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INSTA-FRINGEMENT: WHAT IS A FAIR USE ON SOCIAL MEDIA?

CAROLINE E. KIM

ABSTRACT

The phenomena of the Internet reinforced the need for well-defined intellectual property rights. In turn, the enactment of the General Data Protection Regulation emphasized the importance of social media and privacy. However, the problem remains that the law has not yet fully embraced the relationship between many technological advancements and social media. The widespread use of social media illustrates that contemporary copyright law must address what constitutes “shareable content.”

This article examines what social media platforms can do in order to provide a clearer definition of what constitutes a “fair-use” on their platforms. A data controller such as Instagram must provide more transparency with respect to the definition of “shareable content.” Additionally, the primary policy objective of this article is to enhance the general public’s knowledge about copyright law, and to ensure that copyright protections are retained for social media influencers.

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I. INTRODUCTION.....	103
II. BACKGROUND.....	109
A. The Scope of Copyright in the Instagram Age	109
B. The Digital Millennium Copyright Act and “Blanket Immunity”	111
C. The Safe Harbor Provision and Instagram’s “Terms and Services”	111
III. ANALYSIS	113
A. The Fair Use Debate	113
B. Fair Use and the Limitations of the DMCA.....	114
C. From an Art Context to a Commercial Context	117
IV. PROPOSAL.....	119
A. “Secondary Transformative Use” in an Instagram World.....	119
V. CONCLUSION.....	122

INSTA-FRINGEMENT: WHAT IS A FAIR USE ON SOCIAL MEDIA?

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I. INTRODUCTION

*“I don’t know why people are so keen to put the details of their private life in public; they forget that invisibility is a superpower.”*¹ This was the reaction of the anonymous graffiti artist and political activist Banksy.² Anonymity cannot escape the intrusive gaze of social media and Big data.

In the Age of the Internet,³ social media is the primary channel for interaction and cultural engagement.⁴ The proliferation of communication technology has only increased society’s tendency toward posting about personal interests and day-to-day activities.⁵ Today, communication has shifted from person-to-person communication, to screen-to-screen communication.⁶ Social media practices have created a lucrative marketplace for social media influencers (“Influencers”)⁷ in which popular posts

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¹ David Fear, *Street (il)Legal: Q&A with Banksy*, TIMEOUT.COM (Apr. 12, 2010), <https://www.timeout.com/newyork/film/street-il-legal-q-a-with-banksy>.

² *Banksy*, BIOGRAPHY.COM (Mar. 14, 2018), [https://www.biography.com/people/banksy-20883111?_escaped_fragment_="](https://www.biography.com/people/banksy-20883111?_escaped_fragment_=).

³ *Internet*, Black’s Law Dictionary, (10th ed. 2014). The Black’s Law Dictionary defines the word “Internet” as “[a] global network connecting countless information networks and computing devices from schools, libraries, businesses, private homes, etc., using a common set of communication protocols.”;

⁴ 47 U.S.C. § 230(f)(10)(1998). In contrast, Section 230 of the Communications Decency Act defines the word “Internet” as “the international computer network of both Federal and non-Federal interoperable packet switched data networks.

⁵ Karissa Bell, *The future of Google search looks a lot like social media*, MASHABLE (Sept. 24, 2018), <https://mashable.com/article/google-search-updates-social-media/#Ddlaiw7XniqL>.

⁶ Sean Bryson, *Is 5G technology ready? Mobile World Congress 2018*, CISCO.COM, <https://www.cisco.com/c/en/us/solutions/enterprise-networks/5g-at-mobile-world-congress-2018.html> (last visited Sept. 30, 2018); Katy Steinmetz, *Teens Are Over Face-to-Face Communication, Study Says*, TIME (Sept. 10, 2018), <http://time.com/5390435/teen-social-media-usage/>.

⁷ RAYMOND S. NICKERSON, EMERGING NEEDS AND OPPORTUNITIES FOR HUMAN FACTORS RESEARCH, 177, 187 (Raymond S. Nickerson ed., 1995).

⁸ Tom Ward, *How to Use Instagram Stories: A Guide For Brands*, FORBES (May 18, 2018), <https://www.forbes.com/sites/toward/2018/05/18/how-to-use-instagram-stories-a-guide-for-brands/#56fd43415b94> (explaining that “[a] takeover is when an influencer takes over a brand’s account for a specific period of time.”).

online are exchanged for monetary value in the physical world.⁸ Undoubtedly, influencers can have a profound impact when using their newsfeeds (“feeds”) for advertisement or promotional purposes.⁹

Contemporary behavior on social media is largely-comprised of incessant posting, unfiltered sharing, and pervasive data collection.¹⁰ As a result, social media has become increasingly difficult to regulate, police, and authenticate.¹¹ From an intellectual property standpoint, the problem is that the law has not fully adapted to the advances in social media and technology.¹² Courts have confronted neither the legal issues regarding social media’s terms and conditions, nor the copyright expectations of social media influencers.¹³ Consequently, the rules concerning the use of intellectual property remain unclear in how they pertain to social media and content-sharing.

The increasingly widespread use of social media demonstrates that copyright law must address what constitutes “shareable content.” Similarly, Instagram must take responsibility for providing a clearer definition of what will constitute a “fair-

⁸ Mark Abadi, *Brands are direct-messaging 13-year-olds on Instagram to pay them \$5 or \$10 at a time to promote products without a contract*, BUSINESS INSIDER (Aug. 22, 2018), <https://www.businessinsider.com/instagram-influencers-teenagers-2018-8> (stating that in 2017, the influencer industry was worth \$1 billion dollars); Myelle Lansat, *A woman who pays Instagrammers and YouTubers \$500 to \$30,000 per post on behalf of brands like Cosmo and Esquire has a go-to formula for calculating what they’re worth*, BUSINESS INSIDER (Aug. 9, 2018), <https://www.businessinsider.com/how-instagram-youtube-influencers-are-paid-2018-8>.

⁹ Max Chafkin, *Confessions of an Instagram Influencer*, BLOOMBERG BUSINESSWEEK (Nov. 30, 2016), <https://www.bloomberg.com/news/features/2016-11-30/confessions-of-an-instagram-influencer>. Influential content creators (“Instagrammers”) with large followings may be paid for their posts through marketing partnerships or sponsorships. “Insta-famous,” instagrammers participate in advertisement campaigns in a broad range of industries, such as fashion, lifestyle, food, luxury, and sports brands.

¹⁰ JAMES GRIMMELMANN, INTERNET LAW: CASES & PROBLEMS 41-42 (7th ed., 2017) (ebook); Natalya N. Bazarova, *Sharing Our Lives Online: Risks and Exposure in Social Media*, 60 J. BROAD. & ELEC. MEDIA 190, (2016) (noting, “[e]very day hundreds of millions of people share their personal information via social networking, blogging, and micro-blogging platforms and tools, making themselves known to others in a way that is both public and private.”).

¹¹ Lynette Dicey, *Can social media be regulated?*, INVESTORS MONTHLY, (Mar. 24, 2017), <https://www.businesslive.co.za/redzone/news-insights/2017-03-24-can-social-media-be-regulated/> (pointing out that “[w]hile there are valid reasons for the call for social media regulation, the implementation and enforcement of any such regulation could be prohibitively expensive and problematic.”). Despite rules set forth by social media platforms and copyright laws, the question remains open on how to implement social media regulation and content authentication; Maeve Duggan, *Mobile Messaging and Social Media 2015*, PEW RES. CTR., (Aug. 19, 2015), <http://www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015/> (reporting that online adults had a “28% increase in the use of Instagram (up from 13% in 2012)”).

¹² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2017) (Alito, J., concurring) (noting that “[t]he Court should be more attentive to the implications of its rhetoric for, contrary to the Court’s suggestion, there are important differences between cyberspace and the physical world.”). The gaps in intellectual property, trademark, and privacy laws have grown in exponentially since the evolution of social media networks. Although the Supreme Court has acknowledged that the law applies to social media networks, the Court has not provided a precise definition for what constitutes a social media site.

¹³ *Proprietary Rights in Content on Instagram*, INSTAGRAM, <https://www.instagram.com/about/legal/terms/before-january-19-2013> (last visited Oct. 3, 2017); Chris Taylor, *Instagram Will Basically Sign Your Life Away*, MASHABLE (Dec. 17, 2012), <https://mashable.com/2012/12/17/instagram-signs-your-life-away/#5uZpVUoAdGq6>.

use” versus an “infringement” under its “Terms of Use.” This article discusses what constitutes “shareable” content on Instagram, as Instagrammers often act as the gatekeepers of the modern online community.¹⁴ The issue is whether Instagram influencers (“Instagrammers”) retain a copyright to their User-Generated Content (“UGC”) when they explicitly inform the public that it cannot use their image without permission.¹⁵

Unauthorized reposting and sharing is a problem because social media is often viewed as “free for the taking.”¹⁶ In particular, when media outlets post unauthorized content, Instagrammers lose control over the reproduction and distribution of their works.¹⁷ The misappropriation of infringed content not only interferes with an Instagrammer’s revenue stream, but also encourages similar appropriative conduct.¹⁸ Given the frequency of repeat offenders, and the rapid advancements in application technologies (“Apps”), the primary concern is how to protect the exclusive copyrights of individual Instagrammers, and, accordingly, the value of their work.¹⁹

An Instagrammer’s post can go viral within seconds.²⁰ Most recently, Instagram launched a new “verification” feature that acknowledges an Instagrammer’s

¹⁴ *Guidelines: Learn how to use Instagram’s assets*, INSTAGRAM, <https://en.instagram-brand.com/guidelines/general> (last visited Oct. 5, 2017). The fundamental policy behind copyright is to create laws that balance both private and public interests, namely the sharing and reproduction rights between an original creator, an audience, and a future creator. Under Instagram’s Legal Guidelines on how to use its assets, the application (hereinafter “App”) provides the following: “You should not use or claim rights in Instagram in a way that is confusingly similar to or dilutive of Instagram, including as, or as any part of, a trademark. Do not use Instagram’s trademarks for anything that would be inconsistent with Instagram’s terms or Community Guidelines....”

¹⁵ Instagram, *supra* note 13 (stating that “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.”).

¹⁶ *Social Media Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/>.

¹⁷ 17 U.S.C. § 107 (1992); 17 U.S.C. § 1201 (1999); Instagram, *supra* note 13. According to the Proprietary Rights in Content on Instagram clause, “[b]y 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,” which includes, 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.”

¹⁸ RJ Vogt, *Instagram Influencer Says PopSugar Stole Posts for Profit*, LAW360 (June 25, 2018), <https://www.law360.com/media/articles/1057198/instagram-influencer-says-popsugar-stole-posts-for-profit>.

¹⁹ Instagram, *supra* note 13. The Instagram Services “contain Content of Instagram (‘Instagram Content’),” which is “protected by copyright, trademark, patent, trade secret and other laws.” All rights to Instagram Content and the Instagram Services are owned and retained by Instagram. Instagram “grants [users] a limited, revocable, non-sublicensable license to reproduce and display the Instagram Content (excluding any software code) solely for your personal use in connection with viewing the Site and using the Instagram Services.”

²⁰ Jingjing Jiang, *Millennials stand out for their technology use, but older generations also embrace digital life*, PEW RES. CTR. (May 2, 2018), <http://www.pewresearch.org/fact-tank/2018/05/02/millennials-stand-out-for-their-technology-use-but-older-generations-also-embrace-digital-life>; Mayuran Sivakumaran & Pablo Iacopino, *The Mobile Economy 2018*, at 12, GSMA INTELLIGENCE (Feb. 26, 2018), <https://www.gsmaintelligence.com/research/?file=061ad2d2417d6ed1ab002da0dbc9ce22&download>. Globally, there are over 5 billion people with mobile phone connections.

authenticity and influence on society.²¹ As digital celebrities, Instagrammers are relevant because they connect and engage with their vast audiences by sharing their personal interests.²² Instagrammers set themselves apart from others by posting content that is relatable to large audiences, which is key to companies and marketing agencies.²³ In this way, Instagrammers are rated by their audience size, resonance, outreach, and propensity to generate views.²⁴ By 2020, Influencer marketing is expected to reach approximately \$10 billion.²⁵

With the rise of the influencer industry, courts have been introduced to the complexity of litigating intellectual property issues that involve the rights of social media influencers and copyright infringement.²⁶ To date, it remains unclear how copyright laws should apply to social media and content-sharing, as copyright issues are notoriously vague.

Within the past few years, legal issues related to Instagram, UGC, and User-Found Content (“UFC”) have prompted numerous copyright lawsuits.²⁷ Most famously, artist Richard Prince (“Prince”) challenged the boundaries of copyright law by presenting the question of how the Fair Use Doctrine relates, or should relate, to Instagram.²⁸ In 2014, Prince exhibited an art installation called “New Portraits” at the Gagosian Gallery.²⁹ For his “New Portraits” installation, Prince printed photographs of various Instagram photos and enlarged them on canvases, adding his

²¹ Lauren Meltzer, *How Instagram’s verification rollout will impact social media influencers*, ABC NEWS (Sept. 11, 2018), <https://abcnews.go.com/Business/instagrams-verification-rollout-impact-social-media-influencers/story?id=57660490>.

²² *Id.*

²³ *Id.*

²⁴ Clare O’Connor, *Forbes Top Influencers: Meet The 30 Social Media Stars of Fashion, Parenting, And Pets (Yes, Pets)*, FORBES (Sept. 26, 2017), <https://www.forbes.com/sites/clareoconnor/2017/09/26/forbes-top-influencers-fashion-pets-parenting/>.

²⁵ Kevin Tran, *Instagram influencer posts doubled in 2017*, BUSINESS INSIDER (Jan. 18, 2018), <https://www.businessinsider.com/instagram-influencer-posts-doubled-in-2017-2018-1>.

²⁶ *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 215 (E.D.N.Y. 2013); *Southgate v. Facebook, Inc.*, Civil Action No. 1:17-cv-648 (AJT/IDD), at 3 (E.D. Va. Nov. 14, 2017); *2Die4Kourt v. Hillair Cap. Mgmt., Ltd. Liab. Co.*, 692 F. App’x 366, 268 (9th Cir. 2017); *Opperman v. Path, Inc.*, No. 13-cv-00453-JST, at 11-12 (N.D. Cal. May 6, 2013); *Instagram*, *supra* note 13.

²⁷ Francisco Javier Careaga Franco, *Opperman v. Path: Privacy Class Action Against Twitter, Yelp, Instagram, Foursquare May End in \$5.3 Million Settlement*, JOLT DIGEST (Apr. 19, 2017), <https://jolt.law.harvard.edu/digest/privacy-class-action-against-twitter-yelp-instagram-foursquare-may-end-in-5-3-million-settlement>. “Instagrammers” are influential content creators with large followings, who may be paid for their posts through partnerships or sponsorships for purposes of advertisement.

²⁸ *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013). Notably, Richard Prince was sued in the recent case, *Cariou v. Prince*, where the Second Circuit held that “all except five (*Graduation*, *Meditation*, *Canal Zone (2007)*, *Canal Zone (2008)*, and *Charlie Company*) of Prince’s artworks make fair use of Cariou’s photographs. We express no view as to whether the five are also entitled to a fair use defense.”; *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006); Andrew R. Chow, *Copyright Case Over Richard Prince Instagram Show to Go Forward*, N. Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/arts/design/richard-prince-instagram-copyright-lawsuit.html> (reporting “Mr. Graham first filed a cease-and-desist order against Mr. Prince, and then a lawsuit in 2015.”). Prince’s “New Portraits” installation featured a photo titled “Rastafarian Smoking a Joint” by Photographer Donald Graham via print from another Instagram user’s account.

²⁹ Chow, *supra* note 28. In July of 2017, a federal judge in New York ruled that the lawsuit against Prince for copyright infringement would not be dismissed and would continue.

own “comments” below the images.³⁰ The installation led to a lawsuit against Prince for copyright infringement by photographer Donald Graham.³¹

The debate on fair use has progressed from the art context to the commercial context. Earlier this year, a Los Angeles-based influencer, Nita Mann (“Mann”), filed a Complaint against a popular media and lifestyle company called PopSugar.³² Mann filed the proposed class-action on June 25, 2018, alleging that PopSugar’s unauthorized posting of Mann’s content violated Mann’s rights under the Digital Millennium Copyright Act (“DMCA”), and unlawfully appropriated her images without permission.³³ She further alleges that [b]y misappropriating the infringed images, PopSugar also impeded the growth of [Batra’s] and Class members’ social media presence on authorized platforms.³⁴ Alternatively, celebrity Jessica Simpson was sued by a media company for posting a picture of herself taken by a paparazzi on her Instagram and Twitter accounts.³⁵

In light of recent litigation, Instagram should revise its “Terms of Use” and provide concrete examples of what constitutes “shareable” content.³⁶ The use of broad language in Instagram’s “Terms of Use” should not allow the popular platform to arbitrarily implement its policies. Specifically, Instagram’s “Terms of Use”³⁷ states that users own the photographs, images, or content that they post.³⁸ Nevertheless, the jurisdictional limitations that govern the Internet may permit certain circumstances that allow individuals to use content regardless of whether or not they

³⁰ Gagosian Gallery, *Richard Prince New Portraits*, GAGOSIAN.COM, <https://www.gagosian.com/exhibitions/richard-prince-june-12-2015> (last visited Oct. 5, 2017). As a part of his artist’s statement, Richard Prince noted, “On the gram I was just asked why I like Instagram. I said, ‘Because there’s rules. And if you break the rules, you get kicked off.’”

³¹ Complaint at 4, *Graham v. Prince et al.*, 265 F. Supp. 3d 366 (S.D.N.Y. 2017) (No. 1:15-cv-10160-SAS). “Mr. Graham worked fervently to convince the Rastafarians that became the subjects of his photographs that his purposes were artistic and to overcome an inherent distrust due to his ‘outsider’ status. Mr. Graham’s efforts culminated in a series of photographic works including the Copyrighted Photograph.”

³² Vogt, *supra* note 18.

³³ *Id.*

³⁴ *Id.*

³⁵ Ashley Cullins, *Jessica Simpson Sued for Posting Paparazzo’s Picture of Herself on Instagram*, MSN.COM (Jan. 24, 2018), <https://www.msn.com/en-us/entertainment/celebrity/jessica-simpson-sued-for-posting-paparazzos-picture-of-herself-on-instagram/ar-AAv7UZS>; Erika Harwood, *Why Celebrities Are Getting Sued for Posting Photos of Themselves: Khloe Kardashian is the latest to face legal action*, VANITYFAIR.COM (Apr. 27, 2017), <https://www.vanityfair.com/style/2017/04/khloe-kardashian-instagram-photo-lawsuit>.

³⁶ INSTAGRAM, *supra* note 14. Under Instagram’s Legal Guidelines on how to use its assets, the App provides the following:

You should not use or claim rights in Instagram in a way that is confusingly similar to or dilutive of Instagram, including as, or as any part of, a trademark. Do not use Instagram’s trademarks for anything that would be inconsistent with Instagram’s terms or Community Guidelines. We may revoke permission to use Instagram’s trademarks at any time. **Instagram reserves the right to withhold approval of content if it’s inconsistent with the Instagram brand.** (emphasis added).

³⁷ *Terms of Use*, INSTAGRAM, <https://help.instagram.com/581066165581870> (last visited Sept. 25, 2018). The Facebook-owned Instagram may change and update its Terms of Use and policies pursuant to the App’s “Updating These Terms” section.

³⁸ Instagram, *supra* note 13.

have not been granted permission.³⁹ The present conflicts in the law, as well as jurisdictional particularities, will only complicate what constitutes permissible sharing within the United States.⁴⁰

Unauthorized sharing is problematic because social media content is generally understood as “free for the taking.”⁴¹ There is a special concern for cases in which an Instagrammer’s copyrighted work is infringed, and Instagram fails to remove the infringed work despite notice from an influencer.⁴² As a matter of public policy, Instagram should ensure that its guidelines are accessible and easy to understand, as many children and teens use the popular App.⁴³

The current reality reflects how Instagram does not provide adequate information, sufficient safeguards, or enforceable remedies against infringers. This article analyzes (1) whether social media influencers (“Instagrammers”) retain a copyright to their UGC and (2) whether Instagrammers are appropriately informed about what they may or may not post. The lack of clarity surrounding sharing practices online carries significant legal implications because electronic communication has become the “social norm.”⁴⁴

This article is organized into four primary sections. Section I provides background on the scope of copyright and the Fair Use Doctrine.⁴⁵ Section II discusses the Digital Millennium Copyright Act, and whether the Act’s “blanket immunity” applies to social media platforms.⁴⁶ Section III analyzes the continued uncertainty over whether Internet Service Providers (“ISPs”) must “adopt and

³⁹ GRIMMELMAN, *supra* note 10, at 51. Governmental authority over the Internet raises jurisdictional issues over a “court’s government-given power” and “ability to say what the law is.” Conflicting laws and policies of different governments impact whether United States copyright laws are enforceable.

⁴⁰ 17 U.S.C. § 107; Intellectual Property Office, *Guidance: Exceptions to Copyright*, GOV.UK (June 12, 2014), <https://www.gov.uk/guidance/exceptions-to-copyright>; Government of Canada, *Copyright Act (R.S.C., 1985, c. C-42)*, CANADA.CA, <http://laws-lois.justice.gc.ca/eng/acts/C-42/page-18.html> (last visited July 21, 2018); Australian Copyright Council, *Fair Dealing: What Can I Use Without Permission*, ACC, [copyright.org.au, https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Fair_Dealing_What_Can_I_Use_Without_Permission.aspx](https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Fair_Dealing_What_Can_I_Use_Without_Permission.aspx) (last visited July 30, 2017); Copyright Council of New Zealand, *Information Sheet: Fair Dealing*, CCNZ, [copyright.org.nz, http://www.copyright.org.nz/viewInfosheet.php?sheet=338](http://www.copyright.org.nz/viewInfosheet.php?sheet=338) (last visited July 30, 2017). There exist certain exceptions to copyright laws under fair use in the United States and under fair dealing in Great Britain, Canada, Australia, and New Zealand; PEW RES. CTR., *supra* note 16.

⁴¹ *Id.*

⁴² INSTAGRAM, *supra* note 13. Provision 4 of Instagram’s “Propriety Rights on Instagram” stipulates that, “Instagram Services contain Content of Instagram (‘Instagram Content’),” which is “protected by copyright, trademark, patent, trade secret and other laws.” All rights to the Instagram Content and the Instagram Services are owned and retained by Instagram. Instagram “grants you a limited, revocable, non-sublicensable license to reproduce and display the Instagram Content (excluding any software code) solely for your personal use in connection with viewing the Site and using the Instagram Services.”; Ernesto Van der Sar, *Instagram Sued for Failing to Remove Copyrighted Photo*, TORRENTFREAK.COM (Mar. 30, 2016), <https://torrentfreak.com/instagram-sued-for-failing-to-remove-copyrighted-photo-160330/>.

⁴³ Monica Anderson & Jingjing Jiang, *Teens, Social Media Technology 2018*, PEW RES. CTR. (May 31, 2018), <http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/>.

⁴⁴ GRIMMELMANN, *supra* note 10, at 42-43.

⁴⁵ 17 U.S.C. § 107; 17 U.S.C. § 1201.

⁴⁶ *Id.*

reasonably implement” a policy to deal with repeat infringers under the DMCA’s safe harbor provision.⁴⁷ The Final Section concludes with a set of proposed guidelines and best practices that would aid Instagram content creators in protecting their work, and in asserting their intellectual property rights.

II. BACKGROUND

A. *The Scope of Copyright in the Instagram Age*

The American legal system strives to prohibit the infringement of “copyrighted works in certain circumstances.”⁴⁸ The language, “certain circumstances,” does not specify which “circumstances” are protected on social media. Current copyright laws and their scope warrant reconsideration because social media now dominates the communication space.⁴⁹ The focus of this paper is on Instagrammers that use the platform to generate significant numbers of followers (often in the millions), along with “likes,” “regrams,” and “shares” of their posts.⁵⁰ These users may also gain lucrative deals to work with large companies for advertisement purposes.⁵¹ Accordingly, both copyright law and Instagram must clarify how the law and the corresponding policies apply to content-sharing online.

The Copyright Act of 1976 states that “[o]riginal works of authorship” are copyrightable, and are protectable as such.⁵² These types of original works are “protected in all media and from all possible derivative uses as soon as [they are] fixed in a tangible medium of expression.”⁵³ As soon as a qualifying work is produced, it is subject to copyright protection.⁵⁴ The author of an original work is the copyright owner.⁵⁵ The copyright owner has the exclusive right to control the reproduction, distribution, and preparation of derivative works.⁵⁶ Generally, the affirmative defense of fair use is raised to combat claims alleging copyright infringement.⁵⁷ The

⁴⁷ 17 U.S.C. § 512(c) (2010); 17 U.S.C. § 107.

⁴⁸ *Id.*

⁴⁹ Abadi, *supra* note 8.

⁵⁰ *How do I like a comment on a photo or video?*, INSTAGRAM, <https://help.instagram.com/107009073121923?helpref=search&sr=2&query=heart> (last visited Sept. 19, 2018); Madeline Buxton, *Instagram Is Testing A New, Simpler Way To React To Stories*, REFINERY29.COM (July 25, 2018), <https://www.refinery29.com/2018/07/205461/instagram-stories-reactions-emoji>. Instagram features various icons that users may utilize to react to posts online. These icons include, but are not limited to, the option to heart, share, and comment on a posted photo.

⁵¹ *Id.*

⁵² 17 U.S.C. § 107.

⁵³ 17 U.S.C. § 102(a) (2006).

⁵⁴ 17 U.S.C. § 102.

⁵⁵ *Id.*; 17 U.S.C. § 106 (2002).

⁵⁶ 17 U.S.C. § 106.

⁵⁷ 17 U.S.C. § 107; U.S. Copyright Office, *More Information on Fair Use*, COPYRIGHT.GOV (last visited July 2018), <https://www.copyright.gov/fair-use/more-info.html>. The Fair Use Doctrine permit[s] the unlicensed use of copyrighted works in certain circumstances.”; 17 U.S.C. § 501(a) (2002). An “infringer” is “anyone who violates any of the exclusive rights of the copyright owner” provided under sections 107 through 122 of the United States Copyright Act.

Fair Use Doctrine (hereinafter “Section 107”) limits the exclusive rights of a copyright owner by allowing infringement “in certain circumstances.”⁵⁸ Unfortunately, Section 107 does not specify how the term “work” should be applied in the context of social media.⁵⁹

The scope of a fair use and what constitutes an infringement is very broad.⁶⁰ A fair use determination involves an analysis that employs the following four factors:

- (1) The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for, or value of, the copyrighted work.⁶¹

In its present form, Section 107 is unclear on the difference between what is rightful and wrongful borrowing, taking, or “deriving.”⁶²

A derivative work is defined as: “a work based on or derived from one or more already existing works.”⁶³ Also known as a ‘new version,’ a derivative work is copyrightable if it includes an “original work[] of authorship.”⁶⁴ Any work in which the editorial revisions, annotations, elaborations, or other modifications represent, as a whole, an original work of authorship is a derivative work (or a new version).⁶⁵ In other words, a derivative work is a primarily a new work, but one that also incorporates “one or more preexisting” derivative works under copyright law.⁶⁶ Whether a work is deemed a derivative work turns on the amount of material that it incorporates from a preexisting work.⁶⁷

Derivative works are protected by copyright laws, and confer their own unique rights on the author.⁶⁸ “[A] work that has fallen into the public domain, that is, a work that is no longer protected by copyright, can be used for a derivative work, but the copyright in the derivative work will not restore the copyright of the public-domain content. Neither will it prevent anyone else from using the same public-domain work for another derivative work.”⁶⁹ The concern is that in addition to Section 107’s broad statutory text, the general public lacks institutional guidance on what constitutes a fair use.⁷⁰

⁵⁸ *Id.*

⁵⁹ 17 U.S.C. § 107.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ U.S. Copyright Office, *Definitions*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq-definitions.html> (last visited Oct. 6, 2017).

⁶⁴ 17 U.S.C. § 102.

⁶⁵ 17 U.S.C. § 101 (2010).

⁶⁶ 17 U.S.C. § 102.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ U.S. Copyright Office, *supra* note 63.

⁷⁰ U.S. Copyright Office, *supra* note 57 (disclaiming that “the Copyright Office is unable to provide specific legal advice to individual members of the public about questions of fair use.”) (citing 37 C.F.R. § 201.2(a)(3) (2017)).

B. The Digital Millennium Copyright Act and “Blanket Immunity”

In 1998, Congress enacted the Digital Millennium Copyright Act⁷¹ with the goal of updating copyright law to better reflect the advances of the Internet.⁷² Specifically, the DMCA supplemented copyright law by adding the following two provisions: Title I⁷³ and Title II.⁷⁴ Title I of the Act provides, “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this Article,” thereby granting copyright holders the necessary protection for their copyrighted works that take a digital form.⁷⁵ Alternatively, Title II simultaneously establishes four safe harbor provisions that protect ISPs from liability.⁷⁶ While Title I expands the copyright protections for original works, at the same time, Title II provides a shield for ISP’s against liability through its safe harbor provision.⁷⁷

C. The Safe Harbor Provision and Instagram’s “Terms and Services”

Instagram’s nearly-universal popularity has created a new niche for modern advertising.⁷⁸ Growing approximately five-percent per quarter, Instagram has been leading the charge, unquestionably remaining at the very forefront of the social media universe.⁷⁹ On Instagram, where a post can go viral in a matter of seconds, the author of the original work can be difficult to ascertain. In the same way, it would be quite burdensome for the author to prove that he or she was, in fact, the original author. Content-sharing practices online often lead to the unauthorized use of another person’s copyrighted content.⁸⁰ Instagram’s “Platform Policy” stipulates the following:

⁷¹ Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁷² 17 U.S.C. § 107; 17 U.S.C. § 512 (2010); 17 U.S.C. § 1201.

⁷³ 17 U.S.C. § 109 (2008); 17 U.S.C. § 117 (1998).

⁷⁴ 17 U.S.C. § 512 (Section 512 of the Copyright Act proscribes limitations to the remedies that apply to copyright infringement.).

⁷⁵ 17 U.S.C. § 1201(a) (to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and a technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”); 17 U.S.C. § 107.

⁷⁶ 17 U.S.C. § 512.

⁷⁷ *Id.*; 17 U.S.C. § 109.

⁷⁸ *Rights*, INSTAGRAM, <http://help.instagram.com/1188470931252371> (last visited July 22, 2018). Subsection seven of Instagram’s “Rights” section provides: “You agree that Instagram is not responsible for, and does not endorse, Content posted within the Service. Instagram does not have any obligation to prescreen, monitor, edit, or remove any Content. If your Content violates these Terms of Use, you may bear legal responsibility for that Content.”

⁷⁹ Josh Constine, *Instagram hits 1 billion monthly users, up from 800M in September*, TECHCRUNCH.COM (June 20, 2018), <https://techcrunch.com/2018/06/20/instagram-1-billion-users/>.

⁸⁰ Robert Williams, *Instagram may have 95M bot accounts*, *The Information reports*, MOBILEMARKETER.COM (July 19, 2018), <https://www.mobilemarketer.com/news/instagram-may-have-95m-bot-accounts-the-information-reports/528141/>. Artificial intelligence and “bots” use fake accounts to plague social media platforms with misinformation.

You represent and warrant that: (i) you own the Content posted by you on or through the Instagram Services or otherwise have the right to grant the license set forth in this section, (ii) the posting and use of your Content on or through the Instagram Services does not violate the privacy rights, publicity rights, copyrights, contract rights, intellectual property rights or any other rights of any person, and (iii) the posting of your Content on the Site does not result in a breach of contract between you and a third party. You agree to pay for all royalties, fees, and any other monies owing any person by reason of Content you post on or through the Instagram Services.⁸¹

The content-sharing application (“App”) further stipulates that Instagram’s services contain “Content of Instagram . . . [and] Instagram Content is protected by copyright, trademark, patent, trade secret and other laws, and Instagram owns and retains all rights in the Instagram Content and the Instagram Services.”⁸² In addition to its “Terms and Conditions,” Instagram has set-forth Community Guidelines, and provides a “built-in-reporting option.”⁸³ The Community Guidelines (“The Short”) begin with the following mission statement: “[w]e want Instagram to continue to be an authentic and safe place for inspiration and expression. Help us foster this community. Post only your own photos and videos and always follow the law.”⁸⁴

⁸¹ *Instagram Intellectual Property*, INSTAGRAM, https://help.instagram.com/535503073130320/?helpref=hc_fnav (last visited Sept. 20, 2018). Instagram’s “Help Center” contains a “General Conditions” section that provides the following language:

You acknowledge that **we may make updates to the Instagram Service from time to time**. You can deactivate your Instagram account by logging into the Service and completing the form available [here](#). If we terminate your access to the Service or you use the form detailed above to deactivate your account, your photos, comments, likes, friendships, and all other data will no longer be accessible through your account (e.g., users will not be able to navigate to your username and view your photos), but those materials and data may persist and appear within the Service (e.g., if your Content has been reshared by others). (emphasis added).

Companies like Facebook and Instagram have updated their terms and services and privacy policies in response to the European Union’s adoption of the General Data Protection Regulation; Nicole Gallucci, *There’s a reason you’re getting tons of updated terms of service emails*, MASHABLE (Apr. 25, 2018), <https://mashable.com/2018/04/25/terms-of-service-update-emails/#vHCF0zs9sOqU>.

⁸² *Id.* Instagram states, “[p]eople can like and paper on your post just like a regular post,” which “appear on the entire post, rather than on the individual photos and videos that are part of your post.” Upon sharing a post, “you can edit the caption, location and accounts you’ve tagged in your post.”

⁸³ *Copyright Report Form*, INSTAGRAM, <https://help.instagram.com/contact/552695131608132> (last visited Sept. 20, 2018).

⁸⁴ *Id.* The built-in-reporting feature provides “[y]ou can report inappropriate posts, papers or people that aren’t following our Community Guidelines or Terms of Use right when you see them by using our built-in reporting features.” Furthermore, Instagram states that it “is committed to helping people and organizations protect their intellectual property rights” and “[t]he Instagram Terms of Use do not allow posting content that violates someone else’s intellectual property rights, including copyright and trademark.”

⁸⁴ *Id.* (stating “We reserve the right, in our sole discretion, to change these Terms of Use.”).

III. ANALYSIS

A. *The Fair Use Debate*

The law continues to face the challenge of adapting to the pace of technological advances.⁸⁵ Section 107 is silent on what constitutes permissible sharing by third parties.⁸⁶ The lack of clarity with respect to “permissible sharing” continues to cause confusion as to the meaning of the Safe Harbor Provision.⁸⁷ Inconsistent interpretations among the different U.S. jurisdictions further complicate this controversy.⁸⁸

More than 2.8 billion people use social media.⁸⁹ In fact, Instagram announced that the App’s membership had grown to “800 million monthly active users, up from 700 million in April of 2017.”⁹⁰ Recently, the App’s popularity was further reinforced by its more than “800M+ Monthly Actives, 500 M+ Daily Actives, and 250M+ Daily

⁸⁵ Bell, *supra* note 4.

⁸⁶ 17 U.S.C. § 107. The Fair Use Doctrine limits the exclusive rights of copyright holders by allowing the infringement of copyright in certain cases. Pursuant to Section 107, the factors to be considered in determining what constitutes a fair use include the following: “(1) purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

⁸⁷ *Id.*; 17 U.S.C. § 1201. Although the Safe Harbor Provision of the DMCA requires internet companies to comply and remove an allegedly infringing work, the burden is on the creator of the work to file a take-down notice.

⁸⁸ *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013), cert. denied, 571 U.S. 1018 (2013) (No. 13-261); *Bill Graham Archives v. Dorling Kindersley Ltd.* (Bill Graham Archives), 448 F.3d 605, 615 (2d Cir. 2006) (concluding that “the first fair use factor weighs in favor of [defendant] because [defendant’s] use of BGA’s images is transformatively different from the images’ original expressive purposes and [defendant] does not seek to exploit the images’ expressive value for commercial gain.”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176 (9th Cir. 2007) (concluding that “Google’s fair use defense is likely to succeed at trial, and therefore we reverse the district court’s determination that Google’s thumbnail versions of perfect 10’s images likely constituted a direct infringement.”).

⁸⁹ Kevin Gallager, *The Social Media Demographics Report: Differences in age, gender, and income at the top platforms*, BUSINESS INSIDER (Aug. 4, 2017), <http://www.businessinsider.com/the-social-media-demographics-report-2017-8> (reporting, “[g]lobally, more than 2.8 billion people — or 37% of the world’s population — use social media.”); Simon Kempt, *Special Reports Digital in 2017: Global Overview*, WEARESOCIAL.COM (Jan. 24, 2017), <https://wearesocial.com/special-reports/digital-in-2017-global-overview>.

⁹⁰ Anita Balakrishnan & Julia Boorstin, *Instagram says it now has 800 million users, up 100 million since April*, CNBC (Sept. 25, 2017), <https://www.cnbc.com/2017/09/25/how-many-users-does-instagram-have-now-800-million.html> (reporting, “Five hundred million of those are daily active users, the company said. That means that Instagram is still ahead of rival Snap in terms of users, based on Snap’s last report. Snap said in August that it had 173 million daily active users.”); *Facebook to Acquire Instagram*, FACEBOOK NEWSROOM (Apr. 9, 2012), <https://newsroom.fb.com/news/2012/04/facebook-to-acquire-instagram/>. Previously, the founder and Chief Executive Officer of Facebook Inc., Mark Zuckerberg, posted on his Facebook page, “I’m excited to share the news that we’ve agreed to acquire Instagram and that their talented team will be joining Facebook.”

Stories Actives.”⁹¹ Avid Instagram users and influencers interact with one another in a myriad of ways, with these interactions taking various forms, including rapid-fire posting, reposting, sharing, and “liking.”⁹² Not surprisingly, in light of shifting practices for how users interact on Instagram,⁹³ the social media landscape has evolved into one where users engage with more user-found content.⁹⁴

B. Fair Use and the Limitations of the DMCA

On a daily basis, Instagrammers interact with one another in many different ways.⁹⁵ Content creators may range from celebrities to artists, bloggers to critics, academics to students, and not necessarily in this order.⁹⁶ The fact is that all Instagrammers possess the universal ability to “share.” The Instagram platform provides them the ability to post and repost a combination of UGC and UFC.⁹⁷ In fact, Instagram states that the purpose of the App is to help users “capture and share the world’s moments on the [platform].”⁹⁸ Interestingly, amidst the “500M+ Daily Actives, and 250M+ Daily Stories Actives,” Instagram does not directly provide the repost function (“regram”).⁹⁹ Instead, in order to regram, Instagrammers must download other applications.¹⁰⁰

⁹¹ *Instagram Statistics*, INSTAGRAM PRESS, <https://instagram-press.com/our-story/> (last visited Oct. 20, 2017).

⁹² Instagram, *supra* note 50; Shana Lebowitz, *Narcissists can hide in plain sight on Instagram — here are 7 signs you’re following one*, BUSINESS INSIDER (Jan. 10, 2018), <https://www.businessinsider.com/narcissists-habits-instagram-2018-1>.

⁹³ Sarah Frier, *Instagram Founders Depart Facebook After Clashes with Zuckerberg*, BLOOMBERG (last updated Sept. 25, 2018), <https://www.bloomberg.com/news/articles/2018-09-25/instagram-founders-depart-facebook-after-clashes-with-zuckerberg>.

⁹⁴ Balakrishnan & Boorstin, *supra* note 90.

⁹⁵ Instagram *supra* note 50.

⁹⁶ *About Us*, INSTAGRAM, <https://www.instagram.com/about/us> (last visited Oct. 17, 2017) (announcing, “Instagram has become the home for visual storytelling for everyone from celebrities, newsrooms and brands, to teens, musicians and anyone with a creative passion.”).

⁹⁷ *User-Generated Content (UGC)*, TECHOPEDIA, <https://www.techopedia.com/definition/3138/user-generated-content-ugc> (last visited Sept. 30, 2018). UGC “refers to any digital content that is produced and shared by end users of an online service or website.”; Pius Boachie, *User-Generated Content Brings Authenticity to Brands*, ADWEEK (Apr. 13, 2018), <https://www.adweek.com/digital/user-generated-content-brings-authenticity-to-brands/>.

⁹⁸ Instagram, *supra* note 96.

⁹⁹ Carl Velasco, *Friends Can Now Repost Your Instagram Stories, But Here’s The Catch*, TECHTIMES (June 9, 2018), <https://www.techtimes.com/articles/229751/20180609/friends-can-now-repost-your-instagram-stories-but-here-s-the-catch.htm>; Constine, *supra* note 79. Previously, Instagram did not provide a repost function. Instagram now allows users to re-share a post with their friends using “Instagram Stories.” The re-sharing function allows users to re-share a post by adding their commentary or reacting to a post. However, the App does not directly provide the option to repost or “regram” content to their feed.

¹⁰⁰ Aisling Moloney, *How to repost a video on Instagram and the apps you will need*, METRO.CO.UK (Sept. 18, 2017), <http://metro.co.uk/2017/09/18/how-to-repost-a-video-on-instagram-and-the-apps-you-will-need-6936488/> (reporting, “[t]here is no conventional way to actually repost or ‘regram’ an Instagram post like there is a share button on Facebook or a retweet option on Twitter.”).

The pressing question in terms of the “regram” function is what constitutes a “transformative use.”¹⁰¹ The U.S. Supreme Court has defined a “transformative use” as one that “adds something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message.”¹⁰² The U.S. Copyright Office has suggested that this is a type of appropriative use or conduct that would be “more likely to be considered fair.”¹⁰³ Furthermore, the Office also employs the words of the Supreme Court, stating that “[t]ransformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.”¹⁰⁴ These definitions require more specificity because Instagram is a market for derivative works. In a market that disseminates millions of posts per minute, the time is ripe to address the transformative use inquiry in the context of social media.¹⁰⁵

Under the “transformative use” factor, courts look at both the quantity and quality of the copyrighted material that was used.¹⁰⁶ If the use includes a large portion of the copyrighted work, [a] fair use is less likely to be found; if the use employs only a small amount of copyrighted material, a finding of fair use is more likely.¹⁰⁷ That said, some courts have found that the use of an entire work was a fair use under “certain circumstances.”¹⁰⁸ In other circumstances, courts have interpreted certain uses such as downloading copyrighted work to not be a fair use because the selection was an important part of the work.¹⁰⁹ This instruction demonstrates the lack of clarity surrounding what constitutes fair use on social media. As the Supreme Court emphasized in *Campbell v. Acuff-Rose Music, Inc.*, “[t]he enquiry must take account not only of harm to the original but also of harm to the market for derivative works.”¹¹⁰

Some courts favor a broad interpretation of “transformative” use.¹¹¹ However, other courts criticize such interpretations as being overly broad, thereby evidencing

¹⁰¹ See 17 U.S.C. § 107.

¹⁰² *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 571-79 (1994) (noting, [t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”); see generally *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D. N.Y. 2008).

¹⁰³ U.S. Copyright Office, *supra* note 57; 17 U.S.C. § 107.

¹⁰⁴ *Id.*

¹⁰⁵ *Vogt*, *supra* note 18; 17 U.S.C. § 107; see *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1060 (9th Cir. 2017); *Small Just. LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 323 (1st Cir. 2017); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 595 (S.D.N.Y. 2018); Amanda G. Ciccatelli, *Photo Sharing on Social Media & Copyright Infringement: What you Need to Know*, IPWATCHDOG (Dec. 15, 2017), <https://www.ipwatchdog.com/2017/12/15/photo-sharing-social-media-copyright-infringement/id=91022/>.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. Copyright Office, *supra* note 57.

¹⁰⁸ *Field v. Google Inc.*, 412 F.Supp.2d 1106, 1109-10 (D. Nev. 2006); *Bill Graham Archives*, 448 F.3d at 615; *Kelly v. Arriba-Soft*, 336 F.3d 811, 822 (9th Cir. 2003).

¹⁰⁹ *Harper & Row Publr, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985); *Capitol Records Inc. v. Alaujan*, 593 F.Supp.2d 319, 325 (D.Mass., 2009); *BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005).

¹¹⁰ *Campbell*, 510 U.S. at 590 (quoting *Harper & Row, Publr, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985)).

¹¹¹ *Bill Graham Archives*, 448 F.3d at 615; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176 (9th Cir. 2007); *Caner v. Autry*, 16 F. Supp. 3d 689, 710 (W.D. Va. 2014).

the persistent lack the clarity regarding what rises to the level of a transformative use in United States copyright law.¹¹² This ambiguity finds no clarification in prior case law, as the majority of potential lawsuits settle before adjudication.¹¹³ Consequently, courts have not had the opportunity to examine these kinds of copyright infringement actions, and to ultimately rule on what constitutes “permissible sharing” on social media.¹¹⁴

The substantial uncertainty surrounding the appropriate threshold for what rises to the level of a fair use in these contexts continues to frustrate both lawyers and content creators alike.¹¹⁵ Some critics have suggested otherwise, and argue that the fair-use-doctrine has been subject to extensive judicial interpretation. These critics insist that it is the gaps, ambiguities, and inconsistencies in the statutory text that results in careful review of copyright cases. Other scholars point to the pervasive disregard of copyright law, and assert that requiring users to pay for every use of copyrighted-content inevitably assumes that users know when to seek permission and from whom.

Instagram’s “Terms of Use” are just as broad and general as the instructions provided by the U.S. Copyright Office.¹¹⁶ Under the “Copyright” Section of the Instagram Help Center, the App provides the following language under the section titled “Copyright:”

The FAQs in this section provide some information about copyrights, including how you can protect your own copyrighted works and avoid infringing the copyrights of other people when posting to Instagram, as well as how Instagram addresses reports of copyright infringement. If you

¹¹² Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) (recognizing that “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another.”).

¹¹³ Oliver Herzfeld & Marc Aaron Melzer, *Fair Use In The Age Of Social Media*, FORBES (May 26, 2016), <https://www.forbes.com/sites/oliverherzfeld/2016/05/26/fair-use-in-the-age-of-social-media/#305f9a223300> (reporting “[s]ince there are few final rulings in social media-related fair use cases, there are fewer answers than we might like.”). In an opportune moment to clarify the ambiguity of the Fair Use Doctrine, the “parties ultimately settled, depriving us of a precedential court opinion on the question of fair use in this context.” The “boundaries of ‘transformative use’ were tested in recent litigation between the North Jersey Media Group and Fox News.” In that case, the North Jersey Media Group (“NJMG”) owns an iconic, post-911 photograph of firemen raising a flag above Ground Zero. Fox posted a slightly altered version of the photograph with the caption #NeverForget” on the 12th anniversary of the attacks, which resulted in a lawsuit. “[T]he court found that Fox’s alteration of the content and message of the photograph was ‘minimal,’ and did not constitute an original idea.”

¹¹⁴ *Id.*

¹¹⁵ Instagram, *supra* note 81. Instagram provides users with copyright information under the “Learn More About Copyright” section. However, the only way of reporting a potential infringement to the App is through an internal form that lists a series of possible complaints.

¹¹⁶ Amy B. Wang, *A lawyer rewrote Instagram’s terms of use ‘in plain English’ so kids would know their privacy rights*, WASH. POST (Jan. 8, 2017), https://www.washingtonpost.com/news/parenting/wp/2017/01/08/a-lawyer-rewrote-instagrams-terms-of-use-in-plain-english-so-kids-would-know-their-privacy-rights/?utm_term=.df26291ce863 (reporting, “‘Terms and conditions’ is one of the first things you agree to when you come upon a site,” Jenny Afia, a privacy lawyer and partner at Schillings law firm in London, told The Washington Post. ‘But of course, no one reads them. I mean, most *adults* don’t read them.’”).

believe someone is using your copyrighted work without your permission, you can fill out [this form](#).

Please note that laws in different countries may vary. For more information on copyright law, you can visit the website of the [U.S. Copyright Office](#) or the [World Intellectual Property Organization \(WIPO\)](#). Instagram can't provide you with legal advice, so you may want to speak with an attorney if you have more questions about copyright.¹¹⁷

The section above provides an internal report form, along with hyperlinks to the respective homepages of the U.S. Copyright Office and the World Intellectual Property Organization ("WIPO").¹¹⁸ Moreover, in spite of the many links and general FAQ included in the "Learn More About Copyright" suite, Instagram concludes with the disclaimer, "[s]ince there are no clear rules that tell you what falls within the fair use doctrine, you may want to consult an attorney if you have questions about whether you are within the boundaries of fair use."¹¹⁹

C. From an Art Context to a Commercial Context

Previously, the question of "transformative" use was primarily applicable to the "Art World" context.¹²⁰ Fair use issues came under particular scrutiny following the lawsuit between Graffiti Artist Shephard Fairey and the Associated Press.¹²¹ The lawsuit centered on the "Hope" poster of President Barack Obama, which was created in 2008 and officially circulated during Obama's 2009 presidential campaign.¹²² In the latest art scandal, artist Richard Prince was sued for his "New Portraits" exhibit,

¹¹⁷ Instagram, *supra* note 83. Instagram's Copyright Report Form states, "[u]se this form to report content that you believe infringes your copyright." The form includes the following options:

1. My account has been hacked;
2. I found a fake account that is pretending to be me;
3. I am being bullied or harassed;
4. I found inappropriate or abusive content;
5. My name (or the name of my organization) is being used without my permission;
6. Someone has posted my private information;
7. I (or someone I am legally responsible for) appear in content that I do not want displayed on Instagram;
8. I found content that may violate another legal right;
9. I found content which I believe infringes my trademark; and
10. I found content which I believe infringes my copyright.

¹¹⁸ U.S. Copyright Office, *supra* note 57.

¹¹⁹ *Id.*

¹²⁰ Chow, *supra* note 28.

¹²¹ David Ng, *Shepard Fairey gets two years' probation in Obama 'Hope' poster case*, L. A. TIMES (Sept. 7, 2012), <http://articles.latimes.com/2012/sep/07/entertainment/la-et-cm-shepard-fairey-associated-press-obama-20120905> (reporting, what Gary Pruitt, the CEO and president of the AP, said in his statement: "After spending a great amount of time, energy and legal effort, all of us at the Associated Press are glad this matter is finally behind us'." He continued on to say, "We hope this case will serve as a clear reminder to all of the importance of fair compensation for those who gather and produce original news content.").

¹²² *Id.*

in which he printed photographs of various Instagram photos and enlarged them on canvases that included his own “papers” situated below the images.¹²³ In this case, art experts postulated that Prince’s Latest Copyright Lawsuit “could have a major impact on the interpretation of copyright law” in light of the “shortcomings of current copyright law.”¹²⁴

The boundaries of “transformative use” have blurred with the recent rise in lawsuits that have been filed against high-profile celebrities accused of “altering” photo credits, and reposting photographs of themselves on their own Instagram pages.¹²⁵ In September of 2017, Khloe Kardashian, a reality-television star, was sued by the British company Xposure Photos (“Xposure”).¹²⁶ According to the lawsuit, Xposure alleges that Ms. Kardashian altered the photograph to leave out “photo credit” of the photo in question on her Instagram account.¹²⁷ Specifically, the company is “seeking up to \$150,000 in damages for ‘willful, intentional and malicious copyright infringement,’ plus ‘an additional \$25,000 in damages for the unauthorized alteration or removal of copyright information.’”¹²⁸

Given the substantial ambiguity concerning the Fair Use Doctrine, it appears that the “New Art” that is posted and exchanged on Instagram requires clarification. Scholars and academics find that art has emerged as the central topic of debate in the transformative use inquiry. As art and copying are codependent, the transformative test set-forth under the Fair Use Doctrine fails to protect the very creative work it was designed to govern. Hence, artists are more vulnerable to lawsuits, especially artists who practice in digital media.

The Supreme Court’s decision not to hear the case *Authors Guild v. Google, Inc.* is another case where the Court would have had the opportunity to provide more clarity on the definition of “transformative” use in the context of technology, as well as to address the substantial discrepancy in what constitutes fair use.¹²⁹ Instead, the fair use question remains unanswered. At a time where Instagram co-founders,

¹²³ Chow, *supra* note 28.

¹²⁴ Brian Boucher, *Why Experts Say the Latest Copyright Lawsuit Against Richard Prince Matters*, NEWS.ARTNET.COM (Jan. 5, 2016), <https://news.artnet.com/market/richard-prince-lawsuit-expert-opinions-402173> (reporting, “[e]ven in the Second Circuit, where this case is being brought, and which has the most liberal standard of fair use and the most liberal, open sense of transformative use, I don’t think this one makes it as fair use, said Goldstein.”)(internal quotations omitted).

¹²⁵ Ken Shepherd, *Khloe Kardashian sued by paparazzi photo agency for \$175k for sharing copyrighted photo on Instagram*, WASH. TIMES (Apr. 27, 2017), <http://www.washingtontimes.com/news/2017/apr/27/khloe-kardashian-sued-photographer-violating-copyr/>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (reporting, “[o]n its website, Xposure tells visitors that it allows guests to “freely browse our online library as a guest” but that “should you wish to download either low-resolution comping images or full-resolution images for final use you must first register with us and sign in with your chosen user ID and password when you enter the site.”).

¹²⁹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 225 (2d Cir. 2015). The Second Circuit held that the copying, indexing and snippet view functionality of Google Books was a fair use.

Kevin Systrom and Mike Krieger have resigned from their own company, the law should “[re]explore [its] curiosity and creativity again.”¹³⁰

IV. PROPOSAL

A. “Secondary Transformative Use” in an Instagram World

The Fair Use Act provides a definition of “secondary transformative use” that is unclear, and that may stifle creativity, or even encourage infringement.¹³¹ The indefiniteness of what constitutes “secondary-transformative use” on Instagram must be addressed.¹³² It is essential that the legal community confront the ambiguity of Section 107 amidst broad and commonly-misunderstood policies on social media. Instagram’s conflicting policies only complicate the reporting process for copyright infringement. Specifically, Instagram caters to two audiences in promoting its App: (1) collective users whom engage on the platform; and (2) third party-marketing vendors such as mobile companies, businesses, and advertising agencies.¹³³ The App’s “Terms of Use” provisions are overly-broad and convoluted, allowing for conflicting interests between these two audiences.¹³⁴ Additionally, users may unknowingly sign away their rights with a click of a button.¹³⁵ The following terms and conditions are found on Instagram’s webpage, with proposed additions in italics, and deletions stricken through:

These Terms of Use are effective on January 19, 2013. To access our previous Terms of Use, please [click here](#).

¹³⁰ Kate Lyons, *Instagram co-founders resign to explore ‘creativity again’*, GUARDIAN (Sept. 24, 2018), <https://www.theguardian.com/technology/2018/sep/25/instagram-co-founders-resign-to-explore-creativity-again>.

¹³¹ U.S. CONST., art. I § 8, cl. 8 (stating that the United States Congress shall have the power to “promote the Progress of Science and useful Arts”); MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 495 (6th ed. 2014).

¹³² Jessica Contrera, *A reminder that your Instagram photos aren’t really yours: Someone else can sell them for \$90,000*, WASH. POST (May 25, 2015), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/05/25/a-reminder-that-your-instagram-photos-arent-really-yours-someone-else-can-sell-them-for-90000/?utm_term=.1d5ceb31ba63 (reporting, “If someone wanted to argue that this collection is not “transformative” enough to be legal, they would have to file a lawsuit on their own.” A spokesman from Instagram saw the story and said, “People in the Instagram community own their photos, period. On the platform, if someone feels that their copyright has been violated, they can report it to us and we will take appropriate action. Off the platform, content owners can enforce their legal rights.”).

¹³³ Wang, *supra* note 116.

¹³⁴ Instagram, *supra* note 13.

¹³⁵ Cadie Thompson, *What you really sign up for when you use social media*, CNBC (last updated May 27, 2017), <https://www.cnn.com/2015/05/20/what-you-really-sign-up-for-when-you-use-social-media.html> (reporting that “[w]hile privacy policies were originally intended to be a protection mechanism for consumers, they have turned into ‘ownership policies,’ said Nico Sell... And now corporations have way more rights to users’ data than most people realize, she said.”).

By accessing or using the Instagram website, the Instagram service, or any applications (including mobile applications) made available by Instagram (together, the "Service"), however accessed (*via computer terminals, computers, mobile devices; and to access services such as email and the World Wide Web*), you agree to be bound by these terms of use ("Terms of Use"). The Service is owned or controlled by Instagram, LLC ("Instagram"). **These Terms of Use affect your legal rights, including and not limited copyrights and trademarks, and obligations. If you do not agree to be bound by all of these Terms of Use, do not access or use the Service.**

There may be times when we offer a special feature that has its own terms and conditions that apply in addition to these Terms of Use. In those cases, the terms specific to the special feature control to the extent there is a conflict with these Terms of Use. *In such cases, your legal rights and obligations as defined above will be subject to the provisions of the feature.*

ARBITRATION NOTICE: EXCEPT IF YOU OPT-OUT AND EXCEPT FOR CERTAIN TYPES OF DISPUTES DESCRIBED IN THE ARBITRATION SECTION BELOW, YOU AGREE THAT DISPUTES BETWEEN YOU AND INSTAGRAM WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.¹³⁶ (emphasis added)

Section 107 is ambiguous because no one factor is dispositive in defining what is appropriate for fair use.¹³⁷ The solution is to amend the following segment of Section 107 (additions are in italics):

A. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Comment:

¹³⁶ Instagram, *supra* note 13.

¹³⁷ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. at 430; Kelly v. Arriba Software, 336 F.3d 811, 820 (9th Cir. 2003); Narell v. Freeman, 827 F.2d 907, 914 (9th Cir. 1989).

- (1) *For purposes of this section:*
- a. *“purpose and character of use” are appropriate for fair use including and not limited to criticism, comment, news reporting, teaching, scholarship, or research; works that are “transformative” and not merely reproduced are favored in cases where the copyrighted work is “transformed” into a work of new utility or meaning;*
 - b. *“Whether the nature of the copyrighted work” is appropriate for fair use depends on the circumstances of first publication and purpose of the work; art, music, poetry, feature films, and other creative works are generally more protected than nonfictional works.*
 - c. *“amount or substantiality of the portion used are appropriate for fair use depending on the amount or quantitative measure of the work derived from the original copyrighted work; “effect of the use on the potential market for or value of the work is appropriate for fair use depending on and not limited to whether the copyrighted work could have been purchased or licensed; whether the copyrighted work could have been reasonably available for purchasing or licensing depends on the market; special attention should be given to the copyrights in relation to social media and the Digital Millennium Copyright Act (“DMCA”).¹³⁸*

A clearer standard is necessary to protect the UGC of Instagrammers. The current trend of circulating UFC on social media platforms demands immediate clarification, and the implementation of a uniform standard.¹³⁹ Therefore, the addition of a comment or a restatement to Section 107 would provide practical guidance for how to protect copyrighted works on social media platforms.

Instagram users should be aware of the best practices for how they can interact and share their content online.¹⁴⁰ Users should note that not all posts are shareable under the Creative Commons (“CC”) licenses.¹⁴¹ Moreover, not all CC licenses permit adaptations of a work.¹⁴² Users should understand that “giving credit” is not sufficient.

¹³⁸ 17 U.S.C. § 107.

¹³⁹ *Id.*

¹⁴⁰ Matt Symonds, *5 Social Media Tips to Protect Your Future from Your Online Past*, FORBES (Mar. 14, 2014), <https://www.forbes.com/sites/mattsymonds/2014/03/14/5-social-media-tips-to-protect-your-future-from-your-online-past/#d9579dd5be6a> (claiming that “[s]ocial media updates are often spontaneous, unfiltered statements and communicate how you feel at a particular moment in time. They are often used to let off steam. However, when they are left as a permanent record and are publicly available . . . they become part of your personal branding.”).

¹⁴¹ *About the Licenses*, CREATIVECOMMONS, <https://creativecommons.org/licenses/> (last visited Sept. 25, 2018).

¹⁴² *Id.*

V. CONCLUSION

In conclusion, the explosion of social media has redefined how we communicate, and, simultaneously, blurred the lines of what constitutes transformative use online. The best practice for Instagrammers is to earmark their work or provide an explicit disclaimer. If an original work is infringed, Instagrammers can report the infringement to the App,¹⁴³ or seek to file an injunction. However, both options do not guarantee a resolution. In the alternative, litigation is not a practical option because it is time consuming and expensive. Similarly, arbitration is an unrealistic remedy due to the legally-binding arbitration provisions found in the terms of service agreements of many Apps.¹⁴⁴

Under current copyright laws, the standard for what constitutes “shareable” UFC will remain ambiguous until Section 107 is amended. Moving forward, the law should diagnose and immediately address the two prevailing problems in social media infringement cases: (1) the harm to the original work; and (2) the “harm to the market for derivative works.” At the moment, users should institute the practice of always asking permission *first* when attempting to post or share digital content.¹⁴⁵

¹⁴³ Instagram, *supra* note 83.

¹⁴⁴ See *Universal Comput. Sys., Inc. v. Dealer Sols., L.L.C.*, 183 S.W.3d 741, 752 (Tex. App. 2005).

¹⁴⁵ Dicey, *supra* note 11.