted by state legislatures).

of law provision pursuant to which UCITA would apply to a transaction.³⁶

Similar to the UCC, it is difficult to determine whether the UCITA should apply to a contract's formation.³⁷ However, the terminology in the UCC and UCITA define certain contract principles differently.³⁸ For instance, under UCITA the term "record" is replaced by "writing" and "signature" is used in place of "authentication."³⁹ Additionally, unlike the UCC, UCITA applies to transactions involving "computer information," which applies to agreements to create, modify, transfer, or distribute computer software, interactive multimedia products, computer data and databases, Internet and online information, and other "computer information transactions."⁴⁰ UCITA would authorize most shrink-wrap licenses and clip-wrap agreements, recognize electronic records, authentication, and agents, and establish rules for contract formation, terms and construction, express and implied warranties, ownership and transfers, and damages and remedies.⁴¹ Conversely, UCITA does not apply to "core financial service transactions, compulsory licenses, employment contracts other than independent contractors outside the news reporting industry, contracts in which the delivery of the information as computer information is discretionary or immaterial, and subject matter otherwise regulated under specific articles of the UCC."⁴²

³⁶ See MILLSTEIN ET AL., *supra* note 26, at § 8.04 (noting that only two states have adopted UCITA).

³⁷ See MILLSTEIN ET AL., *supra* note 26, at § 8.04 (discussing contracts in relation to UCITA).

³⁸ See MILLSTEIN ET AL., *supra* note 26, at § 8.04 (defining terms in relation to contract formation).

³⁹ See MILLSTEIN ET AL., *supra* note 26, at § 8.04 (explaining the different terminology used in the UCITA).

⁴⁰ See RAYSMAN, *supra* note 20, at § 2.01[1] (stating that UCITA applies to transactions involving "computer information"); see e.g., MILLSTEIN ET AL., *supra* note 26, at § 8.04 (defining UCITA as "information in electronic form which is obtained from or through the use of a computer.")

⁴¹ See RAYSMAN, *supra* note 20, at § 2.01[1] (describing what UCITA would cover as drafted); see, e.g., Donnie L. Kidd, Jr. & William H. Daugherty, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 244 (stating that UCITA validates both shrink-wrap and point-and-click contracts).

⁴² RAYSMAN, *supra* note 20, at § 2.01[1] (describing what the UCITA does not cover).

4. *Procedural Statutes: Uniform Electronic Transaction Act (UETA)*

The substantive contract law provisions exemplified by the Restatement, the UCC and UCITA are not the only provisions that are helpful, but rather there are also procedural statutes that govern electronic interstate and foreign commerce in effect in the United States.⁴³ At the end of the twentieth century, two electronic transaction statutes were adopted in order to eliminate barriers to electronic commerce, the Uniform Electronic Transaction Act ("UETA") and E-Sign.⁴⁴ UETA was promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1999 and is effective in forty-seven states including the District of Columbia.⁴⁵ The purpose of UETA is to facilitate electronic commerce, but it is not a general contracting statute or a digital signature statute.⁴⁶ The central goal of UETA is to complement the existing state digital signature laws.⁴⁷

UETA allows for a record, a contract or signature not to be denied its legal status on the basis of its electronic form, and if a law requires a signature, an electronic signature can satisfy that requirement.⁴⁸ UETA also allows for the use of electronic agents in electronic contracts and "addresses attribution of electronic records or electronic signatures, the effect of changes or errors in an electronic record that may occur during transition, requirements that a signature or record be notarized, acknowledge, verified, or made under oath, and record retention requirements."⁴⁹ UETA will only apply when

⁴³ See MILLSTEIN ET AL., *supra* note 26, at § 8.04 (describing additional procedural statutes that are relevant to electronic interstate and foreign commerce).

⁴⁴ See Juliet M. Moringiello & William L. Reynolds, Article, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 459 (commenting on the adoption of the electronic transactions statutes).

⁴⁵ See *id.* at 459 (stating that UETA was one of two electronic statutes adopted in the twentieth century); see also MILLSTEIN ET AL., *supra* note 26, at § 8.04 (explaining the role of UETA).

⁴⁶ See MILLSTEIN ET AL., *supra* note 26, at § 8.04[2](d) (describing the purpose of UETA in electronic commerce).

⁴⁷ See MILLSTEIN ET AL., *supra* note 26, at § 8.04[2](d) (emphasizing the goal of UETA in electronic commerce).

⁴⁸ See MILLSTEIN ET AL., *supra* note 26, at § 8.04[2](d) (illustrating that an electronic signature cannot be denied its electronic status).

⁴⁹ MILLSTEIN ET AL., *supra* note 26, at § 8.04[2](d) (listing factors that must be recognized in order to make changes).

both parties have agreed to conduct the transaction by an electronic means or when a party has agreed to conduct some form of a transaction, but not others by the use of electronics.⁵⁰

B. Applying Contract Law Principles to Social Media Networks Sites

The rise of social networking sites in the last decade has substantially shaped the world of technology and the use of the Internet.⁵¹ The latest social media networking site, Instagram, has allowed for people to connect with other users of the site and share pictures or videos.⁵² The use of social media networking sites is challenging the future principles of contract law.⁵³ One area in particular that has recently been a struggle with traditional contract law is the terms of use agreements in the electronic commerce context.⁵⁴ Therefore, in order to understand the role of contracts in social media networking sites there must be a breakdown of the different terms of use policies into which users can enter.⁵⁵

1. Social Media Networks Terms of Use Agreements

Social media networks, like Instagram's terms of use agreement, provide both the privacy policy and control over the information provided by the user to the Internet world.⁵⁶ In the terms of use agreements, users are allowed some control over their infor-

⁵⁰ See Moringiello & Reynolds, *supra* note 44, at 460 (showing that UETA can only be used when both parties have agreed to conduct transactions by electronic means).

⁵¹ See Henderson, *supra* note 2, at 3 (showing the rise of popularity in the use of social media sites); see also Curtis, *supra* note 2 (explaining the rise in popularity of social media sites over the last decade).

⁵² See Terenzi, *supra* note 15, at 1050 (explaining how the use of social networking sites has become a way for users to connect and share information).

⁵³ See Moringiello & Reynolds, *supra* note 44, at 456 (discussing that the advancement of technology has led to the development of electronic contracting).

⁵⁴ See Terenzi, *supra* note 15, at 1071-72 (describing how courts have struggled to apply traditional contract principles to terms of use agreements).

⁵⁵ See Terenzi, *supra* note 15, at 1072 (discussing necessity for different click-through terms of use agreements).

⁵⁶ See Hartzog, *supra* note 10, at 66 (explaining the role of terms of use agreements in social media sites' contracts).

mation shared on the social media network.⁵⁷ Also, the terms of use agreements allow users the right to sell, use, and transmit that personal information before the user agrees to accessing the website and handing over their information to the social network.⁵⁸ A terms of use agreement is defined as “a set of promises proposed by a website and agreed to by the user of the website.”⁵⁹ For example, Instagram is a social networking website that allows users to share photos and videos.⁶⁰ When a user visits Instagram, he or she is required to accept Instagram’s terms of use in order to become a user (i.e. create a profile, post pictures, and tag, etc.).⁶¹ Therefore, Instagram’s terms of use agreement binds both parties to the legal responsibilities set forth in the terms of use agreement.

C. The Use of an Arbitration Clause in an Electronic Contract

An arbitration clause is a form of alternative dispute resolution.⁶² Alternative dispute resolution has become a popular method to resolve Internet disputes, specifically the use of arbitration.⁶³ Arbitration is a “binding pre-dispute agreement to adjudicate a dispute in a non-judicial forum.”⁶⁴ An arbitration clause in a contract provides advantages to a company including: “the drafting...of...contractual terms [that are] to the company’s advantage; the take it or leave it nature of the transaction; the ability to designate

⁵⁷ See Terenzi, *supra* note 15, at 1075 (explaining that users do have some control in social media sites’ terms of use agreements).

⁵⁸ See Terenzi, *supra* note 15, at 1075 (showing that users must agree to the terms of use before they have access to the social network).

⁵⁹ Terenzi, *supra* note 15, at 1076 (explaining the role of social media sites’ terms of use agreements).

⁶⁰ See *Instagram and Kids*, *supra* note 5 (explaining Instagram’s terms of use); see also Boyd & Ellison, *supra* note 3, at 214 (describing that some social media sites have photo-sharing capabilities).

⁶¹ See Henderson, *supra* note 2, at 1 (explaining the terms of use that a user must accept before they have access to the site).

⁶² See Esther C. Roditti, *1-4 Computer Contracts* § 4.08, 1 (Matthew Bender, 2014) (explaining that arbitration is a form of alternative dispute resolution).

⁶³ See *id.* (describing how alternative dispute resolution has become a popular method to resolve Internet disputes).

⁶⁴ See Donna M. Bates, *A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT’L L.J.* 823, 830-31 (explaining that arbitration allows a dispute to be solved without judicial help).

the law and venue that governs the contracts; and the ability to prohibit class actions suits.”⁶⁵

The Federal Arbitration Act (“FAA”) governs the use of arbitration clauses in the United States.⁶⁶ Arbitration clauses are not unique to social media networking sites and a common issue presented in electronic contracts is the lack of case law on the enforceability of electronic contract terms in their absence.⁶⁷ Courts have been hesitant to enforce arbitration clauses, but in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court held that parties do not forgo substantive rights in arbitration, but rather trade a judicial forum for arbitration.⁶⁸ Many courts have struck down arbitration clauses because of procedural and substantive unconscionability.⁶⁹ This can be recognized in a recent California case *AT&T Mobility L.L.C. v. Conception*.⁷⁰ The Court noted that “a state cannot proclaim all arbitration clauses unconscionable, a state may provide that arbitration clauses must be presented in a prescribed manner, such as in bold type or in highlighted print.”⁷¹

Additionally, before a company can include an arbitration

⁶⁵ Roditti, *supra* note 62 (referring to the advantages of an arbitration clause).

⁶⁶ See 9 U.S.C. §§ 1-14 (2012) (explaining the parameters of the Federal Arbitration Act); see also Bates, *supra* note 64, at 831-32 (describing that the FAA governs federal U.S. arbitration).

⁶⁷ See Moringiello & Reynolds, *supra* note 44, at 475 (explaining that there is very little case law to support the enforceability of electronic terms); see also Sherman Kahn, *Administering Arbitration Clauses in Online Terms of Service Agreements*, SOCIALLYAWARE (Apr. 29, 2013), archived at <http://perma.cc/8W9N-8359> (explaining the use of arbitration clauses by companies in terms of use agreements).

⁶⁸ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985) (holding that by agreeing to arbitrate statutory claim, a party does not forgo substantive rights afforded by statute; it only submits to their resolution in arbitral, rather than judicial forum, trading court procedures and opportunity for review for simplicity, informality, and expedition of arbitration).

⁶⁹ See Bates, *supra* note 64, at 829 (showing that many courts strike down the use of an arbitration clause in a contract); See, e.g., Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and NonConsumer Contracts*, CORNELL LAW FACULTY PUB. 874-75 (2008), archived at <http://perma.cc/3G5R-ZUGP> (explaining that courts at both the state and federal level are mixed on the question of unconscionability);

⁷⁰ See *AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740, 1756-57 (2011) (describing that California state cannot declare all arbitration clauses unconscionable).

⁷¹ Moringiello & Reynolds, *supra* note 44, at 476 (providing that AT&T Mobile L.L.C. held that California's treatment of consumer arbitration clauses violated the Federal Arbitration Act).

clause in its terms of use agreements, the arbitration clause must be administered by an organization.⁷² A common organization utilized for online terms of service agreements is the American Arbitration Association (“AAA”).⁷³ The AAA is a non-profit organization that provides services such as designing and developing alternate dispute resolutions for corporations, unions, government agencies, law firms, and the courts.⁷⁴ The AAA administers two types of arbitration clauses arising from online terms of services agreements, business-to-business and business-to-consumer.⁷⁵ The business-to-business dispute is heard under the AAA Commercial Arbitration Rules.⁷⁶ Conversely, a business-to-consumer dispute requires additional scrutiny in order to ensure fairness since the agreements are accepted before a dispute arises.⁷⁷ When a business wants to include a pre-dispute arbitration clause in its terms of use agreements, it should become familiar with the Consumer Due Process Protocol, which addresses issues that may result when including an arbitration clause.⁷⁸ While an arbitration clause deals with consumers, the AAA requires that the clause drafter submit the clause to them for review and approval.⁷⁹

D. Types of Terms of Use Agreements in Electronic Contracts

1. *Shrinkwrap Agreements*

⁷² See Kahn, *supra* note 67 (explaining the role of the American Arbitration Association).

⁷³ See Kahn, *supra* note 67 (showing the use of the American Arbitration Association to administer arbitration clauses in online terms of service agreements); see also *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARBITRATION ASS’N., archived at <http://perma.cc/G58V-VQ3S> [hereinafter AM. ARBITRATION ASS’N.] (explaining the purpose of the American Arbitration Association).

⁷⁴ See AM. ARBITRATION ASS’N., *supra* note 73 (discussing the types of services the American Arbitration Association provides).

⁷⁵ See Kahn, *supra* note 67 (explaining the two types of arbitration agreements).

⁷⁶ See Kahn, *supra* note 67 (describing the business-to-business agreement).

⁷⁷ See Kahn, *supra* note 67 (highlighting the importance of the business-to-consumer arbitration clause in terms of use agreements, which is also known as a pre-dispute arbitration clause).

⁷⁸ See AM. ARBITRATION ASS’N., *supra* note 73 (explaining the Consumer Due Process Protocol).

⁷⁹ See Kahn, *supra* note 67 (providing how important it is to submit a draft to the AAA in pre-dispute arbitration clauses).

The next issue presented in Instagram's terms of use policy is the "take it or leave it" policy.⁸⁰ A "take it or leave it" policy presents the issue of different terms of use agreement forms: shrinkwrap agreements, browsewrap agreements, and clickwrap agreements.⁸¹ A shrinkwrap agreement includes a physical copy of software, purchased by a consumer, where by breaking the shrinkwrap or running the program the user agrees to the terms of use.⁸² Up until 1996, many courts have held shrinkwrap agreements to be unenforceable on the grounds that a consumer did not assent to the terms of use before they bought the computer software.⁸³ In *ProCD, Inc. v. Zeidenberg*, Judge Easterbrook relied on the UCC section 2-204 which states, "A contract for sale of goods may be formed in any manner to show agreement."⁸⁴ Thus, by a user installing the software, the user has essentially agreed to the terms of use in the agreement.⁸⁵

2. Browsewrap Agreements & Clickwrap Agreements

Browsewrap agreements consist of terms of use agreements that users may not read at all, but rather consent to by using the website.⁸⁶ Browsewrap agreements are included usually at the bottom of the page of a website and are accessed by clicking a link.⁸⁷ Once again the courts are tentative to enforce browsewrap agreements be-

⁸⁰ See Terenzi, *supra* note 15, at 1076 (discussing one sided nature of shrinkwrap agreements)

⁸¹ See Terenzi, *supra* note 15, at 1076 (describing the three principle forms of terms of use agreements).

⁸² See Kidd, Jr. & Daugherty, *supra* note 41, at 243 (describing that shrinkwrap agreements are commonly used in software packaging); see also Terenzi, *supra* note 15, at 1076 (referring to a shrinkwrap agreement as licensees included in physical copies of computer software).

⁸³ See Terenzi, *supra* note 15, at 1077 (explaining that many courts held shrinkwrap agreements to be unenforceable).

⁸⁴ See *ProCD, Inc.*, 86 F.3d at 1455 (describing the influential opinion written by Judge Easterbrook that upheld shrinkwrap terms of use); see also U.C.C. § 2-204(1) (2012) (explaining the nature of a contract for the sale of goods can be made in any manner).

⁸⁵ See Terenzi, *supra* note 15, at 1077 (declaring that when a user installs a shrinkwrap agreement they have agreed to the terms of use).

⁸⁶ See Terenzi, *supra* note 15, at 1078 (describing a browsewrap agreement).

⁸⁷ See Terenzi, *supra* note 15, at 1078 (detailing the location of browsewrap agreements on a website).

cause of the users' lack of notice to such terms of use.⁸⁸ Furthermore, the most popular form of electronic terms of use agreements are clickwrap agreements, which are also known as "point-and-click" agreements.⁸⁹ Clickwrap agreements are terms of use agreements that require the user to click a link that says "I Agree."⁹⁰ The clickwrap agreement forces the user to scroll through the agreement, avoiding the problem of a notice issue that is presented in a browserwrap agreement.⁹¹

E. The American Bar Association Four Steps for Forming a Legally Binding Online Contract

The American Bar Association ("ABA") declared a set of rules in order to avoid legal issues with electronic contracting.⁹² The rules declared four "bottom line" steps for forming legally binding online contracts: (1) The user must have adequate notice that the proposed terms exist; (2) the user must have a meaningful opportunity to review the terms; (3) the user must have adequate notice that taking a specified, optional action manifests assent to the terms; (4) the user must, in fact, take that action.⁹³ The clickwrap agreements are known for satisfying these requirements because they present the user with the terms of use before allowing the user to access the content or interact with the website.⁹⁴

F. Children and Social Media Sites

⁸⁸ See Terenzi, *supra* note 15, at 1078 (explaining how courts are unlikely to enforce browserwrap agreements because of the lack of notice to a user).

⁸⁹ See Kidd, Jr. & Daugherty, *supra* note 41, at 243 (describing that "point-and-click" agreements are the most used type of electronic terms of use agreements).

⁹⁰ See Terenzi, *supra* note 15, at 1079 (stating that a user assents to a clickwrap agreement by clicking the link that says "I agree").

⁹¹ See Terenzi, *supra* note 15, at 1079 (informing that a clickwrap agreement gives the user notice by making them scroll through the agreement).

⁹² See Terenzi, *supra* note 15, at 1079 (showing that in 2007 the ABA "promulgated a series of recommendations to avoid legal issues with electronic contracting").

⁹³ See Jason Haislmaier, *How Do I Build an Enforceable Online Agreement?—Not (Always) the Way Salesforce.com or Google Would*, THINKING OPEN (Mar. 8, 2008), archived at <http://perma.cc/8TNQ-QN3A> (reflecting the four steps in forming a legally binding online contract); see also Terenzi, *supra* note 15, at 1079-80 (listing the four "bottom line" steps for forming a legally binding online contract).

⁹⁴ See Terenzi, *supra* note 15, at 1080 (explaining the way clickwrap agreements satisfy the ABA requirements for an electronic contract to be legally binding).

Children are growing up in the age of technology and are participating in the use of social media sites.⁹⁵ There are special rules put in place for the privacy of children on social media websites.⁹⁶ The Children's Online Privacy Protection Act ("COPPA") was enacted in 1998 in order to prohibit online service providers from knowingly collecting any information about children younger than thirteen years of age.⁹⁷ COPPA also states that no one younger than thirteen may use their services.⁹⁸ For example, Instagram's terms of use policy makes clear that "[y]ou must be at least 13 years old to use the Service."⁹⁹ By having this provision in their policy, Instagram helps protect children from being vulnerable to contact by "strangers."¹⁰⁰ However, COPPA does not require an age confirmation to access a social networking website.¹⁰¹ This problem in COPPA allows children younger than thirteen full access to all social media sites, including Instagram.¹⁰² Therefore, in order for social media sites to protect themselves from such suits, COPPA provides language regarding parental consent.¹⁰³ COPPA requires that children under the age of thir-

⁹⁵ See Greg Sterling, *Pew: 94% of Teenagers Use Facebook, Have 425 Facebook Friends, but Twitter & Instagram Adoption Way Up*, *MARKETING LAND* (May 21, 2013), archived at <http://perma.cc/M53Z-ZH9V> (showing the popularity of use of social media sites amongst teenagers); see also Mary Madden et al., *Teens, Social Media, and Privacy*, *PEWRESEARCHCENTER* (May 21, 2013), archived at <http://perma.cc/Z7FU-P3ZX> (highlighting the findings on the use of social media sites by teens).

⁹⁶ See Ann M. Haralambie, *Use of Social Media in Post-Adoption Search and Reunion*, 41 *CAP. U.L. REV.* 177, 196-97 (2013) (explaining that there are rules in place on social media sites in order to protect children).

⁹⁷ See KENT STUCKEY, *INTERNET AND ONLINE LAW* § 8.07 (1996) (stating that social media networks are not allowed to knowingly collect information about children younger than thirteen years of age).

⁹⁸ See *id.* at § 8.07 (prohibiting children under the age of thirteen from having access to social networking websites).

⁹⁹ *Terms of Use*, *supra* note 7.

¹⁰⁰ See CHARLENE BROWNLEE & BLAZE WALESKI, *PRIVACY LAW* § 6.07A (2006) (stating that social networking websites leave children vulnerable to "strangers").

¹⁰¹ See STUCKEY, *supra* note 97, at § 8.07 (explaining that COPPA contains no age requirement in order to access a social networking websites, thereby giving children younger than 13 full access).

¹⁰² See STUCKEY, *supra* note 97, at § 8.07 (stating how children younger than 13 may have full access to social media sites).

¹⁰³ See Haralambie, *supra* note 96, at 198 (showing that COPPA provides language regarding parental consent before using a social media site if a child is under thirteen).

teen obtain parental consent stating:

- B) the operator to provide, upon request of a parent under this subparagraph whose child has provided personal information to that website or online service, upon proper identification of that parent, to such parent--
- (i) a description of the specific types of personal information collected from the child by that operator;
 - (ii) the opportunity at any time to refuse to permit the operator's further use or maintenance in retrievable form, or future online collection, of personal information from that child; and
 - (iii) notwithstanding any other provision of law, a means that is reasonable under the circumstances for the parent to obtain any personal information collected from that child.¹⁰⁴

Social media sites all have some type of policy in place for children, but no two policies are identical.¹⁰⁵ Most websites prevent children under the age of thirteen from using its website, regardless of parental consent.¹⁰⁶ Despite these restrictions, children still have full access to social media sites.¹⁰⁷ This leads to children violating the terms of use policies on social media sites, which presents the issue of minors entering into a contract.¹⁰⁸ Under the common law, a child is consid-

¹⁰⁴ Haralambie, *supra* note 96, at 198 (referring to part B of COPPA regarding parental authority for children under the age of thirteen).

¹⁰⁵ See Haralambie, *supra* note 96, at 198 (describing that social media sites have different policies for participation of minors); see also *Instagram and Kids*, *supra* note 5 (explaining ways to protect children and their privacy).

¹⁰⁶ See Haralambie, *supra* note 96, at 199 (providing that some social media sites bar children under the age of thirteen from using its site); see also *Instagram and Kids*, *supra* note 5 (discussing the use of social media sites by children).

¹⁰⁷ See Haralambie, *supra* note 96, at 199 (declaring that even though there are restrictions put in place children are still violating the terms of use put in place).

¹⁰⁸ See Haralambie, *supra* note 96, at 199 (showing how children violate the terms of service that social media sites have); see also *Instagram and Kids*, *supra* note 5 (explaining that children do not follow terms of use policies).

ered a person who does not have the "full legal capacity to incur contractual duties."¹⁰⁹ The common law states that a person has full capacity to contract at the age of twenty-one, yet social media sites provide in their terms of use that one must be the age of thirteen to use their services.¹¹⁰ Will this requirement end up becoming a problem for the future of social media sites?

III. FACTS

Instagram's terms of service change on January 19, 2013 led to the photo-sharing service being sued over contract changes. In *Rodriguez v. Instagram, LLC*,¹¹¹ a class action suit was brought by a California resident after an announcement by Instagram that its terms of use would be modified.¹¹² Instagram users believed that such an amendment was a breach of contract.¹¹³ However, Instagram makes clear that individuals who want to use its service must agree to be bound by Instagram's terms of use and as a result, such notice to modify the terms of use is not a breach.¹¹⁴ In *Rodriguez*, the plaintiff sought "special treatment," wanting to continue to use Instagram and to use the lawsuit to rewrite the terms that govern her and other individuals' use of the service.¹¹⁵ The plaintiff failed to prove that she suffered any harm from Instagram's new terms of use because she failed to delete her account and consequently had no standing to

¹⁰⁹ RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (providing that an infant does not have the legal capacity to enter into a contract).

¹¹⁰ See HOGG, *supra* note 17, at 605-06 (describing that an infant has full legal capacity to contract).

¹¹¹ See *Rodriguez*, 2013 U.S. Dist. LEXIS 98627, at *2-3 (exemplifying a civil action suit that arose out of an announcement by defendant Instagram, LLC that its terms of use would be modified).

¹¹² See *id.* (showing that a civil suit was brought against Instagram for modifying its terms of use).

¹¹³ See *Instagram sued over contract changes*, PHYS.ORG (Dec. 24, 2012), archived at <http://perma.cc/UH6N-H37S> (explaining how a class action law suit tried to stop Instagram from changing its terms of service).

¹¹⁴ See John Ribeiro, *Instagram says 'take it or leave it' in lawsuit over terms of use*, COMPUTERWORLD (Feb. 14, 2013), archived at <http://perma.cc/ZJL5-NPMF> (describing Instagram's take it or leave it policy).

¹¹⁵ See *Rodriguez*, 2013 U.S. Dist. LEXIS 98627, at *3-6 (explaining that the plaintiff is seeking special treatment in order to continue to use Instagram's services); see also Ribeiro, *supra* note 114, (filing described the plaintiff in looking for special treatment in her decision to commence the lawsuit).

sue.¹¹⁶

Facebook's ownership of the photo-sharing service, Instagram, has endured heated debate regarding its terms of use, but there is also much controversy over Facebook's own terms of use that may have led to this unprecedented change in social media contracts. Facebook acquired Instagram in the spring of 2012 for one billion dollars, which was a transformation that led to the decision by Facebook that the terms of use must be modified in order to protect its company.¹¹⁷ In *I.B. v. Facebook, Inc.*,¹¹⁸ Facebook allowed a minor to register on its website and use its service.¹¹⁹ In *I.B.* the two minors in the class suit asked their parents to use their credit card in order to purchase Facebook Credits from Facebook for use in the "Ninja Saga" game.¹²⁰ The parents sought to void the contracts into which the minors entered in *I.B.*, but their claims failed under Cal. Fam. Code §6701(a)¹²¹ because they failed to prove that the operator was acting as the minor's agent.¹²² However, the claim under Cal. Fam. Code §6701 (c)¹²³ survived.¹²⁴

Likewise, in *E.K.D. v. Facebook, Inc.*, the plaintiffs challenged Facebook's practice of including its users' names and profile pictures in advertisements and alleged that users under the age of eighteen were legally incapable of consenting to commercialization of their identity.¹²⁵ In *E.K.D.*, Facebook was defined as a free, internet-based social networking site with over 153 million members in

¹¹⁶ See *Rodriguez*, 2013 U.S. Dist. LEXIS 98627, at *9 (proving that the plaintiff lacked standing to sue).

¹¹⁷ See Swisher, *supra* note 4 (highlighting the story of Instagram being sold to Facebook).

¹¹⁸ See *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 996 (N.D. CA. 2012) (illustrating a case where Facebook was sued due to its contract terms).

¹¹⁹ See *id.* (explaining that a minor is allowed to use and register on Facebook).

¹²⁰ See *id.* (illustrating how the minors acquired their parent's credit card in order to purchase Facebook Credits).

¹²¹ See CAL. FAM. CODE §§ 6700-6701 (2014) (stating that a minor cannot enter into a contract or do any of the following things).

¹²² See *Fife.*, 905 F. Supp. 2d at 998 (showing that the parents failed to make a claim under Cal. Fam. Code § 6701 (a)).

¹²³ See CAL. FAM. CODE § 6701(c) (2014) (implying that a minor cannot make a contract relating to any personal property not in immediate control of the minor).

¹²⁴ See *Fife*, 905 F. Supp. 2d at 989 (showing that the claims survived under Cal. Fam. Code §6701 (c)).

¹²⁵ See *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 897-98 (S.D. Ill. 2012) (describing the class action suit that was brought by Facebook users under the age of 18).

the United States, over fourteen million of which are under the age of eighteen.¹²⁶ In order to join Facebook, a user must provide his/her name, age, gender, and a valid e-mail address and click a button that leads to a message stating that "By clicking Sign Up, you are indicating that you have read and agreed to Facebook's Term so Service," with a hyperlink to Facebook's terms of service."¹²⁷ The minors in *E.K.D.* challenged the forum selection clause, but continued to use Facebook social networking site.¹²⁸ This action by the minors led to the ruling in *E.K.D.* "that [a minor]...must disaffirm the entire contract, not just the irksome provisions."¹²⁹ This type of action by the minors may have had a leading role in the development of Instagram's new terms of service.¹³⁰

Facebook not only experienced problems with minors entering into contracts, but also endured class-action suits.¹³¹ In order to establish a class-action suit, a district court must find that the settlement is "fair, reasonable, and adequate."¹³² For instance, in *Fraleley v. Facebook, Inc.*, 150 million Facebook users brought a class-action suit because their names and/or likeness allegedly were misused to promote products and services through Facebook's so-called "Sponsored Stories" program.¹³³ In order to decide the fairness of a settlement, the settlement must be evaluated as a whole rather than looking at its individual components.¹³⁴ In order to guide the district court's

¹²⁶ See *id.* at 896 (describing Facebook as a free internet social networking website with millions of members in the United States).

¹²⁷ *Id.* (explaining the information a user must provide in order to use Facebook).

¹²⁸ See *Fife*, 905 F. Supp. 2d at 1001 (showing that the minors in *E.K.D.* continued to use Facebook and therefore could not disaffirm the contract); see also *Dawes*, 885 F. Supp. 2d at 900 (declaring that the minor plaintiffs cannot disaffirm the forum selection clause since they continued to use Facebook services).

¹²⁹ *Dawes*, 885 F. Supp. 2d at 899 (discussing a minor's right to disaffirm a contract under California law).

¹³⁰ See *Instagram and Kids*, *supra* note 5 (explaining children's rights under terms of service agreement with Instagram).

¹³¹ See, e.g. *Dawes*, 885 F. Supp. 2d at 897-98 (showing a class action suit against Facebook).

¹³² FED. R. CIV. P. 23(e)(2) (ruling that in order to have a class-action suit the settlement must be fair, reasonable and adequate).

¹³³ See *Fraleley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 940 (N.D. CA. 2013) (exemplifying a class action suit brought against Facebook).

¹³⁴ See *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1026 (9th Cir. 1998) (determining whether a settlement is fair, adequate, and free from collusion, which has become known as the "Hanlon Factors"); see also *Fraleley*, 966 F. Supp. 2d at 941 (es-

role in approving the class settlement, a number of factors were examined:

The strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the state of the proceeding; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.¹³⁵

These *Hanlon*¹³⁶ factors led to the decision in *Fraleley* that the class settlement was fair, adequate, and free from collusion.¹³⁷

The controversial history of Facebook's terms of use controversies depicts the possible modification of Instagram's terms of use.¹³⁸ Instagram's terms of use makes clear to its user that "by accessing or using the Instagram website, the Instagram service, or any applications (including mobile application) made available by Instagram...you, agree to be bound by these terms of use."¹³⁹ Instagram sets out three prominent terms early in its terms of use policy, such as: (1) "take it or leave it policy"; (2) an arbitration notice; (3) "you must be at least 13 years old to use the service."¹⁴⁰ Due to Instagram being a service owned by Facebook, the great deal of controversy that has surrounded Facebook may have lead Instagram's change in terms

tablishing the use of the Hanlon Factors to determine that a settlement must be evaluated as a whole).

¹³⁵ *Hanlon*, 150 F. 3d at 1026 (describing the Hanlon Factors that a district court uses to determine the approval of a class settlement).

¹³⁶ See *Hanlon*, 150 F. 3d at 1026 (discussing the Hanlon factors).

¹³⁷ See *Fraleley*, 966 F. Supp. 2d at 941 (showing that *Hanlon* factors led to the decision in *Fraleley*).

¹³⁸ See Michael Zhang, *Instagram Responds to Controversy Over ToS, Promises Changes*, PETAPIXEL (Dec. 18, 2012), archived at <http://perma.cc/F8G2-FGBZ> (discussing Instagram's policy changes are similar to Facebook's).

¹³⁹ *Terms of Use*, *supra* note 7.

¹⁴⁰ *Terms of Use*, *supra* note 7 (emphasizing the three terms that are laid out in the first section of Instagram's terms of use policy).

of use and set a precedent for the future of social media networks in protecting their companies from lawsuits brought by its users.

PART IV. ANALYSIS

Social media sites have become an integral part of users' everyday lives.¹⁴¹ A user is allowed to control what they want to put in his or her profile; in essence a user is typing himself/herself into being.¹⁴² A user can enter descriptions like his/her name, birthday, location and interests.¹⁴³ Also, social media sites encourage a user to put a profile picture of himself/herself.¹⁴⁴ Users on social media sites have a sense of control over who they befriend and share information with.¹⁴⁵ The complete freedom to control his/her profile led users to feel invincible in the social media realm, which has led users to become greedy by bringing law suits against social media sites like Facebook and Instagram.¹⁴⁶ Users feel like they are untouchable in the social media realm, but most users fail to acknowledge social media sites' terms of use policy.¹⁴⁷ Facebook Inc. is trying to remind users that they are not truly in control of their profile by rewriting the terms of use policy for its new ownership of Instagram; the redrafting of Instagram's terms of use policy reminds users that they can either "take

¹⁴¹ See Boyd & Ellison, *supra* note 3, at 210 (explaining the popularity of social media sites amongst users); see, e.g., Curtis, *supra* note 2 (giving a timeline of the development of social media sites).

¹⁴² See Boyd & Ellison, *supra* note 3, at 211 (indicating that when a user joins social media they literary "type oneself into being").

¹⁴³ See Boyd & Ellison, *supra* note 3, at 211-13 (explaining the information a user can put into a profile); see also Curtis, *supra* note 2 (highlighting the different ways a user can share information on a social media site).

¹⁴⁴ See Boyd & Ellison, *supra* note 3, at 213 (highlighting how most social media sites encourage users to upload a profile picture); see also Curtis, *supra* note 2 (explaining the use of images on social media sites).

¹⁴⁵ See Boyd & Ellison, *supra* note 3, at 211-13 (showing the power of control users have when it comes to using social media sites).

¹⁴⁶ See Shih & Oreskovic, *supra* note 9 (discussing a class-action suit involving Facebook and privacy issues); see also Terenzi, *supra* note 15, at 1075 (showing that users do have control on social media sites); *Instagram sued over contract changes*, *supra* note 113 (demonstrating, via a class action suit, the invincible control that users think they have over social media sites); Ribeiro, *supra* note 114 (highlighting that Instagram's "take it or leave it" policy has led to a lawsuit over the terms of use).

¹⁴⁷ See Terenzi, *supra* note 15, at 1075 (explaining that users do have some control when making a user profile).

it or leave it.” This type of proviso is the future for other social media sites in regaining control.¹⁴⁸

A. Instagram’s terms of use creates a browsewrap contract for its users

Instagram’s terms of use agreement is considered a browsewrap agreement.¹⁴⁹ When a user sets up an Instagram account on his or her iPhone/iPad, or Android phone by creating a username and password, the user has agreed to the Instagram terms of use policy.¹⁵⁰ In essence, the user has created a contract between Instagram and his or herself and is subsequently bound by the terms of the agreement.¹⁵¹ The most important type of browsewrap contract is the terms of use agreement of social media sites.¹⁵² Instagram users are not notified of the terms of use policy when they sign up and inherently acknowledge that they have read and agreed to such terms upon signing up.¹⁵³ This type of agreement allows for the user to gain access to the social media site easily and begin sharing photos.¹⁵⁴ This type of contract formed between the user and Instagram has become known as the “take it or leave it policy.”¹⁵⁵ It is this “take it or leave

¹⁴⁸ See Henderson, *supra* note 2, at 10 (providing that social media sites are new forms of communicating and will lead to changes in the law such statutory definitions); see also Curtis, *supra* note 2 (highlighting social media sites are ways for people to interact freely).

¹⁴⁹ See Hartzog, *supra* note 10, at 72 (stating the definition of a browsewrap agreement); see also Terenzi, *supra* note 15, at 1078 (defining browsewrap agreements as “agreements the user may not read at all; the user, however, consents to the terms of use by using the website”).

¹⁵⁰ See Terenzi, *supra* note 15, at 1076 (explaining how the site requires users to accept the terms of use prior to using the website and how users becomes bound by the terms once they begin using the site).

¹⁵¹ See Terenzi, *supra* note 15, at 1076 (portraying that the terms of use agreement on social media sites govern the contractual duties and liabilities between the social media site and the users).

¹⁵² See Hartzog, *supra* note 10, at 72-73 (stating the most important types of browsewrap contracts are the terms of use agreements).

¹⁵³ See *Terms of Use*, *supra* note 7 (acknowledging that when a user creates an account they agree to the terms of use).

¹⁵⁴ See *Instagram and Kids*, *supra* note 5 (stating how simple it is to sign up for an Instagram account and for a user to share photos).

¹⁵⁵ See *Terms of Use*, *supra* note 7 (emphasizing that if a user does not agree to be bound by all the terms of use on Instagram then they should not access the service, so essentially the user can take it or leave it).

it policy” that has initiated the creation of new sections in Instagram’s terms of use such as the arbitration clauses and use by minors.

B. “Take it or leave it”

Instagram’s “take it or leave it” policy epitomizes the future of social media contracts and the law. This type of policy is already causing controversy amongst users and may begin to stir up some debate in the social media site realm.¹⁵⁶ Courts are already struggling with online contracting, most notably the presentation of offers and formation of assent.¹⁵⁷ When a court is presented with this type of issue, it applies traditional principles of contract law and “focuses on whether the user had reasonable notice when they manifested assent to the online agreement.”¹⁵⁸

By applying this principle to Instagram’s terms of use policy, the court will examine the point at which a user creates an account and decide whether the user had reasonable notice about the terms of use policy.¹⁵⁹ An Instagram user is never presented with a notice of the terms of use policy; instead, social media sites utilize a browse-wrap contract to make it clear that the user has a “duty” to read and understand the terms of use.¹⁶⁰ Instagram provides easy access for its users to read the site’s terms of service by simply selecting options and tapping on the terms of service tab.¹⁶¹ Therefore, this makes a user responsible for understanding the site’s terms of use.¹⁶² If a user

¹⁵⁶ See Terenzi, *supra* note 15, at 1071 (explaining that traditional contractual principles will cause turmoil for the future of electronic commerce context); see also Shih & Oreskovic, *supra* note 9 (explaining the change in Instagram’s terms of use led to controversy amongst its users).

¹⁵⁷ See Hartzog, *supra* note 10, at 73 (showing that browsewrap agreements can be problematic in the formation of online contracts).

¹⁵⁸ Hartzog, *supra* note 10, at 73 (stating how courts apply traditional contract law to online agreements and focus on whether the user had reasonable notice).

¹⁵⁹ See Hartzog, *supra* note 10, at 73 (discussing whether a user has reasonable notice about a terms of use policy).

¹⁶⁰ See Hartzog, *supra* note 10, at 73 (explaining that a user has a duty to read the terms of use policy when they access a social media site).

¹⁶¹ See *Terms of Use*, *supra* note 7 (showing that a reader can obtain easy access to Instagram’s term of use based on the Instagram’s directions on the site).

¹⁶² See Hartzog, *supra* note 10, at 73 (showing that a user has an obligation to read the terms of use when he or she uses a social media site); see also *Terms of Use*, *supra* note 7 (understanding Instagram’s terms of use by having a duty as a user to read them).

can learn to share a photo and apply filters, then it is assumed that the user knows how to read and navigate the site.¹⁶³ Consequently, a court would likely agree that a user, once registered, is bound by Instagram's terms of service.

C. Instagram's Arbitration Clause

The addition of Instagram's arbitration clause to its terms of use is unquestionably due to Facebook's ownership of the popular photo-sharing site.¹⁶⁴ The history of Facebook's past ordeals with class action suits and problems with minors using the site has led to the future change of social media contracts.¹⁶⁵ Facebook has taken the initiative with its new ownership of Instagram in attempting to push the limits of the "take it or leave it policy" by adding an arbitration clause.¹⁶⁶ Instagram's arbitration clause provides a contract between its users and the site giving an advantage to Instagram by allowing the company to protect itself from class action suits and for users to resolve disputes in arbitration.¹⁶⁷ Instagram's terms of use policy includes an arbitration clause that says:

ARBITRATION NOTICE: EXCEPT
IF YOU OPT-OUT AND EXCEPT
FOR CERTAIN TYPES OF
DISPUTES DESCRIBED IN THE
ARBITRATION SECTION BELOW,
YOU AGREE THAT DISPUTES
BETWEEN YOU AND INSTAGRAM
WILL BE RESOLVED BY BINDING,

¹⁶³ See Terenzi, *supra* note 15, at 1078 (stating that browsewrap agreements are terms of use agreements that a user may not read at all, however the terms of use are included on the website by clicking a link).

¹⁶⁴ See *Terms of Use*, *supra* note 7 (implementing an arbitration clause in Instagram's terms of use policy).

¹⁶⁵ See *Fife*, 905 F.Supp. 2d at 989 (discussing an issue that Facebook company had involving minors); see also *Fraley*, 966 F.Supp.2d at 940 (showing that Facebook was involved with a class action suit); *Dawes*, 885 F.Supp.2d at 894 (illustrating an issue Facebook had with minors involving a class action suit).

¹⁶⁶ See *Terms of Use*, *supra* note 7 (highlighting the addition of an arbitration clause in Instagram's terms of use).

¹⁶⁷ See Roditti, *supra* note 62 (referring to the advantages of an arbitration clause); see also Bates, *supra* note 64, at 852-53 (depicting the advantages of an arbitration clause); Eisenberg et al., *supra* note 69, at 874 (discussing the downside of including an arbitration clause because it prevents class action suits).

INDIVIDUAL ARBITRATION AND
YOU WAIVE YOUR RIGHT TO
PARTICIPATE IN A CLASS
ACTION LAWSUIT OR CLASS-
WIDE ARBITRATION.¹⁶⁸

Instagram's terms of use policy has paved the way for arbitration clauses to appear in social media contracts.

The use of arbitration clauses in social media sites is unique and once again poses a threat of enforceability of such clauses by the courts.¹⁶⁹ Arbitration clauses can often present the issue of procedural and substantive unconscionability.¹⁷⁰ In order to prevent Instagram's arbitration clause from being challenged by its users, courts should apply California law, which requires very little evidence of procedural unconscionability when a contract contains a clause that requires a user to give up his or her right to bring a class action suit.¹⁷¹ Social media sites should try to incorporate the use of California law into terms of use policies in order to prevent the issue of unconscionability.¹⁷² Instagram's arbitration clause poses such an issue for its users since it contains a section waving class action suits.¹⁷³ By applying the United States Supreme Court decision in *Concepcion*, a court would likely conclude that Instagram's arbitration clause is fair since it is bolded, in all capital letters, and presented at the beginning of the terms of use.¹⁷⁴ Instagram's arbitration

¹⁶⁸ *Terms of Use*, *supra* note 7.

¹⁶⁹ See Axelson & Wassom, *supra* note 6 (proving the court's difficulty to enforce a social media sites' arbitration clause).

¹⁷⁰ See Eisenberg et al., *supra* note 69, at 874-75 (explaining the use of arbitration clause causes confusion amongst the state and federal courts); see also Moringiello & Reynolds, *supra* note 44, at 475 (finding that arbitration clause have been struck down due to unconscionability).

¹⁷¹ See *Concepcion*, 131 S. Ct. at 1745 (noting the California Supreme Court's and the Ninth Circuit's theory on arbitration clauses); Moringiello & Reynolds, *supra* note 44, at 475-76 (discussing the footnote in *AT&T Mobility L.L.C. v. Concepcion*).

¹⁷² See *Concepcion*, 131 S. Ct. at 1745 (explaining the United States Supreme Court use of California law).

¹⁷³ See *Terms of Use*, *supra* note 7 (inferring that Instagram's arbitration clause may raise an issue with users).

¹⁷⁴ See *Concepcion*, 131 S. Ct. at 1748 (declaring that arbitration clauses must be presented in a prescribed manner); see also *Terms of Use*, *supra* note 7 (depicting the factors of Instagram's arbitration clause).

clause is presented in a manner that has been approved by the United States Supreme Court and as a result, will lead other social media sites to follow in its footsteps.¹⁷⁵

Instagram's arbitration clause clearly does not present an issue of unfairness.¹⁷⁶ If Instagram's arbitration clause was unfair, then the AAA would not have allowed it to be in the terms of use agreement.¹⁷⁷ The AAA requires companies like Instagram that deal with consumers on a daily basis to submit the clause for review and approval.¹⁷⁸ Instagram's terms of use agreement explains that an individual arbitration will be governed by the "American Arbitration Association's rules for arbitration of consumer-related disputes."¹⁷⁹ It further explains that the Federal Arbitration Act will govern the dispute resolution provision.¹⁸⁰ The inclusion of the AAA and the Federal Arbitration Act in Instagram's arbitration clause displays that it abided by the rules of the United States that govern arbitration clauses.¹⁸¹ Therefore, Instagram's arbitration clause displays the quality of fairness and a level playing field for both its users and itself.¹⁸²

D. The Popular Children's Toy, Instagram

Children today are growing up in the age of social media and are unaware of the ramifications and dangers that social media sites

¹⁷⁵ See Moringiello & Reynolds, *supra* note 44, at 476 (showing that the United States Supreme Court ruled that arbitration clauses must be presented in a prescribed manner).

¹⁷⁶ See *Terms of Use*, *supra* note 7 (outlining Instagram's arbitration clause).

¹⁷⁷ See *Terms of Use*, *supra* note 7 (showing how Instagram's arbitration clause followed the American Arbitration Association rules for arbitration clauses); see also AM. ARBITRATION ASS'N., *supra* note 73 (explaining the process for approving arbitration clauses).

¹⁷⁸ See Kahn, *supra* note 67 (discussing that companies need the approval of American Arbitration Association before they can use an arbitration clause).

¹⁷⁹ *Terms of Use*, *supra* note 7.

¹⁸⁰ See *Terms of Use*, *supra* note 7 (stating the Federal Arbitration Act governs dispute resolution provisions); see also 9 U.S.C. §§ 1-14 (defining the Federal Arbitration Act).

¹⁸¹ See e.g., *Terms of Use*, *supra* note 7 (highlighting that Instagram's arbitration clause was fair); see AM. ARBITRATION ASS'N., *supra* note 73 (implying that Instagram abided by the rules of the American Arbitration Association); see also 9 U.S.C. §§ 1-14 (outlining rules governing arbitration clauses that Instagram abided by).

¹⁸² See Kahn, *supra* note 67 (indicating that arbitration clauses are for the benefit of fairness).

pose.¹⁸³ Children have become obsessed with the Instagram app, which allows a user to take photos, apply filters to the photos, upload the photos, and share them on the web to see how many "likes" they can get.¹⁸⁴ COPPA was enacted to protect children from dangers associated with these actions.¹⁸⁵ COPPA makes it clear that online services providers are not allowed to collect information about children who are younger than thirteen.¹⁸⁶ Instagram follows COPPA by stating in its term of service that a user must be at least thirteen years old to use the site.¹⁸⁷ Instagram may be protecting itself from entering into contracts with children under thirteen, but inherent in the site is the issue of monitoring the age of children who use the site.¹⁸⁸ COPPA does not require social media sites to have an age requirement confirmation and children know that they can simply lie about their age when signing up, which creates an issue of perjury.¹⁸⁹ Children enter into a contract by using Instagram.¹⁹⁰ The children agree to Instagram's term of service by signing up and are allowed access to the site.¹⁹¹ However, children typically do not understand the concept of a contract and assume that lying about their age to use the site will not result in any legal ramifications.¹⁹² If the site becomes aware that the child is under thirteen, it could lead to serious issues including perjury by a child.¹⁹³ Under common law, a person

¹⁸³ See Henderson, *supra* note 2, at 3 (stating that social media sites are popular, but still pose legal ramifications that are not fully understood).

¹⁸⁴ See *Instagram and Kids*, *supra* note 5 (describing that sharing photos and apply a variety of filters is the basis of Instagram).

¹⁸⁵ See STUCKEY, *supra* note 97, at § 8.07 (stating the importance of protecting children in online services).

¹⁸⁶ See STUCKEY, *supra* note 97, at § 8.07 (showing that an online service provider may not collect information about a child younger than thirteen years of age).

¹⁸⁷ See *Terms of Use*, *supra* note 7 (discussing the age requirement that Instagram provides in its terms of service).

¹⁸⁸ See *Terms of Use*, *supra* note 7 (illustrating that Instagram does not provide any age monitoring in its terms of service).

¹⁸⁹ See STUCKEY, *supra* note 97, at § 8.07 (claiming that COPPA has no age confirmation requirement and children are aware they can gain access to social media websites by pretending they are thirteen).

¹⁹⁰ See *Terms of Use*, *supra* note 7 (requiring agreement prior to use of Instagram).

¹⁹¹ See *Terms of Use*, *supra* note 7 (showing that once a child has access to Instagram the child has agreed to the terms of service).

¹⁹² See RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (proving that a child does not have the full legal capacity to enter into a contract).

¹⁹³ See *Terms of Use*, *supra* note 7 (explaining the ramifications of being an Instagram user under the age of 13).

is considered to have full capacity to contract at the age of twenty-one, although this rule has been changed by statute to make the preferred age eighteen.¹⁹⁴ This common law rule conflicts with COPPA that requires a child to be thirteen in order to use social media sites.¹⁹⁵ If a child is caught lying about his or her age and court systems abide by common law, the contract between the child and Instagram will become voidable.¹⁹⁶

Like most social media sites, Instagram does not monitor the age of its users.¹⁹⁷ Even though the terms of service do provide the stipulation of “you must be at least thirteen,” it is well known that children frequently disobey the rules.¹⁹⁸ This is why it is important for parents to be aware of the social media sites their children are using.¹⁹⁹ COPPA provides language regarding parental consent in order to protect innocent children from being abused by social media service providers and online predators.²⁰⁰ Parents need to understand that Instagram photos are open to the public by default and Instagram allows users to browse public photos posted by others and by people who they follow.²⁰¹ Also, when children sign up for Instagram, they most likely are providing truthful information such as their name,

¹⁹⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (stating that a person has full legal capacity to contract at the age of twenty-one); J.C. SMITH & J.A.C. THOMAS, SMITH & THOMAS: A CASEBOOK ON CONTRACTS (11th ed. 2000) (comparing common law and statutory law capacity age requirements).

¹⁹⁵ See STUCKEY, *supra* note 97, at § 8.07 (requiring online service providers from knowingly collecting information about children younger than thirteen years of age).

¹⁹⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (discussing the common law rule).

¹⁹⁷ See *Terms of Use*, *supra* note 7 (showing that Instagram does not explicitly state in its terms of use that they closely monitor children, but only provide an age requirement).

¹⁹⁸ *Terms of Use*, *supra* note 7 (referring to Instagram’s age requirement to use the site).

¹⁹⁹ See *Instagram and Kids*, *supra* note 5 (discussing the importance of parents being aware of their child’s use on Instagram).

²⁰⁰ See Haralambie, *supra* note 96, at 198 (discussing that COPPA requires parental consent).

²⁰¹ See *Instagram and Kids*, *supra* note 5 (explaining to parents that Instagram photos are open to the public); see also Haralambie, *supra* note 96, at 198 (explaining the role of parents under COPPA regarding parental authority for children under the age of thirteen).

age, and telephone number.²⁰² This makes children vulnerable to online predators who may leave lewd or sexually suggestive comments on photos.²⁰³ Another major problem with photo sharing is the types of pictures children are posting and making public that may become posted on legal websites dedicated toward this type of behavior by children.²⁰⁴ Predators not only search for these types of photos, but also create fake profiles to make them appear they are someone they are not.²⁰⁵ By including an age requirement to use the site, Instagram displays an effort to protect children from the dangers of social media.²⁰⁶

E. The Future for Social Media Contracts

Including a "my way or the highway" type of policy in a social media contract is the future for social media sites.²⁰⁷ The announcement of Instagram changing its terms of service led Instagram to being sued.²⁰⁸ In *Rodriguez*, the plaintiff failed to stop using the social media site after the terms of use were modified, which shows the plaintiff accepted the changes.²⁰⁹ This exemplifies Instagram's "take it or leave it policy."²¹⁰ Instagram's new approach with "take it or leave" represents the future for social media sites' contracts by learning to set limits and take control of its users.²¹¹ If a user does not agree with any of the terms of use, then the user does not have to

²⁰² See *Instagram and Kids*, *supra* note 5 (sharing information that children most likely provide when signing up for Instagram).

²⁰³ See *Instagram and Kids*, *supra* note 5 (showing that children are vulnerable to online predators).

²⁰⁴ See *Instagram and Kids*, *supra* note 5 (indicating that children are sharing pictures that are being posted on legal sites for online predators).

²⁰⁵ See *Instagram and Kids*, *supra* note 5 (stating that predators make fake online profiles on Instagram).

²⁰⁶ See *Terms of Use*, *supra* note 7 (integrating an age requirement in Instagram's terms of use policy shows the importance of protecting children).

²⁰⁷ See *Terms of Use*, *supra* note 7 (highlighting the first type of take it or leave it policy).

²⁰⁸ See *Rodriguez*, 2013 U.S. Dist. LEXIS 98627, at *2 (showing how Instagram was sued for changing its terms of service).

²⁰⁹ See *Rodriguez*, 2013 U.S. Dist. LEXIS 98627, at *2 (discussing how the plaintiff continued to use Instagram after they changed its terms of use).

²¹⁰ See *Terms of Use*, *supra* note 7 (proving Instagram has a "take it or leave it" policy).

²¹¹ See Swisher, *supra* note 4 (discussing how Facebook bought Instagram in June 2012); see also *Terms of Use*, *supra* note 7 (pointing out Instagram's terms of use).

access the site, which represents a bold and brave move by Instagram.²¹² This type of policy allows social media sites to control its site and protects sites from being sued because of something with which a user does not agree.²¹³ Instagram's terms of use policy is shaping the future for social media site's contracts.²¹⁴

The use of an arbitration clause will be the future for social media sites' contracts because it provides for flexibility, speed, and economic cost.²¹⁵ After Facebook's numerous class action suits, the addition of an arbitration clause to Instagram's terms of service will help protect the new company from economic loss.²¹⁶ Social media sites must be aware that there are certain requirements for an arbitration clause to be considered fair and must be presented in a prescribed manner.²¹⁷ For instance, Instagram's arbitration clause is bolded, capitalized, and placed at the top of the page for all users to see.²¹⁸ In order to protect social media sites from class action suits and economic loss, an arbitration clause should be added to all social media contracts.²¹⁹

The future of social media is also evolving along with the aging of the current childhood generation.²²⁰ It is known that by the age of twelve, fifty-eight percent of children in the United States and the United Kingdom have a Facebook account.²²¹ The use of the Internet

²¹² See *Terms of Use*, *supra* note 7 (explaining that an Instagram user should not use the site if he or she does not agree to its terms of use).

²¹³ See *Terms of Use*, *supra* note 7 (highlighting Instagram's terms of use policy as an example for future contracts).

²¹⁴ See *Terms of Use*, *supra* note 7 (outlining Instagram's terms of use policy).

²¹⁵ See Roditti, *supra* note 62 (discussing the advantages of an arbitration clause in a computer contract); see also, Eisenberg et al., *supra* note 69, at 872 (highlighting the benefits of including an arbitration clause in a contract).

²¹⁶ See *Terms of Use*, *supra* note 7 (showing that the use of an arbitration clause protects a company from economic loss).

²¹⁷ See *Concepcion*, 131 S. Ct. at 1748 (declaring that arbitration clauses must be presented in a prescribed manner); see also Kahn, *supra* note 67 (discussing the importance of the design and presentation of an arbitration clause).

²¹⁸ See *Terms of Use*, *supra* note 7 (highlighting the details of Instagram's arbitration clause).

²¹⁹ See Eisenberg et al., *supra* note 69, at 872 (highlighting the benefits of including an arbitration clause in a social media contract).

²²⁰ See Sterling, *supra* note 95 (explaining the statistical data for teenagers that use Facebook); see also *Instagram and Kids*, *supra* note 5 (showing that social media sites are popular amongst children).

²²¹ See STUCKEY, *supra* note 97, at § 8.07 (providing statistical information about the children aged twelve who have access to a Facebook account); see also Ster-

by minors age twelve to seventeen increased to ninety-three percent in 2009, which is the highest percentage of any demographic group.²²² The use of social media sites is growing rapidly and it is important for a site to include in its terms of use that children must be at least thirteen to access the site.²²³ This type of clause does not stop younger children from accessing social media sites so COPPA makes it clear that parents must acknowledge that their child is using the site if they are under the required age.²²⁴ COPPA ensures that minors who do not meet the age requirement cannot sue social media sites by putting the responsibility on the parents to control the actions of their children.²²⁵ The numerous class actions suits that Facebook endured from minors forced them to prevent these suits with Instagram by adding the age requirement.²²⁶ This age requirement is in place to protect children from the dangers of accessing social media sites and is something that all social media sites should strive to incorporate into its contract policies.²²⁷

V. CONCLUSION

Today, the new means for communicating is through the use of social media sites and the popular site Instagram is a method for doing so. Instagram, an app owned by Facebook Inc. that has encountered numerous lawsuits during the past decade, recently decided to revise its terms of use. The decision to revise the terms of use led to a controversy amongst Instagram users. Instagram's revision of the terms of use marks an unprecedented change in social media con-

ling, *supra* note 95 (giving statistical information about teenagers who use Facebook).

²²² See STUCKEY, *supra* note 97, at § 8.07 (showing that children between the age of twelve and seventeen who use the internet).

²²³ See *Terms of Use*, *supra* note 7 (giving an example of a social media contract that provides a clause for children to be at least thirteen to use the social media site).

²²⁴ See Haralambie, *supra* note 96, at 198 (stating that COPPA requires parental consent).

²²⁵ See Haralambie, *supra* note 96, at 198 (giving the responsibility to parents whose children do not meet the age requirement and access social media sites).

²²⁶ See *Terms of Use*, *supra* note 7 (stating that a user must be at least thirteen years of age).

²²⁷ See *Terms of Use*, *supra* note 7 (providing an age requirement in Instagram's term of use policy).

tracts by adding a “take it or leave it policy,” an arbitration clause, and an age requirement. The redrafting of its terms of use policy has led users to feel a loss of control over their profiles. The revisions that Instagram incorporated into its terms of service will help guide other social media sites to make similar changes. Instagram’s new terms of use policy will set a precedent for the future of social media sites in the development of user contract policies and will make users think twice before uploading a photo to the site.