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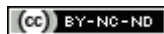
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Copyright in the Mobile Media Era

Krysta M. Smith



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Copyright in the Mobile Media Era

Krysta M. Smith *

INTRODUCTION

The introduction of smartphones has revolutionized the usage of social media with the ability to be constantly connected to thousands of people at once. In a single day, a person can update her Facebook status, tweet her opinions, and provide a photo-documentary of the day's activities through Instagram. It is expected that individuals will have social media accounts and will update them continuously. Instagram, in particular, has transformed the use of social media. Now, people can tell stories through their photos. Not only is Instagram being used by the average person but it has become an avenue for professional photographers to share their work and allows celebrities to connect with their fans. However, these technologies raise various legal and policy concerns.

This Article will provide a brief introduction into the privacy issues surrounding Instagram and a discussion of the legal and policy concerns emerging from the usage of such applications. Part I will outline the available protection and illustrate how the protection is lacking. Part II will use the recent Instagram controversy as a case study to give concrete parameters to the legal analysis. Part III will introduce the privacy concerns raised by individuals when the change in service announcement was made by Instagram. Part IV will introduce the use of Instagram by professional users who are significantly impacted by such privacy issues. Part V will discuss policy concerns surrounding regulation or deregulation of the industry. Finally, Part VI will suggest policy changes to protect application users in the future.

I. AVAILABLE PROTECTION

The available protection for photography primarily comes in the form of copyright protection. "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later

* Krysta M. Smith is a J.D. candidate 2014, University of Pittsburgh School of Law; B.A. in International Business and B.A. in Spanish from Washington & Jefferson College, 2011.

developed” including the category of pictorial, graphic, and sculptural works.¹ Title of a work vests in its author when the work is created.² Copyright protection also vests when the work is created.³ Furthermore, copyright protection is afforded to the author regardless of whether the work is published.⁴ Under such protection, a photographer’s work is automatically protected by United States copyright law. An owner has the ability to waive such copyright protection; however, waiver requires that the work be specifically identified in a written document that is signed by the author.⁵

The remaining issues are the copyright factors that are involved in posting photographs from one’s phone through an application. It is clear from United States copyright law and the incorporation of the Berne Convention⁶ that copyright automatically extends to such a work. As publication on the Internet does not equate to submitting one’s work into the public domain where anyone can make use of it,⁷ submission of one’s photos to a smartphone application should also be treated similarly. However, within terms of service contractual agreements, individuals effectively relinquish their copyright protection, oftentimes without even knowing that they are doing so.⁸

However, regardless of copyright protection, when releasing photographs into applications, individuals are only as protected as the terms of service allow. Thus, individuals must place their trust in the developers and owners of the applications. Some applications, such as Instagram, build a great sense of goodwill and trust, expanding their user base to millions of individuals.⁹ However, what is bound to occur when the policies are changed and the trust is broken? The subsequent case

¹ 17 U.S.C. § 102(a)(5) (2006).

² 17 U.S.C. § 201(a) (2006).

³ 17 U.S.C. § 102 (2006).

⁴ 17 U.S.C. § 104(a) (2006).

⁵ 17 U.S.C. § 106A(e) (2006).

⁶ *International Copyright*, UNITED STATES COPYRIGHT OFFICE (Nov. 2009), <http://www.copyright.gov/fls/fl100.html> (discussing the international convention, which the United States signed in 1989, that provides automatic protection to authors’ works).

⁷ Brad Templeton, *10 Big Myths About Copyright Explained*, BRAD TEMPLETON (Oct. 2008), <http://www.templetons.com/brad/copymyths.html>.

⁸ Victor Luckerson, *New Site Grades Those Pesky ‘Terms of Service’ Agreements You Never Read*, TIME (Aug. 10, 2012), <http://business.time.com/2012/08/10/new-site-grades-those-pesky-terms-of-service-agreements-you-never-read/>.

⁹ Olivier Laurent, *The New Economics of Photojournalism: The Rise of Instagram*, BRITISH J. PHOTOGRAPHY (Sept. 3, 2012), <http://www.bjp-online.com/british-journal-of-photography/report/2202300/the-new-economics-of-photojournalism-the-rise-of-instagram>.

study of the Instagram controversy of December 2012 illustrates why more protection is needed.

II. INSTAGRAM POPULARITY AND OUTRAGE

Kevin Systrom and Michel Krieger, creators of Instagram, released the application in 2010.¹⁰ Instagram altered camera phone photography in a way that few could anticipate. Systrom and Krieger strived to create an application to “make phone photography fast, simple and beautiful,”¹¹ and to allow users to add “a specific ‘mood and tone’”¹² through the Instagram filters. Not only did Instagram change the use of smartphones to take photos, but it also changed the ability to share photos.

Instagram operates almost exclusively on a mobile platform¹³ and links to Facebook, Twitter, and Tumblr, making it “super-simple to share photos” on other platforms in addition to an individual’s followers on Instagram.¹⁴ Douglas Rushkoff stated: “[Instagram] has spawned a new visual language, a new etiquette of sharing and outpouring of creativity in the form of contests, collaborative art exhibits and personal expression.”¹⁵ As of September 2012, Instagram had more than 80 million users from around the world, including world-renowned photojournalists.¹⁶

Change in Terms and Outrage

It is common knowledge that people usually do not read the terms of service agreements. People do not view these as legally binding agreements but rather as the last hurdle to overcome before using the latest application.¹⁷ Whether the failure to read terms of service agreements is a matter of laziness or motivated by some other rationale, the bottom line is that it may be the most practical answer. A study conducted by Carnegie Mellon professors in 2008 indicated that a single

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Sam Eriksmoen, *Is Instagram Right for Your Photography Business?*, LIVEBOOKS BLOG (Jan. 7, 2013), <http://blog.livebooks.com/2013/01/is-instagram-for-your-photography-business/>.

¹⁴ Laurent, *supra* note 9.

¹⁵ Douglas Rushkoff, *Instagram Users Should Wise Up*, CNN (Dec. 20, 2012), <http://www.cnn.com/2012/12/20/opinion/rushkoff-instagram-users>.

¹⁶ Laurent, *supra* note 9.

¹⁷ Luckerson, *supra* note 8.

Internet user is inundated with almost 1,500 privacy policies in a single year.¹⁸ For the average layperson, this is approximately 3,750,000 words per year in privacy policies.¹⁹ However, when major changes in terms of service are made public, outcry ensues.

Instagram fostered goodwill through creating a unique application that people love to use.²⁰ However, in December 2012, Instagram threatened this goodwill by changing its terms of service:

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 compensation with paid or sponsored content or promotions, without any compensation to you.²¹

This initiated a myriad of angry responses from users and non-users alike.

Tumblr blogs exploded with criticism following the changes in the terms of service.²² Threats emerged from individuals, professionals, and celebrities to drop the application and choose other venues for sharing their photos and experiences. Fears of exploitation ran rampant after the changes in the terms of service. Celebrities, such as Kim Kardashian, Anderson Cooper, and Rosario Dawson, all threatened to leave Instagram because of the changes to the terms of service.²³ The fear of a sharp decline of users and a total loss of goodwill encouraged Instagram to backtrack and revert to the old policy.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Ian Paul, *Instagram Policy Changes: Lessons to Learn from the Uproar*, PCWORLD (Dec. 19, 2012), <http://www.pcworld.com/article/2021486/instagram-policy-changes-lessons-to-learn-from-the-uproar.html>.

²¹ Ian Paul, *Instagram Updates Privacy Policy, Inspiring Backlash*, PCWORLD (Dec. 18, 2012), <http://www.pcworld.com/article/2021285/instagram-updates-privacy-policy-inspiring-backlash.html> [hereinafter Paul, *Instagram Updates*].

²² *Id.*

²³ Paul, *supra* note 20.

Backtrack

In the age of the Internet, news travels fast and bad news travels faster. Within a day of releasing the proposed new terms, Systrom responded to the backlash by posting on the Instagram blog backtracking from the new language:

Our intention in updating the terms was to communicate that we'd like to experiment with innovative advertising that feels appropriate on Instagram. Instead it was interpreted by many that we were going to sell your photos to others without any compensation. This is not true and it is our mistake that this language is confusing. To be clear: it is not our intention to sell your photos. We are working on updated language in the terms to make sure this is clear.²⁴

Systrom stressed Instagram's commitment to protecting its users' ownership rights.²⁵ Furthermore, he thanked the users for raising such concerns and indicated that the users' feedback will be taken into consideration for drafting the new terms.²⁶ However, Douglas Rushkoff noted: "the damage has been done, and the Instagram community is on notice that they may not own the rights to the photos they upload."²⁷

Instagram reinstated the original terms of service: "You hereby agree that Instagram may place such advertising and promotions on the Service or on, about, or in conjunction with your Content. The manner, mode and extent of such advertising and promotions are subject to change without specific notice to you."²⁸ At first glance, it seems that Instagram users reclaimed their rights; however, the newest terms are vaguely worded, indicating that a user is giving up more rights to

²⁴ Kevin Systrom, *Thank You and We're Listening*, INSTAGRAM BLOG (Dec. 2012), blog.instagram.com/post/38252135408/thank-you-and-were-listening.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Rushkoff, *supra* note 15.

²⁸ *Terms of Use*, INSTAGRAM, <http://instagram.com/about/legal/terms/> (last visited Feb. 22, 2013).

her photos.²⁹ The question remains as to how much of Instagram users' privacy is actually protected?

III. PRIVACY CONCERNS

“Technological advancement holds little, if any, promise for privacy these days. Advancing technology brings mostly threats, potential and realized, to privacy interests”³⁰ Technology has enormously improved everyday life, but with every improvement comes potential downfalls. Today's society has become accustomed to less privacy, but is this enough reason to allow such infringements to continue? Or, do individuals assume the risk by partaking in such technological advancements?

Camera phones have made it infinitely easier to photo-document one's life. Applications, like Instagram, allow individuals to not only document their lives for themselves, but also to share their experiences with the world. Whether it is a night out with one's friends or a trip around the world, the experience is shared with all. Richard Koci Hernandez, professional photographer, said: “For me, photography is my memory. I've chosen photography to prove I exist. I see my captured view of the world as my search for meaning. For me, words are often inadequate, so I choose to define my experiences with photographs.”³¹ Camera phones have enabled everyone to approach photography in a similar manner.

Private Photos Become Advertisements

When an application or organization steps in and declares that it can use an individual's photos for advertisement purposes, the integrity of that individual's photo is threatened. Noah Kalina, Mark Zuckerberg's wedding photographer, stated: “if a company wants to use your photos for advertising they need to TELL you and PAY you.”³² Despite this, applications such as Instagram have the ability

²⁹ Nilay Patel, *Why the Instagram Debacle Just Taught Every Tech Company to be Shadier than Ever*, THE VERGE (Dec. 21, 2012), <http://www.theverge.com/2012/12/21/3791786/why-the-instagram-debacle-just-taught-every-tech-company-to-be>.

³⁰ Joseph A. Tomain, *Advancing Technology & Aging Democracy*, SOC. SCI. RES. NETWORK, Aug. 9, 2012, at 1, 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2127212.

³¹ Richard Koci Hernandez, *Photographers, Embrace Instagram*, CNN (Oct. 15, 2012), <http://www.cnn.com/2012/10/14/opinion/hernandez-mobile-photography>.

³² Doug Gross, *Instagram Backtracks After User Privacy Revolt*, CNN (Dec. 19, 2012), <http://www.cnn.com/2012/12/18/tech/social-media/instagram-terms-users>.

to take possession of photographs and sell them for profit, regardless of the application owner's expressed intention.³³

Celebrity Use of Instagram and Potential Exploitation

Selling users' photographs without permission impacts all users of such an application; however, the effect on celebrities far surpasses the effect on the average user. Celebrities use their name recognition to generate millions of dollars each year through their various business ventures.³⁴ Furthermore, celebrity endorsements comprise approximately one-fifth of all advertisements.³⁵ Celebrity endorsements are used to build trust with potential customers and trigger remembrance of a brand.³⁶ Thus, celebrities have a privacy and financial interest in protecting their photographs (or other individuals' photographs of them) from being sold without permission.

Numerous celebrities and organizations utilize Instagram in their day to day activities. National figures and celebrities such as Barack Obama, Justin Bieber, and Oprah all have Instagram accounts and are affected by what privacy they are afforded.³⁷ Moreover, organizations such as National Geographic, Starbucks, MTV, McDonalds, Nike, and Tiffany & Co. also have Instagram accounts.³⁸ Some of these celebrities and organizations seriously reconsidered their use of Instagram with the change in terms of service in December 2012.³⁹ Following the announcement of the terms of service changes for Instagram, National Geographic

³³ Systrom, *supra* note 24 (Systrom declared that it was not Instagram's intention to sell the photographs, yet the language is vague enough to allow such action); Patel, *supra* note 29.

³⁴ Pallavi Gogoi, *How Much Is a Celebrity Name Worth?*, BUSINESSWEEK (May 7, 2006), <http://www.businessweek.com/stories/2006-05-07/running-on-star-powerbusinessweek-business-news-stock-market-and-financial-advice>.

³⁵ Ira Kalb, *Sexy Celebrity Ads Are The Worst Thing Companies Can Do For Their Sales*, BUSINESS INSIDER (Feb. 21, 2013, 10:35 AM), <http://www.businessinsider.com/despite-what-you-believe-celebrities--sex-doesnt-sell-2013-2>.

³⁶ *What is the Effect of Celebrity Endorsements in Advertising?*, WISEGEEK, <http://www.wisegeek.com/what-is-the-effect-of-celebrity-endorsements-in-advertising.htm> (last visited Feb. 21, 2013).

³⁷ Laurent, *supra* note 9.

³⁸ *Id.*

³⁹ Paul, *supra* note 20.

announced: “We are very concerned with the direction of the proposed new terms of service and if they remain as presented, we may close our account.”⁴⁰

The ability of an application to sell a user’s photos could lead to the potential exploitation of that user’s name. Wil Wheaton professed the concern: “if someone Instagrams a photo of Seth Green walking through an Urban Outfitters, does that mean Urban Outfitters can take that image and use it to create an implied endorsement by Seth? . . . What if the picture is taken by a complete stranger? Who gets final say in how the image is used? The subject, the photographer, or Instagram?”⁴¹ This statement perfectly encompasses the privacy infringement concerns raised by celebrities regarding such applications.

IV. SMARTPHONE CAMERAS REVOLUTIONIZE PROFESSIONAL PHOTOGRAPHY

Smartphone cameras have given rise to a new form of photography by providing a new tool for artists to utilize.⁴² “Smartphone artwork is becoming recognized as a viable new media form, providing an opportunity for veterans to expand their style and reach.”⁴³ In conjunction with the emergence of a new tool, Instagram created a new platform for professional artists and photographers to share their work.

National Geographic signed a brand partnership with Instagram in 2010 with the original goal of sharing photos and offering photography challenges.⁴⁴ Over time, however, the partnership has evolved to “become an integral part of the magazine’s operations, with professional photographers taking over NatGeo’s feed of images, reporting instantly from their travels and photo shoots.”⁴⁵ Furthermore, National Geographic’s photographers have created their own accounts for various purposes: opening a window into their personal lives, sharing their creative process, endorsing their passions, or documenting their notes.⁴⁶ It is evident that

⁴⁰ Karissa Donkin, *Instagram Photo Ownership Fiasco Won’t Hurt App’s Popularity, Experts Say*, THESTAR.COM (Dec. 19, 2012), http://www.thestar.com/life/technology/2012/12/19/instagram_photo_ownership_fiasco_wont_hurt_apps_popularity_experts_say.html.

⁴¹ Gross, *supra* note 32.

⁴² Lauren Russell, *Mobile Phones Give Artists New Tools to Create*, CNN (Sept. 19, 2012), http://www.cnn.com/2012/09/19/living/iphone-art/index.html?iid=article_sidebar.

⁴³ *Id.*

⁴⁴ Laurent, *supra* note 9.

⁴⁵ *Id.*

⁴⁶ *Id.*

Instagram has provided professional photographers the opportunity to form a connection with the public and their fans.⁴⁷

Despite the seemingly amateur nature of the standard smartphone that a majority of people have in their purses or pockets, professional photographers still must use their skills to create high-quality photographs. Richard Koci Hernandez noted: “Apps and filters only change a photo’s look and aesthetic feel. That doesn’t make a better photo. If you put lipstick on a pig, it’s still a pig.”⁴⁸ As such, professional photographers have a greater interest than the standard user in photos uploaded on applications like Instagram. Professional photographers make their living with their photos so, if another entity, such as Instagram, begins selling their photos, it can affect their livelihood.

V. POLICY CONCERNS—SHOULD STRICTER PROTECTION BE AFFORDED TO USERS?

Given that copyright protection only protects individuals as long as they do not relinquish those rights, one must turn to another area of the law for viable protection. What protection exists within contract theory for users of applications?

Traditional Contract Law and the Doctrine of Unconscionability

The *Restatement (Second) of Contracts* states that if a contract or term is found to be unconscionable at the time the contract is made, courts may or may not refuse to enforce the contract.⁴⁹ Unconscionability arises in two prongs: procedural unconscionability and substantive unconscionability.⁵⁰ Procedural unconscionability refers to the bargaining process and how the contract was negotiated⁵¹ or whether terms were buried in fine print.⁵² Substantive unconscionability pertains to the actual fairness of the terms.⁵³ Most courts have held that both procedural and substantive unconscionability are needed for a

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

⁵⁰ Edith Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 480 (2008).

⁵¹ *Id.*

⁵² *Id.* at 482.

⁵³ *Id.* at 480.

contract to be deemed unconscionable⁵⁴ and have adopted a sliding scale determination.⁵⁵ The sliding scale determination indicates that “the more egregious the procedural unconscionability, the less substantive unconscionability need be present, and vice versa.”⁵⁶

The Doctrine of Unconscionability Transposed to Electronic Agreements

It is commonly known that “people who sign standard form contracts rarely read them,”⁵⁷ despite the traditional legal doctrine imposing a “duty to read.”⁵⁸ As such, “clicking, ‘I agree,’ in an online transaction is generally a sufficient manifestation of assent for courts to find that a party has agreed to the terms of the contract, regardless of whether a party understood or read those terms.”⁵⁹ At this point, individuals have entered into a legally enforceable agreement.⁶⁰ Smartphone applications provide terms of service for individuals to read before downloading them to their phones. Often, these individuals do not read the said terms and are then bound by them. These standardized forms can have important, unusual, or unexpected clauses that provide an element of surprise to users. Given that these terms are buried in the fine print⁶¹ of thousands of words,⁶² one could claim a certain degree of procedural unconscionability.

These terms of service then impose unfair terms on users. Substantive unconscionability results most often when the procedural unconscionability allows harsh or one-sided terms in the contract.⁶³ In the realm of Smartphone applications, these terms of service include important terms that people do not read resulting in renunciation of their rights. This is where individuals, oftentimes unknowingly, consent to waive their copyright rights.⁶⁴

⁵⁴ *Id.*

⁵⁵ *Id.* at 482.

⁵⁶ Warkentine, *supra* note 50, at 482.

⁵⁷ *Id.* at 469.

⁵⁸ *Id.* at 476.

⁵⁹ Tomain, *supra* note 30, at 13.

⁶⁰ Ed Bayley, *The Clicks that Bind: Ways Users “Agree” to Online Terms of Service*, ELECTRONIC FRONTIER FOUNDATION (Nov. 16, 2009), <https://www.eff.org/wp/clicks-bind-ways-users-agree-online-terms-service>.

⁶¹ Warkentine, *supra* note 50, at 481–82.

⁶² Luckerson, *supra* note 8.

⁶³ Warkentine, *supra* note 50, at 482.

⁶⁴ 17 U.S.C. § 106A(e) (2006).

With the emergence of theories such as the “terms later” theory,⁶⁵ more responsibility is being placed on the consumers of a service or product to read and understand the terms.⁶⁶ Assistant Professor of Law, Joseph A. Tomain, stated: “the law continues to ignore reality and holds consumers to unfavorable terms when they cannot really be said to have meaningfully consented to all the terms of an adhesion contract.”⁶⁷ Individuals unknowingly abandon rights to their intellectual property when an application in a single line of the terms of service declares that the user’s data can be sold and used in advertisements.

Is the Market an Effective Means of Control?

Copyright laws do not protect the users’ data as the users actively relinquish the protection when clicking to agree to terms of service.⁶⁸ The doctrine of unconscionability fails to protect users from application owners wielding their superior power to take away individuals’ rights. Thus, the question remains, how can users’ interests be protected?

Adam Smith’s theory promulgated in the *Wealth of Nations* illustrates the natural phenomenon of the invisible hand that guides “free markets and capitalism through competition for scarce resources.”⁶⁹ Thus, the market does not need control or regulation because competition will control the market itself. Here, the scarce resources are the users’ data and smartphone photos.⁷⁰ There are other application services that are available now or will emerge in the future to provide alternative means for users to display their photos.⁷¹ Thus, the potential competition can control the original application’s behavior.⁷²

In the case of Instagram in December 2012, the market served as an effective means of control. Photojournalist, Richard Koci Hernandez, stated:

⁶⁵ Roger C. Bern, “Terms Later” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 641 (2004).

⁶⁶ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (holding that a user accepted the terms by using the product after clicking through the license agreement on the screen and is, therefore, bound by them).

⁶⁷ Tomain, *supra* note 30, at 14.

⁶⁸ *Id.*; 17 U.S.C. § 106A (2006).

⁶⁹ *Invisible Hand*, INVESTOPEDIA, <http://www.investopedia.com/terms/i/invisiblehand.asp#axzz2LpvUy2RM> (last visited Feb. 20, 2013).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

I have my fingers crossed that they, Instagram, will listen to the voice of the community and reverse the new terms of service, but I'm not holding my breath . . . I don't feel like debating the terms of service or being too nostalgic about the old days of Instagram, I feel that it's so much better just to take our work and more importantly friendship and conversation to another place that respects our rights and ownership as creators. . . . Let's move the party to a new location.⁷³

Competitors of Instagram made it clear that they had no intention of selling users' photos. Yahoo, owner of Flickr, stated: "(w)e feel very strongly that sharing online shouldn't mean giving up rights to your photos."⁷⁴ The outrage and perhaps, the fear of competition spurred the Instagram creators to revert to the original terms of service. Systrom emphatically declared: "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."⁷⁵ The drama seemed to subside from the Instagram controversy, and resultantly, celebrities and photojournalists continued to use the service.⁷⁶

VI. POLICY CHANGES

Despite the reversion to the original terms, users' rights in their photographs posted through Instagram are still questionable.⁷⁷ The market served as an effective means of preventing Instagram from explicitly removing rights.⁷⁸ However, the threat still exists. As a country, the United States places high emphasis on protecting individuals' rights in their creative works as demonstrated by copyright protection.⁷⁹ Yet, that protection is unknowingly relinquished by most users.⁸⁰

⁷³ Gross, *supra* note 32.

⁷⁴ *Id.*

⁷⁵ Systrom, *supra* note 24.

⁷⁶ INSTAGRAM, <http://www.instagram.com/> (last visited Feb. 20, 2013).

⁷⁷ Patel, *supra* note 29.

⁷⁸ Systrom, *supra* note 24.

⁷⁹ 17 U.S.C. §§ 102–1332 (2006).

⁸⁰ Tomain, *supra* note 30, at 13.

Government Intervention

In order to prevent unconscionability, the government could regulate how terms of service may be altered. These mandates would eliminate procedural unconscionability by declaring that terms cannot be buried in the fine print. Furthermore, public notice requirements would eliminate the ability of such applications to revise policies, create backlash, and then backtrack.⁸¹ Such governmental mandates would protect both users and the applications, by protecting intellectual property and goodwill, respectively. However, such protection comes with a price: administrative costs for the government and taxpayers and compliance costs for the organizations.⁸²

Copyright reform is another avenue that the government could adopt. Copyright law currently protects the rights of authors to attribution and integrity, and contains explicit requirements to effectuate waiver.⁸³ In order to effectuate waiver, the author must expressly agree through a written instrument that identifies the work and the uses of that work.⁸⁴ Currently, it seems that terms of service agreements supersede this protection. Copyright reform, taking into consideration burgeoning technology, could add protection for application users.

Market Control

With the technological advances and the age of social media, individuals are now more connected than ever. The Instagram debacle emerged as a result of blog posts by angered users that spurred a domino effect of outrage online and in the media. To a certain extent, young individuals have an expectation that data may be shared;⁸⁵ however, their views change when another entity profits from such data sharing. Instagram users were outraged and educated each other about the issue, and encouraged behavior to facilitate change. Celebrities and photojournalists encouraged boycotts of the service, indicating that they would “move the party to a new location.”⁸⁶

⁸¹ Paul, *Instagram Updates*, *supra* note 21.

⁸² Peter P. Swire, *Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information*, in *Privacy and Self-Regulation in the Information Age* by the U.S. Department of Commerce, SOC. SCI. RES. NETWORK, Aug. 15, 1997, at 1, 5, available at http://papers.ssrn.com/SOL3/papers.cfm?abstract_id=11472.

⁸³ 17 U.S.C. § 106A (2006).

⁸⁴ *Id.*

⁸⁵ Donkin, *supra* note 40.

⁸⁶ Gross, *supra* note 32.

The downfall to market control in this situation is that true market control is financially driven.⁸⁷ These applications are free services, and such changes in terms of service are made to generate income for the application through advertisements by using user data in conjunction with advertisements.⁸⁸ Douglas Rushkoff, noted: “For if we’re not paying in money, we’ll end up paying with something else.”⁸⁹ Hence, the market is not an entirely effective means of control.

A Proposed New Policy

Given the limitations of both governmental regulation and market control, there needs to be some hybrid of the two for optimal user protection. Governmental regulation should intervene to ensure that the unconscionability in such contracts does not abolish users’ rights in their property. The emergence of smartphones and camera phones has revolutionized photography and art in general.⁹⁰ The convergence of technology and new art methods in the form of applications has shown that current copyright law is not equipped to provide adequate protection. Users rely on terms of service when they download and begin using the application. Allowing owners of the applications to be able to change the terms of service and retroactively remove the user’s interest from the photographs contravenes the protective nature of copyright law. Copyright vests when the work is created⁹¹ and waiver must be specific.⁹²

Copyright protection should be explicitly extended to cover photographs produced by smartphones. It should not be possible to effectuate waiver of said copyright through buried lines in terms of service. Thus, there should be governmental regulations indicating how and to what extent terms of service can be changed. These regulations should be used to protect individuals’ reliance interests so that applications cannot retroactively claim an ability to sell users’ data that was uploaded when such ability was not provided for in the terms of service. From that point, the market control will regulate the actions of smartphone applications through the innovation of new and emerging technologies and the competition provided by existing applications.

⁸⁷ Swire, *supra* note 82, at 1.

⁸⁸ Paul, *Instagram Updates*, *supra* note 21.

⁸⁹ Rushkoff, *supra* note 15.

⁹⁰ Russell, *supra* note 42.

⁹¹ 17 U.S.C. § 102 (2006).

⁹² 17 U.S.C. § 106A (2006).

CONCLUSION

Smartphone technology has affected all aspects of life from everyday communication to social connections to the production of art. Smartphones have enabled individuals to photo-document their lives and instantly share those life moments with the world. Use of such technology should not benefit the application owners at the expense of the users. The Instagram controversy from December 2012 perfectly illustrates the need for user protection. The current legal environment does not offer adequate protection in the changing technological environment. Steps must be taken to continue encouraging technological advancement while protecting users' data and interests.