



Instagram Alters Terms To Allow Sale Of User Photos For Ads

Law360, New York (December 18, 2012, 3:32 PM ET) -- [Facebook Inc.](#)-owned photo-sharing service Instagram amended its terms of use Monday to grant it the power to sell pictures and other content uploaded by users to advertisers and other third parties, a move that elicited uproar from concerned users and leaves the company vulnerable to legal challenges.

The changes, which do not go into effect until Jan. 16, include new language stipulating that Instagram can sell users' photos to the highest bidder. Users would not be eligible for a cut of any sale, and are unable to opt out unless they delete their accounts before the new policy goes into effect.

"Some or all of the service may be supported by advertising revenue," the new terms state. "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 user name, 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."

Numerous Instagram users vented their frustrations in online forums and microblogging platforms like [Twitter](#), with hacker organization Anonymous calling on its 789,000 Twitter followers to boycott Instagram because of the changes.

[Merchant & Gould PC](#) partner William Schultz told Law360 that Facebook and Instagram could encounter legal problems because of the change, particularly regarding photos of minors.

Even though Instagram users are required to be at least 13 years old, there is nothing preventing an adult user from uploading a photo of a child 12 or younger without permission from the minor's parent, according to Schultz.

"This is Instagram's most vulnerable spot, especially in the wake of the recent school shooting in Connecticut," Schultz said. "There is a strong sense right now that minors need to be better protected. Anytime you are dealing with photographs, you are dealing with minors. Facebook better have some protections internally or it could face significant legal challenges."

Users could also challenge the policy as unconscionable and argue that it places burdens on a user that a typical account holder would not understand, according to Schultz. Some account holders may never hear of the new policy before it goes into

effect, and could claim that Instagram did not provide significant notice before such a significant change.

The new policy also raises liability issues for users, who may be held accountable for widespread copyright violations. If a user uploads a copyright-protected photo sold to advertisers and the copyright holder sues Facebook, a strong indemnification provision in the new terms grants Facebook the right to turn around and go after the user who originally posted the photo for intellectual property violations, according to Schultz.

"There is a significant increase in potential liability for users who upload their photos," Schultz said. "The users have to be aware that they are potentially on the hook for this."

A representative from Facebook was not immediately available for comment Tuesday.

Providing for the sublicensing of user content is not an uncommon practice, according to Schultz, who said that he has included similar provisions when writing terms and services for other companies.

"I think users would be surprised that so many other companies have these same types of provisions," Schultz said. "Facebook and Instagram are just so popular that they are going to run into more headwind in terms of public perception."