

A Play in One Act

# ***Terms of Service***

**Cast of Characters\***: Archie, Dan, Eric, Jack, Maureen, Orin, Wendy, Helen, Valentine, a professor of business ethics.

\*This is a work of fiction. Any similarity to existing persons (dead or alive) is purely co-incidental.

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# Setting

Curtains open to a group of friends hanging out at a coffee shop ...

**Archie:** I read that Google just introduced behavioral ad targeting and that other information companies have been doing this for a while. I don't think they're using my searches, but they could and that's creepy. I'm going to install TrackMeNot, a system I read about in May's *Atlantic Monthly*.

**Joel:** What's that?

**Archie:** It's a Firefox extension you can download from Mozilla that automatically sends search queries to up to four search engines in an effort to obfuscate your real searches and make search-based profiling harder.



**Eric:** But that's illegal! It violates Google's Terms of Service. Wait, let me get that for you on my laptop. Here it is: Article 5.3. "You agree not to access (or attempt to access)

any of the Services by any means other than through the interface that is provided by Google. You specifically agree not to access (or attempt to access) any of the Services through any automated means (including use of scripts or web crawlers).”

**Archie:** Hmm. I use Google for everything and I’ve never seen that.

**Helen:** Wait a minute! Just because someone asserts a Term of Service, that doesn’t mean it’s the law! You can’t go around unilaterally imposing Terms of Service and assuming the law will back it up. Can you? I mean, I’m not a lawyer...

**Valentine:** Why shouldn’t Google, or any other information intermediary, have a defensible right to assert any Terms they please? After all, it’s their property.

**Dan:** This reminds me a bit of cases like EBay vs. BiddersEdge or Intel vs. Hamidi. Do we know whether the law would uphold these terms, if Google were to sue? But let’s take this out of the Court of Law and into the Court of Conscience! Information intermediaries profit from freely available information online. They send their spiders and bots around to harvest URLs benefitting from liberal access provided by others. Then they turn around and slap on restrictions, forbidding the same activities on their own sites. Haven’t they heard of the Golden Rule?

**Eric:** That’s a cheap shot!

**Maureen:** Let’s give Valentine the property metaphor, for a moment. Still, we need to take into consideration the affordances of Net architecture and protocols when determining entitlements. Just as the extent of and limits on landowners’ rights depend at least in part on features of real property, so we would expect website owners’ rights to be shaped in part by characteristics of the medium.

**Joel:** Exactly! Architecture, technical constraints and affordances should be our guides here. TMN is polite as can be, obeying all standard protocols, doesn’t break down barriers, sneak through back-doors. It’s no more disruptive to normal usage than downloading songs or searching on Britney Spears.

**Helen:** I don’t know, Joel. Since generating logs is inherent to network interaction, this might give moral legitimacy to unconstrained use of logs. And letting architecture decide could lead to an arms race.

**Dan:** When you join the Net, you benefit from the connectivity and the “positive network externalities of the digital commons.” I’m sure I’ve heard that phrase before! When you turn around and impose constraints on what others can do in relation to your site, you’re essentially denying them some of these benefits.

**Maureen:** And in doing so you could also be inhibiting the Web’s potential to promote the public interest.

**Archie:** Yes, and why should site owners get to be in full control of our interaction? Don’t I have a say in the matter? If I don’t like them tracking my online behavior, my searches, aren’t I entitled to defend myself, my privacy?

**Jack:** The framers of our Constitution were very clear about protecting freedom of inquiry, thought, speech ...

**Eric:** Well sure. But this is a free market, isn't it? Parties set terms of transaction and if you don't like the terms you can walk away; choose a service whose terms you prefer!

**Maureen:** But allowing individual parties to set terms imposes a burden on all individuals surfing the Web, especially as the law-abiding (or timid) among us will feel we need to scrutinize all Terms of Service for fear that making a move or a click contravenes a site's terms. These transaction costs would detract from the public value of the Web and diminish efficient access to and delivery of information, whether from primary sources or intermediaries. Not to mention, it's depressing.

**Jack:** Not to mention, chills inquiry!

**Orin (who's been dozing off until now):** We should write these rules into the technical handshake and then no loss of efficiency!

**Joel:** I assume that if automated access impedes or significantly degrades performance of a site there would be recourse.

**Helen:** It certainly makes sense and serves the public interest to protect Web based information services against unwanted access that causes discernible harm, not simply disruption the service happens not to like. Whether this is automatically generated or not is beside the point!

**Business Ethics Professor:** I admit, the Terms of Service rationale is morally weak, particularly for intermediaries who take advantage of positive externalities and the open Web ideology. But even if TMN has no discernible impact on performance, there is still a moral issue. Life on the Web is all about give and take. Listen, information isn't really free, is it? The job of the intermediary is to take information at the bottom of the food chain, including personal information, and create value out of it. If you don't want to pay money for their product and you want to get information, then you must be prepared to give it. You remind me of DVR owners who fast-forward through commercials!

**Archie (looking anguished):** So, if I use TMN, does that make me a bad person, a free rider?

**Wendy:** Relax, Archie!

Professor, with all due respect, you can't be serious when you claim that to keep the information economy afloat individuals have an obligation to write a blank check with their personal information. What about successful alternative models?

We can't let the tail wag the dog. The "property" card isn't going to answer the question of whether these or those Terms of Service are morally legitimate because if Maureen's right, we don't really know what owning a website entitles us to (including whether it precludes something like TMN).

And shrink-wrap style private orderings may not yield socially optimal outcomes. (You can ask my namesake, Wendy Gordon, to explain this).

And we're not going to discover morality in architecture even though (as we know) architecture can embody morality.

No. There's no avoiding the hard work – determining the public values at stake (values to which our society subscribes) – and working back from there to determine the reasonableness of terms, and by implication whether installing TrackMeNot is morally defensible, in light of these values.

“don't let the tail wag the dog.”