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ProFlowers Distinguished Professor of Internet Studies Nancy S. Kim

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PROFLOWERS DISTINGUISHED PROFESSOR OF INTERNET STUDIES NANCY S. KIM

INTRODUCTION BY THOMAS D. BARTON*

Introducing Nancy Kim as the ProFlowers Distinguished Professor of Internet Studies is a joy as well as a privilege. Few scholars anywhere would be more deserving of such formal recognition. Professor Kim's contributions combine theory with practicality, elegance with precision, and passion with objectivity—a testimony to how the academic community can shape legal and social reform through thoughtful analysis and balanced awareness of diverse interests. In the background of her work, one always senses her lively mind, breadth of legal experience, and consummate professionalism.

When a modest person like Professor Kim is honored, an introduction carries with it a special responsibility to highlight some of that person's most notable achievements. For Professor Kim, those achievements are numerous. She came to California Western School of Law in 2004 after working for nearly a decade with law firms and start-up technology companies in the Silicon Valley. In 2007, she also assumed a continuing role as Visiting Professor at Rady School of Management at the University of California, San Diego. Her leadership in intellectual property and contract law has grown to national levels. Her contributions to the legal community include dozens of scholarly presentations in the United States and abroad. Additionally, she has received appointments to a succession of Executive Committees of the American Association of Law Schools, sections on Art Law, Internet and Computer Law, Commercial and Related Consumer Law, and Contracts Law—a section for which she

is currently the Chair and an active Contributing Editor of its *Contracts Law Blog*. Most recently, Professor Kim was elected a member of the American Law Institute (ALI). She has become immediately active within the ALI, joining the Members Consultative Groups for the Restatement (Third) of *Information Privacy Principles* and *The Law of Consumer Contracts*.

Additionally, Professor Kim's book, *Wrap Contracts: Foundations and Ramifications*,¹ has been widely acclaimed for its clarity and vision, and was made the subject of a national contract law conference panel as well as the focus of symposia online and in a forthcoming issue of the *Southwestern Law Review*. Her work addresses issues central to our culture and economy as well as to the legal system. For example, as electronic contracting grows in frequency and scope, with ever-broadening implications for individual privacy, traditional contract law principles struggle to keep pace. The realities of "click through" agreements challenge the image of individuals as rational, informed choice-makers that underpins the justness and coherence of many contract law doctrines. Can private contracting principles remain a legitimate touchstone for Western liberal values? How can we ensure that evolving technology continues to serve human freedom and social mobility? The subjects Nancy Kim identifies and addresses are central to social and material well-being, and will only intensify. Lawyers and non-lawyers alike are grateful that such a fine mind, and fine person, has prompted and advanced this discussion.

* Louis and Hermione Brown Professor of Law, California Western School of Law.

1. NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (Oxford Univ. Press 2013).

PROFLOWERS DISTINGUISHED PROFESSOR OF INTERNET STUDIES

ACCEPTANCE BY NANCY S. KIM

It is my pleasure to be named the Inaugural ProFlowers Distinguished Professor of Internet Studies. I am grateful for the honor and wish to thank Dean Niels Schaumann, the Trustees, my colleagues, my research assistants over the years, our excellent reference librarians, the faculty support team, and my students who have helped me look at the law in new and different ways. Most of all, I thank my family. They have enthusiastically embraced my research agenda and brought me examples of bad contracts, patiently listened to me rant about the evils of Facebook and the lack of online privacy, and kept me current with new technologies. Any honor I receive belongs to them.

This professorship has an interesting origin given my research interests. ProFlowers was one of the first e-commerce companies to deliver flowers to consumers. Provide Commerce owns the ProFlowers website. Several years ago, class action plaintiffs filed a lawsuit against Provide Commerce alleging, among other things, consumer fraud and invasion of privacy. Plaintiffs alleged that, while shopping on the ProFlowers website, a pop-up window appeared offering free shipping. When they clicked upon the window, they were allegedly directed to a website operated by Clarus Marketing Group, LLC (CMG). The plaintiffs alleged they were not informed that by accepting the offer, they were enrolling in CMG's membership program, which charged them monthly membership fees without their knowledge. Plaintiffs further alleged that Provide Commerce gave their payment information to CMG without their knowledge or consent. Provide Commerce denied the allegations, but settled the lawsuit. This chair was established as part of a cy pres settlement in that lawsuit and will be used to fund my research in the area of internet studies, consumer privacy, and data security.

One of the big issues I grapple with in my scholarship is the meaning of consent. In the context of online or “wrap” contracts, consumers often do not consent to the terms imposed upon them in any meaningful way. Social scientists and behavioral economists have shown how heuristic biases and cognitive limitations hinder consumers’ decision-making abilities. My research applies these findings in the context of online contracting. For example, most consumers suffer from an optimism bias that makes them believe, even if contract terms are onerous, the drafter will not enforce them. Consumers also suffer from information overload that makes it impossible to process and understand all the contract terms that they encounter online. They follow the herd, believing that there is safety in numbers. They trust companies that are household names. They are myopic and interested in the short term gratification offered by the website rather than what may happen to them later if they click “agree.”

The unique digital environment affects both how consumers perceive terms and how companies present them. If consumers are online shopping, they are typically in a hurry to complete the transaction. If they are engaged in some form of entertainment or merely browsing a website, consumers generally are not expecting to be hijacked by a legal document. Image, rather than text, dominates the online environment. The intangibility of digital terms obscures the legal nature of online contracting. Companies take advantage of these strains on consumers’ attention and the weightlessness of digital terms to present contract terms which are, paradoxically, excessive yet inconspicuous.

Courts too often construct consent in a way that fails to resonate with the experience of most consumers. It is too easy to get consumers to “manifest assent” online, and the judicial construction of consent puts too great a burden on consumers. Judges have accepted the argument that clicking on an “accept” icon means that the consumer has agreed to unread terms, even if those terms are buried several clicks away.

The judicial construction of assent expects too little from drafters. It fails to account for the aggregative nature of wrap contracts. It ignores that a click to acknowledge a hyperlink that discreetly states “TERMS” fails to signalize to most consumers that important legal rights are being allocated or reallocated. Clicking “accept” means the

relinquishment of important legal rights and remedies and the undertaking of significant burdens and obligations. The “TERMS” typically include forced arbitration clauses, class action waivers, limitations of liability (for the drafter), warranty disclaimers, early termination fees, restocking fees, forum selection clauses, and clauses that extract privacy rights, personal information, and intellectual property rights from the consumer. As they extract these rights and impose these obligations, many online companies tout their services as “free,” further misleading the consumer into thinking the transaction is trivial and without legal effect. The result is frictionless contracting where consumers agree to terms that they do not know exist.

Of course, it makes no sense to say that consumers agree to terms when they don’t even know they exist. It contradicts the very nature of an agreement. Clicking to proceed on a website is not the same thing as signing on a dotted line. A hyperlink to a webpage lacks the signaling effect of a stack of legal documents handed to a consumer for signature. Companies have little incentive to refrain from unilaterally imposing onerous terms upon consumers if courts continue to allow them to do so. Not surprisingly, online terms proliferated, resulting in consumer habituation. The more frequently consumers confront clickboxes, the more automated their response and the less likely they are to read the fine print. The allegations in the lawsuit against Provide Commerce highlight this problem. The online environment, the proliferation of terms, heuristic biases, and cognitive limitations all make it easy to ensnare consumers in programs like CMG’s, which they never intended to join.

Corporate sponsorships can be tricky affairs where a recipient of such largesse may feel obligated in some way to promote the interests of the sponsor. Cy pres awards, on the other hand, are granted to promote the interests of class members—in this case, online consumers. I am grateful to receive this award to continue my research into how to improve the online environment for consumers.

