



Smarter Discovery™

## When Contracts Collide with Social Networking & Online Movie Rentals

Every now and then, there comes a case that gives me law school flashbacks. Professor Rohwer, my old contract professor, this one's for you.

*Harris v. Blockbuster*, 2009 U.S. Dist. LEXIS 31531 (N.D. Tex. Apr. 15, 2009) involves Blockbuster allegedly violating the Video Privacy Protection Act. Blockbuster Online (an online video rental service) entered into a contract with Facebook that caused rental information for Facebook-Blockbuster Online users to be published to all of the users' Facebook friends via Facebook's Beacon application. *Harris*, 1-2.

The Plaintiffs apparently did not like their rental history being broadcast to their Facebook friends.

The Plaintiffs claimed Blockbuster Online violated the Video Privacy Protection Act. The VPP prohibits a video service provider from disclosing a customer's personally identifiable information without their written consent. The VPP Act allows for liquidated damages of \$ 2,500 for each violation. *Harris*, 2.

The Defendants invoked a binding arbitration provision, pursuant to the contractual "Terms and Conditions." The Terms and Conditions were a "clickwrap" style agreement, which included binding arbitration and a waiver of any class action litigation against Blockbuster. *Harris*, 4. The online contract stated, in relevant part:

Blockbuster may at any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, with or without notice. Such modifications will be effective immediately upon posting.

The issue before the Court was whether the online contract "Terms and Conditions" were illusory and thus unenforceable. *Harris*, 3-4. The Court found the online contract illusory.

For those flashing back to first year Contracts, a contract must be supported by consideration, where something of value (such as a peppercorn) is received by a promisor from a promisee. Black's Law Dictionary. If there is no consideration, the contract is illusory and unenforceable. *Harris*, 4 and Black's Law Dictionary.

The crux of the Plaintiffs' arguments were that since Blockbuster reserved the right to modify the Terms and Conditions at their "sole discretion" at "any time" to be effective immediately on their site, the contract was thus illusory. *Harris*, 6-7.



The Court found the contract was illusory because Blockbuster had the power to unilaterally change the contract whenever they wanted to do so. The only “limit” was the new terms would not be effective until posted online. *Harris*, 6-7.

Online “clickwrap” agreements can include forum selection clauses, choice of law provisions and other “unilateral” agreements. The issue of illusory contracts will continue to be litigated and will probably be the topics of future Contracts hornbooks.

This case also raises an interesting question: just what will the discovery look like? Will the Plaintiffs produce screen shots of their published movie rental history to show their injury? Will the Plaintiffs request databases from the Defendants? These sorts of questions will continue to come up as Web 2.0 litigation continues.