

I have read and agree to the Terms and Conditions: A royalty-free pass to sub-license IPR

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The words on the screen, in small font, appeared to be as harmless and familiar as a house key.¹ “By signing up,” they read, “you agree to our Terms, Data Policy, and Cookies Policy.” As a whopping 98% of the users clicked the green “join” button, according to paragraph 2.3.1 of the terms of service, they agreed to give ‘NameDrop’ their future firstborn child. Luckily, NameDrop was merely an experiment run by two communications professors in Connecticut, who were trying to prove exactly what other scholars have found by observing user behaviour online²; that “I have read and agree to the terms and conditions” is the biggest lie on the internet.³

While privacy has always remained a concern greatly emphasised upon by scholars when discussing the careless behaviour of users on social media platforms, an emerging concern post the case of *Sinclair Vs. Ziff Davis, LLC, and Mashable, Inc.*⁴ decided on 13th April, 2020, is the loss of right over one’s own content, creation, and legal remedy. In this particular case, a district court found no copyright infringement by the defendant, a digital media company, when it used one of the photographs uploaded by the plaintiff on her public photography account on Instagram, even after an unsuccessful attempt to license the photo directly from the plaintiff. The court held that since the plaintiff had created a public account on the platform, she was bound by its Terms of Service and had consequently granted Instagram the right to sub-license content posted by her, which was exercised by Instagram when it granted the defendant the license to use the same.

As per the Terms of Service of Instagram, by signing up on the platform, the users grant Instagram a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of any content which is covered by Intellectual Property Rights (consistent with the user’s privacy and application settings). Notably, even the outright declination on the part of the user to license his or her content to a third party does not stop the licensee from seeking the same from Instagram. Once Instagram sub-licenses the creation, the owner has no legal recourse or remedy to recover the same as he is bound by the terms of service of the

¹ David Berreby, *Click to agree with what? No one reads terms of service, studies confirm*, THE GUARDIAN, Mar 3, 2017.

² *Global Mobile Consumer Survey; The Dawn of the Next Era in Mobile*, released by Deloitte, US edition, (2017).

³ Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23, INFORMATION, COMMUNICATION & SOCIETY, 1-20, (2018).

⁴ LLC, No. 1:2018cv00790 - Document 31 (S.D.N.Y. 2020).

platform. Thus, when a user opts to switch his account to ‘public mode’, he validates the terms of use of the platform and permits all aforementioned rights to the service.

Social media has become an integral part of our daily lives, not only remaining a medium to stay connected to our loved ones but also as an important tool for marketing one’s brand and aiding self-promotion of artists. With almost 4 billion users, social media is no passing trend. Therefore, when the use of platforms with such large audiences comes at the cost of losing crucial rights over one’s content and creations, it becomes climacteric to ensure that the users are making an informed choice. ***The dilemma posed to professionals using social media platforms to promote themselves and establish their brands to either keep their work ‘private’ and defeat the purpose of using one of the most popular photo-sharing apps or lose the right to their own content and have it licensed to third parties even against their explicit declination, that took on a royalty-free basis.*** However, in countries like India with a limited scope of contract and copyright law, the implications of such contracts may differ.

For beginners, the primary statute governing contract law in India, the Indian Contract Act, 1872,⁵ does not elucidate upon the validity of e-contracts, clickwrap, or adhesion contracts. E-contracts find their legality in Section 10A of the Information Technology Act, 2000.⁶In furtherance of the same, Indian Courts have accepted the validity of electronic contracts. However, this is not blanket acceptance. The courts in India have time and again emphasized their willingness to delve deeper into the contents of the contract with a focus on the bargaining powers of the parties. In the case of *LIC India vs. Consumer Education and Research Centre*⁷, the Supreme Court of India emphasized the scope of its intrusion in case of adhesion contracts in light of Article 14⁸ of the Indian Constitution. According to Black’s Law Dictionary, an Adhesion Contract is “a standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the term”⁹, also popularly known as ‘take-it or leave-it’ contracts. Thus, the validity of such agreements is questionable in India.

Though the Copyright Act of 1957 is silent when it comes to the issue of sub-licensing by a licensee, since the terms of service of Instagram explicitly use the term ‘sub-license’, there is no contention that if the agreement is valid, Instagram would have the right to do the same. Relating to licensing of copyright, Section 30¹⁰elucidates upon licensing by owners of copyright. Although in the given case, the platform would merely be a sub-licensor and not the owner, due to lack of a dedicated section to sub-licensing, the dictate of Section 30 is presumed

⁵The Copyright Act, No. 14 of 1957, INDIA CODE, 1957.

⁶ §10A, The Information Technology Act, No. 2 2000, INDIA CODE, 2000.

⁷AIR 1995 SC 1811.

⁸INDIA CONST. art. 14.

⁹ Adhesion Contract definition, BLACKSLAW DICTIONARY, (9th ed. 2009), available at Westlaw.

¹⁰ §30, The Copyright Act, No. 14 of 1957, INDIA CODE, 1957.

to be applicable. Section 30A¹¹ of the act states that the provision of Section 19¹² would apply to Section 30 as they apply to the assignment of copyright under Section 18.¹³ Section 19 states that no assignment, and therefore, no licensing, of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent. Since there is a limited scope of e-contracts in India and since Section 19 requires the agreement to be in writing, the validity of the whole agreement comes becomes questionable.

Indian Courts are yet to exercise their jurisdiction and discuss the validity of such contracts in cases where one party is domiciled in India and the other party, the one with the higher bargaining power, is based out of the country. Under such circumstances, it becomes important to raise awareness among creators as to how they lose control of where their content is used, even if there is explicit declination on their part, without so much as a minimal amount of royalty. Until such validity is examined, we must ask ourselves, is it fair of multi-national corporations, earning in billions themselves, to put creators in the dilemma where they must give up either the audience they can reach through the platform, or the right of dictating the use of their own creations, on a royalty-free basis.

¹¹ §30A, The Copyright Act, No. 14 of 1957, INDIA CODE, 1957.

¹² §19, The Copyright Act, No. 14 of 1957, INDIA CODE, 1957

¹³ §18, The Copyright Act, No. 14 of 1957, INDIA CODE, 1957