

# COPYRIGHT AND SOCIAL MEDIA

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# Copyright and Social Media: Terms & Conditions of Instagram

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## Introduction

Social media is an increasingly relevant factor in the IP equation, particularly in relation to ownership and infringement of copyright. The tension between the regulation of content by copyright and the encouragement of sharing on social media platforms is particularly highlighted when looking at the terms and conditions of use.

This topic brief aims to discuss these issues, focusing on the vulnerability of users due to their lack of understanding of the terms and conditions, and the threat of infringement proceedings.<sup>1</sup>

The use and development of social networking sites (SNSs) in recent years has been rapid. SNSs allow users to create and share information, communicate and connect with a vast community of users, which has been described as a “testament to the human nature of our creations,”<sup>2</sup> supporting a “culture of connectivity.”<sup>3</sup>

SNSs are a powerful tool for organisations, as they provide them with a platform to market themselves easily to wide audiences. Social media platforms themselves are also lucrative digital businesses, mainly making their revenue through advertising. For example, it was estimated that Instagram would reach approximately \$4bn in revenue in 2017, and it is expected that Instagram advertising revenue could reach over \$10bn in 2019 (Levy 2017). Social media platforms encourage users to share both original content and third-party content using tools such as retweet, quote-retweet, repost and share. This is because the more people that use their platform, the more valuable the advertising, which is a key source of revenue.

In contrast, copyright gives creators the ability to restrict other people's use of their work, including copying and communicating to the public. On SNSs a copy of an image is made each time a photograph is posted, re-posted, or shared.

It is argued that the disparity between the principles of copyright and social media leads to confusion, and the SNSs seem to mislead their users. Whilst it is unlikely that Instagram would ever bring an action against its own users for copyright

infringement for policy reasons, the emerging case law suggests that Instagram users are becoming increasingly vulnerable to action from third-party copyright holders. Therefore, Instagram has a responsibility to better inform its users of the implications of sharing third-party content. Further, it could be argued that a notice and takedown system, together with a user education tools, would be an effective way forward for the SNS.

## **Terms and Conditions of Instagram**

Before users can sign up to and use Instagram, they must agree to the terms and conditions of use.

The first concern about the terms of use, is that they are rarely read by users. Furthermore, the language of the terms are complicated and unclear, so the users do not always understand the legal implications. Instagram has been highlighted as having particularly ambiguous content in their terms of use. The minimum age for users to sign to Instagram is 13 years, however, the reading age for the terms are at least University level.

In relation to the content of the terms, two key issues arise; ownership of the content and copyright infringement through sharing on the SNS. These are discussed below in more detail.

## **Who owns the Images on Instagram?**

Instagram claim that they do not take ownership of their user's content: *"Instagram users own their content and Instagram does not claim any ownership rights over your photos. Nothing about this has changed. We respect that there are creative artists and hobbyists alike that pour their heart into creating beautiful photos, and we respect that your photos are your photos. Period. I always want you to feel comfortable sharing your photos on Instagram and we will always work hard to foster and respect our community and go out of our way to support its rights."* (Kevin Systrom co-founder, Instagram).<sup>4</sup>

However, according to the terms of use,<sup>5</sup> the user grants Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use their content. To break it down, this means the following:

- Users can license their work to third parties (non-exclusive);
- Instagram has free use of the user's content (royalty-free);
- Instagram can pass the rights it has been granted to use the content, to a third-party without the creator's permission (transferable – meaning Instagram can freely assign or convey the rights granted to them by the users to a third party, usually in relation to an assignment);

- Instagram can license the use of the users content to third parties (sub-license – meaning Instagram can license the content licensed to them, to third parties);
- Instagram can do this anywhere, without geographical restriction (world-wide);
- Instagram can edit, share, copy and communicate the user's content to the public (use).

So, whilst Instagram does not own the content *per se*, it does have virtually all the rights of someone who is the rights-holder, aside from the fact that it is not an exclusive licence. This is particularly important for photographers to be aware of, since if they licensed an image to a third-party under an exclusive licence, posting the image on their Instagram account would violate that licence.

From Instagram's perspective, perhaps it is necessary for them as a private company to protect themselves and have access to their user's content for advertising and marketing purposes. However, Instagram should be doing more to inform and protect their users. However, despite the negative feedback on these issues, Instagram continues to be successfully growing as a social network and so there seems to be a lack of motivation for driving change at this point.

One thing that might change this in the near future, is that more copyright infringement disputes are arising.

## **Copyright Infringement on Instagram**

Users often share third-party content on SNSs - it is a normal part of the user behaviour - and therefore, infringement of copyright material is prevalent on Instagram. Instagram's terms of use state that users warrant that they own the content that they post and that the content does not violate, misappropriate or infringe on the rights of any third-party, including, but not limited to, publicity rights, copyrights, trademark and/or other intellectual property rights. In addition, users guaranty that any third-party content that they upload has consent from the rights- holders.

As mentioned, these terms are contradictory to the normal user behaviour, which SNSs encourage through sharing tools, as it benefits them by increasing their advertising revenue.

Whilst there have not yet been any court proceedings pertaining to copyright infringement of images on Instagram, there have been a number of high profile disputes. For example, Khloe Kardashian has faced legal action in relation to a photograph herself she posted on her own Instagram.<sup>6</sup> The photograph was owned by Xposure Photos, who argued that Kardashian posted the photograph, without a

licence from the copyright holder. The responsibility of Kardashian is also heightened in this case since she draws significant revenue from her Instagram usage. This particular case settled with the photo agency agreeing to drop the case, and Kardashian deleting the photograph.

## Conclusion & Recommendations

Instagram, whilst providing a popular service, is seen to have a considerably unfair user-agreement that encourages sharing – for the benefit of advertising revenues – but leaves users increasingly vulnerable to copyright infringement claims. It is accepted that we live in *'a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before?'*<sup>7</sup>

Nevertheless, it is argued that Instagram has a responsibility to better inform its users of the implications of sharing third-party content. It is suggested that Instagram should introduce an improved copyright policy that includes:

- (1) A Notice and Takedown procedure to enable copyright holders to enforce their rights on the SNS,
- (2) Introduce a copyright education tool which provides information and awareness about copyright to its users
- (3) Develop software that informs copyright holders when another users has screen-grabbed their image and provides a copyright notice to the user
- (4) Review their user agreement so that it does not leave its users vulnerable to copyright claims, or licence breaches and make its terms and conditions clearer and fairer towards its users.

If Instagram does not take these steps, the company could be vulnerable to action. The Paris Court of First Instance recently found that Twitter's Terms of Use (not dissimilar to Instagram's) were void and unenforceable as they were "abusive" towards users, resulting in fines of up to 30,000 Euros, and Twitter replacing their terms.

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<sup>1</sup> For a more detailed discussion on this topic, see: [Bosher and Yeşiloğlu, An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram \(2018\) International Review of Law, Computers & Technology](#)

For a brief discussion see: <https://theconversation.com/ten-things-you-should-know-about-instagrams-terms-of-use-102800>

<sup>2</sup> Mangan and Gillies, *The Legal Challenges of Social Media* (Edward Elgar; 2017)

<sup>3</sup> Van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (OUP; 2013)

<sup>4</sup> Kevin Systrom, 'Thank you and We're Listening' Instagram Blog: <http://instagram.tumblr.com/post/38252135408/thank-you-and-were-listening>

<sup>5</sup> Instagram Terms of Use: <https://help.instagram.com/478745558852511>

<sup>6</sup> Xposure Photos (UK) Ltd., Vs. Khloe Kardashian, and Does 1 Through 10, United States District Court Central District of California, Case No.: 2:17-Cv-3088, Complaint for Copyright infringement, Filed 04/25/2017.

<sup>7</sup> Lessig *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. (Penguin Press, 2008)