



Privacy and the Digital Age

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THE CASE

Should there be limits in place regarding the types of data that social media platforms can collect, and for what purposes? This case is centered around a complaint from users of the social media platform iSocial, who become aware that the platform is collecting a great deal of their personal data, and then selling that data to third party advertisers. In their defense, iSocial posits that all users agree to the platform's privacy policy while installing the app and that they are using user data in accordance with industry standards.

Students must determine whether iSocial is halakhically permitted to continue collecting its users' data, and specifically whether it is permitted to:

1. Collect data from posts on users' profiles, and if it is dependent on whether the profile is listed as "public" or "private." A public account can be viewed by anyone, and a private account can only be viewed by accounts that have been approved by the user.
2. Collect data from the direct messages (private conversations) sent between users.
3. Share or sell collected user data to third party companies.

○ **build a window**

While the Mishnah's term literally means that one may not "open" a window, it is describing a person creating an opening in the wall to function as a window.

I. HEZEK RE'YAH: PROTECTING PRIVACY IN ONE'S HOME

One area of *halakhah* that pertains to privacy rights is the principle of הֶזֶק רְאִיָּה (*hezek re'iyah*, visual damage), which is all about protecting people from being observable within their homes. This idea is explored in various contexts throughout *massekhet* Bava Batra. Below, we will examine a *mishnah* to help us appreciate the standards of privacy that *Hazal* established.

SOURCE #1

משנה בבא בתרא ג:ז

לא יפתח אדם
חלונותיו לחצר
השותפין...

לא יפתח אדם לחצר
השותפין פתח כנגד
פתח וחלון כנגד חלון.
היה קטן, לא יעשנו
גדול. אחד, לא יעשנו
שנים.

אבל פותח הוא
לרשות הרבים פתח
כנגד פתח וחלון כנגד
חלון. היה קטן, עושה
אותו גדול. אחד,
עושה אותו שנים

Mishnah Bava Batra 3:7

A person may not build a window^o
overlooking a courtyard that belongs to
partners...

A person may not build an entrance
opposite another entrance, or a window
opposite another window, toward a
courtyard that belongs to partners. If
there was a small entrance, they may not
enlarge it. If there was one entrance, they
may not fashion it into two.

But one may build an entrance opposite
another entrance or a window opposite
another window toward the public
domain. If there was a small entrance,
they may enlarge it. If there was one
entrance, they may fashion it into two.

- » How do you understand the nature of these prohibitions? Why are we so concerned with protecting people's right to privacy within their homes?
- » Why do you think the *mishnah* prohibits constructing a window that **enables** looking into someone else's house, rather than there being a prohibition against **looking** through the window?

○ “evil eye”

The exact meaning of “evil eye” is subject to a wide-ranging debate. In some contexts, evil eye appears to be connected to the arousing of jealousy. For example, see Talmud Bavli Pesahim 50b.

The Talmud addresses the conclusion of the *mishnah*, that this restriction on building windows or entrances does **not** apply when it is facing the public domain

SOURCE #2

תלמוד בבלי בבא בתרא ס.

Talmud Bavli Bava Batra 60a

דאמר ליה סוף סוף הא בעית
אצטנועי מבני רשות הרבים.

Because [the person building the entrance can] say to [the other person]: “Ultimately, you must conceal yourself from the people of the public domain.”

Since the homeowner already needed to take into account that passersby from the street were able to look into their home, it is permissible for someone else to build an entrance facing their house from the other side of the street.

- » Can this principle be applied to our online activity? What should be considered in view of the “public domain” on a social media app?
- » Should it make a difference if something was only intended to be shared with one’s friends, as opposed to being shared publicly?

In order to determine whether the principle of *hezek re’iyah* may have relevance to conversations around digital privacy, we must establish the nature of the “damage” that *Hazal* are referring to. We will examine the explanation of the Ramban, who cites three possible understandings.

SOURCE #3

חידושי הרמב"ן בבא בתרא נט.

Ramban on Bava Batra 59a

וכל שכן בהיזק ראייה דנוקי אדם
באדם הוא, אי משום עין רעה
אי משום לישנא בישא אי משום
צניעותא.

Certainly *hezek re’iyah* is also a form of personal damage, whether due to “evil eye,”[○] harmful language, or modesty.

- » How do you understand how each of these three concepts apply to *hezek re’iyah*? What does it mean for *hezek re’iyah* to result in the evil eye, harmful speech, or [violations of] modesty?
- » Which of these concerns about *hezek re’iyah*, if any, can also be applied to digital contexts, such as a social media app? How so?

II. ARE PRIVACY POLICIES LEGALLY BINDING?

As described in the case, the iSocial privacy policy is a complex 50-page legal document. Presumably, most users accept the policy without skimming through the document, let alone carefully reading the entire policy. What is the legal standing of a contract where one of the signatories does not fully understand what they are committing to? Are they held responsible for agreeing to the contract, or is the agreement null and void because of the misunderstanding?

Typically, one **is** held responsible for the contents of a contract that one signed, regardless of whether one fully understood its terms (Shulhan Arukh, Hoshen Mishpat 45:3).^o However, there may be exceptions to this principle.

SOURCE #4

ערוך השולחן, חושן משפט מה:ה

בעל דבר שחותם על השטר
להתחייב א"ע בשום דבר או לפטור
את חבריו משום דבר אפילו חתם
א"ע כשלא קרא את השטר ואפילו
ידענו שאינו יודע כלל מה שכתוב
בשטר ואפילו נכתב השטר בלשון
הגוים והדבר ברור שאינו יודע
לקרות ואינו מבין הלשון כלל מ"מ
מתחייב הוא בכל מה שכתוב בו כיון
שלא חשש לקרותו וסמך עצמו על
נאמנות של אחרים הוא גומר בדעתו
להתחייב בכל מה שנכתב שם. ...

ונ"ל דעכ"ז אם יש עדים שקראו
לפניו השטר ורימו אותו כגון שקראו
לפניו מנה ונמצא בשטר מאתיים
וכיוצא בזה... דשטר פסול הוא דויל
בתר טעמא דהא לא נשתעבד עצמו
על מה שכתוב בשטר.

Arokh HaShulhan, Hoshen Mishpat 45:5

A litigant who signs a document to obligate themselves for something, or to release their fellow from something—even if they signed the document without reading it, and even if we know that they had no idea what was written in the document, and even if it was written in a foreign language and it's clear they could not read it or understand the language at all—nonetheless the person obligated themselves to everything they have written since they were not concerned about reading it and instead relied on the trustworthiness of others, and made up their mind to obligate themselves to everything written there. ...

Nonetheless, it appears to me that if the witnesses tricked them, such as by reading before him that it was "100" and in the document it actually said "200," or similarly... then it is an invalid document, since we go after the reasoning that the person did not obligate themselves on what was written in the document.

- » What's the difference between the two cases—why is a person held responsible in the first type of case, but not in the second?
- » Which case is more similar to the circumstances of a social media user who agrees to a complex privacy policy without reading it? Can the user make a claim that they were misled about the content of the privacy policy? Why or why not?