Big Tech's TOS are Void. There are Consequences.

Summary

Terms of Service (TOS), user agreements, and other purported contracts between Big Tech corporations and end users are invalid and void. Neither clicking buttons *Sign up* or *I Agree* next to these TOSes nor using their services creates a contract between the corporation and the user, at least on the terms written by these corporations, especially Big Tech Social Media Platforms ("BTP").

The substance of the Big Tech TOS violates multiple conditions necessary to form a valid contract.

(1) Exchange of value is a necessary condition of a contract: both sides must give (immediately or in the future) and receive something of value. **Big Tech TOS promise nothing of value** to the users because their services have value only if provided continuously and reliably, but the corporations reserve the "right" to discontinue the services to anybody, any time, for any or no reason. At the same time, they receive substantial value at the moment the user signs up, continue receiving value as the user interacts with the service, and keep most of the received value even after discontinuing the service to the user.

(2) The purported agreements are **neither executed nor delivered** by Big Tech Platforms. The texts are referred to by a URL on the platforms' websites and can be modified at any time, even while the user reads them. On top of that, they incorporate other documents by reference, sometimes conditionally ("*if you use feature F, terms Z11 and V102 apply to you*"), which incorporate more documents and so on.

(3) Those are **contracts of adhesion**. They are choke-full of clauses that no reasonable (or even sane) user would voluntarily accept if she or he knew of them.

(4) These contracts are too long to read, even with notice. Furthermore, even if the users are given notice of TOS, they are likely **not given the notice of other documents** incorporated by reference from the TOS.

(5) BTP deceive users about many aspects of their services, especially the nature, value (both to the Platform and the user), and the intended use of the **private data** they collect from the user.

(6) Most content used by BTP is created by the uncompensated labor of their users. BTP TOS allow them to coerce their users to give them **forced labor**, in violation of the **XIII Amendment** and 18 U.S. Code CHAPTER 77 — PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS.

The forum selection clause, attempting to drag users to Big Tech home courts, is void, too.

The Kings are naked!

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Introduction

Big Tech Social Media Platforms ("BTP") are commercial service providers and are subject to the same laws that all other service providers. Neither Section 230 nor the First Amendment raise them above others. Moreover, BTP services touch on the most sensitive rights and interests of their users, from privacy to the First Amendment rights, and require explicit expression of trust and permission. For most operations, BTP need to access his/her computer or smartphone, which requires user's permission under *Computer Fraud and Abuse Act 18 U.S. Code § 1030*.

The First Amendment protects BTP and its consumers from the coercion by the government, but not from liability to its users, which can be vindicated by the users in courts and by states under states' consumer protection laws.

It is easy to see that most Platforms' Terms of Service (TOS) and User Agreement (UA) documents do not form valid contracts. They are defective both by the process of formation and by their substance, invalid and void. Any modifications under the modification clauses of these purported contracts are void and create no valid contract .

This discussion mainly refers to Twitter, for succinctness, but almost all in it practically applicable to purported "contracts" of other consumer facing Platforms.

The author was surprised to find very little literature about the subject of paper. One good exception is **Nancy S. Kim, *Wrap Contracts and Ramifications*, 2013**, ISBN 978-0199336975 referred as (Kim 2013) here.

Benefits Received by BTP from Users

It is well known that Twitter and other BTP benefit from their users through ads promotion. However, some lesser known but more important benefits include:

(1) **Users' private data** in enormous amounts is probably the most valuable assets collected by BTP from unsuspecting users. That includes their social connections, and private information of those connections. This is further discussed in a separate subsection below.

(2) **Users' relationships**, both personal (such as **friendships**) and commercial (such as **audiences**), built in the real world. For example, a person who created a Twitter account invites his/her friends to do the same. Famous people, like Scott Adams, the creator of Dilbert, bring their

[1] © 2022, Leo Goldstein. ah@defyccc.com. The current article page is https://defyccc.com/big-tech-terms-of-service-are-void/

existing audiences (thousands or millions of individuals) to Twitter. As they continue using Twitter, they continue to bring or help retain more and more people.

(3) **Users' Personality rights**, such as the **right of publicity**.[2] This is a person's right to the exclusive use of his/her name and identity in commerce. When a popular author, respected statesman, or an eminent scientist joins Twitter, this serves as an endorsement, to attract and retain more users: "hey, Dr. Robert Malone is on Twitter, join to hear more from him". The right of publicity can be also protected under unfair competition laws.[3]

   (a) **A Personal reputation**, which seems to be legally protectable under publicity laws, is often either used or abused by Big Tech Platforms. For example, these platforms can and do use various doctors' reputations to promote themselves as a place where people can receive trusted medical advice. However, at the same time, these platforms also try to destroy many doctors' reputations by fake fact checks, deplatforming, or suspended accounts, which show a defamatory message on them.

(4) **Uncompensated labor** of users, many of whom are accomplished writers, artists, and scientists, even Nobel Laureates. Most of the content on Big Tech Platforms is created by its users, and many of them create the content by their labor in professional or business manner.

(5) **Copyrighted creative works of many users**, who bring it to the platforms and purportedly give those platforms unlimited worldwide license, with the right to sublicense.

(6) **Ad viewership**: The value of ads is multiplied many times by the personal data the Platform has obtained from the user. Also, users view what is claimed to be **organic posts**, but these are selected by the Platform, for its own benefits. This has not always been the case. From its inception until about 2015, Twitter showed a user all posts from all accounts the user followed, in chronological or reverse chronological order (and ads, of course). Now **Twitter shows the user whatever Twitter wants**, including tweets from accounts the user does not follow (and more ads).

Private Data, Enormous Amounts of

With every passing year, Big Tech collects more data on every user, and utilizes this data for its profit more efficiently. BTP collect data on each mouse click or tap of the user. Facebook even collects mouse movements.[4] The nature of "social" media allows these platforms to collect information on a user's social connections. The platforms also collect information about users from third party websites, using ads and beacons.

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[2] E.g., California Civil Code § 3344 https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV&sectionNum=3344

[3] *Restatement (Third) of Unfair Competition*, s.46-49; https://rightofpublicity.com/statutes/restatement-third-of-unfair-competition-s46-49

[4] https://www.fastcompany.com/40584539/facebook-confirms-it-tracks-your-mouse-movements-on-the-screen

This enormous increase in collected data, which benefits the platforms (likely to the detriment of the users), continues to grow at a staggering pace. More data from more users enables the platforms to establish patterns and develop algorithms, which in turn facilitate the extraction of more information, from each data point, for each user. Advances in computer power and artificial intelligence continually enable the platforms to extract more and more information from the raw data. That includes raw data collected in the past.

Even in 2012, Facebook was able not only to detect, but to manipulate users' emotions.[5] What is known of these experiments became public only in 2014.

In addition to the collected data containing the user's content, views, likes, retweets, and so on, it is also tied to the user's real identity -- name, address, possibly SSN. Deleting cookies is not enough to protect oneself from this collection. For many people, platforms have the users' locations and often know the people with whom they associate. Big Tech platforms know more about many of their users than the users themselves.

Big Tech Platforms exchange this data among themselves (see Twitter and Google in Twitter's "Privacy Policy"), buy users' real-world data from data brokers (like Acxiom), and collect additional data on government websites.[6]

Big Tech Platforms' (BTP) Services

Their basic services provided by Big Tech Social Media Platforms are telecommunications and computational services, including data storage. That includes emergency communications and reliable storage for the data of extraordinary value. In 2019, Forbes noticed: "*Twitter has truly become the realtime emergency alert platform of government*".[7]

On top of that, BTP provide other services, some of which have surprising analogues in the physical world. These services are promised by platforms directly or expected because of their representations or actual usage. For example, users depend on Platforms to maintain and create their interpersonal relationships, in addition to business relationships.

Many people using Twitter are creators – journalists, artists, writers, scientists etc. They post their creative work and build their audiences on Twitter. Some of them bring their existing content and audiences to Twitter. Sometimes they pay Twitter for advertising to build these audiences. This content and business relationships with their followers are intangible assets which belong to the authors, not to

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[5] https://www.npr.org/sections/alltechconsidered/2014/06/30/326929138/facebook-manipulates-our-moods-for-science-and-commerce-a-roundup ; https://www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648/

[6] https://defyccc.com/google-spies-on-us-on-gov-sites/

[7] https://www.forbes.com/sites/kalevleetaru/2019/04/28/as-the-government-and-emergency-agencies-shift-to-twitter-what-happens-to-those-left-behind/ | https://archive.is/3oT17

Twitter. Most creators expect and deserve to benefit financially from their content and relationships they build. For them, Twitter is also something like a literary agent.

Those who use their social media accounts for professional or business purposes, invest in them like into other assets, and expect BTP to hold those assets in the same way as banks, investment firms, and insurance companies hold assets of their customers. Nobody expects that a social media platform would keep their intangible assets worth millions of dollars, while booting them with a defamatory message. Nobody expects to be cut off from friends or emergency communications without notice.

For most users, BTP services only have value if they are continuous, provided in perpetuity or over the long term with advance notice and opportunity to transfer the assets from them.

Failure to Create Contract, Procedural and Substantive

To create a contract between two parties, some substantive and procedural requirements must be satisfied. There are slight differences to this depending on state and circuit interpretation, so here is the controlling precedent in the 5th circuit.

In re Capco Energy, Inc., 669 F. 3d 274 - Court of Appeals, 5th Circuit 2012

> *280 "[A]* ***binding contract requires*** *`(1) an* ***offer****; (2) an* ***acceptance*** *in strict compliance with the terms of the offer; (3) a* ***meeting of the minds****; (4) each party's* ***consent to the terms****; and (5)* ***execution and delivery of the contract*** *with intent that it be mutual and binding.'" Coffel v. Stryker Corp., 284 F.3d 625, 640 n. 17 (5th Cir.2002) (quoting Copeland v. Alsobrook, 3 S.W.3d 598, 604 (Tex.App.1999)). "The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did and not on their subjective state of mind.* ***Additionally, consideration is a fundamental element of any valid contract.****" Copeland, 3 S.W.3d at 604 (citations omitted)."* -- emphasis added

Let's see which of these necessary requirements are satisfied by Twitter's TOS and process of making the purported contract.

No Consideration Received by a User

Both sides must receive consideration (or value) under the contract.

Platforms' services have value for the user only if the platform promises to provide these services continuously, in perpetuity or long term. However, platforms' TOS do the exact opposite. They reserve the platform's right to terminate services to the user at any time, for any or for no reason, and without notice. That includes Twitter, Facebook, YouTube, and many more.

At the same time, platforms start benefiting from the user at the moment the user has clicked the "*I Agree*" button. At that moment, the platform receives, collects, and has the right to use quite a significant portion of the user's private data: the user's name, address, phone and email, IP address, location, and the data about the user collected in the past by any party. Under the "contract", putatively

gives consent to the forum selection clause, and to unrestricted modifications of the TOS by the platform. This ostensibly allow the platform to claim rights to the user's intellectual property, labor, private information, personal relationships, and anything conceivable. The platform can use and/or sell the user's private information collected in the process of "signing" the contract as well as any additional information that will be collected in the future. Such future information is obtained via cookies placed on the user's computer, which might be triggered even if the user is not actively using the platform's services.

Thus, the platform receives immediate value and future permissions from the user, but neither gives nor promises anything in return. This **voids** the purported contract.

Per ***Vernon v. Qwest Communications Intern., Inc., 857 F. Supp. 2d 1135 - Dist. Court, D. Colorado 2012***

> *1154 "Cf. White v. Four B Corp., 2011 WL 4688843, at *2 (D.Kan.2011). Because a contract requires a bargained-for benefit or detriment, "words of promise which by their terms make performance entirely optional with the `promisor'" cannot serve as consideration for an enforceable agreement, and any purported "agreement" would be illusory. Stated differently, an illusory contract is said to lack mutuality of obligation."*

Purported Contract is Neither Executed Not Delivered by Twitter

In Texas and most states, the creation of a contract in writing requires delivery of the executed instrument. Neither Twitter nor Facebook deliver a copy of purported contract, although it can be easily done by sending it as an email attachment. A link to the platform's website is not an adequate delivery because the electronic document on the corporate website can be changed at any time, without leaving traces of the changes. Simply providing a link to the contract means that the company is in full control of it and can change its content at any time and even provide different content to different individuals, at the same time. Further, TOS usually incorporate multiple references to other lengthy online documents on the company's website, which are also "dynamic" and can and do change repeatedly. Together with the purported "right" to change the terms at any time and the frequent use of this option, this creates a situation where the purported contract is anything that the platform wants it to be. In other words, the contract do not exists.

Twitter "contracts" are not only lengthy, but also convoluted. The TOS at https://twitter.com/en/tos incorporates by reference Privacy Policy, Rules and Policies, and many other documents. These documents incorporate other documents, and so on. This is how it starts:

> ***"If you live outside the European Union, EFTA States, or the United Kingdom, including if you live in the United States,*** *the Twitter User Agreement comprises these Terms of Service, our Privacy Policy, the Twitter Rules and Policies, and all incorporated policies."*

The TOS itself consists of two different but similar parts – terms for the EU+UK and terms for the US and the rest of the world. That makes it impossible to just skim the text – the user trying to skim the endless amounts of pages would not know whether he was reading the text for EU or for the US.

Some parts of the purported agreement are under help.twitter.com (like https://help.twitter.com/rules-and-policies/twitter-cookies). Other apparently incorporated documents include Twitter's services, corporate affiliates, and your privacy.[8]

Unilateral Modification at Will without Notification

Twitter's TOS contains a clause allowing Twitter to modify terms, without restrictions, at will, at any time, and even without notifying the "counterparty":

> "*We may revise these Terms from time to time. The changes will not be retroactive, and the most current version of the Terms, which will always be at twitter.com/tos, will govern our relationship with you. We will try to notify you of material revisions…*"

Texas Courts and the 5th Circuit hold clauses and agreements that allow anytime unilateral modification or termination to be illusory. In *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 - Dist. Court, ND Texas 2009, the court found the arbitration provision to be illusory, because Blockbuster reserved the right to modify TOS, containing that provision, unilaterally and at any time. The court based its decision on *Morrison v. Amway Corp.,* 517 F. 3d 248 - Court of Appeals, 5th Circuit 2008, which held that "the arbitration agreement was illusory and unenforceable" because of the unilateral any time modification clause.

The principle that a promise which the promisor can always avoid is an illusory one is not limited to arbitration clauses. *Light v. Centel Cellular Co. of Texas*, 883 SW 2d 642 - Tex: Supreme Court 1994: "*Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance. …* ***When illusory promises are all that support a purported bilateral contract, there is no contract.***"

There have been many cases in which Twitter applied changes to their TOS instantaneously and even retroactively. It is also capable of backdating them.

No Opportunity to Read TOS before "manifesting assent"

Twitter and other Platforms do not provide the user an opportunity to read the prospective agreement before signing. A typical agreement is longer than 50 pages and requires more than one day to read. Over this time, the agreement might have been changed. The user does not know that s/he "assents" to the same agreement s/he has read.

[8] https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates

A very long text with anytime unilateral modifications clauses is also a failure to provide a '**notice and opportunity to read**' (*Specht*) – why read a lengthy legal text which can be changed by the other party at any time, even in the time of reading?

Contracts of Adhesion

As per one definition:[9]

> *"an adhesion contract exists if the parties are of such disproportionate bargaining power that the party of weaker bargaining strength could not have negotiated for variations in the terms of the adhesion contract. Adhesion contracts are generally in the form of a standardized contract form."*

In another definition, adhesion contract is:[10]

> "*A standard-form contract drafted by one party and signed by another in a weaker position. The signing party is typically a consumer with little commercial leverage, and must either reject the deal or accept it with little chance to influence the terms.*"

Contracts of adhesion have additional requirements for validity:

> *"a party who adheres to the other party's standard terms does not assent to the terms if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. … people are bound [only] by terms a reasonable person would expect to be in the contract."*

No reasonable person would agree to a term that allows the other party to modify the contract unilaterally, at will and without notification. Thus, even if a contract were formed by clicking a "*Sign up"* button, it is formed without the modification at will term, so every modified contract following it is void. Twitter TOS is full of terms that no person who has ever heard Twitter's promises in the media or even its IPO documents, would expect in the contract.

> *"Courts may also look at whether the provisions are written in clear, unambiguous terms when determining whether to strike down an adhesion contract."*

Twitter's TOS is ambiguous, and confusing even for figuring out what documents are included in it.

"Some factors of procedural unconscionability include duress, fraud, undue influence, and fine print."

- When a user is forced to accept Twitter's TOS to receive emergency updates from a local government[11], this is duress.

[9] https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion)
[10] https://www.law.cornell.edu/wex/adhesion_contract
[11] https://www.forbes.com/sites/kalevleetaru/2019/04/28/as-the-government-and-emergency-agencies-shift-to-twitter-what-happens-to-those-left-behind/ | https://archive.is/3oT17

- The multiple documents referenced by hyperlinks inside of TOS are worse than "fine print". For example, the word Privacy appears in large blue letters as a subsection header, while "the fine print" and the linked document contain terms that essentially amount to no privacy.

Twitter also purports to bind users by its TOS, even when the user does not sign up for a Twitter account: "*You don't have to create an account to use some of our service features, such as searching and viewing public Twitter profiles or watching a broadcast on Periscope's website. "*

Fraud, Duress, Overreaching

False Dating of TOS

As of March 31, 2022, Twitter's TOS is dated by August 19, 2021. In truth, the last change was made later than August 2021. The incorporated policy https://help.twitter.com/en/managing-your-account/suspended-twitter-accounts (*Suspended Twitter Accounts*, linked to from section *3. Content on the Services*) was modified between August 31, 2021 and March 31, 2022 by Twitter[12] adding the following:

> **"Note**: In addition to showing **Account suspended** on a Twitter profile, we may add more details around why an account has been suspended."

Hardly anybody outside Twitter knows what else was changed since the last official update of TOS.

Misrepresentation

In its 2013 IPO paperwork[13] , Twitter represented itself as "*a global platform for public self-expression and conversation in real time*", and "*we have democratized content creation and distribution, enabling **any voice to echo around the world** instantly and **unfiltered**."*

This is a firm and hefty promise, which cannot be dismissed as puffery. However, twitter's TOS claims, enabling Twitter to terminate users, remove content, and arbitrarily change terms at will, and Twitter's actions based on those terms, makes the above quote a misrepresentation and constitute fraud, which voids any contract achieved through it.

State Actor, Apparent or Actual

Many government agencies communicate to citizens through Twitter. Some of the communications are exclusively through Twitter. Hence, a reasonable person would conclude that Twitter's TOS is compatible with the duties flowing from its apparent (at least) status as a state actor, which are like those of the government. This would mean that Twitter would provide continuous, uninterruptable

[12] https://web.archive.org/web/20210830171152/https://help.twitter.com/en/managing-your-account/suspended-twitter-accounts ; March 31, 2022

[13] https://www.sec.gov/Archives/edgar/data/1418091/000119312513424260/d564001ds1a.htm

access to the government accounts, non-discrimination by political views, restrictions on collection of private information in accordance with the IV Amendment.

Twitter's failure to disclose to the prospective users that it does not operate this way and that its TOS allows it to operate this way seems sufficient to make the purported TOS invalid because of fraud.

Fine Print

Written in huge letters at the beginning of Twitter's Privacy Policy (which is an oxymoron):[14]

> "*We believe you should always know what data we collect from you and how we use it, and that you should have meaningful control over both. We want to empower you to make the best decisions about the information that you share with us. That's the basic purpose of this Privacy Policy.*"

However, in direct contradiction to the statement above, written in fine print (as is most of the document) and tucked in a hard-to-find section, well past the midpoint of the document, we find the following:

> *"*[1] ***Notwithstanding anything to the contrary in this Privacy Policy*** *or* ***controls we may otherwise offer to you, we may preserve, use, share, or disclose your personal data or other safety data if we believe that it is reasonably necessary*** *to comply with a law, regulation, legal process, or governmental request; to protect the safety of any person; to protect the safety or integrity of our platform,* ***including to help prevent spam, abuse, or malicious actors on our services****, or*
>
> [2] ***to explain why we have removed content or accounts from our services****; to address fraud, security, or technical issues; or to protect our rights or property or the rights or property of those who use our services."*

(1) The policy essentially disclaims all promises of privacy and even effects of all privacy controls in the user interface. "*if we believe that it is reasonably necessary*" for a list of causes from complying with a law to "*address[ing] … technical issues*" to protecting Twitter's rights. This verbiage is tantamount to saying, "at will", especially because users are completely unaware of actions Twitter commits under this clause.

(2) Even more concerning, the policy states that if Twitter must explain its choice to remove accounts or content, Twitter may publicly disclose their users' personal data, collected on and off Twitter, and purchased from the third parties. This even includes releasing a user's safety data. Such public disclosures of safety data could easily lead to physical harm.

[14] https://twitter.com/en/privacy |https://archive.ph/qVF3r

Twitter routinely transfers users' private information to third parties, including Google. Such gotchas are everywhere in Twitter's TOS and user's agreement, and it is unnecessary to point to each of them to see fraud.

Formal Analysis

Returning to ***In re Capco Energy, Inc., 669 F. 3d 274 - Court of Appeals, 5th Circuit 2012***

> *"'[A] **binding contract requires** `(1) an **offer**; (2) an **acceptance** in strict compliance with the terms of the offer; (3) a **meeting of the minds**; (4) each party's **consent to the terms**; and (5) **execution and delivery of the contract** with intent that it be mutual and binding.'" "The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did and not on their subjective state of mind. **Additionally, consideration is a fundamental element of any valid contract.**'"* -- -- emphasis added, referenced cases omitted

Twitter does not execute the "contract". Twitter does not deliver the executed contract. Twitter has no intention of making the purported contract "mutual and binding", but unilateral and binding only the user. Twitter shows its lack of interest in the purported contract by not even checking a user's real name and not verifying the user's address.

Twitter provides no consideration to the "counterparty". Twitter considers the user bound by the "contract" even if the user does not use the services or signings up for an account. There is no offer because nothing of value is offered, and because the terms might have changed while the user was reading them. There is no user's consent to the terms because there is no practical opportunity to read the terms, and there is no notice regarding all parts of the terms.

Thus, **none of the conditions** for creating a valid contract is met. This invalidity cannot be repaired by a unilateral modification at later time, or by a user consent achieved by coercion, fraud, or overreaching.

No Legal Precedents in Favor of BTP

There is a widely held but mistaken belief that BTP TOS are supported by legal precedent. Not even close (not considering district courts). Previous litigation was focused on some procedural sides of the online contract creation, such as a notice and an opportunity to read purported TOS. When terms were upheld, the TOS was relatively short and kept in one document and the substantive meaning of the document was not in question. Most such cases argued the validity of an arbitration clause, which could be upheld without the rest of the purported contract, using the laches doctrine. Other cases were consumer claims of dubious merit, where courts seized at the literal words of the purported contract to dismiss them quickly.

BTP TOS got worse over the period 2013 - 2019, so the current versions of them would likely fail even the "notice and opportunity to read" test.

Specht v. Netscape Communications

Specht v. Netscape Communications Corp., 306 F. 3d 17 - Court of Appeals, 2nd Circuit 2002 might be the most influential early case. In *Specht*, the Court rejected validity of a click-wrap agreement offered by a software vendor because of the **lack of notice** – the user would have to scroll down the page to see the agreement. BTP put links to the texts of their Terms next to the Sign-up button and imagine that by satisfying notice requirements they create legal contract binding their users. See (Kim 2013) pp. 135-137 for refreshing explanation of distinctions between a notice and a contract.

The Computer Fraud and Abuse Act

The common notion that we are on Twitter's property or any other Platform's property when we use the platform's service is just a metaphor. In fact, the user's smartphone and Twitter's server farm connect to each other as peers.[15] *Computer Fraud and Abuse Act: 18 U.S. Code § 1030*,[16] originally enacted in 1984 and amended later, prohibits "*intentionally access[ing] a computer without authorization or exceed[ing] authorized access, thereby obtain[ing] information from any protected computer*" – § 1030(a)(2)(C). The only qualification in the law is that the accessed and protected computer (as is usually the case) "*is used in or affecting interstate or foreign commerce or communication,*" obviously satisfied by the fact that Big Tech services are interstate commerce, at least outside of California.

The platforms access users' computers and smartphones by running JavaScript code in the users' browsers and apps on their phones. The platform access users' computers and obtain private data, including information from the camera, GPS, accelerometer etc. In the absence of a valid contract, nothing gives the platform the authorization necessary to do that. Even if the user gives the platform permission to obtain the text of a tweet, s/he does not give the platform permission to access other data on the user's device. This might be running afoul of the Computer Fraud and Abuse Act. CFAA also prohibits many things, regularly committed by Big Tech.

Illegality under Amendment XIII

The last but not the least – involuntary servitude, including forced labor, is prohibited in the United States of America.[17] Big Tech economic is largely based on the use of uncompensated labor, but Twitter's and other BTP TOS allow them to obtain from its users forced labor. Under *18 U.S. Code § 1589*, obtaining *"forced labor"* includes *"obtaining the labor or services of a person … by means of serious harm or threats of serious harm to that person or another person; … the term 'serious harm'*

[15] The users pay for the traffic and the sum of costs of users' computers and other devices interacting with Platforms' services exceeds the cost of their services. Platforms run on users' smartphones their apps, and in browsers their scripts. Thus, Platforms access users' computers much more than users access Platforms.

[16] https://www.law.cornell.edu/uscode/text/18/1030

[17] XIII Amendment; also 18 U.S. Code CHAPTER 77 — PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS, *§ 1589. Forced labor.*

means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm …"

Mere threats of deplatforming, demonetization, de-ranking, or even attaching a negative label (reputational harm) in retaliation for not providing labor (including providing content that falls outside of the BTP specifications) is squarely against the law.[18]

Even threatening to enforce a TOS against a user-laborer might be a criminal violation of § 1589(a)(3) as "*abuse or threatened abuse of law or legal process*".

The BTP's habit to collect user's private data and to use it practically at their discretion enhances the implied threat to the users.

More Fraud, Duress, Overreach, and Unconscionability of TOS

Some Funny Terms

"Using the Services"

> *"Our Services evolve constantly. As such, the Services may change from time to time, at our discretion."*
>
> *"We may stop (permanently or temporarily) providing the Services or any features within the Services to you or to users generally."*
>
> *"We may also remove or refuse to distribute any Content on the Services, limit distribution or visibility of any Content on the service, suspend or terminate users, and reclaim usernames without liability to you."*

"Content on the Services"

> *"we may modify or adapt your Content"*

"Ending these Terms"

> *"We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason…"*

Twitter TOS ends with

> *"These Terms are an agreement between you and Twitter International Company, (Co. number 503351, VAT number IE9803175Q), an Irish company with its registered office at One Cumberland Place, Fenian Street Dublin 2, D02 AX07 Ireland. If you have any questions about these Terms, please contact us.*

[18] https://defyccc.com/peonage-was-abolished-do-twitter-facebook-and-youtube-know/

Effective: *August 19, 2021"*

So, someone who skips to the end would assume that the "contract" was with a company in Ireland.

Comments

Twitter's counterparties are misled even about the size of the TOS. If a user visits a hyperlink, s/he sees only a part of the purported contract text. Most of the text is in hyperlinked Privacy Policies, Community Standards, and other documents on other pages.

Twitter TOS is not the same as Twitter User Agreement. Neither contains all documents, incorporated by reference.

Neither the average person, nor a sophisticated person, nor even a Supreme Court Judge[19] knows what is written in Big Tech TOS, to which s/he supposedly agreed. This situation is not rare, but in all physical world cases the individual is likely to be informed of the contract terms important to him/her and to be given a complete copy of the contract which cannot be altered.

The individual who has purportedly signed a contract with an SMP is typically not even informed of the nature of the service s/he are going to receive, sometimes to the point that s/he does not even understand that s/he is owed some services. In the physical world, the individual signing a standard contract knows what kind of services s/he is going to receive. For example, a cruise cannot be mistaken for a mortgage. But in the online world, it is different. Not only individuals, but courts and governments are misled about the services that they are supposed to receive from Facebook and Twitter, even after years of using them.

The "self-enforcement" of the BTP TOS is another unusual and detrimental for the users feature.

Courts and attorneys are accustomed to the notion that large corporations behave either within the boundaries of the law, or close to them. But Big Tech operates somewhere else altogether.

Other Big Tech Platforms' TOS are not Better

Twitter was considered here for specificity, but most of what is said about Twitter's TOS and services is applicable to other Big Tech Platforms. YouTube also adds to its TOS terms for other Google services.

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[19] In 2010: *"Answering a student question, [Supreme Court Justice] Roberts admitted he doesn't usually read the computer jargon that is a condition of accessing websites, and gave another example of fine print: the literature that accompanies medications, the AP story reports."*
https://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/
Today's TOS are much longer and more complicated than they were in 2010.

Privacy (i.e., lack of privacy) practices of other BTPs are even worse than Twitter's. Facebook is known for recording every cursor move made by its users and, of course, extensive access to other information on their smartphones.

Unilateral termination for any or no cause at any time and unrestricted modification at will are features of other Big Tech Platforms, too. Even worse, these terms in Facebook and YouTube TOS are spelled more crookedly and misleadingly. Speaking of Facebook and YouTube, they allow themselves in their TOS

a) to terminate services anytime unilaterally at will and without notification
b) to modify TOS in anyway anytime unilaterally at will, and without at least prior notification
c) YouTube also reserves the "right" to terminate the user's other Google services, including Gmail. That have apparently happened to Prof. Jordan Peterson in 2017.[20]

At the same time, the language of these provisions is intentionally complicated and misleading. It also changes creatively from one year to another. See ***Annex C*** for quotes and short comments.

Invalidity of forum selection clause

The forum selection clause in the Big Tech TOS would remain invalid even if the "contracts" were valid. This can easily be shown numerically. Most platforms' (including Facebook, Google, and YouTube) favorite forum and venue is the United States District Court for the Northern District of California, Santa Clara division. (Twitter prefers San Francisco division.)

Each of these companies has more than 50 million of "counterparties" in the US, and more than 500 million in the world. If only 1% of their US users or 0.1% of their foreign users, or any combination thereof, decide to sue the platforms, the Santa Clara federal court of California would be clogged for decades. Enforcing this clause would be a denial of justice.

Of note, the injuries inflicted by Big Tech on its users through deplatforming, de-ranking, shadow-banning etc. are particular to the individual or organization and cannot be easily pursued via class suits.

Forum selection is a legal innovation. Traditionally, litigation in the home district of the plaintiff was the norm.

Conclusion

Users accounts with Big Tech Platforms are like bank accounts or insurance policies. Both types of accounts can be accessed and used over the Internet, through a website or an app. Nobody would entertain the idea that the First Amendment or anything else allows the bank to close somebody's account and to pocket the money; or deduct 90% from an account holder's balance ("*we changed your*

[20] https://torontosun.com/2017/08/01/free-speech-advocate-jordan-peterson-suspects-political-reasons-might-have-been-behind-google-shutdown

balance from $90,000 to $9,000 – so what? This is our free speech, and who are you to tell us what to do on our website?"). But this is exactly what Big Tech Platforms do to their account holders.

Annexes

The downloadable Annexes file[21] is part of this article.

[21] https://defyccc.com/wp-content/uploads/TOS-Annexes.pdf