

# The Right to Terminate

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In the last few years, more than 16 billion images and movies have been uploaded to the Instagram photo application. All of these photos and videos are licensed in a way that appears to give the company an extremely broad right to use the material. This includes the right for Facebook (Instagram's owner) to sell the images with very little restriction. The license also appears to severely limit the rights that are retained by the photographer, including the right to remove the photos and videos from the service.

The Instagram Terms of Use are written in a way that creates a walled garden — a private collection of the world's visual legacy that is privately owned and available for commercial exploitation with little regard to the wishes of the millions of people who created or appear in the photos. The TOU allows Instagram (also called the Service) to sell or license photos without providing any compensation to the photographer.

Most importantly, the Instagram Terms of Use creates a Hotel California for your images. You can check them in, but you can't check out. Once uploaded, Instagram asserts the right to make your photos and your identity part of the Service forever. Users also agree to pay for the company's lawyers if anyone in a photo ever sues the company or sues anyone to whom the company licenses the photos.

Additionally, we believe that there is a strong possibility that the imbalanced Terms of Use embodied in this agreement may become standard practice for social media, particularly for content that is uploaded directly to a service. We're already seeing companies which are building Facebook-compatible technologies adopt Terms of Use modeled on Instagram.

In this document, we examine the meaning of the Instagram Terms of Use, and we outline some of the implications of the document. We then propose a re-balancing of the agreement that can be achieved by a simple right to terminate. If the Instagram service no longer meets the needs of the Instagram user, we propose that the license and liability protection given to Instagram may be terminated by the user.

## The rights you grant to Instagram

The Instagram Terms of Use appear to grant to the company a very broad package of rights.

Of course, this includes the right to reproduce your images and videos, with basically no limitation, as long as it is part of the Instagram Service. (More below)

The TOU also allows Instagram to sublicense the images at their will, and with no payment to you. This means that the photos can be lent, sold or leased to whomever the company chooses, for whatever purpose they choose, as long as it is part of the Service.

The TOU also allows Instagram to publish these images using your identity (if you are a person) or your brand (if you are a company.) Again, you exercise limited control over how this is done into the future.

You also agree to allow Instagram to make use of the information it knows about you — who your friends are, what you like, who your customers are, where you go, what products you buy or research, where you shop, what organizations you belong to and more. Because Instagram is owned by Facebook, it can have access to all information that Facebook collects about you. And, again, you agree that you have limited control over how Instagram uses that information.

You agree that you have secured permission (model, property and artwork releases) from anyone or anything in all photos, and that no photo violates any right of property or privacy. You also agree that you will pay Instagram's legal bill if they — or anyone they sell the picture to — ever gets sued for the use of any of the photos.

You agree that, if you are under 18, your parents have also agreed to all these grants of rights, and that your parents agree to assume any legal liability.

You also agree that the company may change anything it wants about the Service at any point in the future, and these changes will not limit any of the rights you have granted above. Basically, the Service may become anything that the company wants it to become. This might include a subscription service, a feed for publishers, a publication (or many publications), a photo licensing service, an advertising agency, a data mine for security services — whatever.

You agree that you will never participate in any class action suit against Instagram.

You agree that you have granted these rights and protections to Instagram and its licensees *forever*, with no ability to terminate the agreement.

I maintain that this is an extremely broad grant of rights, especially considering that you agree to the TOS in perpetuity, and that you agree to open-ended indemnification of the company.

## The Service, the Account, the Content, and the Data

In order understand the agreement, let's look at the different components. Although they are not defined in great detail, we can look at the TOU and see some broad outlines.

**The Service** is defined in the TOU as the Instagram website as well as any applications that are made available by Instagram. Instagram specifically reserves the right to change the Service in any way, at any point in the future. You agree in the TOU to agree to all future changes. There appears to be no limitation on what the Service can become.

**Content** is defined extremely broadly as anything you upload to the Service, create in the Service, or link to the Service. This includes your username, photos, audio, video, likes, and comments, as well as lots of stuff Instagram does not currently support, such as links and apps.

**The Account** seems to reference the user's access to the Service and the Content, and is separate from the actual Content and Data. The account may be deleted, but the Content may remain on the Service, presumably at the will of the company. It appears that the Account is simply the means by which you can upload content to the Service or access content on the Service.

The Instagram TOU refers to **Data** that may be associated with your account several times, but never defines it in any way. Data probably refers to metadata that is uploaded with photos and videos such as the date and location taken. It probably also includes other people's likes and comments, as well as internal Instagram data, such as the list of people who have viewed an image.

The Instagram TOU only allows you to have control over your account — your access to the material. You exercise little practical control over the content or the data, and no control at all over the Service.

## What you can and can't terminate

Now let's look at what the TOU says about what can and can't be terminated. There are several references to termination, but they all deal with the termination of *your* rights, and never Instagram's rights.

- You may terminate your account, but that does not terminate Instagram's rights to use the content or data associated with the account. Essentially, you may relinquish control over the material in your account and pass it over to Instagram for use in the service.
- Instagram may also simply take the account away from you, for any reason, or for no articulated reason.
- You do not have the right to delete content or data from the service.
- You may change the privacy settings of content, which currently allows you to limit viewing to people in your network. However, there is no stipulation that the privacy policy will remain unchanged. Indeed, you specifically agree that Instagram may change the Privacy Policy at any later date, in any way, for any reason.

## Explicit versus Implicit

As part of this discussion, it's important to make a distinction between implicit and explicit permission. These are two pretty different things.

If you post nearly anything to the web in unencrypted form, you are granting implicit permission for it to be reproduced and stored in at least some way. At minimum, you are allowing the bits of the file to be transferred from computer to computer as the file travels through the network of computers that makes up the internet. This does not mean that you have granted anyone explicit permission to store, display or sell the image. Nor do you specifically grant anyone permission to publish internet content in your name. As a matter of practical reality, however, you have granted the entire internet implicit permission to store, transfer and display the content.

Explicit permission is a really different thing. This is particularly true when it is accompanied by liability protection. Explicit permission allows photos and other information to be aggregated and used in a much larger number of ways. It becomes much more difficult to restrain a company's use of your information when you've granted those rights explicitly.

The Instagram contract outlines a very broad set of explicit rights with very little control offered to the creator or subject of the content. It goes pretty far beyond TOU assertions of comparably sized services. It's the first large-scale service I know of that requires you to agree to the sanctioned, sub-licensable use of your photos and your data in perpetuity.

## Linked Content versus Uploaded Content

One reason that the Instagram contract is so valuable to the company is that it mostly encompasses *uploaded* content, rather than *linked* content. Much of what you see on most social media sites is linked content. The person who is responsible for the material entering the system is a user who does not have the legal right to grant such permission.

Adding someone's YouTube video to your Facebook page, or pinning a magazine image to your Pinterest board does not create a defensible grant of license in court. It's clear to the social media company that Joe User does not have the rights to most magazine images, no matter what the TOU says.

Uploaded content is a different story. It is much "cleaner" since the vast majority of it originates with mobile phone cameras, and carries metadata that ties it to a photographer, a date, and a location. It is often provided by a user who is also the creator, which creates a much more defensible license.

A large, clean image collection can be turned into a commercial service far more successfully than a bunch of links can. Linked content carries implicit permission for use — it's already published somewhere else on the internet. But it generally carries a low level of explicit permission. Uploaded content, by contrast, carries a much larger probability of valid explicit permission.

## Human Shields

The Instagram TOU contains some important legal protections for the company. When you upload photos to Instagram, you agree that anyone in the photo has agreed to the broad use of the photos, including Instagram's right to license them to others. The account holder explicitly agrees to pay for Instagram's lawyers if there is any "breach" of that warranty.

In practical terms, this means that you agree that Instagram can do anything with the photos you upload, and that everyone in the photos is cool with that. If the photo is used or licensed in a way that bothers the subject, the Account holder will be paying the legal fees and the settlements before Instagram will.

Essentially, this sets up the Account holder as a human shield who stands between the subject of the photo and the company, in the case of a legal dispute.

## A Walled Garden

The Instagram TOU seems to be written so that it can create a privately held content repository of unprecedented size. Photos may only be accessed through a user account, allowing the company to have nearly total control over the content. Content that is on Instagram is simply not available outside the service.

The Instagram TOU does not allow you to even gather information about your own photos in a comprehensive way. You don't have the rights to the comments about your photos. Services that can gather up information such as likes and comments are explicitly forbidden. While the Instagram TOU states that you own your photos and videos, the company does assert that it has sole ownership of the information about your photos.

This kind of closed ecosystem runs counter to what many people expect from the internet.

## How is this different from Google or the Internet Archive?

Okay, so anyone who knows about the internet understands that it's really difficult to "remove" any material from the web. Google Images seems to be able to find photos that were pub-

lished long ago. And the Internet Archive creates copies of huge numbers of web pages and makes them available for free, with no apparent time limit. How is Instagram different?

There is at least one important difference between services like Google Images and Instagram: There is generally no contract between Google and the person who uploaded the images it displays. Google is simply indexing content and showing it to you. The company claims an implicit license to the work, but does not have an explicit license.

Other Google services that allow direct user uploads (such as Google Docs or Google Drive) also have open-ended Terms of Service, but they are significantly less aggressive than the ones that Instagram claims. Google does not claim an explicit right to sublicense your content, nor does it ask for explicit liability protection. Flickr and MySpace both have Terms of Service that make explicit provisions for termination of the agreements.

What we see with Instagram is a significant extension of the licenses that we normally see in internet services, in my opinion. Offering full indemnification for any commercial use, it dramatically extends the rights claimed when compared to other major distribution services.

Okay, so what should be done about this? In the next sections, let's outline the practical needs and desires of social media services, and propose a more balanced relationship between user and service.

## **Whereas...**

It's clear that services like Facebook, Instagram and Google all provide valuable services that are expensive to support. There should be no expectation that these services will continue to be available for free, or will be supported only by a soft advertising model.

It's also clear that these services must create an environment where users agree to refrain from copyright and privacy violation, and shoulder some of the responsibility to act in accordance with the law.

And it's also clear that these services must be allowed to evolve in order for it to have long-term viability. Any user agreement must take this into account

And, finally, it's also clear that the simple act of distributing *anything* on the internet involves the transfer of intellectual property from one service to another as the photo, video or text propagates through the web.

## Free isn't free

The Instagram service is being provided at no transactional cost to the users. Clearly this is unsustainable in the long term. The servers and bandwidth that are necessary to make Instagram work are expensive to implement. The company will only survive if it can create a business model that provides a profitable return on investment. One way or another, someone has to pay.

It's clear that internet-based companies need flexibility to create these business models. Many compelling new services evolved from completely different origins. The ability to change a business model is one of the most valuable features of development in the internet age. In the change from free to profitable, companies may evolve in ways that are objectionable to large chunks of the user base.

As a professional photographer, I understand the value of licensing images. I believe that Instagram and other photo services are poised to serve a multi-billion dollar market. There is a new appetite for photographs that is truly unprecedented. Editorial and advertising services are yearning for access to the photo stream. I'd like to see this done with some mechanism for revenue sharing, as services take these photos to the market. Other services like Eye Em are building this machinery in, while Instagram seems to be specifically excluding a revenue share.

One important function of Terms of Use is to define the limits of what a service may become, and how users may exit the service if it no longer suits them. If, as my reading indicates, Instagram intends to become a commercialized content-licensing service that does not pay the creators, many users will object. And many will be surprised to find out how little control they have over their photos, data, screen names and identities.

## The Right to Terminate

I think agreements that facilitate the needs listed above must have some balance, and I see a bright line where I think that balance must be achieved. That balance should be tied to the intentional termination of the explicit protections the agreement provides.

I do not believe that aggressive indemnification clauses should extend beyond the intentional termination of the account. Nor do I believe that explicit rights to sublicense content should extend beyond intentional termination. And I believe that an individual should have the ability to prevent a company from assuming someone's identity once an account has been intentionally terminated.

As services become larger repositories of intellectual property, the balance of power shifts away from the user and toward the company. The only way to ensure a fair balance, in my opinion, is to let the user remove his permission for the explicit use of his identity and content, as well as his liability protection for the service.

I realize that creating language to achieve these objectives is not easy. Our current language of licensing is tied to the old model of publishing, where publication could be easily tied to delivery on hard goods or over scarce public airwaves. We simply don't have a good way to describe propagation over internet servers that distinguishes it from sales on paper.

And I also acknowledge that we don't want the public record as embodied in social media to simply disappear wholesale. Note, for instance, that I use the term "intentional termination" so that accounts or identities may survive the death of their users, if that is their will.

But it should be possible to create a user agreement that allows the individual to have some control over the licensable use of content, as well as the liability protection granted. Indeed, this has been standard practice for most crowd-populated content services on the web until now. Users should insist on this, and courts should hold that grants of rights that exceed this are not enforceable.

## Why this Matters

One way or another, these issues will be settled in the coming years. There are giant unanswered questions regarding privacy, right-to-exploit, liability, use of identity, and cultural preservation, to name but a few.

They may be settled by standard practice in Terms of Use, as each service slowly adopts a more and more inclusive package of company rights. Or perhaps they will be decided in courtrooms as these agreements are challenged. And they also may be decided by legislative bodies, as governments see an imbalance in these agreements and craft legislation that limits what can be included. Of course, both litigation and legislation could come down on the side of expansive rights held by the service providers.

Is it going to be possible for individuals to exercise control over their images, their online profiles and even their identity in the online world? If we would like it to be so, we need to begin to set the limits of what we consider to be balanced, moral and justifiable. That process begins, for me, with a discussion of the limits granted to these services and the rights to terminate your agreements as outlined here.

## So, What's next?

Are the Instagram Terms of Service simply going to become the new normal? Certainly Facebook would like it to be so. The TOU confers some very valuable rights to the company in an exploitable package. It also sets the stage for a favorable litigation outcome when these issues come before the court.

I see several important prerequisites for change.

**People have to care.** The new rights profile *will* become the new normal if too few people care enough to push back. While many people are sanguine about releasing their information into the wilds of the internet, I think there are fewer who are totally okay with conveying those explicit internet rights to a single company.

**People have to see how this is different.** Many people I talk to think all internet Terms of Service are inscrutable legalese that is stacked against them. Very few people read the terms,

and fewer understand them. But there is a difference here. I believe this document lays that out pretty clearly.

**People have to know what kind of change to ask for.** It does little good to stand up and scream that a business practice is unfair. “Unfair” is not specific and is not actionable. The proper response will outline what specifically is imbalanced, and will propose a remedy. Again, I think I’ve laid that out reasonably well here, proposing that contracts with social media companies should have a meaningful termination clause.

**People need to take action.** Once you know what your objectives are, it’s easier to understand what kind of action can help you reach them. This part is not contemplated by this document at all. I hope that this can be a crowdsourced solution: a multi-faceted effort to raise awareness that spreads the word and asks for a more balanced approach.

The first-level advocates for change include photographers, stock agencies, media companies, and related associations that have a greater understanding of the value of exploitable licenses. But I think they could immediately be joined by advocates for privacy and childrens’ rights. The issues here go far beyond the right to commercialize photography and well into the commercialization and control of identity.

It will be interesting to see if anyone cares enough to act.

*Peter Krogh will be moderating a panel discussion on this issue at the 2013 PhotoPlus Expo in New York in October.*