

# #KnowYour(Copy)Rights: Applying a Legal Filter to Instagram's Revised Terms of Use

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Less than three years old, Instagram, a mobile photograph-sharing program which was purchased by Facebook for \$1 billion in April 2012, has quickly become a force in social media, amassing a huge repository of user-created content from its 90 million active, registered users. While the vast majority of standard Instagram users may have little concern with the legal ownership issues related to posted Instagram content, professional photographers and other major brands in the photo space have taken notice of Instagram's Terms of Use ("TOU"), especially since Instagram's December 17, 2012 announcement that it was adopting new TOU, which took effect January 19, 2013.

Unsurprisingly, given Instagram's meteoric rise, the original TOU ("Original TOU") that covered pre-2013 behavior on Instagram failed to address some of the key intellectual property issues related to display of user-created content. Instagram initially proposed changes to the Original TOU that would go into effect on January 16, 2013 ("Revised TOU"), but after a huge backlash ensued, Instagram finalized a second revised TOU that went into place on January 19, 2013 ("Final TOU"). Unfortunately, while the Final TOU appropriately addresses some of the concerns of owners of copyrighted materials, the Final TOU is only a slight improvement over the Revised TOU and creates a new landscape of social network photography sharing that puts copyright holders in a precarious situation.

## The Original TOU: A Snapshot of a Simpler Time

The Original TOU, while not user friendly, was not nearly as onerous as the new version. The Original TOU is divided into three sections: Basic Terms, General Conditions, and Proprietary Rights in Content on Instagram. It is the third section that contains the most important terms related to intellectual property rights. The very first term includes the most relevant language,

as it describes the kind of rights Instagram is claiming in regards to the content posted to its service:

Instagram does NOT claim ANY ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials (collectively, "Content") that you post on or through the Instagram Services. By displaying or publishing ("posting") any Content on or through the Instagram Services, you hereby grant to Instagram **a non-exclusive, fully paid and royalty-free, worldwide, limited license** to use, modify, delete from, add to, publicly perform, publicly, display, reproduce and translate such Content, including without limitation distributing part or all of the Site in any media formats through any media channels, except Content not shared publicly ("private") will not be distributed outside the Instagram Services. *[Emphasis added.]*

With this one term, Instagram has attempted to find the sweet spot between ownership and licensing. Unless the user actively identifies the content as "private," Instagram has the ability as a licensee to take any content posted via its service and perform a number of functions. And, unlike the vast majority of licensing agreement that exchange use by the licensee for a royalty or fee paid to the licensor, Instagram's license is "fully paid and royalty-free." While technically Instagram does not own the content, the vast licensee powers given to Instagram via the Original TOU are alarming, especially given the second term in the Proprietary Rights section.

Immediately after claiming a broad royalty-free license to use Instagram content, Instagram indicates its intent to use the content as part of advertisements and promotions. Not only are the details of this use largely undefined, but Instagram also specifies that the manner of this promotional use is subject to change without notifying the Instagram user. Instagram also gives the user extremely little control over the terms of this license, as the Original TOU does not specify the manner in which the user may revoke the license. Instagram is also claiming a high level of control over use of Instagram content, while at the same time placing the burden of ensuring that the original content was obtained legally on the Instagram user, who must implicitly aver that he or she has acquired the proper license or ownership rights to the material. And as a final piece to this proprietary ownership puzzle, it is the user who bears the burden of paying any royalties for the content posted.

## The Revised & Final TOU: The Cloudy Future of Instagram User IP Rights Comes Into Focus

If the Original TOU set off warning bells for savvy Instagram users by granting Instagram a free license without assuming any major liability, Instagram's changes in the Revised and Final TOU should have put its users on alert. In the process of creating an updated TOU, Instagram created more clarity about what issues it is most concerned with. It has asserted an explicit right to sub-license, beefed up its liability protection, outlined the right to evolve the service in an unrestricted manner, and precluded the users' rights to terminate their own accounts or to remove material. While the company did remove some language from the Revised TOU, the underlying rights to make broad use of the photos and identities of Instagram users remain in the Final TOU.

In the advertising section of the Revised TOU, Instagram makes an earnest attempt to explain its re-purposing of Instagram content for promotional purposes:

To help us deliver interesting paid or sponsored content or promotions, you agree that a business or other entity may pay us to display your username, likeness, photos (along with any associated metadata), and/or actions you take, in connection with paid or sponsored content or promotions, without any compensation to you.

This lack of compensation was implicit in the Original TOU's statement that Instagram's license was royalty-free, but in the Revised TOU, Instagram includes the rationale for this arrangement. Interestingly, the Final TOU does not include this language. Instead the Final TOU reverts back to the Original TOU language on advertising. By actively deciding to leave this term general and relatively vague, Instagram may be hoping that users will miss the amount of control and imbalance of revenue inherent in the free license being granted to Instagram.

The remaining key updates survived the revision process and appear in the Final TOU, which was expanded from the three sections in the Original TOU to twelve sections in the Final TOU. The first key change is found in the "Rights" section, which replaced "Rights in Content" from the Original TOU. Here, Instagram further expands the scope of its license, creeping closer and closer to ownership rights in Instagram content. Whereas Instagram claims a "non-exclusive, fully paid and royalty-free, worldwide, limited license" in the Original TOU, the Final TOU adds

a couple of key words and claims a “non-exclusive, fully paid and royalty-free, **transferable, sub-licensable**, worldwide license” (emphasis added). Instagram continues to add rights to its license, giving it the flexibility to treat Instagram content in a manner normally reserved for proprietary owners of copyrighted materials.

The final language of Instagram’s claimed license is also concerning because of how little control the Instagram user has over terminating the license. The only termination language included in the Final TOU is related to how Instagram can terminate the user’s privileges for violating the TOU. By giving the user no ability to force the termination of the agreement, the license and liability protection that the user grants Instagram is indefinite and completely open-ended. Even after the Instagram user has terminated his account, the license granted to Instagram survives and Instagram is afforded both rights to the Instagram content and shelter from any liability incurred. This open-endedness becomes more concerning when coupled with the abstract and seemingly unrestricted manner in which Instagram defines its service. In the “General Conditions” section of the Final TOU, Instagram reserves “the right to **modify** or terminate the Service or [user] access to the Service **for any reason.**” (emphasis added) Instagram is free to define its Service and could continue to expand the scope of its license indefinitely based upon the language in the Final TOU. There is nothing in the Final TOU that would stop Instagram from deciding to become a stock photo agency, a publisher, or a broadcast service, and use the personal or brand identity that the license grants to Instagram without the threat of incurring liability. Instagram’s freedom to unrestricted sublicensing starts trading dangerously close to exploitation when considered in this context.

The second key change involves the addition of two entirely new sections to the Final TOU. While the burden of securing any necessary intellectual property rights to the material posted by on Instagram remains with the user, the Final TOU includes both a new limitation of liability clause and a new indemnification clause. The limitation of liability clause disclaims all liability attributable to Instagram for a laundry list of actions, including “any action taken in connection with copyright or other intellectual property owners.” At the same time, the added indemnification clause prohibits Instagram users from holding Instagram liable for any claims made against Instagram users related to any user-created content. The addition of these new terms follows Instagram’s established trend of disclaiming any liability for how Instagram content was originally created, while still retaining the ability to use Instagram content in an unrestrained fashion.

The final change involves restricting Instagram user's rights to seek recovery from Instagram by limiting any dispute to arbitration. The Final TOU includes an opt-out provision that Instagram users must execute or else be subject to binding arbitration for any dispute that arises related to use of the Instagram application. However, intellectual property disputes are not covered by the opt-out clause, and instead must be resolved by arbitration under the American Arbitration Association's rules. The arbitration notice and provision represent a final consideration that copyright owners must account for when operating on Instagram.

## **Exposing the Negative: What This Means for Copyright Owners**

In an ironic twist, the Final TOU includes a new section that instructs Instagram users on how to report copyright and other intellectual property violations to Instagram for resolution. Unfortunately, the question remains whether it is Instagram that users should be reporting for commandeering their intellectual property rights. After reviewing the legal issues in both the Original TOU and the Final TOU, copyright owners who have more at stake than the standard Instagram user need to proceed with caution when posting content to Instagram. Both independent professional photographers and major brands in the photography space should post photographs to Instagram with a complete understanding of the license associated with creating Instagram content. While the most direct and clear threat may be to Instagram's users whose business and/or livelihood are tied to the intellectual property of photographs, Instagram's TOUs could threaten any user's control of identifying information. Any user or entity using Instagram, who wants to retain control over his name, identity, and images, should do some hard weighing of the pros and cons of posting to Instagram prior to relinquishing a significant amount of control over content.

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