

# Exhibit HH

**FILED**

JUL 02 2012

DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY J. Alvarez DEPUTY  
J. Alvarez

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

RYAN UNG, CHI CHENG, and ALICE ROSEN,  
on Behalf of Themselves and All Others Similarly  
Situating,

Plaintiffs,

vs.

FACEBOOK, INC.,

Defendant.

Case No. 1-12-CV-217244

ORDER RE: DEMURRER

The demurrer to the Complaint filed by defendant Facebook, Inc. came on for hearing before the Honorable Joseph H. Huber on June 19, 2012, at 9:00 a.m. in Department 2. The matter having been submitted, the Court orders as follows:

Defendant's request for judicial notice is DENIED.

Plaintiffs' request for judicial notice is DENIED.

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1 The Court finds that Plaintiffs Ryan Ung, Chi Cheng, and Alice Rosen (collectively,  
2 “Plaintiffs”) are not required to separately establish “standing.” Rather, Plaintiffs must simply  
3 establish the elements of each of their causes of action. Therefore, Defendant’s “standing”  
4 argument has no merit.

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6 Defendant argues that Plaintiffs have no privacy interest in their browsing history. In  
7 response, Plaintiffs argue that they have a legally protected privacy interest in the whole of their  
8 browsing history. As explained in the case of *United States v. Maynard*, 615 F.3d 544, 562  
9 (D.C. Cir. 2010):

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11 Prolonged surveillance reveals types of information not revealed by short-term  
12 surveillance, such as what a person does repeatedly, what he does not do, and  
13 what he does ensemble. These types of information can each reveal more about a  
14 person than does any individual trip viewed in isolation. Repeated visits to a  
15 church, a gym, a bar, or a bookie tell a story not told by any single visit, as does  
16 one’s not visiting any of these places over the course of a month. The sequence of  
17 a person’s movements can reveal still more; a single trip to a gynecologist’s office  
18 tells little about a woman, but that trip followed a few weeks later by a visit to a  
19 baby supply store tells a different story. A person who knows all of another’s  
20 travels can deduce whether he is a weekly church goer, a heavy drinker, a regular  
21 at the gym, an unfaithful husband, an outpatient receiving medical treatment, an  
22 associate of particular individuals or political groups -- and not just one such fact  
23 about a person, but all such facts.

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25 The reasoning of this case is persuasive. Even tracking a portion of a person’s browsing  
26 history, which would include visits to a large number of sites given that Facebook’s cookies exist  
27 on millions of websites, can paint a comprehensive picture of a person’s life. For example,  
28 repeated visits to certain websites could show a person has a particular disease, or religious

1 affiliation, or is contemplating having an abortion, or any number of private facts about a person.  
2 “Legally recognized privacy interests are generally of two classes: (1) interests in precluding the  
3 dissemination or misuse of sensitive and confidential information (‘informational privacy’); and  
4 (2) interests in making intimate personal decisions or conducting personal activities without  
5 observation, intrusion, or interference (‘autonomy privacy’).” (*Hill v. National Collegiate*  
6 *Athletic Assn.* (1994) 7 Cal. 4th 1, 35.) Compiling a comprehensive profile of a person through  
7 their web activities necessarily implicates both informational privacy and autonomy privacy.  
8 Accordingly, the Court finds that there is a legally protected privacy interest in a person’s  
9 identifiable browsing history.

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11           However, there is no legally protected privacy interest in anonymous data. (See *London*  
12 *v. New Albertson’s, Inc.*, 2008 U.S. Dist. LEXIS 76246, 24-25 (S.D. Cal. Sept. 30, 2008).)  
13 Therefore, non-Facebook members do not have any privacy right in their browsing data that has  
14 not been linked to their identities. Plaintiffs argue that the browsing data of non-Facebook  
15 members can be linked to them if the non-Facebook members ever join Facebook. While that  
16 may be true, at this point the browsing history of non-Facebook members is anonymous and is  
17 not subject to protection under the right to privacy.

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19           Defendant contends that Plaintiffs have failed to allege that they had a reasonable  
20 expectation of privacy in their browsing history because Facebook discloses its use of cookies in  
21 its Privacy Policy, which is published on its website. The Privacy Policy states, in relevant part:

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23           **Cookie Information.** We use “cookies” (small pieces of data we store for an  
24 extended period of time on your computer, mobile phone, or other device) to  
25 make Facebook easier to use, to make our advertising better, and to protect both  
26 you and Facebook. For example, we use them to store your login ID (but never  
27 your password) to make it easier for you to login whenever you come back to  
28 Facebook. We also use them to confirm that you are logged into Facebook, and

1 to know when you are interacting with Facebook Platform applications and  
2 websites, our widgets and Share buttons, and our advertisements. You can  
3 remove or block cookies using the settings in your browser, but in some cases that  
4 may impact your ability to use Facebook.

5  
6 (Declaration of Ana Yang Muller in Support of Defendant Facebook, Inc.'s Demurrer to  
7 Plaintiffs' Class Action Complaint, Exhibit B.)

8  
9 First, the Privacy Policy is not the proper subject of judicial notice, so it is not properly  
10 before the Court on demurrer. Even if the Court were to consider the language of the Privacy  
11 Policy, however, it would not show that Facebook members have consented to having their  
12 Internet activity tracked.

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14 The above portion of the Privacy Policy states generally that Facebook uses cookies to  
15 store information about users, but it does not make clear the extent of the information Facebook  
16 allegedly gathers about each user. According to the allegations of the Complaint, more than 2.5  
17 million websites have integrated the Facebook "Like" button. (Complaint, ¶ 12.) Facebook uses  
18 the "datr tracking cookie" to track members' visits to those websites even if the website visitor  
19 does not click on the "Like" button" and even if the Facebook member is logged out of  
20 Facebook. (*Id.*, ¶¶ 14-15.) This type of widespread tracking is not apparent from Facebook's  
21 Privacy Policy. Although a person might not have any reasonable expectation of privacy from  
22 Facebook while interacting with the Facebook website itself, that does not mean a person would  
23 expect Facebook to track all or a large part of the person's Internet activity when not on the  
24 actual Facebook website.

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26 Defendant asserts that the use of cookies to provide Internet services is a longstanding  
27 practice and courts have repeatedly rejected attempts to impose liability for such conduct. While  
28 this may be true as to the use of cookies on a single website, Facebook's alleged conduct goes far

1 beyond that. Facebook is alleged to have used cookies to track large portions of people's  
2 browsing histories across numerous other websites so that a profile of each person can be put  
3 together. Given the types of information that this can reveal about a person (as discussed above),  
4 the Court finds that Facebook's alleged conduct constitutes a serious invasion of a privacy  
5 interest.

6  
7 In sum, Plaintiffs have sufficiently alleged that Defendant's conduct constitutes a serious  
8 invasion of a legally protected privacy interest in which there is a reasonable expectation of  
9 privacy for Facebook members. However, there is no legally protected privacy interest for non-  
10 Facebook members. Accordingly, Defendant's demurrer to the first cause of action (Violation of  
11 Article 1, Section 1 of the California Constitution) is OVERRULED as to plaintiff Ryan Ung (a  
12 Facebook member) and SUSTAINED WITH 10 DAYS' LEAVE TO AMEND as to plaintiffs  
13 Chi Cheng and Alice Rosen (non-Facebook members).

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15 Plaintiffs' unjust enrichment cause of action is based on Facebook receiving money "as a  
16 result of collecting and storing its users' personal information. . . ." (Complaint, ¶ 36.) This  
17 allegation shows that the cause of action is essentially a remedy being sought in connection with  
18 Facebook's alleged violation of Plaintiffs' right of privacy (i.e. the first cause of action). The  
19 proper method to attack an improper remedy is through a motion to strike, not a demurrer. (See  
20 *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal. App. 4th 365, 385 ["The appropriate  
21 procedural device for challenging a portion of a cause of action seeking an improper remedy is a  
22 motion to strike."].) Accordingly, Defendant's demurrer to the second cause of action (Unjust  
23 Enrichment) is OVERRULED.

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25 With regard to the third cause of action (Violation of the California Invasion of Privacy  
26 Act/Unlawful Wiretaps - California Penal Code § 631, *et seq.*), Plaintiffs allege that "[t]he  
27 communications of Plaintiffs with third-party websites were intentionally obtained by Facebook  
28 while in transit over wires, lines, cables, or instruments through the State of California and while

1 they were being sent from or received at a place within California in violation of California Penal  
2 Code § 631.” (Complaint, ¶ 43.) “Facebook willfully, intentionally, and without the consent of  
3 Plaintiffs, or any party to the communications, and in an unauthorized manner using an  
4 unauthorized connection, obtained, read, attempted to read and learned, and attempted to learn  
5 the contents of such electronic communications of Plaintiffs while they were in transit in or  
6 through California in violation of California Penal Code § 631.” (*Id.*, ¶ 44.) “Facebook used and  
7 communicated such illegally obtained electronic communications of Plaintiffs in violation of  
8 California Penal Code § 631.” (*Id.*, ¶ 45.)

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10 Defendant argues that these vague, unsupported, and conclusory allegations are  
11 insufficient to state a claim. Defendant is correct that conclusory allegations are insufficient to  
12 survive demurrer. (*Curcini v. County of Alameda* (2008) 164 Cal. App. 4th 629, 650.) Plaintiffs  
13 have alleged only legal and factual conclusions and therefore have not sufficiently stated a claim  
14 pursuant to Penal Code section 631.

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16 Even if Plaintiffs included more detailed allegations, however, Plaintiffs would not be  
17 able to maintain this cause of action. Section 631 “has been held to apply only to eavesdropping  
18 by a third party and not to recording by a participant to a conversation.” (*Warden v. Kahn* (1979)  
19 99 Cal. App. 3d 805, 811.)

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21 Plaintiffs’ theory is as follows:

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23 When a website includes Facebook Third-Party Content on one of its web pages,  
24 the page does not actually contain the Facebook Content itself. [] Rather the page  
25 contains instructions that, when a Plaintiff or Class member visits the page, cause  
26 the Plaintiff’s or Class member’s browser to ask Facebook to deliver the  
27 Facebook Content to the browser, to be displayed as part of the page. . . .

28 Accordingly, the Facebook Content is third-party content that is incorporated onto

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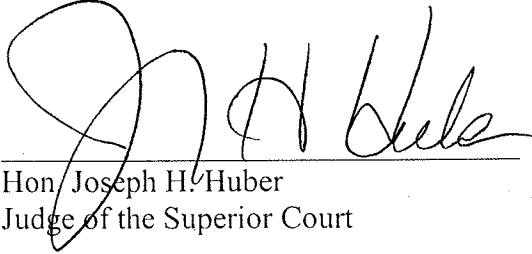
the (first-party) page as the page is loading, and Facebook is a third party to any communications directly between the Plaintiff or Class member and the web server that hosts the page.

(Plaintiffs' Memorandum of Points and Authorities in Opposition to Facebook's Demurrer, p. 19:1-9.)

Plaintiffs' description shows that Facebook is actually a participant in the communication between a plaintiff's or class member's browser and a website because Facebook is requested to and does deliver information to be displayed on the website. Moreover, Plaintiffs do not make clear how Facebook learns the contents of any communications aside from the information that Facebook itself sends upon request to be displayed as part of web page. Consequently, even if Plaintiffs had included allegations explaining their theory (quoted above), the conduct Facebook is accused of does not violate Penal Code section 631. Accordingly, Defendant's demurrer to the third cause of action (Violation of the California Invasion of Privacy Act/Unlawful Wiretaps - California Penal Code § 631, *et seq.*) is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

Plaintiffs' fourth cause of action relies on allegations of a violation of Penal Code section 631. (Complaint, ¶ 51.) As discussed above, Plaintiffs have not stated a claim for a violation of Penal Code section 631. Therefore, Plaintiffs cannot maintain a cause of action for negligence based on such a violation. Accordingly, Defendant's demurrer to the fourth cause of action (Negligence *Per Se*) is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

Dated: 7-2-12

  
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Hon. Joseph H. Huber  
Judge of the Superior Court