

Instagram Retreats on Privacy Policy Change but Gets Sued Anyway

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Photo-sharing app Instagram announced last Thursday, December 20, 2012 that it will withdraw one of its recent changes to the site's privacy policy following a public backlash. The withdrawn language explicitly permitted third party advertisers to pay Instagram to display a user's name, images, preferences and photos for advertising purposes (along with any associated metadata) without compensation to the users: "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."

Two days after implementing the change, Instagram issued a public about-face, saying that the company had "no intention of selling [its users' content], and we never did. We don't own your photos – you do." In a company blog post entitled "Updated Terms of Service Based on Your Feedback" published on December 20, Instagram co-founder and CEO Kevin Systrom apologized for the confusion and said that the company will revert to the original advertising terms and will tweak its privacy policy to make it clear that users' photos will not be used without their consent.

Although Instagram backed down from the explicit provision allowing it to share information with third party advertisers, its original privacy policy, like the policies of many other social networks, grants Instagram a non-exclusive, fully paid, royalty-free, worldwide license to use all content posted by a user in any media formats through any media channels without restriction – so it is fair to wonder whether Instagram ever needed the explicit language giving it the right to share information with advertisers in the first place.

Moreover, the public storm over Instagram's policy change initially obscured the fact that Instagram's now-withdrawn policy is only one of a number of changes that the company made to its Terms of Use – and these additional changes may be instructive for other companies with concerns about litigation exposure. For example, Instagram's updated terms permit it to share information about its users with Facebook (its parent company) as well as with outside affiliates and institutes a "take it or leave it" approach under which users who want to opt out of the policy have to quit using the service. The company's new terms also include a clause under which parents of users under the age of 18 are deemed to have consented to the use of their children's images for advertising purposes. In yet another change, the company stated that ads will not necessarily be labeled as ads: "You acknowledge that we may not always identify paid services, sponsored content, or commercial communications as such."

Finally, Instagram attempted to take preventive steps to avoid class action lawsuits: its new terms of service require users with a legal complaint to submit to arbitration for most claims, rather than to commence litigation in court, and prohibit them from joining a class action lawsuit under most

circumstances. Other proposed changes included a liability cap of \$100 for all damages of any kind and a one year statute of limitations within which to bring claims against Instagram.

Not everyone overlooked the significance of these new provisions. On Friday, December 21, a San Diego law firm commenced a purported class action litigation in California, challenging Instagram's class action waiver and liability cap and alleging that Instagram unfairly forced users who did not agree with its new terms to delete their accounts and give up rights to the photos they had previously shared using the service. The complaint alleges that Instagram's proposed new terms would "transfer valuable property rights to Instagram while simultaneously relieving Instagram from any liability for commercially exploiting customers' photographs and artistic content, while shielding Instagram from legal liability." But class action waivers and liability limits are widely used and have been approved by the courts, including by the U.S. Supreme Court in *AT&T Mobility v. Concepcion*, 563 U.S. ____ (2011). Provided that they are clearly worded and conspicuously disclosed, they can be an effective and appropriate tool for business owners seeking to provide low cost or free services to consumers without high legal costs.

That Instagram attempted to take preventive steps to avoid class action lawsuits and limit potential damages is understandable. Whether Instagram's new Terms of Use are sustainable will be of interest to many other companies in similar situations.

About the Author

Ms. Bromberg is the head of the Firm's Intellectual Property and Licensing Group. She handles all aspects of intellectual property and technology law, including license agreements, technology transfer and vendor agreements, joint development and co-branding agreements, and management of IP litigation (including patent, trademark, copyright, and trade secret litigation). She was named as a New York *Super Lawyer* for Intellectual Property in 2010, 2011, and 2012.

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