

8-2015

Mobile Apps: Crossing The Bright-Line Rule of Contracting With Children

Travis A. Brown

Follow this and additional works at: <http://digitalcommons.apus.edu/theses>

 Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Juvenile Law Commons](#), and the [Legal Studies Commons](#)

Recommended Citation

Brown, Travis A., "Mobile Apps: Crossing The Bright-Line Rule of Contracting With Children" (2015). *Master's Capstone Theses*. Paper 56.



APUS Library Capstone Submission Form

This capstone has been approved for submission to and review and publication by the APUS Library.

Student Name [Last, First, MI] *	Brown	Travis	Aaron
Course Number [e.g. INTL699] *	LSTD699	Paper Date [See Title pg.]	August 2015
Professor Name [Last, First] *	Becker, Alison		
Program Name *	Legal Studies		
Keywords [250 character max.]	Capacity to Contract, Children, Contracts, Damages, Intangible Assets, Minors, Mobile apps,		
Passed with Distinction * Y or N	Y		
Security Sensitive Information *	N		
IRB Review Required * Y or N	N		

If YES, include IRB documents in submission attachments.
All capstone papers must be checked via Turnitin.

* Required

Capstone Approval Document

The thesis/capstone for the master's degree submitted by the student listed (above) under this title *

Mobile Apps: Crossing the Bright-Line Rule of Contracting With Children

has been read by the undersigned. It is hereby recommended for acceptance by the faculty with credit to the amount of 3 semester hours.

Program Representatives	Signatures	Date (mm/dd/yyyy)
Signed, 1 st Reader * [capstone professor]	<i>Alison L. Becker</i>	06/13/2015
Signed, 2nd Reader (if required by program)	<i>Terri L. Wilkins, J.D.</i>	6/17/2015
Recommendation accepted on behalf of the <u>program director</u> *		
Approved by <u>academic dean</u> *	<i>Mark T. Riccardi</i>	

Digitally signed by Mark T. Riccardi
DN: cn=Mark T. Riccardi, o=American
Public University System, ou=Academics,
email=riccardi@apus.edu, c=US
Date: 2015.07.14 13:14:31 -06'00'

* Required

Send thesis submission to:

ThesisCapstoneSubmission@apus.edu

Attachments must include:

- This completed form
- FINAL Thesis document as Microsoft Word file
- IRB Review docs (if applicable)

If you have any questions about this form or the file attachments, please contact: ThesisInfo@apus.edu

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE OF CONTRACTING
WITH CHILDREN

A Master Thesis

Submitted to the Faculty

of

American Military University

by

Travis Aaron Brown

In Partial Fulfillment of the

Requirements for the Degree

of

Master of Arts

in

Legal Studies

August 2015

American Public University

Charles Town, WV

The author hereby grants the American Public University System the right to display these contents for educational purposes. The author assumes total responsibility for meeting the requirements set by United States Copyright Law for the inclusion of any materials that are not the author's creation or in the public domain.

© Copyright 2015 by Travis Aaron Brown
All rights reserved.

DEDICATION

I dedicate this research to my dearest family. Having my sons in mind, the time diverted seemed pertinent. For my wife, who offered her intangible assets, thank you. I dedicate the talking points on ethics, technology and regulation to my closest of colleagues; pairing science with philosophy always seemed natural.

ACKNOWLEDGMENTS

Special thanks to Professor Alison Becker for her counsel and time commitment towards a demanding capstone/thesis. I wish to thank modern influencers in consumer protection, Senator Elizabeth Warren and Ralph Nader. Lastly, the late Jacques Ellul, who is still a difficult sociologist for me to understand, but I have come to appreciate his work very much.

ABSTRACT OF THE CAPSTONE

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE OF CONTRACTING
WITH CHILDREN

by

Travis Aaron Brown

American Military University, June 10, 2015

Charles Town, West Virginia

Professor Alison Becker, Capstone Professor

This research describes the relationship between laws of the United States and the advancement of app technology, more specifically in contracts with minors. Two questions are explored: (1) whether minors need a bright-line rule for app contracts, and (2) whether the intangible assets exchanged within a mobile app contract can be recovered. Existing research in areas such as intangible assets, financial contracts and contracting with children have been integrated so that mobile app practices might improve and that damages suffered by children might be better defined.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

TABLE OF CONTENTS

CHAPTER	PAGE
I. INTRODUCTION & BACKGROUND.....	6
II. LITERATURE REVIEW.....	11
A Brief History on Contracting with Minors.....	11
Capacity to Contract.....	15
Remedies for Breach of Contract.....	18
Intangible Assets in Mobile App Contracts.....	23
Fine Print Contracts: Mobile Apps.....	26
III. ANALYSIS.....	36
<i>I.B. v. Facebook, Inc.</i> : Mobile App Contracts with Children.....	36
COPPA: Reducing the Age of Minors and Expanding the Loophole.....	42
IV. CONCLUSION.....	46

I. Introduction and Background

“[T]he modern rule in the absence of statute is that they [contracts] are voidable by the infant.”¹ Consider contracting with children in three distinct categories: (1) the transfer of simple goods (a candy bar) for the exchange of currency;² (2) the transfer of wages for child labor (a child movie role);³ and (3) the transfer of a mobile application (app) for the exchange of currency, data⁴, tracking and third party permissions.⁵ It is the contract for an app that has drawn the United States Northern District of California Court’s attention, generated disputed case law⁶ and received slow growth in public awareness.⁷ This research describes the relationship between laws of the United States and the advancement of app technology, more specifically in contracts with minors. Two questions are explored: (1) whether minors need a bright-line rule for app contracts, and (2) whether the intangible assets exchanged within a mobile app contract can be recovered.

¹ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

² See Brian Blum, *Contracts: Examples & Explanations* 482-485 (5th ed. 2011)(Necessaries are an exclusion to common law of the bright-line rule.).

³ *Berg v. Traylor*, 148 Cal. App. 4th 809 (2007); Cal. Fam. Code § 6701.

⁴ Liane Colonna, *A Taxonomy and Classification of Data Mining*, 16 SMU Sci. & Tech. L. Rev. 309 (Fall 2013).

⁵ Seungyeop Han et. al., *A Study of Third-Party Tracking by Mobile Apps in the Wild*, University of Washington Technical Report (March 1, 2012).

⁶ *I.B. v. Facebook, Inc.*, 905 F. Supp. 2d 989 (N.D. Cal. 2012).

⁷ See Keith Stuart, *What Every Parent Needs To Know About Video Games: A Crash Course*, *The Guardian* (June 2, 2014) available at <http://www.theguardian.com/technology/2014/jun/02/parents-guide-video-games-playstation-xbox-wii-apps-children> (The Guardian is a 2014 Pulitzer Prize winner. It identified a reader base, including parents, which were lacking knowledge in child games, including mobile apps.).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

“Technology also obliges us to live more and more quickly...efficiency is everything. All else is peripheral.”⁸ Although sociologist Jacques Ellul had some objections towards technology, he was not a Luddite. Simply put, Ellul critiqued different rates of technological advancement by how such developments negatively impacted society.⁹ Among his comparisons were the slow development of penicillin and the rapid advancement of war machines.¹⁰ In contrast to the development speed of war technology is the slow pace of federal government regulation according to a popular stereotype, “given the slow pace of Washington’s bureaucracy, policymakers are often busy solving yesterday’s problems.”¹¹ Likewise, while mobile application technology has developed at a rapid pace, its regulations and policy have been slow to follow.¹²

In 1876, Alexander Graham Bell invented the telephone.¹³ The device was stationary and devoid of a camera, Twitter or any app.¹⁴ Approximately seventy-five

⁸ ReRun Producties, *The Betrayal by Technology: A Portrait of Jacques Ellul* 23:49, 25:30 (1992) available at <https://vimeo.com/4766586>.

⁹ Jacques Ellul, *The Technological Society*, at 4 (English ed., Random House Inc. 1964) (1954).

¹⁰ *Id* at 4.

¹¹ See U.S. Rep. Fred Upton, Rep. *Fred Upton in Washington Times: We Need a Keystone Economy, Energy & Commerce Committee* ¶ 11 (Sept. 14, 2012) available at <http://energycommerce.house.gov/brand/rep-fred-upton-washington-times-we-need-keystone-economy> (Although in context to the Keystone issue, Upton offers the widely accepted stereotype regarding government operating at a slow pace.).

¹² See Frey, *infra*; FTC COPPA Final Rule, *infra* (comparing the rapid development of a popular mobile app game, the previous pace of adoption of technology and legislation of COPPA).

¹³ A.G. Bell, *Improvement In Telegraphy: Patent No. 174,465*, United States Patent and Trademark Office (March 7, 1876).

¹⁴ *Id*.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

years later, the invention of the telephone had 50 million users.¹⁵ This timely benchmark for the adoption of technology coincided with a lesser-known Alexander's discovery: the 1952 electronic game. Alexander S. Douglas created the first computer game, a version of Tic-tac-toe, with a device called the Electronic Delay Storage Automatic Calculator (EDSAC).¹⁶ In 2009-2010, a hybrid of these inventions formed the record-setting app, Angry Birds.¹⁷ This technology only required thirty-five days to accumulate 50 million users.¹⁸ Included in the large consumer base was a population of children under the age of eighteen (18) years.¹⁹

The common law regarding the bright-line rule for contracting with minors (infancy doctrine) has undergone changes. The principle, children lack the necessary capacity to participate in contracts,²⁰ still holds. However, the age that defines a child has changed. Leading up to 1981, United States common law established twenty-one (21) years of age as the age of an adult. The then-new treatise recognized that most state legislatures had reduced the age for contracting to 18 years.²¹ The treatise

¹⁵ Carl Frey & Michael Osborne, et al, *Technology At Work: The Future of Innovation and Employment*, Citi Global Perspectives & Solutions 12, 13 (Feb. 2015).

¹⁶ Alexander S. Douglas, *Some Computations In Theoretical Physics*, University of Cambridge (1954).

¹⁷ Frey, *supra* (Showing common knowledge of the telephone advancing to a mobile/smartphone, which also merged games onto the device. The game Angry Birds, with inclusion of its mobile app version, set records in technological adoption).

¹⁸ Frey, *supra* at 4.

¹⁹ *See Id*; *See* FTC COPPA Final Rule, *infra* (Deductive reasoning formed from both sources. Angry Birds growth happened during a time that Internet-based games were known and permitted to market towards consumers under the age of majority.).

²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

²¹ *Id.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

provided bright-line limitations on contracting with minors. When the United States Congress was addressing the issue of children being exposed to Internet pornography, the Child Online Protection Act (COPA) of 1998 reduced the age of a minor again: “the term ‘minor’ means any person under 17 years of age.”²² By the year 2000, the United States Congress via Children's Online Privacy Protection Act (COPPA) lowered the age with subcategories, thirteen (13) years to seventeen (17) years and those less than 13 years: “the Rule imposes certain requirements on operators of Web sites or online services directed to children under 13 years of age.”²³

California has several cases that address contracting with minors due to: (a) the movie industry for child actors in California;²⁴ and (b) many mobile app companies, such as Facebook²⁵, Google, Zynga, Apple, and Twitter, are also concentrated in California. App consumers from another state, such as Maryland, may find that their disputes filed locally change venue to the United States Northern District of California due to the location of the app company’s corporate headquarters.²⁶ By focusing on this region’s legal cases, the research maintains interstate relevance, which will be further explained later in the thesis.

²² Child Online Protection Act (1998), 47 U.S.C. 609 § 1403(e)(7) *available at* https://epic.org/free_speech/censorship/copa.html (later passed as 47 U.S.C. § 231).

²³ Federal Trade Commission, *16 CFR Part 312 Children’s Online Privacy Protection Rule; Final Rule*, Federal Register Vol. 78, No.12 3972 (January 17, 2013)(hereinafter referred to as FTC COPPA Final Rule).

²⁴ *Berg*, 148 Cal. App. 4th 809.

²⁵ *I.B.*, 905 F. Supp. 2d 989.

²⁶ *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

There are multiple consumer protection issues that agencies address however, the main areas are credit cards, mortgages and fair wages.²⁷ These issues have been brought to light with the help of professionals, such as U.S. Senator Elizabeth Warren and attorney Ralph Nader.²⁸ In *The Market For Data: The Changing Role of Social Sciences in Shaping the Law*, Warren stated,

[A] legislature can wipe out a policy direction, reverse a body of case law, or create entirely new rights with a fifteen-second voice vote... Now bankruptcy is much more the province of interest groups that have spent millions to hire lobbyists, to launch a public relations campaign, and to make strategic campaign contributions.²⁹

Warren had focused upon erroneous data presented to legislatures by industry insiders and the complicated fine print contracts of credit cards.³⁰ The focus upon fine print contracts for mobile apps is comparably lacking. In reference to contracting with minors, the consumer protection debate is missing.

The court ruling of *Berg v. Traylor*, 148 Cal. App. 4th 809 (2007) addressed contracting with children, but did not expound upon mobile app fine print. United States Senator Elizabeth Warren's research primarily analyzed financial fine print for adult consumer issues.³¹ Liane Colonna's research, *A Taxonomy and Classification of Data Mining*, 16 SMU Sci. & Tech. L. Rev. 309 (Fall 2013), explained the

²⁷ Elizabeth Warren, *Unsafe At Any Rate*, 5 Democracy J. 8 (Summer 2007).

²⁸ Ralph Nader, *Unstoppable: The Emerging Left-Right Alliance To Dismantle The Corporate State* (Nation Books 2014).

²⁹ Elizabeth Warren, *The Market For Data: The Changing Role of Social Sciences in Shaping the Law*, Wis. L. Rev. 1, 4 (2002) (Hereinafter: Warren Data).

³⁰ *Id.*

³¹ *About Elizabeth: Biography*, Elizabeth Warren U.S. Senator for Massachusetts (accessed April 2015) available at <http://www.warren.senate.gov/?p=biography>.

intangible assets transferred in data mining with which consumers, legislators, and general law professionals are unfamiliar. It appears that these separate areas of study have not been integrated for comment on COPPA. The research herein therefore integrated the aforementioned areas of study to: (1) identify how the mobile app providers based in California interact with the national child-consumer class as a whole; (2) review erroneous arguments made by said providers so that contractual practices may improve; and (3) define damages suffered by children in said contracts.

II. Literature Review

A. A Brief History on Contracting with Minors

A review of the early formation of United States contract law revealed patterns and precepts that help explain current policy of the bright-line rule for contracting with minors. When laws change, so do the authorities that govern them. For example, where common law bestowed authority to a guild or church, once centralized legislation was passed, the power shifted to the royal crown.³² This changed the relation between the advantaged and disadvantaged.³³ These politics share common ground with our political culture today. The history exemplifies how private industry, culture and government interact with the laws surrounding contracts with minors.

Dating back to the early medieval ages of 1150 to the epoch of King Henry II, contract law transitioned from regional customs and royalty mandates to that of

³² See Kevin M. Teeven, *A History Of Legislative Reform Of The Common Law Of Contract*, 26 U. Tol. L. Rev. 35 (Fall 1994).

³³ *Id.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

central legislation.³⁴ This change from local and private governance to central authority came with some resistance. For example, King Henry II, "intruded upon the powers of both the church courts and the barons' courts."³⁵ He created better access to a centralized royal court for contract matters.³⁶ This might have been an advancement in consumer and contract protection, a high and neutral judge. However, this change was met with resistance from feudal authority and other private groups, "threats of non-payment of taxes and even force..." and demands for, "limits on royal courts' intrusion into local courts' contract work."³⁷

Common law has stemmed from various English cultures, case laws and other non-binding decisions; all of which required some unification for a budding American nation. Prior to a modern centralized law, the common law of the cultures recognized that children lacked the capacity to contract.³⁸ The United States of America, by way of the American Law Institute, first put together treatises regarding contracts in 1923.³⁹ Contract law received additional updates; the latest became effective in 1981.⁴⁰

³⁴ *Id.*

³⁵ *Id* at 26.

³⁶ *Id.*

³⁷ *Id* at 37.

³⁸ Andrew Schwartz, *The Card Act In Perspective: Ongoing Efforts To Find Balance In Credit Card Regulation*, Utah L. Rev. 417 (2011).

³⁹ *ALI Overview: Creation*, The American Law Institute (accessed May 2015) available at <http://ali.org/index.cfm?fuseaction=about.creation>.

⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

Common law has some limitations with its old tradition. For example, when the new concept and need for curing a contract arose, the Uniform Commercial Code (UCC) 2-508, first adopted the practice.⁴¹ Up until then, common law stated that a breach of contract warranted quick action, a likely termination.⁴² This did not allow for a second chance of performance that might ultimately help the injured party and support waste avoidance.⁴³ Arguably, the UCC still offers the better application of the 'cure' than its common law counterpart, Restatement (Second) of Contracts.⁴⁴

Another limitation is that UCC and Restatement (Second) are merely suggestive law, albeit respected and highly referenced. This places them second in comparison to the enacted law of the state and federal government. The suggestive law addressing contracts with infants specifically states that, "the modern rule in the absence of statute is that they [contracts] are voidable by the infant."⁴⁵ Today, statutes are hardly absent.

There are several statutes that place further restrictions, as well as those that place infants on par with adults in regards to capacity. The United States military law was one of the earliest examples. In 1890, the United States Supreme Court reiterated that legislature determines when an infant is competent for military or civil duties.⁴⁶

⁴¹ William H. Lawrence, *Cure After Breach Of Contract Under The Restatement (Second) Of Contracts: An Analytical Comparison With The Uniform Commercial Code*, 70 Minn. L. Rev. 713 (Feb. 1986).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

⁴⁶ *In re Morrissey*, 137 U.S. 157 (1890).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

A similar U.S. Supreme Court case in 1937 affirmed the age of enlistment, allowing fourteen (14) year old minors to enlist and become effectively emancipated.⁴⁷

Following the military exceptions were the interests of prominent industries such as telecommunications.⁴⁸ In 1944, the Western Union Telegraph Company argued that the protections of the Fair Labor Standards Act of 1938⁴⁹ did not apply to its trade.⁵⁰ The court decision permitted the employment of workforce members who were less than sixteen (16) years of age.⁵¹ The majority of industries were exempt due to the statute's language and intent, which primarily focused upon child labor contracts in the mining industry.⁵²

After reviewing a brief history of contract law, the initial titled research question already has some apparent answers. If the bright-line rule of contracting with minors has received multiple exclusions and amendments early on, then it is likely to have been crossed by mobile apps. However, it begs the question if a line even exists to be crossed. The bright-line rule remains centered in common law, which is only a suggestive influence. The research questions still require further study, including a better look at the concept of capacity.

⁴⁷ *United States v. Williams*, 302 U.S. 46 (1937).

⁴⁸ *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945).

⁴⁹ 29 U.S.C. §201- 212.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

B. Capacity to Contract

The basic principle of capacity to contract is central to the research question of whether minors need a bright-line rule for app contracts. Proper mental capacity is necessary to insure clear intent and prevent improper bargaining; children are effortlessly induced.⁵³ An easy example to picture is a young child exchanging the title and deed to a home for the promise of cookies. After all, cookies are better than paper to a child. It is the later years of infancy that bring dispute. Per common law, at the age of 21 years, “men and women achieve full capacity to contract...”⁵⁴ Little is left of the 21 year milestone other than the authorization to consume alcohol.⁵⁵ Most bright-line rules utilize 18 years as the mark for when adult capacity begins.⁵⁶

Adults are on notice; a sale or contract to a child may later result in disaffirming and require several remedies.⁵⁷ This is common knowledge and, “an adult acting with reasonable care can avoid entering contracts with minors...”⁵⁸ This can also act to the child’s detriment: out of an abundance of caution, no one will economically interact with them. One of the popular accommodations for this is having a parent sign a contract on the child's behalf.

Take for example the key facts in *United States v. Williams*, 302 U.S. 46 (1937). The plaintiff had allowed for her son to enlist in the armed services. Her

⁵³ Cheryl Preston & Brandon Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines*, 61 Kansas L. Rev. 344, 357 (Dec. 2012).

⁵⁴ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

⁵⁵ Preston, *supra* at 368.

⁵⁶ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

⁵⁷ *Id.*

⁵⁸ Preston, *supra* at 357.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

involvement with this contract was required because her son was a minor; he lacked capacity to contract. The plaintiff also entered her minor-son into a “war-risk insurance” policy. Unbeknownst to her, the son soon ended the insurance policy while he was still a minor. Among the matters decided in the case, the court asserted that: (1) minors between 14 and 18 years required parental consent to join the military; (2) parental consent was in respect to the parental role, but not for the acknowledgement of a child’s incapacity; (3) employment with the military was distinct from other private employment as it caused an emancipation; (4) after the initial parental consent, the parent was no longer a party to the contract as the U.S. superseded parental control.⁵⁹

As noted, a military enlistment is not a typical contract. The parent in California can still act as an agent in a child-acting contract entered via parental consent.⁶⁰ This policy is discussed further on, but for now it serves the research on capacity to continue examining war and violence. It is peculiar that a minor as young as 14 years could assume the required capacity of an adult in order to engage in warfare. Other areas of law have also drawn conclusions surrounding capacity and violence.

In criminal law, minors are examined on a case-by-case basis to determine their culpability in violent crime participation. The United States Supreme Court in *Roper v. Simmons* further established that minors were categorically less culpable

⁵⁹ *United States v. Williams*, 302 U.S. 46 (1937).

⁶⁰ *Berg*, 148 Cal. App. 4th 809.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

than the average adult, using 18 years as a bright-line rule of reference.⁶¹ A bright-line rule assists in sparing a child convict from the death penalty, but it is not used to keep him from being tried as an adult.⁶² A bright-line rule is used in common law for contracting with a minor. This infers that a typical contract requires greater capacity than that required for killing.⁶³ This reasoning has been used in other arguments of the bright-line rule, which uses the capacity to fight as evidence of the capacity to take on other responsibilities:

Just as eighteen-year-olds are deemed by the law to be sufficiently mature to enter into any other contract - and mature enough to be drafted, vote, serve as a juror, and be sentenced to death - then, a fortiori, they are mature enough to hold a credit card: Old enough to fight, old enough to swipe.⁶⁴

Traditionally, the minor's incapacity has been based upon an objective bright-line rule of age (first 21 years, then 18 years).⁶⁵ However, the exceptions to this policy only grow more robust as subjective comparisons are made with violence, war service, and other exclusions due to legislative latent ambiguity. Preston and Crowther's conclusion may have been over generous: "the underlying principle is still protecting minors...A comparison across legal fields does not suggest the infancy doctrine is outdated."⁶⁶ If the doctrine of the bright-line rule (infancy doctrine) is not

⁶¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶² Preston, *supra* at 358.

⁶³ Larry Cunningham, *A Question of Capacity: Towards A Comprehensive And Consistent Vision Of Children And Their Status Under Law*, 10 U.C. Davis J. Juv. L. & Pol'y 275 (2006).

⁶⁴ Schwartz, *supra* at 407, 432.

⁶⁵ *Id.*

⁶⁶ Preston, *supra* at 368.

outdated, its argument has at least become useless. This would be in line with Senator Elizabeth Warren's observations on bankruptcy law, "Indeed, the market is creating an anti-market in which one study seems to contradict another, leaving policymakers free to ignore all data and making such scholarship not only difficult, but useless."⁶⁷

C. Remedies for Breach of Contract

A breach of contract occurs when one party fails to perform a contracted promise.⁶⁸ A promisee has several options of remedy based upon the circumstances, such as "withhold any return performance...sue for full expectation relief."⁶⁹ Voidable contracts are different than conventional breaches in that they allow for a promisee (a minor) to disaffirm the contract without a failure in performance by the other party.⁷⁰ In such cases, the minor may also seek remedy. Again, the circumstances and local legislation vary in the form of remedy a minor may receive in a voided contract.⁷¹ By reviewing some of the conventional remedies for breach and avoidance, this document can begin to address the research question of whether the intangible assets exchanged within a mobile app contract can be recovered.

⁶⁷ Warren Data, *supra* at 4.

⁶⁸ Blum, *supra* at 605.

⁶⁹ *Id.*

⁷⁰ *Id.* at 482, 483.

⁷¹ Cheryl Preston & Brandon Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines*, 61 Kansas L. Rev. 344 (Dec. 2012) (This research shows the enacted law of New Hampshire is unique by requiring minors to make restitution of benefits in a voided contract.).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

As earlier detailed regarding capacity, a minor can be easily influenced beyond reasonable and sound judgment.⁷² The common law, which makes contracts with minors voidable, establishes a warning to industries: this contract may be disaffirmed at will. Based on these standards, “the party seeking avoidance need not show that the terms of the contract are unfair...the decision to avoid the contract involves some degree of equitable balancing, and unfair terms of advantage-taking may influence the court...”⁷³

Simple compensation is not enough to protect unfair bargaining with children. In utilizing an earlier example, if a contract for deed and title to a home were exchanged for cookies, the disaffirmed contract would require the items to revert back to the owners. However, the company has since leased the property. The company has significantly profited in the interim period leading up to the cancellation; this profit outweighs the opportunity cost of their bargained cookies. The company also stood a chance for the contract to have escaped voidance, thus the risk was worth it. Although this is merely a hypothetical situation, it illustrates why an additional remedy in a voided contract is needed to provide teeth to the deterrent of unfair practices. A type of restitution or punitive damage is needed.

One way to identify the proverbial teeth is observing how companies focus upon limiting remedies via contractual clauses, reducing their liability.⁷⁴ For example, research identified a strategy in Chicago, Illinois real estate contracts from

⁷² Blum, *supra* at 64.

⁷³ *Id* at 488.

⁷⁴ Debra Stark, et al, *Dysfunctional Contracts And The Laws And Practices That Enable Them: An Empirical Analysis*, 46 Ind. L. Rev. 797 (2013).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

2003-2008.⁷⁵ There were some companies that limited a buyers' right to remedy to just the return of their earnest money.⁷⁶

This is not a meaningful remedy because it does not cover any of the losses buyers would normally be entitled to under the law due to a breach of the contract, creating-as one court put it-"heads-I-win, tails-you-lose" illusory agreements. In essence, these clauses constitute a waiver of the right to recover benefits of the bargain/expectation damages, consequential damages, reliance-type damages, and the remedy of specific performance.⁷⁷

Limitation of remedies is not unique in adult contracts, including those pertaining to real estate. Even mobile app companies such as Zynga have the following verbiage in their push button contracts:⁷⁸

TO THE EXTENT PERMISSIBLE UNDER APPLICABLE LAWS, UNDER NO CIRCUMSTANCES WILL THE ZYNGA PARTIES BE LIABLE TO YOU FOR MORE THAN THE AMOUNT YOU HAVE PAID ZYNGA IN THE ONE HUNDRED AND EIGHTY DAYS (180) DAYS IMMEDIATELY PRECEDING THE DATE ON WHICH YOU FIRST ASSERT ANY SUCH CLAIM.

YOU ACKNOWLEDGE AND AGREE THAT IF YOU HAVE NOT PAID ZYNGA ANY AMOUNTS IN THE ONE HUNDRED AND EIGHTY DAYS (180) DAYS IMMEDIATELY PRECEDING THE DATE ON WHICH YOU FIRST ASSERT ANY SUCH CLAIM, YOUR SOLE AND EXCLUSIVE REMEDY FOR ANY DISPUTE WITH ZYNGA IS TO STOP USING THE SERVICE AND TO CANCEL YOUR ACCOUNT(emphasis in original).⁷⁹

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 797-798.

⁷⁸ See *Google Play Terms of Service*, Google Play (Dec. 10, 2014) available at https://play.google.com/intl/en_us/about/play-terms.html (Push Button Contract: the act of downloading a mobile application by pushing a button on the smartphone/tablet and thus agreeing to all the contractual terms of service).

⁷⁹ 7.2 *Limitations; Waivers Of Liability*, Zynga: Terms (Sept. 30, 2011) available at <https://company.zynga.com/legal/terms-of-service/01>.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

A restitution disgorgement remedy is a type of remedy available to the intellectual property fields of contract law.⁸⁰ It is based on the concept of deterring the unjust enrichment of a trespasser of the intangible asset.⁸¹ In other words, "if the reasonable royalty will adequately compensate [the infringer] the patent owner cannot prevent the trespass."⁸² Therefore, "measuring the infringer's profits may sometimes provide a useful proxy for assessing the patent owner's compensatory loss."⁸³

Consider a cluster of Internet data that contains a promisee's shopping behaviors. This is intangible property, but a shopper does not typically patent their personal data before releasing it to a mobile app company. This data could be used to reduce a company's customer acquisition costs. Due to the way that data is bundled and shared; it could be sold to many companies over a short period of time. Thus, some intangible property can bring a royalty to multiple companies scattered around the world. If the data is collected via a voidable contract with a minor and the contract is later disaffirmed, the royalty from the data could become a factor similar to the aforementioned patent research by Roberts.⁸⁴

⁸⁰ Caprice Roberts, *Intellectual Property Remedies: The Case For Restitution And Unjust Enrichment Remedies In Patent Law*, 14 Lewis & Clark L. Rev. 653 (Summer 2010).

⁸¹ *Id.*

⁸² *Id.* at 670.

⁸³ *Id.* at 670.

⁸⁴ *See Id.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

If the injured party were to seek a prohibitory injunction,⁸⁵ they would have trouble tracking down all the companies and recovering the intangible assets (data) to ensure the injunction. Instead, a different type of remedy is preferred. The plaintiff may seek monetary remedy for their loss. Restitution and compensation are two types of monetary remedy. Patent law has found that restitution is necessary for deterring an offense. Other areas of law tend to utilize compensation and have confused the two types of remedy:

[M]any judges and lawyers use the term "restitution" quite loosely. For example, judges and lawyers often talk and write about requiring criminals to make "restitution" to the victims of their crimes. These judges and lawyers then describe a process that requires the criminals to compensate their victims for *losses* experienced. This, however, is not *restitution*. Rather, it is *compensation*.⁸⁶

Compensatory damages focus upon the loss to the injured.⁸⁷ Sometimes they are easily identifiable, such as the cost to repair a vehicle (tangible / pecuniary loss) or the pain and suffering from an automobile collision (intangible / non-pecuniary loss). However, there is a growing list of intangible property exchanged in our economy today, some of which had little non-pecuniary loss to the injured, but made substantial profits to the parties who possessed the property.⁸⁸

⁸⁵ Paul Wangerin, *Restitution For Intangible Gains*, 54 La. L. Rev. 339, 342 (Nov. 1993)(A prohibitory injunction is, "The most commonly granted act remedy aimed at preventing future harm requires someone or some entity not to do something.").

⁸⁶ *Id* at 344.

⁸⁷ *Id*.

⁸⁸ *See Id* at 352 (showing the benefits of intangible assets that should warrant restitution in a divorce, e.g., the spouse who obtained a better degree and paying job while the other stayed home to watch the kids and has a reduced economic outlook once divorced.).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

In summary of this chapter, remedies for breach of contract are known to vary. Depending on the type of remedy, such as with compensation, the damage award may be too small compared to the benefits of the violation; this encourages some parties to continue flouting the law.⁸⁹ When the assets are intangible and unconventional, such as the items transferred in a mobile app, this problem expands. If minors were to successfully exchange a deed and title to a home for cookies, they would soon realize their error when they and their family must sleep in the street. In contrast, minors would be hard pressed to identify the intangibles exchanged in a mobile app contract, let alone the valuation that might lead to unfair bargaining.

D. Intangible Assets in Mobile App Contracts

In addition to the research of remedies, a modern study of intangible assets must be incorporated to fully address the complexity of mobile app contracts. As noted in 1993:

Two questions about remedies have, for the most part, escaped the attention of practicing lawyers and commentators: (1) under what circumstances, if any, should claims for restitution be filed rather than claims for compensation?; (2) under what circumstances, if any, should recovery be sought for intangible gains?⁹⁰

Wangerin's research showed that several forms of intangible assets existed in our evolving economy. In 2012, the Federal Trade Commission (FTC) stated that data brokers who collect information on consumer behaviors, such as geo-locations

⁸⁹ See *Shredding The Rules*, The Economist (May 2, 2015) available at <http://www.economist.com/news/business/21650142-striking-number-innovative-companies-have-business-models-flout-law-shredding> (giving examples of tech companies that rapidly expand adoption via social networking, risk infringement and other violations, but gain enough public support and income to still benefit.).

⁹⁰ Wangerin, *supra* at 339.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

and marketing, “operate largely in the dark.”⁹¹ The FTC discovered that several data broker activities fell outside of the scope of the Fair Credit Reporting Act (FCRA).⁹² In 2013, the research showed that data mining via Internet based activity, including mobile app contracts, was the collection of a growing set of intangible assets that had been misunderstood by the consumers and legislators.⁹³

A data broker is a person or company that is in the business of collecting intangible assets, bundling them for analysis, and selling the data to a client that needs that intelligence. The FTC categorized data brokers into three groups: (1) entities subject to FCRA, which are typical credit card companies, banks, and other financial institutions; (2) marketing related collectors; and (3) non-marketing, non-FCRA regulated aggregators, such as those concerned with fraud detection and people tracking.⁹⁴

Operating in the dark has a broad meaning, but is another way for the FTC to say that consumers and judges are unaware of these intangibles. An example is the push button contract of a typical mobile app. A mobile app contract can list terms, such as the following, “...can access: in-app purchases, find accounts of the device, read the contents of your USB storage, view network connections...”⁹⁵ The collected

⁹¹ Federal Trade Commission, *Data Brokers: A Call For Transparency And Accountability* 5 (May 2014)(hereinafter referred to as FTC Data Brokers).

⁹² 15 U.S.C § 1681.

⁹³ Liane Colonna, *A Taxonomy and Classification of Data Mining*, 16 SMU Sci. & Tech. L. Rev. 309 (Fall 2013).

⁹⁴ FTC Data Brokers, *supra*.

⁹⁵ *Permissions*, FarmVille 2: Country Escape (April 7, 2015) available at <https://play.google.com/store/apps/details?id=com.zynga.FarmVille2CountryEscape>.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

data is then used by the company and sold to third parties including data brokers.⁹⁶ In *I.B. v. Facebook, Inc.*, one plaintiff sought compensation for the monetary damages totaling just less than one thousand dollars. The minor, J.W., had used their parent's debit card to make unauthorized purchases on Facebook. To further illustrate their lack of knowledge for the intangible assets exchanged; the plaintiff never asked for a report of the information gathered from the personal electronic device, the amount of location tracking conducted, the networks tallied, etc. Nor was a request made for Facebook Inc. to show a valuation for the data collected. The plaintiff never questioned how much money Facebook made, or stood to make, from the data so that restitution could be negotiated.⁹⁷

Data mining allows for unknowns to be discovered in consumer behavior and reduce the cost of marketing, customer acquisition and boost sales in general.⁹⁸ In June 2012, Acxiom Corporation, a data broker/database marketer had \$1.13 billion in sales for that fiscal year.⁹⁹ Acxiom had sold compiled consumer information to other companies like Wells Fargo and Macy's.¹⁰⁰ A "canonical anecdote" known to data brokers is that of a supermarket's point-of-sale system connecting beer purchases to

⁹⁶ See Han, *supra*.

⁹⁷ *I.B.*, 905 F. Supp. 2d 989.

⁹⁸ See Colonna, *supra*.

⁹⁹ Natasha Singer, *Mapping, And Sharing, The Consumer Genome*, The New York Times (June 16, 2012) available at <http://www.nytimes.com/2012/06/17/technology/acxiom-the-quiet-giant-of-consumer-database-marketing.html>.

¹⁰⁰ *Id.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

the purchase of diapers.¹⁰¹ “[T]he marketing manager decided to place the beer shelves closer to the diapers shelves, which resulted in a significant increase in beer sales.”¹⁰²

The financial gains from marketing data have the potential to surpass the initial point of sale that facilitated in gathering it. In the event that a contract or simple purchase is voided, the loss of the forfeited revenue (\$10 - \$1,000) could be offset by selling the data to third parties and improved sales stemming from the intelligence. This relation points back to the issue in the chapter of remedies: whether compensation or restitution is required to deter the trespasser of intangible assets.

E. Fine Print Contracts: Mobile Apps

According to the guidelines set forth by the COPPA, a mobile app contract may be addressed to children as young as 13 years of age.¹⁰³ Mobile app companies, such as Zynga, explicitly state in their privacy policy, “Children under 13 should not use our websites or games at any time.”¹⁰⁴ Mobile app contracts that target 13-17 year old minors still have contract terms, fine print, and length that simulate daunting financial contracts. Just one popular game, FarmVille 2 from the Zynga FarmVille series, has a multi-page contract with more than 14,000 words.¹⁰⁵ Within these terms

¹⁰¹ Colonna, *supra* at 313.

¹⁰² *Id* at 313.

¹⁰³ 15 U.S.C. §§ 6501-6506.

¹⁰⁴ *Privacy Policy*, Zynga.com (Aug. 11, 2014) accessible at <https://company.zynga.com/privacy/policy/01#8>.

¹⁰⁵ *Permissions*, *FarmVille 2: Country Escape*, Google Play, (April 7, 2015) accessible at [https://play.google.com/store/apps/details?id=com.zynga.-FarmVille2CountryEscape &hl=en](https://play.google.com/store/apps/details?id=com.zynga.-FarmVille2CountryEscape&hl=en) (Contract terms include the necessary Terms of

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

are the provisions pertaining to arbitration and the waiver of class action suits that are similar with those in credit card contracts.¹⁰⁶ This chapter is the last of the literature review. With three subsections, it will illustrate the similarities between financial contracts for adults and the gaming contracts children enter into via apps.

1. Geo-location / Jurisdiction

First, the industry's geographical location and respective legal jurisdiction should be identified. Facebook has its United States headquarters in Menlo Park, California.¹⁰⁷ Although mobile apps can be hosted and played on the Facebook platform, they are also downloaded from the companies that create the operating systems for mobile devices: Google (Android), Apple (iPhone), Amazon and Microsoft (Windows).¹⁰⁸ Google and Apple both have their headquarters in California too.¹⁰⁹ Amazon and Microsoft are based out of the state of Washington.¹¹⁰

Service, Private Policy, Permissions, and corresponding Google Help page for necessary explanations of key terms.).

¹⁰⁶ *Terms of Service*, Zynga.com (Sept. 30, 2011) accessible at <https://company.zynga.com/legal/terms-of-service/01>; *Terms of Service*, Zynga.com (Aug. 11, 2014) accessible at <https://zynga.com/legal/terms-of-service>.

¹⁰⁷ *Facebook Inc. Annual Report Form 10-K*, U.S. Securities And Exchange Commission (Dec. 31, 2014) available at <http://www.sec.gov/Archives/edgar/data/1326801/000132680115000006/fb-12312014x10k.htm>.

¹⁰⁸ *It's FarmVille Tailored For You And The Way You Want To Play*, Zynga.com (accessed June 2015) available at <https://zynga.com/games/farmville-2-country-escape> (giving one example of a popular game that is available on multiple operating systems).

¹⁰⁹ *Google, Inc. Annual Report Form 10-K*, U.S. Securities And Exchange Commission 7 (Dec. 31, 2014) available at <http://www.sec.gov/Archives/edgar/data/1288776/000128877615000008/goog2014123110-k.htm>; *Apple, Inc. Annual Report Form 10-K*, U.S. Securities And Exchange Commission 7 (Sept. 27, 2014) available at

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

According to a review by Forbes, Android had 87% of the “global smartphone market” in 2013.¹¹¹ Legal disputes outside of the U.S. are handled differently and may take place in the jurisdiction of their international headquarters. Still, the global statistic gives an idea of the consumer exposure to Google’s app platform. A more telling statistic is the U.S. market share of smartphones. According to a recent study review by Gigaom, Android and iPhone based mobile devices have been close to a tie for several quarters; both having a near 50% share.¹¹²

A U.S. consumer who has a legal dispute with an app purchase would likely be in the courts of Washington (Apple/iPhone) or California (Google/Android). This is due to: (1) the purchase of apps are via these two mobile operating systems despite which local or foreign company made the app; and (2) the boilerplate terms included in such push button contracts. When purchasing an app via the Android Operating System (OS), the consumer will utilize Google Play. According to their terms:

<http://www.sec.gov/Archives/edgar/data/320193/000119312514383437/d783162d10k.htm>.

¹¹⁰ *Amazon.com, Inc, Annual Report Form 10-K*, U.S. Securities And Exchange Commission 7 (Dec. 31, 2014) available at <http://www.sec.gov/Archives/edgar/data/1018724/000101872415000006/amzn-20141231x10k.htm>; *Microsoft Corporation, Annual Report Form 10-K*, U.S. Securities And Exchange Commission 7 (June 30, 2014) available at <http://www.sec.gov/Archives/edgar/data/789019/000119312514289961/d722626d10k.htm>.

¹¹¹ Gordon Kelly, *Report: 97% Of Mobile Malware Is On Android. This Is The Easy Way You Stay Safe*, Forbes (March 24, 2014) available at <http://www.forbes.com/sites/gordonkelly/2014/03/24/report-97-of-mobile-malware-is-on-android-this-is-the-easy-way-you-stay-safe>.

¹¹² Kif Leswing, *Android And iOS Are Nearly Tied For U.S. Smartphone Market Share*, Gigaom (Feb. 4, 2015) available at <https://gigaom.com/2015/02/04/android-and-ios-are-nearly-tied-for-u-s-smartphone-market-share>.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services. All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.¹¹³

In the event that Google is not part of the claim and the injured party goes directly to the maker of the app, such as the popular Zynga, the injured party will find the terms to be similar:

If you are a resident of the United States, this Agreement and any dispute arising out of or related to it or the Service shall be governed in all respects by the laws of the State of California as they apply to agreements entered into and to be performed entirely within California between California residents, without regard to conflict of law provisions. You agree that any claim or dispute you may have against Zynga must be resolved exclusively by a state or federal court located in San Francisco County, California...¹¹⁴

Facebook has a large market share in the social app industry including desktop and mobile platforms. During December of 2014, it had an average of “890 million daily active users (DAUs).”¹¹⁵ A Forbes report showed it to have taken market share from Google in mobile ads.¹¹⁶ Facebook was the origin of popularity for Zynga games, and in 2009, Zynga was the developer for the most active Facebook apps.¹¹⁷

¹¹³ *Google Terms Of Service*, Google (April 14, 2014) available at <https://www.google.com/intl/en/policies/terms>.

¹¹⁴ 8.2 *Law And Forum For Legal Disputes*, Zynga: Terms (Sept. 30, 2011) available at <https://company.zynga.com/legal/terms-of-service/01>.

¹¹⁵ Facebook, Inc. Annual Report, *supra*.

¹¹⁶ Peter Cohan, *Three Reasons To Buy Facebook Stock*, Forbes (April 24, 2014) available at <http://www.forbes.com/sites/petercohan/2014/04/24/three-reasons-to-buy-facebook-stock>.

¹¹⁷ Christopher Mack, *Zynga Making \$100 Million/Year?*, Social Times (April, 30, 2009) available at www.adweek.com/socialtimes/zynga-making-100-millionyear.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

If a legal claim were brought against Facebook, the claimant would also find similar contract language to those of Zynga and Google:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.¹¹⁸

In summary of the geographical setting and legal jurisdiction, there is high potential for a mobile app claim to be hosted in a California court, even if the user lives outside of the state. Several other prominent mobile app companies have their headquarters in California too, but focusing on a few leaders, such as Facebook, helps with this study.

2. *Limiting Terms*

Financial institutions use terms of arbitration to reduce class action suits and limit liability.¹¹⁹ “In the early 1980s, the typical credit card contract was a page long; by the early 2000s...30 pages...”¹²⁰ Within these complex terms and long contracts, there are not only limiting arbitration clauses, but also statements such as, “We reserve the right to change the terms at any time for any reason.”¹²¹ The

¹¹⁸ *Statement of Rights and Responsibilities: Disputes*, Facebook (Jan. 30, 2015) available at <https://www.facebook.com/legal/terms>.

¹¹⁹ Warren, *supra*.

¹²⁰ *Id* at 11.

¹²¹ *Id* at 12.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

following are examples taken from mobile app contracts regarding arbitration and a company's right to change terms at will:

With & Without Notice

a. Facebook

Amendment guidelines. We may update these Payments Terms at any time without notice as we deem necessary to the full extent permitted by law. The Payments Terms in place at the time you confirm a transaction will govern that transaction (emphasis in original).¹²²

b. Google Play/Android

We may modify these terms or any additional terms that apply to a Service... We'll post notice of modifications to these terms on this page...changes addressing new functions for a Service or changes made for legal reasons will be effective immediately... If you do not agree to the modified terms for a Service, you should discontinue your use of that Service.¹²³

c. Zynga

Zynga reserves the right, at our discretion, to change, modify, add or remove portions of these Terms of Service and its Privacy Policy at any time by posting the amended Terms on or within the Service. You may also be given additional notice... (emphasis not original).¹²⁴

Arbitration / Other Limits

a. Facebook

OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS.... You will not transfer any of your rights or obligations

¹²² *Community Payment Terms: Notices And Amendments To These Terms*, Facebook (March 17, 2015) available at https://www.facebook.com/payments_terms.

¹²³ Google Terms, *supra*.

¹²⁴ Zynga Terms, *supra*.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

under this Statement to anyone else without our consent (emphasis in original).¹²⁵

b. Google Play/Android

TO THE EXTENT PERMITTED BY LAW, THE TOTAL LIABILITY OF GOOGLE, AND ITS SUPPLIERS AND DISTRIBUTORS, FOR ANY CLAIMS UNDER THESE TERMS, INCLUDING FOR ANY IMPLIED WARRANTIES, IS LIMITED TO THE AMOUNT YOU PAID US TO USE THE SERVICES (OR, IF WE CHOOSE, TO SUPPLYING YOU THE SERVICES AGAIN) (emphasis in original).¹²⁶

c. Zynga

TO THE EXTENT PERMISSIBLE UNDER APPLICABLE LAWS, UNDER NO CIRCUMSTANCES WILL THE ZYNGA PARTIES BE LIABLE TO YOU FOR MORE THAN THE AMOUNT YOU HAVE PAID ZYNGA IN THE ONE HUNDRED AND EIGHTY DAYS (180) DAYS IMMEDIATELY PRECEDING THE DATE ON WHICH YOU FIRST ASSERT ANY SUCH CLAIM... For any claim (excluding claims for injunctive or other equitable relief) where the total amount of the award sought is less than \$10,000, the party requesting relief may elect to resolve the dispute in a cost effective manner through binding non-appearance-based arbitration (emphasis in original).¹²⁷

In summary, mobile app contracts limit monetary recovery to a strict compensation remedy associated with the purchase of a service. Such contracts issue additional limits to the cap in damages and place time restrictions. The latest of the contracts appear to not directly limit class action suits, however some language suggests an attempt by limiting the transfer of rights and by limiting payouts. It may be that limiting payouts/awards will also deter injured parties from forming a class action suit. “[R]oughly 32 million consumers were eligible for relief through class

¹²⁵ Facebook Terms, *supra*.

¹²⁶ Google Terms, *supra*.

¹²⁷ Zynga Terms, *supra*.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

action settlements in federal court each year,” but they waive such rights or fail to invoke them.¹²⁸

3. Mobile App Contracts: Third Parties and Data Collection

Data collection and the relationship to third parties is another important element of a fine print mobile app. These contract terms are commonly filed under the privacy policy. As covered in the previous chapter on intangible assets, a less regulated and growing category for data brokers is marketing, the area that focuses upon consumer sales and spending.¹²⁹

The United States economy has been through a history of wage inequality, but as a whole, productivity and revenue has had strong growth.¹³⁰ While wages had plateaued and the middle class had become stressed, consumer spending was propped up by methods such as taking on second jobs and increasing loans/credit.¹³¹ One thing remains constant; the middle class’ purchasing power must receive backing. They are the most active purchaser of goods and services.¹³² As former U.S. Labor Secretary, Robert Reich put it, “...consumer spending is 70% of the United States economy.”¹³³ Google (which includes their Android OS, AdSense, AdWords,

¹²⁸ *Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief For Consumers*, Consumer Financial Protection Bureau (March 10, 2015) available at http://www.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf.

¹²⁹ FTC Data Brokers, *supra*.

¹³⁰ See 72 Productions, *Inequality For All* (2013) (a documentary including Robert Reich’s research, including U.S. Labor Department and Federal Trade Commission).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 10:08.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

YouTube and Google Play) further highlighted this fact in its business model, “*We generate a significant portion of our revenues from advertising, and a reduction in spending by or loss of advertisers could seriously harm our business* (emphasis in original).”¹³⁴ Google estimated that 89% of its revenue was from advertisements.¹³⁵

One method to bolster advertisement revenue is to provide the customer with an effective result at a low cost; this is also known as the cost of customer acquisition.¹³⁶ For example, if Ford Motor Co. pays Google to display an advertisement during a YouTube video, the desired effect is that the viewer will click on the ad, follow the directives and purchase from a Ford Motor automobile. Customer acquisition problems could occur if the only people who see the advertising were those who do not drive, or are children, or are fans of Saab. To avoid such problems, Google needs to collect the data, track its users across all devices and apps, and create profiles. Doing so could allow Google to direct ads towards viable consumers to increase positive results.

The following are samples of Internet/mobile app contracts regarding data collection:

a. Facebook

We collect the content and other information you provide when you use our Services, including when you sign up for an account, create or share, and message or communicate with others. This can include information in or about the content you provide, such as the location of

¹³⁴ Google Inc. Annual Report, *supra*.

¹³⁵ *Id.*

¹³⁶ Pei-Yu (Sharon) Chen and Lorin Hitt, *Switching Cost And Brand Loyalty In Electronic Markets: Evidence From On-Line Retail Brokers*, ICIS 2000 Proceedings, Paper 13 (2000).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

a photo or the date a file was created. We also collect information about how you use our Services, such as the types of content you view or engage with or the frequency and duration of your activities... We receive information about you and your activities on and off Facebook from third-party partners... We use the information we have to improve our advertising and measurement systems so we can show you relevant ads on and off our Services and measure the effectiveness and reach of ads and services (emphasis not original).¹³⁷

b. Google

We and our partners use various technologies to collect and store information when you visit a Google service, and this may include sending one or more cookies or anonymous identifiers to your device. We also use cookies and anonymous identifiers when you interact with services we offer to our partners, such as advertising services or Google features that may appear on other sites.... We also use this information to offer you tailored content – like giving you more relevant search results and ads... We will share personal information with companies, organizations or individuals outside of Google when we have your consent to do so.¹³⁸

c. Zynga

If you play Zynga's games or access any of our other Services on a social network like Facebook, Zynga receives certain information about you from the social network automatically. The information we receive depends on the Zynga game you're playing, the social network, and your privacy settings and your friends' privacy settings on that social network... For example, Zynga may collect and store some or all of the following information provided by the social network: your first and last name; your profile picture or its URL; your social network ID number (like your Facebook ID number), which is linked to publicly-available information like your name and profile photo; the social network ID numbers and other public data for your friends; the login e-mail you provided to that social network when you registered with it; your physical location and that of the devices you use to access our Services; your gender; your birthday and/or age range; other publicly-available information on the social network;

¹³⁷ *Data Policy*, Facebook (Jan. 30, 2015) available at <https://www.facebook.com/about/privacy>.

¹³⁸ *Privacy Policy*, Google (May 1, 2015) available at <https://www.google.com/intl/en/policies/privacy>.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

and/or any other information that you or the social networks share with Zynga.¹³⁹

We may disclose or publish aggregated information (information about you and other players collectively that is not intended to specifically identify you, for example, players between the ages of 21 and 25 who live San Francisco) and other non-personal information about our players for industry analysis, demographic profiling, marketing, analytics, and advertising, and other business purposes (emphasis not original).¹⁴⁰

In summary, data is collected by mobile apps; it is collected voluntarily and sometimes more subversive via tracking technologies such as cookies.¹⁴¹ These terms are contained within lengthy contracts and require following additional hyperlinks for the full terms.¹⁴² If contracts are viewed via a mobile device, the screen resolution can be very small, smaller than fine print for a printed credit card contract. This data is expressly shared or sold to third parties.¹⁴³

III. Analysis

A. *I.B. v. Facebook, Inc.: Mobile App Contracts with Children*

The federal case in the United States Northern District of California, *I.B. v. Facebook*,¹⁴⁴ has been summarized for analysis of mobile app contracts with children. First, the applicability to other states and jurisdictions has been addressed by: (1) court findings in *I.B. v. Facebook*¹⁴⁵ and (2) Shepard's Summary. Second,

¹³⁹ *Privacy Policy*, Zynga (May 10 2015) available at <https://zynga.com/privacy>.

¹⁴⁰ *Id.*

¹⁴¹ *Privacy Policy* (Google), *supra*.

¹⁴² *Permissions*, FarmVille 2: Country Escape, *supra*.

¹⁴³ *Privacy Policy* (Zynga), *supra*; *Privacy Policy* (Google), *supra*.

¹⁴⁴ *I.B.*, 905 F. Supp. 2d 989.

¹⁴⁵ *I.B., et al. v. Facebook*, Case No. 12-cv-01894-BLF (N.D. Cal. 2015).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

California's statutes and case law regarding the bright-line rule of contracting with minors were analyzed, as was the court's dealing with intangible assets.

1. Jurisdiction

As of March 10, 2015, the U.S. district court ruled that minors who reside outside of California may invoke California's Family Code.¹⁴⁶ In making this decision, the court first had to determine both whether parties had anticipated the application of California law and whether the statutes were intended to help minors from other states.¹⁴⁷ The court observed similar findings to the previous chapter on mobile app contracts; Facebook terms of contract expressly brought all individuals under the jurisdiction California courts.¹⁴⁸ United States District Judge Beth Labson Freeman cited *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464-65 (1992) to further show the precedent: California law applies if parties had elected for its governance.¹⁴⁹ Additionally, the California court had a "substantial relationship" to the Defendant [Facebook], because it was located in California.¹⁵⁰ Based upon this decision, Google and Zynga would follow suit. Both are located in California and have contract terms that show an intention to resolve claims in California courts.

Shepard's Law was accessed to provide statistics on which regions had used California case law for suggestive law and policy. As of May 2015, *I.B. v. Facebook, Inc.*, 905 F. Supp. 2d 989 (N.D. Cal. 2012) had been cited in fifteen other decisions:

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

two First Circuit, U.S. District Courts in Massachusetts; one Seventh Circuit, U.S. District Court in Illinois; and twelve others from the Ninth Circuit, U.S. District in California. In the Massachusetts case, *Murphy v. Law Offices of Howard Lee Schiff P.C.*,¹⁵¹ the court referenced *I.B. v. Facebook, Inc.*, to show that “an enforcement mechanism against non-financial institutions...” existed under the Electronic Funds Transfer Act (EFTA).¹⁵² In the Illinois case, *In re Ventra Card Litig.*, the citation was used for the same purpose.¹⁵³ A case in California involving Google, *Imber-Gluck v. Google, Inc.*, used the citation to further detail the lawful way by which a minor may disaffirm a contract and the proper method by which a parent guardian must bring forth the claim.¹⁵⁴

2. California Statutes and Case Law

United States District Judge Beth Labson Freeman has referred to the California Family Code¹⁵⁵ pertaining to contracting with minors as, “century-old protections.”¹⁵⁶ This implies that the policies are out of touch with contemporary methods or foreign in comparison to neighboring states. However, this same code section has also been referred to as “the law in its wisdom...”¹⁵⁷ Wisdom shows that infants are impressionable; they need, “protection against his [infant’s] own

¹⁵¹ 2 Civil Action No. 13-10724-RWZ (D. Mass. 2014).

¹⁵² 15 U.S.C. § 1693.

¹⁵³ No. 13 C 7294 (N.D. Ill. 2015).

¹⁵⁴ Case No. 5:14-CV-01070-RMW (N.D. Cal. 2014).

¹⁵⁵ Cal. Fam. Code § 6701, 6710.

¹⁵⁶ *I.B., et al.*, Case No. 12-cv-01894-BLF.

¹⁵⁷ *Id*; *Flittner v. Equitable Life Assur. Soc. of the United States*, 30 Cal. App. 209, 216 (1916).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

improvidence and the designs of others.”¹⁵⁸ Furthermore, California Family Code mirrors the suggestive common law pertaining to the bright-line rule (infancy doctrine) in that an infant may void the contract.¹⁵⁹

California Family Code Section 6701¹⁶⁰ states, “A minor cannot do any of the following: (a) give a delegation of power; (b) make a contract relating to real property or any interest therein; (c) make a contract relating to any personal property not in the immediate possession or control of the minor. Element (b) addresses the aforementioned analogy of a child trading a deed and title to a home for cookies. Children probably have a hard time assessing the representative value that a piece of paper has for real property. This concept is further highlighted in element (c) of the code. Not only is a minor protected from selling the family home and farm, but also the whole family financial account. Giving away the family bank account via credit card access could be just as dire as handing over the family estate. California uses the catchall language, “not in immediate possession” to include financial accounts and similar instruments.¹⁶¹

In *I.B. v. Facebook, Inc.*, 905 F. Supp. 2d 989 (N.D. Cal. 2012) the judge offered further analysis on Cal. Fam. Code § 6701. The key facts in the case were that two minors had used their parent’s credit or bank accounts to purchase game features via a platform titled, “Facebook Credits.” The Plaintiffs (minors and parental

¹⁵⁸ *Id.*

¹⁵⁹ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

¹⁶⁰ Cal. Fam. Code § 6701.

¹⁶¹ *I.B.*, 905 F. Supp. 2d 989.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

guardians) stated that the credit/bank accounts were not in the minors' immediate possession, nor the minors in control/authority of these accounts. Thus, Facebook contracted with them in violation of 6701(c).¹⁶² The Defendant, Facebook, argued that credits are not tangible personal property and therefore the code did not apply. United States District Judge Caludia Wilken ruled that Facebook's claim about tangible versus intangible was, "inconsistent with the plain meaning of the statute which voids a minor's contract 'relating to any personal property' that is not in the minor's possession or control."¹⁶³ Facebook's motion to dismiss under 6701(c) was denied.

The Plaintiffs also cited California Family Code Section 6710, which states, "Except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards or, in case of the minor's death within that period, by the minor's heirs or personal representative."¹⁶⁴ The children had purchased game features or services at Facebook and used the services. After doing so, the children, and their parent, sought a return of the funds through legal action. In other words, the minors had received all the benefits of the purchase and by seeking reimbursement, the services would have been effectively provided for free.

¹⁶² Cal. Fam. Code § 6710(c).

¹⁶³ *I.B.*, 905 F. Supp. 2d 989 at 13, 14.

¹⁶⁴ Cal. Fam. Code § 6710.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

California case law warns of this situation: “simply stated, one who provides a minor with goods and services does so at her own risk.”¹⁶⁵ Additionally, “a minor may ‘disaffirm all obligations under a contract, even for services previously rendered, without restoring consideration or the value services...’”¹⁶⁶ Facebook raised one main question that the court considered: were the minors seeking damages in disaffirming, but going to continue using the service. If this were the case, as it was in *E.K.D. v. Facebook*,¹⁶⁷ then the option to disaffirm was prohibited. The court found that the minors were not intending to continue use of the games purchased at Facebook and their disaffirmance was legal.¹⁶⁸

3. *Intangible Assets: Restitution v. Compensation*

In the latest 2015 hearing, the last of Facebook’s appeals were heard and the Plaintiff’s request for a class action suit was granted in part and denied in part.¹⁶⁹ In the court decision, the term restitution was loosely used in a manner that Paul Wangerin’s research had identified.¹⁷⁰ Restitution was used to assess the monetary damages of the minor, but not the gains of the accused trespasser, Facebook. In other words, the court is tallying the money spent on the app (Facebook) purchases, but not how much money Facebook earned with all the intangible data that it collected from

¹⁶⁵ *I.B.*, 905 F. Supp. 2d 989 at 16 (citing *Goldberg v. Superior Court*, 23 Cal. App. 4th 1378 (1994)).

¹⁶⁶ *Id.* at 19 (citing *Deck v. Spartz, Inc.*, 2011 U.S. Dist.).

¹⁶⁷ *E.K.D. v. Facebook*, 885 F.Supp.2d 894 (SD Ill. 2012).

¹⁶⁸ *I.B.*, 905 F. Supp. 2d 989.

¹⁶⁹ *I.B., et al.*, Case No. 12-cv-01894-BLF

¹⁷⁰ *See Wangerin, supra.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

the minor in the voided contract. The data broker market was not mentioned in the assessment.

The Defendant, Facebook, attempted to reduce monetary damages of a class action suit by stating that it already had a refund policy in place for unauthorized purchases.¹⁷¹ However, the court identified that the policy did not address the Plaintiffs' broader claim: that all contracts with minors were voidable and could be disaffirmed under California Family Code 6710. Either way, the part of the Plaintiffs' class action suit pertaining to monetary damages was denied. "Restitution" or more accurately, compensation, could not be awarded via a class action suit due to the difficulty of variances in individual refunds. The court also decided that the refunds would not be incidental to the injunctive and declaratory relief.¹⁷² The court certified a class action suit pertaining to injunctive and declaratory action. The Plaintiffs could proceed for the purposes of having Facebook correct its policies and affirm its practices were unlawful.¹⁷³

B. COPPA: Reducing the Age of Minors and Expanding the Loophole

The federal Child Online Privacy Protection Act (COPPA)¹⁷⁴ was enacted in 1998 to protect children when they were accessing the Internet. However, throughout its revisions and application, COPPA had introduced several conflicts to the bright-

¹⁷¹ *I.B., et al.*, Case No. 12-cv-01894-BLF.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 15 U.S.C. §§ 6501-6506.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

line rule of contracting with minors.¹⁷⁵ The federal act is less protective than California Family Code in that it allows Internet-based companies to contract with minors between the ages of 13 to 17 years and collect data about them.¹⁷⁶ For children under the age of 13 years, the companies need to obtain parental consent.¹⁷⁷ This legislation is less protective than the three California laws¹⁷⁸ that protect minors in contracting and does not take into account the protections of *Berg v. Traylor*, 148 Cal. App. 4th 809 (2007). In *Berg v. Traylor*, the court ruled that a minor might still disaffirm a contract into which he or she entered with parental representation.¹⁷⁹ This is to say that a child's interests might conflict with those of the agent-parent. Up until the age of majority, the child may exercise this conflict of interest and void the contract.¹⁸⁰

The age of minority can vary depending on the statutes relied upon.

According to COPPA, the minority age group is between 13 and 17 years; a separate minority age group exists for children less than 13 years.¹⁸¹ California's case law¹⁸²

¹⁷⁵ See Eric Goldman, *The FTC's New Kid Privacy Rules (COPPA) Are A Big Mess*, Forbes (Dec. 20, 2012) available at <http://www.forbes.com/sites/ericgoldman/2012/12/20/the-ftcs-new-kid-privacy-rules-coppa-are-a-big-mess>.

¹⁷⁶ See FTC COPPA Final Rule, *supra*.

¹⁷⁷ *Id.*

¹⁷⁸ Cal. Fam. Code § 6500, 6701, 6710.

¹⁷⁹ *Berg*, 148 Cal. App. 4th 809 (2007).

¹⁸⁰ *Id.*

¹⁸¹ See FTC COPPA Final Rule, *supra*.

¹⁸² *I.B. v. Facebook, Inc.*, 905 F. Supp. 2d 989 (N.D. Cal. 2012); *I.B., et al. v. Facebook*, Case No. C 12-1894 CW (N.D. Cal. 2013); *I.B., et al. v. Facebook*, Case No. 12-cv-01894-BLF (N.D. Cal. 2015).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

pertaining to *I.B. v. Facebook* did not rely upon these definitions; rather they cited California Family Code Section 6500, “A minor is an individual who is under 18 years of age. The period of minority is calculated from the first minute of the day on which the individual is born to the same minute of the corresponding day completing the period of minority.”¹⁸³ The difference is that COPPA sets regulations to legally contract and collect data from minors on the Internet (including mobile apps), whereas California Family Code states that all contracts with minors under 18 may be disaffirmed according to the provisions of 6701 and 6710.¹⁸⁴

One element of the COPPA loophole is that violations are only constituted when companies knowingly engage with the restricted age group.¹⁸⁵ This might seem reasonable to consider a culpable mental state. However, Internet contracts, especially simple web pages and games, do not have the same age verification ability as conventional face-to-face bargaining. For example, a minor who attempts to buy a home would have to produce identification of age. The parties involved would examine the identification (I.D.) and see that the minor is too young to participate in the contract process. If the minor had a fake form of I.D. showing him or her to be 30 years of age, yet the contract parties could easily see that the minor was not 30 years old; they could presume that the I.D. was fraudulent. In contrast, “most websites

¹⁸³ Cal. Fam. Code § 6500.

¹⁸⁴ Cal. Fam. Code § 6701, 6710.

¹⁸⁵ See FTC COPPA Final Rule, *supra*.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

don't authenticate users' ages and can't do so easily or cost-effectively, so many websites have no idea when they are dealing with kids.”¹⁸⁶

A second element in the COPPA loophole is the area of enforcement. The COPPA enforcement mechanism states that a violation “shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act.”¹⁸⁷ To date, the FTC has stated it lacks information on how to value the data collected from Internet users and is not able to audit or determine how much of it has been collected.¹⁸⁸ The COPPA loophole is that it relies upon an enforcement power that has publicly stated it lacks knowledge of the matters at hand.

Two bills have been written in attempts to close the gap on government knowledge of data broker activity. United States Senate Bill 2025, “requires data brokers to provide individuals a means to review certain information collected, assembled, or maintained on such individuals, unless a regulatory exception promulgated by the Federal Trade Commission (FTC) applies.”¹⁸⁹ United States House of Representatives Bill 4400,

Requires information brokers to submit their security policies to the FTC in conjunction with a notification of a security breach notification or on FTC request. Authorizes the FTC to conduct information

¹⁸⁶ Goldman, *supra*.

¹⁸⁷ 16 C.F.R. § 312.9.

¹⁸⁸ See FTC Data Brokers, *supra*.

¹⁸⁹ S.2025 Data Broker Accountability And Transparency Act, 113th Congress (2013-2014) available at <https://www.congress.gov/bill/113th-congress/senate-bill/2025>.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

security practices audits of brokers who have had a security breach or require such brokers to conduct independent audits.”¹⁹⁰

Both bills have yet to be enacted. If the FTC cannot audit data collected, it will not be able to evaluate the amount of information a potential violator collects or understand the market value for such information. This further limits COPPA and FTC’s ability to assign a penalty or restitution amount that would adequately deter trespassers. Furthermore, the lack of visibility limits the government’s ability to delete or return the data to the injured.

IV. Conclusion

At inception, the bright-line rule of contracting with minors was thought to be an objective and firm rule.¹⁹¹ However, with the permitted statutes and continued interpretation of case law, this rule is subjective and malleable. If mobile app companies could have Western Unions’ old argument,¹⁹² they might say that the infancy doctrine was not meant for them and they are excluded from its protection entirely. If mobile app companies could adapt Schwartz’s argument,¹⁹³ they might say if a minor is old enough to play, they are old enough to pay. Even federal law has

¹⁹⁰ *H.R. 4400 Data Accountability And Trust Act*, 113th Congress (2013-2014) available at <https://www.congress.gov/bill/113th-congress/house-bill/4400>.

¹⁹¹ Schwartz, *supra* at 409, 410 (“common-law courts universally embraced a bright-line rule setting legal adulthood at twenty-one years...The courts paid no attention to the actual level of maturity...”).

¹⁹² *Western Union Telegraph Co.*, 323 U.S. 490.

¹⁹³ See Schwartz, *supra*.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

lessened the common law age of minority from 18 years to 13 years, at least in the context of protecting children from data collection.¹⁹⁴

The mobile app and data collection industries exercise a strong voice in the U.S. Congress. Senator Warren's research noted between 2000 to 2002, credit industry lobbyists outspent the previous top three spenders in Congress: tobacco, oil and pharmaceutical lobbyist groups.¹⁹⁵ By 2014, this ranking had changed again:

Google [Android, Google Play, YouTube] is the biggest lobbying spending corporation in the United States. In 2014 the firm has commissioned a force of more than 100 lobbyists, about 80 percent of whom are former federal government employees, to do its bidding in Washington, D.C., and has deployed agents in numerous states to grease the path for approvals for its groundbreaking technologies and keep regulators at bay.¹⁹⁶

If mobile app companies have crossed the bright-line rule of contracting with minors, they certainly have company. It is more likely the case that they have not crossed the line. The line has simply vanished.

The first research question is answered with a yes; minors need a bright-line rule for app contracts. Mobile app contracts are lengthy. They are typically printed on multiple pages with hyperlinks to other sites and contain terminology just as complicated as financial contracts intended for adults. These mobile app contracts give away overwhelming permissions. To just name a few of the data permissions, mobile apps often gather the users' location via a Global Positioning System (GPS)/triangulation of cell towers, network contacts, online purchases, web surfing

¹⁹⁴ See FTC COPPA Final Rule, *supra*.

¹⁹⁵ Warren Data, *supra* at 9.

¹⁹⁶ Sam Jewler, *Mission Creep-y*, Public Citizen 49 (Nov. 2014).

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

habits, etc. These intangible assets typically go beyond a child's understanding. Children are no more aware of the value for their data than is the FTC.¹⁹⁷ Having no valuation for the datum and hardly any understanding of its existence or functions, a child is not as sophisticated as an entire mobile app company's staff when bargaining. This disparity is furthered by the impulses of a child when prepositioned with a fun game.

An adult is more accustomed to reading contracts. While there has been a learning curve, today many people understand that mobile apps can track a lot of their online activities. They are willing to exchange this intrusion for the game or other type of app they feel that they need. The collected data also benefits the consumer. The advertisements of goods and services are better paired with potential buyers; as a result, they are often informed and prepositioned with items that fit their interests, which can enhance their lives.

However, adults and children alike do not receive steadfast guarantees as to what happens with their data. One example is the recent bankruptcy decision for RadioShack on May 20, 2015.¹⁹⁸ RadioShack had possessed customer data that was formerly restricted with rules of privacy.¹⁹⁹ Due to financial stress in bankruptcy, RadioShack wanted to forgo those restrictions. The court granted RadioShack's request, allowing it to break its privacy agreement with former customers.²⁰⁰ The

¹⁹⁷ See FTC Data Brokers, *supra*.

¹⁹⁸ *In re RadioShack Corp., et al.*, Case No. 15-10197 (Bankr. D. Del. 2015).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

data of nearly 67 million customers was sold to a third party for \$26.2 million dollars.²⁰¹

In regard to the second research question, whether the intangible assets exchanged within a mobile app contract can be recovered, the answer is no. Among the reasons for why a minor may void a contract is to recover what he or she erroneously exchanged. The ability to void and recover is what protects the minor and deters unfair practices in contracting. Under the present circumstances, neither minors nor adults are able to collect their exchanged intangible assets. The valuation of their personal data still eludes the common consumer. It is mainly the data brokers that are aware of the market price. Similar to the aforementioned study on patent infringement, trespassers are deterred by restitution, not compensation. When a mobile app company obtains the data from a minor, they monetize that data as intangible assets. This profit ought to be forfeited in a voided contract as restitution. Otherwise, the profit of these intangibles can outweigh the small app purchase that is subject to recovery (compensation). This finding renders the action of voiding a mobile app contract as useless. With such disparity, mobile app companies have little incentive to follow California legislation and case law.

Not only do the laws lack a proportionate deterrent, the enforcement of such penalties is slow in pace. For example, *I.B. v. Facebook* started in 2012 and is still

²⁰¹ Dawn McCarty, *RadioShack Sells Customer Data After Settling With States*, Bloomberg (May 20, 2015) available at <http://www.bloomberg.com/news/articles/2015-05-20/radioshack-receives-approval-to-sell-name-to-standard-general>.

MOBILE APPS: CROSSING THE BRIGHT-LINE RULE

active in 2015.²⁰² This case has lasted approximately three years without recovered damages; meanwhile, a mobile app can gain 50 million users in just over a month.²⁰³

If law and policy continue to reduce the age of the protected minor and simultaneously move slower than the technological adoption of mobile apps, then the consumer protection problems could be dismal.

²⁰² *I.B.*, 905 F. Supp. 2d 989.

²⁰³ Frey, *supra* at 4.